SECTION REPORT
FAMILY LAW

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IN THIS MONTH'S REPORT

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Section Wear and Publications

MESSAGE FROM THE CHAIR

It is with pleasure and gratitude to assume the leadership of the Family Law Council, and I am looking forward to a busy and productive year serving family law attorneys in Texas.

Publications

The Family Law Section continues to produce quality publications to benefit its members. Such publications include the Family Lawyer's Essential Toolkit, Family Law Checklists, Predicates Manual, Electronic Evidence Predicates, Texas Family Law Practice Manual and the newest publication, Family Law at Your Fingertips. These publications, along with the wonderful DVD's produced by Heather King, will be available for sale at the upcoming Advanced Family Law Course in August, and they can also be purchased through the Family Law Section website.

Charla Bradshaw, Chair of the Checklist Committee, and Kyle Sanders, Chair of the Predicates Manual Committee, have led their committees to update both manuals. Norma Trusch, Georganna L. Simpson and the Formbook Committee have been working diligently on updates and revisions to the Texas Family Law Practice Manual. All of these updated publications will be ready for sale at the Advanced Family Law Course in August.

I would like to specially thank Georganna L. Simpson for her dedication over many years in producing the Family Law Section Report, which continues to be a huge resource and value to Section members. The Section Report, which includes helpful legal articles and case law summaries, is published quarterly and is available electronically to Section members.

Legislation

The Legislative Committee, Co-Chaired by Diana Friedman and Jack Marr, has worked hard on the Section's Legislative Package for the next Legislative Session, which will return to Austin in the spring of 2017. Committee members have prepared proposed legislation to clarify and revise portions of the Family Code. The proposed revisions include changes to the standard possession order, custody evaluation statute, statutes that were impacted by the United States Supreme Court's decision in *Obergfell v. Hodges*, which legalized same-sex marriage, and statutes related to family law appeals. Thank you to the Legislative Committee for volunteering significant time to this effort on behalf of the Section.

I encourage each of you to become a member of the Texas Family Law Foundation, an entity separate from the Section, whose mission is to improve the practice of family law in Texas. Volunteers participate in research, legislative work and other activities. If you would like to get involved in the Family Law Foundation, please go to the website at www.texasfamilylawfoundation.com. Please also donate to the auction and purchase tickets for the fashion show at the Advanced Course as the proceeds will benefit the Foundation. I also encourage you to join the Foundation's lobby team for the next Legislative Session.

Pro Bono

A continued goal of the Family Law Section is to provide indigent Texans access to an attorney for their family law case. The Pro Bono Committee hosts seminars across the state, as well as webinars, to educate attorneys on the fundamentals of divorce. Family Law Essentials Webinars are available for those attorneys who are not able to attend in person. The price of admission to the seminar or webinar, which qualifies for CLE credit, is the commitment to handle two family law pro bono matters over a twelve month period. These seminars have resulted in hundreds of indigent Texans having access to legal help for their family law matter. Thank you to the Pro Bono Committee and the speakers who donated their time to make this pro bono effort successful. Members who are interested in speaking at or attending future Family Law Essentials seminars can contact Lisa Hoppes at Lisa@hoppescutrer.com.

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Continuing Legal Education

The Family Law Section continues to produce innovative and successful CLE programs.

In May, the Section presented its Marriage Dissolution Course at the Moody Gardens Hotel in Galveston. The program, directed by Charla Bradshaw, and the 101 program directed by Leigh de la Raza, were both a huge success with high quality speakers and articles.

The State Bar of Texas's Annual Meeting, co-directed by Cindy Tisdale, will take place in Fort Worth at the Fort Worth Convention Center **June 16-17, 2016**. Cindy is also directing the family law seminar.

Course Directors, Chris Nickelson and Jimmy Vaught, have put together a great program for the 42nd Annual Advanced Family Law Course, which will be held in San Antonio at the Marriott Rivercenter **July 31 – August 4, 2016**. I have fond memories of the Advanced Courses in years past, which are always full of fun events, meeting new friends and top notch CLE presentations by outstanding attorneys in this State. Jessica Janicek is the 101 Course Director.

In October, New Frontiers in Marital Property Law will take place in Louisville, Kentucky **October 13 – 14, 2016**. Course Directors, Joe Indelicato and Natalie Webb, are working hard on an exceptional program for the participants, and this course is sure to provide the same intellectual discussion of complex property matters as in years past.

In December, Heather King is the Course Director for the Family Law Technology Course, which will be held **December 8 – 9, 2016** in Austin.

There are two collaborative law trainings scheduled – the Advanced Interdisciplinary Training on **June 24, 2016** in Austin, and the Collaborative Basic Interdisciplinary Training **September 8-9, 2016** in Dallas. For more information and to register for these collaborative law trainings, please see www.collaborativedivorcetexas.com.

In closing, I would like to thank Heather King, Immediate Past Chair, for all of her hard work, dedication and commitment to the Family Law Section this past year. It has been a pleasure working beside her and feeling her energy and passion for family law. I would also like to thank the Executive Committee, Council Members, Past Chairs, Committee Chairs and Members, and volunteers for donating their time and expertise for the benefit of the Family Law Section.

I am looking forward to working with all of you for the next year to preserve and enhance family law for the benefit of Texas. Please let me know if you have any ideas to improve the quality and success of the Family Law Section. I hope that you all have a wonderful and relaxing summer, and I will look forward to seeing everyone at the Advanced Family Law Course in San Antonio.

Kathryn Murphy
Chair, Family Law Section

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IN THE LAW REVIEWS AND LEGAL PUBLICATIONS

TEXAS ARTICLES

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LEAD ARTICLES

Marriage Equality and Its Relationship to Family Law, Courtney G. **Joslin**, Response, 129 Harv. L. Rev. F. 197 (March 2016).

The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities, Deborah **Dinner**, 102 Va. L. Rev. 79 (March 2016).

Marriage Equality and the New Parenthood, Douglas **NeJaime**, 129 Harv. L. Rev. 1185 (March 2016).

Alimony's Job Lock, Margaret **Ryznar**, 49 Akron L. Rev. 91 (2016).

A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for a Multidisciplinary Perspective, Peter **Salem** & Michael **Saini**, 17 Cardozo J. Conflict Resol. 661 (Spring 2016).

Practicing LGBT Family Law in a Post-Obergefell World, Deborah H. **Wald**, 38-SPG Fam. Advoc. 19 (Spring 2016).

Collaborative Lawyering in Family Law Cases: A Paradigm Shift for Addressing Family Conflict?, Kristine K. **Howanski** & Connie **Kratovil-Lavelle**, 49-APR Md. B.J. 44 (March/April 2016).

The Consequences of Cohabitation, Anna **Stepien-Sporek** & Margaret **Ryznar**, 50 U.S.F.L. Rev. 75 (2016).

Love is Love: Why Intentional Parenting Should be the Standard for Two-Mother Families Created Through Egg-Sharing, Francesca Rebecca **Acocella**, Note, 14 Cardozo Pub. L. Pol'y & Ethics J. 479 (Spring 2016).

Does the Use of Social Media Evidence in Family Litigation Matter?, Marcia **Canavan** & Eva **Kolstad**, 15 Whittier J. Child & Fam. Advoc. 49 (Spring 2016).

Implications of Offshore Funds on Divorce and Taxes, Daniel J. **Jaffe**, Aspatore 2016 WL 2989423 (April 2016).

The Continuum of Including Children in ADR Processes: A Child-Centered Continuum Model, Lorri A **Yasekik** & Jon M. **Graham**, 54 Fam. Ct. Rev. 186 (April 2016).

The Post-Nuclear Family: Changing Definitions of What Constitutes a Familial Relationship, Cynthia E. **Tobisman**, Aspatore 2016 WL 2989427 (April 2016).

The Impact of Marriage Equality on LGBT Parents, Catherine **Sakimura**, 38-SPG Fam. Advoc. 24 (Spring 2016).

Domestic Violence and the Military, Steven P. **Shewmaker** & Patricia D. **Shewmaker**, 28 J. Am. Acad. Matrim. Law. 553 (2016).

Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond, Edward **Stein**, 84 UMKC L. Rev. 871 (Spring 2016).

Forensic Experts and Family Courts: Science or Privilege-by-License?, Dana E. **Prescott**, 28 J. Am. Acad. Matrim. Law 521 (2016).

No More "Same-Sex Marriage" Marriage is Marriage, Period, Richard A. **Roane**, 38-SPG Fam. Advoc. 12 (Spring 2016).

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A Special Approach to Mediation for Moslem Clients, Nadia **Shahram**, 17 Cardozo J. Conflict Resol. 823 (Spring 2016).

It Takes a Village: Using Seniors to Help Divorcing Families, Forrest S. **Mosten** & Lara **Traum**, 17 Cardozo J. Conflict Resol. 767 (Spring 2016).

In the Best Interests of Children: What Family Law Attorneys Should Know About Domestic Violence, John **Hamel**, 28 J. Am. Acad. Matrim. Law 427 (2016).

Marriage and the Marital Presumption Post-Obergefell, June **Carbone** & Naomi **Cahn**, 84 UMKC L. Rev. 663 (Spring 2016).

Parentage Without Gender, Joanna L **Grossman**, 17 Cardozo J. Conflict Resol. 717 (Spring 2016).

The "Parent" Paradox in a Post-Obergefell World, Eric I. **Wrubel** & Linda **Genero Sklaren**, 38-SPG Fam. Advoc. 32 (Spring 2016).

The Beginner's Guide to International Support, Battle Rankin **Robinson**, 33-WTR Del. Law. 22 (Winter 2015–2016).

ART in the Courts: Establishing Parentage of ART Conceived Children (Part 1), Molly **O'Brien**, 15 Whittier J. Child & Fam. Advoc. 176 (Spring 2016).

ART in the Courts: Establishing Parentage of ART Conceived Children (Part 2), Michelle A. **Keeyes**, 15 Whittier J. Child & Fam. Advoc. 189 (Spring 2016).

Marriage and Family as the New Property: Obergefell, Marriage, and the Hand of the State, Helen M. **Alvare**, 28 Regent U.L. Rev. 49 (2015–2016).

The Path to Marriage Equality and the Road Ahead, Kenneth J. **Bartschi**, 38-SPG Fam. Advoc. 6 (Spring 2016).

Digital Love: Where Does the Marital Communications Privilege Fit in the World of Social Media Communications, Nicole **Scott**, Note 32 J. Marshall J. Info Tech. & Privacy L. 105 (Spring 2016).

When Children Object: Amplifying an Older Child's Objective to Termination of Parental Rights, Brent **Pattison**, 49 U. Mich. J.L. Reform 689 (Spring 2016).

The Right to Marry and State Marriage Amendments: Implications for Future Families, Mark P. **Strasser**, 45 Stetson L. Rev. 309 (Spring 2016).

Premarital and Marital Agreements and the Migratory (Same-Sex) Couple, Linda J. **Ravdin**, 38-SPG Fam. Advoc. 28 (Spring 2016).

After Obergefell: The Next Generation of LGBT Rights Litigation, Nancy **Levit**, 84 UMKC L. Rev. 605 (Sprig 2016).

Two Divorced Parents, One Transgender Child, Many Voices: Proposal for Effective Use of Expert Witnesses to Demonstrate that Awarding Custody to a Supportive Parent Is in a Trans Young Person's Best Interest, Jaime B. **Margolis**, 15 Whittier J. Child & Fam. Advoc. 125 (Spring 2016).

Rights, Privileges, and the Future of Marriage Law, Adam J. **MacLeod**, 28 Regent U.L. Rev. 71 (2015–2016).

Child Support Determinations in High Income Families—A Survey of the Fifty States, Charles J. **Meyer**, Justin W. **Soulen**, Ellen & **Goldberg Weiner**, 28 J. Am. Acad. Matrim. Law 483 (2016).

The Freedom to Choose to Marry, Ruth **Colker**, 30 Colum. J. Gender & L. 383 (2016).

Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children, David M. **Smolin**, 43 Pepp. L. Rev. 265 (2016).

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IN BRIEF

Family Law From Around the Nation
by
Jimmy L. Verner, Jr.

Alimony: A Pennsylvania court did not abuse its discretion when considering a motion to modify alimony when it found that the ex-wife's eligibility for, but refusal to apply for, early Social Security benefits did not amount to substantial or changed circumstances, stating that there is "no authority empowering a trial court to order Wife to apply for and obtain Social Security Retirement benefits prior to reaching full retirement age." *McKernan v. McKernan,* ___ A.3d ___, 2016 WL 910154 (Pa. Super. Mar. 9, 2016). A Connecticut trial court abused its discretion when it found that a husband could afford to pay $50,000 per month in pendente lite alimony when his net income equaled only $15,688.21 per month, noting that not only did the award exceed the husband's ability to pay but also that such an award would be tantamount "to an impermissible distribution of marital assets pendente lite." *Dumbauld v. Dumbauld,* ___ A.3d ___, 2016 WL 784871 (Conn. App. Mar. 8, 2016).

Children: A Washington court of appeals upheld a trial court's downward deviation from Washington's child support guidelines based on the obligor having six stepchildren because in Washington State, stepparents have a judicially enforceable obligation to support their stepchildren. *Zacapu v. Zacapu-Oliver,* 368 P.3d 242 (Wash. App. Feb. 17, 2016). The Maryland Court of Appeals upheld a paternity finding after in vitro fertilization against the father's argument that the statutory definition of "artificial insemination," which allows for adjudication of paternity, did not include in vitro fertilization, agreeing with the mother that the term "artificial insemination" should be broadly construed to mean any medical procedure by which a woman becomes pregnant without engaging in sexual intercourse. *Sieglen v. Schmidt,* ___ A.3d ___, 2016 WL 2941117 (Md. App. May 20, 2016).

Division: A Utah court of appeals did not err when it ordered a husband to pay all joint debts on divorce, when the wife owed an equivalent amount in student loans for which she was solely responsible, because the husband earned seven times what the wife did. *Mullins v. Mullins,* ___ P.3d ___, 2016 UT App. 77 (Apr. 14, 2016). A Florida court erred when it failed to divide the marital portion of the husband's pension (49 weeks' worth out of 31 years) on the ground that the amount was de minimus because $89.67 per month is not de minimus. *Coleman v. Bland,* 187 So.3d 298 (Fla. App. Mar. 4, 2016). The Nebraska Supreme Court finessed the question whether a stock redemption agreement valuing corporate stock at $12 per share controlled the purchase price at which the husband must buy the wife's shares upon divorce, rather than the $50 per share the court ordered, when the agreement exempted intra-spouse "transfers" and a "sale of property (voluntary or not) is a transfer of the property." *Brozek v. Brozek,* 874 N.W.2d 17 (Neb. 2016).

Evidence: Maine's Supreme Court abused its discretion by considering evidence predating the parties' agreed divorce when ruling on a motion to modify spousal support. *McLeod v. MaCul,* ___ A.3d ___, 2016 ME 76 (May 26, 2016). A North Dakota court abused its discretion when, while hearing a motion to modify custody, it refused to consider evidence of drug and alcohol abuse occurring prior to the parties' agreed divorce because that evidence was not "known to the court" at the time of the

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agreed divorce. *Haag v. Haag,* 875 N.W.2d 539 (N.D. 2016). In Georgia, a party need not produce the reporter's record of a trial (a "takedown") to an opponent who seeks to appeal the judgment unless the appealing party agreed to share the cost of the reporter's record prior to trial. *Davenport v. Davenport,* ___ S.E.2d ___, 2016 WL 2946480 (Ga. May 23, 2016).

Judges: The Alaska Supreme Court rejected an appellant's argument that the trial court was biased against him "because the court did not express interest in his claims" such that the appellant failed to introduce evidence "to avoid irritating the court." *Sherrill v. Sherrill,* ___ P.3d ___, 2016 WL 2811984 (Alaska May 13, 2016). In Maine, the verbatim adoption by a trial court of one party's findings or orders "suggests that the court has not carefully reviewed the evidence or applied its independent judgment in making its findings and conclusions." *Yap v. Vinton,* ___ A.3d ___, 2016 ME 58, 2016 WL 1458512 (Apr. 14, 2016).

Premarital agreements: An agreement between a Pennsylvania boyfriend and girlfriend providing that the girlfriend would have custody of any child of the parties, that the boyfriend would have specified visitation and that the boyfriend would pay the girlfriend $10,000 each time he filed suit to change any of the provisions of the agreement survived a motion to dismiss based on violation of public policy when no evidence had been presented that the boyfriend could not afford to make these payments. *Huss v. Weaver,* 134 A.3d 449 (Pa. Super. Feb. 5, 2016). A Wyoming trial court acted correctly when denying a wife's motion to amend a divorce petition to add a cause of action for promissory estoppel based upon the husband's alleged promise that if the wife moved to Wyoming with him he could take care of her for the rest of her life because such causes of action are banned by Wyoming's "Heart Balm" Act, although the alleged promise could be taken into account in dividing the parties' marital property. *Dane v. Dane,* 368 P.3d 914 (Wyo. Mar. 15, 2016).

Visitation: In New York, interference with visitation rights can warrant the suspension of child support when the custodial parent has deliberately frustrated or actively interfered with the exercise of those rights, such as by moving out of state and refusing to provide the new address. *Argueta v. Baker,* 137 A.D.3d 1020, 27 N.Y.S.3d 237 (Mar. 3, 2016). A North Carolina court did not err by ordering supervised visitation of two hours per week when the noncustodial parent invoked his Fifth Amendment right to remain silent after the police found child pornography on his computer. *Meadows v. Meadows,* 782 S.E.2d 561 (N.C. App. 2016). The North Dakota Supreme Court affirmed a trial court's decision to increase a father's parenting time, despite a history of domestic violence in the parties' prior marriage, upon a finding that the father no longer consumed alcohol in excess and that his prior behavior was stress related. *Schurmann v. Schurmann,* 877 N.W.2d 20, 2016 N.D. 69 (Mar. 15, 2016).

Why tie the knot? For the money, at least in *Degnan v. Degnan,* 877 N.W.2d 38, 2016 ND 61 (Mar. 15, 2016), where the North Dakota Supreme Court upheld a trial court's decision to allow a witness to testify that the wife married the husband because the wife needed health insurance and opined that in her opinion, the wife married the husband "for his money." The husband's argument that the motivation for marriage was not one of the "*Ruff-Fischer*" factors – North Dakota's version of our *Murff* factors – fell on deaf ears because the testimony "tended to prove" the wife's financial circumstances.

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COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

I've been thinking about the NSA and how, from what I've read, they know all about me, including that I've been thinking about them. Like you, I don't want to be such an open book, so I've come up with a plan that I'll share with you. Note to NSA: don't read this. Cover your ears and eyes for a moment. Thank you.

I have started purposefully self-publishing false information. Nothing criminal or threatening, of course, just harmlessly misleading. In opening a bank account last week, I listed myself as having been born a South Korean woman whose gender now is indeterminate and whose address is "variable." I did indicate that I had a large amount of money that I would soon transfer to the account, and that seemed to help. I figured my prank would be exposed when I had to show my driver's license and was hurt when it wasn't.

In a more general sense, this is the kind of thing we must do to maintain our autonomy in our ever more measured, recorded, analyzed lives. Every once in a while, for example, it's important to veer off the route provided to you by your car's navigation system. She'll (mine has a woman's voice) get angry, but she'll act like she's not. You know, she'll use that "no, I'm not angry, I'm just disappointed" tone as she keeps correcting you and trying to get you back on the rightful path. But you can tell she's angry.

It's also important to broaden your Google search history. If you search something along the lines of "Is this cold sore serious," you need to balance that with something like "How do I file to run for governor from the passenger seat of a Mini Cooper in Texas, in February?" and "Who put the bomp (in the bomp, bomp, bomp)?" This is the digital equivalent of planes in World War II ejecting loose material to throw off enemy radar. I think. I got that from a movie.

Those tailored ads on websites make me kind of nervous, too. You know what I mean: you look on Amazon for toasters and then ads for toasters start popping up on your Facebook feed. (Sometimes after you just bought the toaster on Amazon, which causes me to question the effectiveness of such ads).

Don't get me wrong, I'm all in favor of technology, as long as I am left with the illusion that I still have some control over it. It's not so much that I would do doughnuts on the mall parking lot in my family sedan, but I don't want a self-driving car to remove that option. It's hard to be bad to the bone when your car tells you she is disappointed in your behavior as she locks you in and drives you safely home, telling you she will talk to you in the morning when you have had time to reflect on your behavior.

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[1] Mr. Geilich is a writer, family lawyer, and full-time mediator in the DFW Metroplex. He's doing what he can with what he's got and can be reached at cngeilich@gmail.com. His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

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CAN YOU ADMIT EDUCATIVE EXPERT TESTIMONY?

By John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Educative experts may testify to general principles or theories of case issues without having conducted evaluations or therapy, gathered data, or been involved with the litigants. Their testimony may help the fact-finder better understand evidence in the case. In this educative capacity, experts advise the jury, much like a consultant might advise a business. Peter Hoffman, *Texas Rules of Evidence Handbook* 685–86 (2012). Topics may include descriptions of treatments for difficult family problems; explanations of research of young children's abilities to withstand a parent's improper emotional pressures during a custody battle; reviews of accepted protocols for proper forensic interviewing of young children. To be relevant, though, the testimony must "fit" the specific facts of the case.

However, lawyers' attempts to admit the testimony of educative experts at trial often take confusing turns. Problems arise when lawyers, adopting the standard *Daubert* inquiry, ask educative experts to describe the methodology that supports their testimony—lawyers fumble over which *Daubert*-related questions will show the testimony as reliable; experts stumble when they invoke *Daubert* factors that primarily relate to data collection methods. Of course, when experts base their opinions on evaluations they have conducted, therapy they have provided, or other data they have analyzed, methodology questions are critical—reliable testimony rests on data derived from reliable methods. But for educative experts, admissibility questions take a different focus. Still, like all expert testimony, educative expert testimony must satisfy *Daubert*'s critical inquiry: Is the testimony sufficiently trustworthy to be admitted into evidence?

How should lawyers seek to admit the testimony of educative experts? The rules of evidence and caselaw offer guidance. The Advisory Committee Notes (2000 Amendment) of Fed. R. Evid. 702 clarify the difference between conventional testifying experts and educative experts. The Notes state: "It might also be important in some cases for an expert to educate the fact finder about general principles without ever attempting to apply these principles to the specific facts of the case … The amendment does not alter the venerable practice of using expert testimony to educate the fact finder on general principles." The Advisory Committee Notes then state that for this kind of generalized testimony, Rule 702 simply requires the following four steps (*my comments are in italics*):

• **The expert must be qualified**. *Trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion*. *see* Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996).

• **The testimony must address a subject matter on which the fact finder can be assisted by an expert**. *Expert testimony should be admitted only when it will help the juror understand relevant issues that are beyond the knowledge and experience of the average juror.*

• **The testimony must be reliable.** *The testimony should be based on trustworthy research and professional literature, using applicable Daubert-related factors to assess the reliability of that research and literature and to gauge the quality of the reasoning that the expert brings to her interpretation of the research and literature.*

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[1]*John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs* PSYCHOLOGYLAW PARTNERS, *a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. His second book, How to Examine Mental Health Experts: A Family Lawyer's Guide to Issues and Strategies, is newly published by the American Bar Assn. Dr. Zervopoulos is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

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• **The testimony must "fit" the facts of the case**. *The educative testimony must then be shown to fit the evidence in the case. On the other hand, if you are seeking to exclude the testimony, this is a key step. see* Rousseau v. State, 855 S.W.2d 666, 686 (Tex. Crim. App. 1993) (trial court excluded defendant's expert testimony on eyewitness reliability when expert's testimony was not shown to "fit" sufficiently with eyewitness evidence in the case).

Educative experts can help you clarify difficult issues in a hearing or at trial. Use this four-step framework to provide the judge with the information required to admit their testimony.

HELP! I WANT TO RETIRE, BUT I'M OFF TRACK!!!

By Christy Adamcik Gammill, CDFA[3]

Sometime around the age of 50, we start to think more seriously about retirement. After all, the kids (if we have them) are out of the house, or at least relatively self-sufficient, we're at the peak earning stage of our careers, and thoughts of soon having time for whatever we please are becoming more and more pervasive.

If You've Fallen off Track

Perhaps you always intended to save more, but just didn't have a solid plan in place or the extra money to follow through. Intentions are commendable, but if life has gotten in the way of saving enough, there's no time like the present to get back on track. It is not too late, but you need to act quickly.

Five Key Concerns for Retirement

To have a well-rounded retirement where you can maintain and protect the lifestyle you and your family have become used to, there are five key areas to address:

1. Income Management
2. Protection
3. Health Care
4. Long-Term Care
5. Leaving a Legacy

Income Management

The income you'll need during retirement is dependent on the lifestyle you plan to have. Will you be relocating or staying where you are? What hobbies or activities do you intend to pursue? Do you plan to work part-time or not at all? All of these variables should be examined as you create your overall budget. Typically, retirees need to replace all or most of their pre-retirement income. Consider this: you may not need as much in the first few years of retirement, but as inflation bites into the dollar's buying power year after year, it will eventually cost more to buy the same things. Make sure your budget takes inflation into account.

Social Security will meet part of your income requirement, but not enough to rely on exclusively. To create an adequate cash-flow, take advantage of tax-advantaged retirement savings

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[3] This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC, member FINRA, SIPC. 12377 Merit Drive, Suite 1500, Dallas, TX 75251, offers investment advisory products and services through AXA Advisors, LLC, an investment advisor registered with the SEC and offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC. CBG Wealth Management is not a registered investment advisor and is not owned or operated by AXA Advisors or AXA Network. Contact information: 972-455-9021 or Christy@CBGWealth.com. GE-99357(11/14)(exp.11/16)

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accounts such as 401(k) plans or Individual Retirement Accounts (IRAs). If your employer sponsors a pension plan, find out if you're eligible and what the plan entails. Keep in mind that if you are over 50 years of age, you may be eligible to make additional contributions to retirement accounts through a catch-up provision. For 2015, the regular contribution limit to 401(k) plans, as set by the IRS is $18,000, and the catch-up is an additional $6,000[i].

Additional personal investments may also help generate a retirement income, therefore, you should speak with a qualified financial professional to determine which types of investments are best for your risk tolerance and investment horizon.

Protection

If you have a spouse or dependents, ask yourself what would become of them if anything were to happen to you. You need to protect their future. Often, when one spouse dies, the survivor's cost of living remains nearly the same. Think about it: the mortgage and taxes still need to be paid, food needs to be bought, electricity needs to stay on, and things you used to do must now be hired out to someone else. Yet, the surviving spouse typically loses a large portion of their retirement income when their partner dies.

Health Care

Though everyone hopes for the best, the truth is, your health during retirement is unpredictable. At age 65, you will qualify for the country's largest health insurance plan: Medicare. If you are among the lucky minority, your former employer may offer continued health coverage for their employees. However, if you're like the majority of Americans, this type of coverage will be unavailable. Therefore, if you plan to retire before you become eligible for Medicare, you will be responsible for purchasing personal coverage to fill the gap.

The Medicare program does a good job insuring the health of America's seniors. But it doesn't cover everything. There are out-of-pocket costs to pay for premiums as well as services outside of the plan's scope, such as vision, hearing, dental, and podiatric care. Considering most seniors need these types of care, the costs can add up. According to a non-partisan report published in 2013[ii], the average senior could expect to pay 36.9% of their income toward healthcare. Therefore, it is of great importance to figure in anticipated medical expenditures when working through your retirement budget.

Long Term Care

As we age, there is an increased probability that we may eventually need assistance with the activities of daily living, such as bathing, dressing, and eating. This type of care, regardless of whether it's in home or at a facility-does not come cheap. Medicare does not cover long-term care and most of us can't afford to pay for it out of pocket without depleting our retirement nest egg.

Many pre-retirees are opting to buy long-term care insurance policies. Depending on the contract and issuing company, these policies usually begin paying for the costs associated with long-term care once you become unable to independently perform several of the activities of daily living.

Though most people recognize the value of long-term care insurance, often the expense of buying a standalone policy deters them from seeking coverage. Some insurers now offer an alternative in the form of a long-term care or "living care" rider that can be attached to a permanent life insurance policy. If the owner ever requires care, the rider makes it possible to accelerate the death benefit of the insurance contract to pay for qualified costs. For more specific information about long-term care coverage options, contact your financial professional.

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Leaving a Legacy

Even if you've fallen off track saving for your own future, it is never too early to speak to an advisor about creating an estate plan to transfer your assets to heirs upon your death. With the help of estate planning and tax professionals, you can create a strategy to structure your bequests in the most advantageous way-both for you and your beneficiaries. Whether you intend to pass your assets to relatives, friends, or a charity near and dear to your heart, there are a variety of tools at your disposal, including living trusts, charitable remainder trusts, and charitable annuities.

When it comes to saving for retirement, time is of the essence. The longer your investment horizon, the more time your money has to work for you. Therefore, you shouldn't delay any longer. Contact your financial professional today to arrange a meeting to assess your situation. From there, commit to a strategy and stick with it. Before you know it, those daydreams of retirement will no longer dissolve into anxiety and worry because you'll feel confident that you are back on track just in time.

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i http://www.irs.gov/Retirement-Plans/Plan-Participant, -Employee/Retirement-Topics-401(k)-and-Profit Sharing-Plan-Contribution-Limit

ii http://www.marketwatch.com/story/housing-health-care-costs-are-retirement killers-2013-03-28

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ARTICLES

The QDRO Corner: Chapter III
SERPs and other Non-Qualified Deferred Compensation
A rose by any other name…

By James M. Crawford, Jr.[4]

The division of non-qualified retirement plans and other executive deferred compensation earned during marriage often presents unique problems for family law practitioners, even if they are relatively comfortable with the arcane world of QDROs. There are two primary reasons for this. First, while these plans may be subject to some parts of Title 1 of ERISA, none are subject to its anti-alienation provisions, in which the QDRO is included as an exception. Second, because these plans are not tax qualified, they cannot be rolled to an IRA to defer tax, and their benefits will not be taxed under the familiar rules governing distributions by QDRO to an alternate payee spouse that are found in IRC §402. Second, if the executive is particularly well compensated, the fact that these plans are not subject to any of the limitations on the amount of benefits that can be provided under a qualified plan will likely mean that the non-qualified component of an executive's retirement will be the more valuable by far.

Typically, this non-qualified component is made up of a mixture of non-qualified retirement plans and various forms of equity-based deferred compensation, such as stock options, stock appreciation rights, restricted stock, restricted stock units, phantom stock and the like. While this article focuses on only the first of these retirement delivery vehicles—the non-qualified deferred compensation plan commonly referred to as a SERP (Supplemental Executive Retirement Plan)—it should be understood that in most cases the concepts and tax effects of a SERP division are much the same as they would be for any other form of non-qualified deferred compensation.

Sniffing out the SERP

The first step in dividing a SERP is to discover that it exists. While one might think this would not be difficult, assuming the executive is honoring his[5] discover obligations, care must still be taken that a SERP is not inadvertently overlooked. There are several reasons for this. For one, the executive may view his SERP benefits, which are unfunded and otherwise unsecured, as merely a pie in the sky promise with no discernable value, and on that basis either intentionally or unintentionally omit them from any financial disclosures. For another, there is no requirement as to how or even if the provisions of a SERP should be formalized as between a plan document, an employment or partnership agreement, a termination or severance package, or a cocktail napkin with a few words of promise scribbled on it. In fact, even if a SERP is covered by ERISA as an employee benefit plan, if (as most do) it qualifies as a so-called "top hat plan" it does need to be in writing at all, and can be created verbally or by estoppel.[6] Moreover, as discussed below, there is usually no requirement under ERISA for the employer to periodical-

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[5] For convenience of reference only, it will be assumed for purposes of discussion that the executive spouse is male.

[6] See, e.g., In re New Valley Corp., 89 F.3d 143 (3d Cir. 1996).

ly furnish to SERP plan participants SERP benefit statements or summary plan descriptions that might be discoverable.[7]

As a consequence, when one or both of the divorcing spouses is a highly paid corporate executive, partner or a managing member of an LLC, family law counsel for the other-spouse should consider requesting information directly from both the executive and from the firm or company to which he provides his services. This request should broadly inquire about all plans or programs in which the service provider participates or has participated.[8] In addition, just to be on the safe side, when it comes time to craft a marital settlement agreement consideration should be given to including a provision under which the executive warrants that he, after diligent inquiry, has disclosed all plans in which he is or has been a participant.

SERP Classification

Before SERP plan benefits can be characterized and divided as separate or community property, much must be known about when and how the right to benefits is accrued, but also about the community property law that governs their division in the context of a non-qualified plan.

Defined Benefit plan, defined contribution plan or hybrid?

Like their qualified plan counterparts, all SERPS can be classified as either defined benefit plans, defined contribution/individual account plans, or as a hybrid of the two. There is a well-developed body of law that addresses how the community interest in each plan type is to be calculated in Texas divorces. However, as discussed in Chapter 1 of the QDRO Corner, with respect to SERPs that are defined benefit plans, this law (for which *Cearley v. Cearley,* 544 S.W.2d 661 (Tex.1976) (*Cearley*) appears to be the watershed case) is not always easy to apply.

Determining to what extent a plan benefit, whether or not vested, is attributable to employment during marriage (which under *Cearley* is the *sine qua non* of community property) can even be challenging when the SERP is a defined contribution individual account plan, owing to the fact that contributions earned during marriage may not be actually credited to the employee's account until months after the divorce has become final—in which case statements of the account for that date may well be inaccurate.

Regardless of the plan type, since non-qualified plans are by definition not subject to any of the plan documents, vesting, participation, survivor benefit, and other requirements that apply to qualified plans, there is no substitute for a thorough review of the terms of the plan before proceeding with any apportionment analysis.

ERISA or Non-ERISA?

Non-qualified plans can also be categorized as either non-ERISA or ERISA covered. With few exceptions (such as for governmental, tribal and church plans, or plans only covering the business owners, partners and their spouses), ERISA applies to any plan that covers at least one employee. However, because most SERPs provide benefits only for a select group of management or highly compensated employees, they are exempt from all of the usual ERISA protection afforded to participants and their spouses under Title 1, including funding, fiduciary oversight, vesting, anti-alienation and surviving spouse requirements. These so-called "Top Hat" plans are subject only to parts 1 (dealing with reporting and disclosure) and 5 (dealing with preemption and enforcement) of Title 1.

[7] Assuming of course that the relaxed reporting and disclosure requirements that are available for Top Hat plans apply (requires the filing of a Top Hat statement with the US Department of Labor).
[8] See Appendix A for a sample request designed to illicit the required information.

For the family law practitioner, this classification can be significant. The fact that a SERP is subject to federal preemption under article Part 5 of Title 1 of ERISA is often cited in support of an employer's refusal to recognize a "QDRO" requiring direct payment to a spouse as alternate payee.[9] On the other hand, unless the employer has timely filed a "Top Hat" statement with the Department of Labor,[10] the employer must comply with ERISA's disclosure requirements, including the production of plan documents and benefit statements upon request.

Recognizing the Fruit of Community Efforts—the Theory.

The Supreme Court long ago established in *Cearley* the basic principle that the community is entitled to all benefits to which a right is derived from employment during marriage, irrespective of whether they are or are not vested (and thus no longer subject to a substantial risk of forfeiture). Unfortunately, there has been much confusion as to how this principle should be applied to the world of non-qualified deferred compensation, particularly that which is equity-based. Worse, some of this confusion has been codified into a set of rules under which the community interest in non-qualified benefits is dictated not by whether the right to them is granted or awarded during marriage, but by how the employer has chosen to structure the mechanism for their delivery.

Example: The compensation committee of ABC company voted to grant Executive with equity-based compensation under two distinct plans for the year just ended. Both plans provide the executive with the right to receive all appreciation in the subject stock paid in the ABC stock of equal value, as follows:

1. A Non-qualified Stock Option to buy 1,000 shares of ABC stock at $15 per share, its fair market value on the date of grant (the "strike price"). This option vests and becomes exercisable after 5 years, or upon a change in control, death or disability, whichever first occurs. Exercising the option after the stock appreciates enables Executive to buy the appreciated stock at the strike price rather than the current price. The option expires after 10 years, and a cashless exercise is required.[11]
2. A Stock Appreciation Right with respect to 1,000 shares of ABC stock granted at $15 per share. This right, along with the any grants from previous years, is credited to the Executive's account in the plan, and vests and becomes exercisable after 5 years, expiring after 10. Upon giving notice to the employer of exercise, the Executive will receive stock equal in value to any appreciation in the company's stock over the base price.

If Executive is divorced at the end of year 3 of the vesting period (i.e., when both awards are 60% vested), one might think that under *Cearley* the community interest in these unvested property rights awarded during the marriage would nevertheless be 100%, with the spouses

[9] While it is fairly well settled law that a state domestic relations order that meets the basic requirements for a QDRO is enforceable in the case of a life insurance or other welfare plan, only a few courts have as yet confirmed that this exception is also available for pension plans that are Top Hat plans. Recalcitrant employers will often cite concerns about such assignments violating IRC §409A's prohibition against acceleration of benefits, notwithstanding that final tax regulations specifically exempt DRO distributions to an alternate payee from this rule. That said, in any case in which it is important to determine whether a direct payment order would truly be unenforceable against the employer, it may be worthwhile to consult with ERISA counsel to determine whether there are any additional cards to play. For example, an account firm with a SERP covering only its partners may not be exempt from ERISA's vesting and funding requirements as assumed, including its, if it can be shown that just one of the mid-level or low level partners is actually a misclassified employee for purposes of ERISA coverage. See, e.g., Simpson v. Ernst & Young, 100 F. 3d 436 (6th Cir. 1996).

[10] See, DOL Reg. 2520.104-23.

[11] In a cashless exercise, enough of the optioned stock is immediately sold to cover the strike price, such that the value of the remainder of the stock is equal to its appreciation since the date of grant.

sharing equally the risk that they will not vest post-marriage. But while this would likely be the finding of the trier of fact with respect to the SAR benefit plan award, by statute (i.e., Tex. Fam. Code § 3.007(d)) the option plan is required to be apportioned under what courts sometimes refer to as the "time rule" under which 40% would be separate property. This is so even though the the two plans are materially indistinguishable in terms of the timing of the award, its economic effect and its value.[12] And since the statute is mandatory in nature, would likely require this decidedly non-*Cearley* result even if the executive is on life support and not expected to work a single day post-divorce before the benefit vests at his death.[13]

In effect, §3.007 treats the unvested "contingent" portion of this property interest as if it were a mere expectancy interest until it vests—exactly the analysis rejected in *Cearley*—solely when the employer chooses to structure the right to receive the appreciation in company stock as a stock option, rather than a grant under an SAR (defined contribution) plan, or phantom stock, or a restricted stock unit plan, but curiously not restricted stock (which is also subject to the stock option rule under § 3.007(d)).[14]

Getting the Fruit into the Right Basket—the Practice

As intimated earlier, many employers are wont to get involved in divorce matters, and steadfastly refuse to permit an ex-spouse be paid a share of non-qualified benefits directly under an assignment order. This is particularly likely to be encountered when the employer is using the award as a golden handcuff to keep the executive from voluntarily jumping ship to join a competitor.[15] On the other hand, it has been the author's experience that it is always worth inquiring into the company's position on the matter, even if the plan currently includes an anti-alienation provision. In one instance, because the company was cash rich, it was willing to bend the rules at the request of the the executive spouse, and amended the plan to permit alienation of the benefit with committee consent.[16]

If the employer instead remains steadfast in its refusal to cooperate, there are usually only three choices: Litigate the issue of whether the company must comply with a direct payment or-

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[12] Section §3.007(d) appears to have been patterned after a line of California cases originating with *In re Marriage of Hug (1984)* 154 Cal.App.3d 780, a case in which the court applied a time rule fraction to divide stock options acquired during marriage based upon the service required for them to vest, rather than by which estate accrued the underlying property right that was subject to vesting. This deviation from California's settled rule that all unvested employee benefits derived from employment during marriage are community property, as to which the risk of vesting is shared equally by the spouses (See, *In re Marriage of Brown* (1976) 15 Cal.3d 838, 848), may be explained by what appears to have been an ill-considered agreement of the parties to the use of the time rule even though, when it comes to stock options (or a profit sharing or 401(k) plan contribution), the time rule is inappropriate because the right to the benefit is accrued when the right to the benefit is granted or credited to the employee's account, rather than over time as in a defined benefit plan. This fact, together with the California's Supreme Court's later rejection of *Hug*'s focus on the employer's perceived motive in awarding a benefit, rather than the timing of its accrual (See, *In re Marriage of Lehman* (1998) 18 Cal.4th 169,180), may explain why the author has been unable to locate a single reported case in California extending Hug's vesting time rule to any form of employee benefits other than stock options.

[13] That is, unless the court defers the division, recognizing that it is impossible at the time of divorce to know when the option will become exercisable because, as is typical, the option in question could vest at any time post-divorce due to an event other than as a result of vesting service.

[14] While all of these programs typically allow for the executive to benefit from appreciation in company stock, some also include the base value of the stock in the award. For example, an award of 6 restricted stock units (RSUs) typically entitles the employee to receive cash or stock equal to the value of 6 appreciated shares upon exercise, rather than just the appreciation on those 6 shares.

[15] The possibility that community rights may nevertheless be forfeited in a post-marriage move raises an interesting question of whether the compensation package the executive receives from the new employer as a signing bonus in order to blunt the effect of this forfeiture is in effect the sale or exchange of a community interest in the old benefits for the new—not a forfeiture at all—in which case there may be a pro-rata community interest in the replacement benefits.

[16] Because some plans include a provision for forfeiting the entire benefit in the event of an attempted alienation, or claim by the non-employee spouse, this inquiry may need to be carefully worded.

der, perhaps putting the executive's future with the company at risk; having the interest of the executive's spouse valued and bought out by the executive with cash or equalizing assets that are either taxable or tax-affected; or executing what is commonly referred to as a "Pay-over Order."

***Litigation**:* The fact that litigation is so costly and fraught with risk, as well as the availability of alternative methods of division, may explain why there is a dearth of case law addressing whether, and under what conditions, a domestic relations order for direct payment of benefits to a spouse would be enforceable against an employer, particularly if ERISA is in play.[17] Since SERPs are essentially unilateral contracts, this litigation must be directed to the employer (which is the payor), and, if the contract is ERISA-covered, to the "plan" (which is deemed an entity capable of suing and being sued under ERISA §502(d) if the contract is deemed the plan is a non-entity. Of course, even if the spouses are successful in avoiding preemption and alienating/garnishing the benefit, it is likely that a court would not be able to compel conduct that is not contractually required, such as the payment of the benefit early or in a form not otherwise available under the plan.

***Buyout**:* Although it is generally accepted that a buyout of SERP benefits incident to divorce is a non-taxable division of property under IRC §1041 (See, PLR 200442003, and the analysis therein), this option is often unpalatable either because the risks and uncertainties associated with the payment of an unfunded promise to pay benefits (often far into the future) is simply too speculative to value; or because the SERP benefits dwarf the remainder of the available estate, or both. On the valuation side, SERP benefits that are to be paid over time, such as in the form of a life annuity over 10 years certainly can be particularly difficult, requiring not only the usual actuarial assumptions that must be made in computing the value of qualified plan benefits (e.g., mortality, and interest rates), but also a quantification of the risk that the benefit, which is a unfunded naked promise to pay,[18] will actually be available when it comes due many years hence. Such analyses are typically complicated by various contingencies such as the timing of vesting, potential changes in control, how earnings are determined, possible future amendments affecting the time or amount of payment, limitations on the source of payment (e.g., 15% of current earnings); potential offsets for amounts owing to the employer; and COLA post-commencement adjustments, both positive and negative. Add to that such other contingencies as the retroactive application of income tax and penalties for non-409A-compliant plans, and that SERP benefits are not insulated from creditors under The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), or state law, and valuation and become the unreliable result of a series of guesses about guesses. In fact, so substantial are these problems, that in the author's experience some valuation experts will refuse the engagement entirely.

Of course, even in situations in which the assets are reasonably susceptible of valuation, there is often a reluctance on the part of the participant spouse to take on the additional risk associated with owning the entire community interest—a risk that would otherwise be shared equally by both spouses.

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[17] That said, in the few cases to address the issue, the courts seem to have come down on the side of enforceability, much the same as they have done with respect to the benefits of employer-provided (ERISA-covered) life insurance. See, e.g., Bass v. Mid-America, (1995, DC IL) 1995 WL 622397 ("QDRO" for Top Hat benefits enforceable against employer); Metropolitan Life Insurance Co v. Wheaton, (1994, CA7) 42 F3d 1080 ("QDRO" permitted on welfare plan benefits even though not pensions subject to ERISA 206 under theory equally applicable to Top Hat plans). See also Metropolitan Life Insurance Co v. Marsh, (1997, CA6) 119 F3d 415.

[18] This is a concern even if the plan is accompanied by a Rabbi Trust, which is a grantor trust designed to set aside funds to pay the promised benefit, but which because of tax laws, must remain part of the general assets of the employer and available to creditors in bankruptcy.

A Pay-over Order: Pay-over orders represent an in kind alternative to a buyout. They are designed such that if, as, and when the executive receives the benefit, the spouse's interest in each payment is received as agent or nominee for the spouse.[19] There are at least five primary concerns that will likely be appropriate to address in crafting orders of this kind.

1. How is the community interest is to be determined and when.
2. What level of control will the non-participant spouse have over any available elections regarding the timing and form in which the benefit will be paid, as well as beneficiary designations.[20]
3. Whether there are to be survivor benefits, and if so, whether the community interest in the value of those benefits will also be subject to a pay-over requirement, or instead be valued and taken into account in determining the appropriate division of benefits while both spouses are alive.
4. What if any provisions are necessary to guard against default by the spouse required to execute the pay-over.
5. How best to ensure that each spouse will be responsible for any income tax due with respect to his or her share, including the crediting of withholding and how is employment tax withholding to be allocated.

Needless to say, an essential element to crafting a successful pay-over order is a full and complete understanding of how the plan works both in terms of benefit accrual and with respect to any distribution-related options and elections that may be available, including beneficiary designations. Because these orders are not QDROs, and are not even directed to the employer, employer consent to their provisions is not required.[21] That is not to say that the employer should not be consulted. For example, even if the employer is not willing to recognize an assignment order, it may be agreeable to splitting the payment at the direction of the participant spouse into two separate accounts in the participant's name—making the administration of the pay-over procedure all that much simpler.

While a detailed discussion of all the issues that are likely to be encountered in the drafting of a pay-over order is beyond the scope of this article, one area of particular concern that is worth mentioning is the issues of taxes and withholding, both with respect income and employment taxes.

Regarding income taxes, the IRS has now clarified that the division of a community interest in non-qualified deferred compensation and stock options between spouses that is incident to divorce is not a taxable event as an assignment of income or otherwise. Such divisions, the IRS advises are merely a recognition an already-existing interest in benefits earned by both spouses as community property, and thus are non-taxable transfers under IRC §1041. Revenue Ruling 2002-22, 2002-1 C.B. 849. However, the IRS has also clarified that this analysis does not apply in determining the employee spouse's "wages" for purposes of withholding for employment taxes. Revenue Ruling 2004-60, 2004-1 C.B. 1051. [22]

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[19] The use of an actual or "constructive" trust is normally not only unnecessary, but may lead to incurring substantial administrative costs associated with trust administration, such as the filing of an annual tax return.

[20] For example, if a lump sum is available, that may not always be the wisest choice for one or the other of the spouses, if for no other reason than a lump sum will bar the recipient spouse from taking advantage of the Source Tax Rule (4 U.S.C. §114) to avoid income tax on a benefit earned, say in California, but received as a Texas resident.

[21] As mentioned earlier, some plans not only include anti-alienation language, but also provide that any attempt to assign the benefit will void the benefit in the discretion of the plan administrator. In such cases, care should be taken in requesting information from the employer so that the request is not taken as a claim for benefits by the non-employee spouse. For the same reason, it may not be prudent to attempt to protect the interest of the non-employee spouse by filing a claim or notice of interest of any kind.

[22] Similar results have been approved for restricted stock transfers (PLR 201016031)

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While neither of these rulings specifically address the tax consequences when community interest is received under a pay-over order instead of directly from the employer, in PLR 200646003 the IRS has since extended the principles of Revenue Rulings 2002-22 and 2004-60 to that context as well, making the non-employee spouse responsible for income tax on her share.

It is noteworthy that under the facts of this ruling, the non-employee spouse received her share of the gain from the employee spouse net of both income and employment tax withholding. On these facts, the IRS concluded based on the cited revenue rulings, that she was entitled to a credit for the income tax withholding deducted from her share (even though it was reported on the employee's W-2), but she was not, however, entitled to claim on her return any share of the amount withheld or paid for employment taxes.

While this double-net approach to handling withholding is apparently one feasible alternative, some practitioners find it less cumbersome for the employee spouse to deduct only the employment tax withholding, and then take credit for all income tax withholding credit on his return. Under this arrangement, the amount paid over is relatively larger (since it is the gross amount net only of FICA), which gives the receiving spouse a little more flexibility in handling her tax obligations.

Either way, the advantage of this sort of arrangement over one in which the Plan benefits are first taxed as income to the employee spouse, and then paid net of taxes to the spouse is plain: not only is each party is properly reporting and paying the income tax due on his or her share, but in computing the amount of tax that each party must pay, each can apply his or her own tax rate.

A related issue can arise when the payment of benefits in a single lump sum is not available, which is often encountered when working with defined benefit plans. Such plans usually require that payment be made in the form of a joint and survivor annuity, often payable for a minimum period certain, such as 10 years. To the extent there is a community interest in these survivor benefits, there are only two realistic design choices. One is to designate the non-employee spouse as the survivor or beneficiary, and adjust the division of payments while both spouses are alive so that the actuarial value of benefits to be received (whether during life, or following the death of one party) equals the value of each party's community interest in the accrued benefit (typically a straight life annuity). This adjustment often entails the non-employee spouse receiving relatively less of the benefit payable while the employee spouse is alive to compensate for the fact that the value of what she stands to receive following his death exceeds the value of what he is to receive following her death.

The other option is to divide all benefits in kind when and as received. This avoids the prospect of valuing the relative survivor and retirement interests, but then raises the question of whether a pay-over order directed to the estate of one spouse will be treated in the same way for tax purposes as a pay-over order directed to the recipient spouse. While logic would indicate that it should not make any difference, i.e., that the principles of Revenue Ruling 2002-22 would apply equally in this situation so long as the property is divided incident to divorce, the author is not aware of any formal or informal guidance from the Service to directly address this issue. For this reason, it is recommended that the court reserve jurisdiction to adjust the award in the advent of an unanticipated tax consequence to effectuate the intent of the parties

The other issue as to which there is some question is whether Rev. Rul 2002-22 can be applied when the community interest in non-qualified benefits or stock options is divided unequally as part of an overall "just and right" division of the community estate. Given that the Code expressly recognizes that 100% of benefits accrued under a qualified plan may be assigned to the non-participant spouse as part of a division of the marital estate (See, IRC §414(p), the better view would seem to be that such unequal divisions would not be problematic so long as the court determines that the distributed share is the alternate payee's share of the community estate. Support for this view may be found in Powell v. Commissioner, 101 T.C. 489 (1993), in

which the court concluded in a pre-QDRO ruling, that the non-employee spouse was taxable as the "distributee" of community property even though she received over 50% (58.96844% to be exact) of the plan benefits.

Regarding employment taxes, it is now plain from Revenue Ruling 2004-60 that community property is disregarded for purposes of the assessment, withholding and payment of these taxes. The issue here is whether the fact that these taxes are not withheld until after the divorce on deferred compensation earned during marriage are a community responsibility to be share equally even though only the employee is credited with payment of the tax. The good news is that however appealing this issue may be from an epistemological standpoint, it generally does not involve sufficient dollars to justify spending a lot of attorney time on the debate, and is often resolved by requiring a simple pro rata allocation for purposes of determining the net pay-over amount.

Attached as Appendix B is a sample order containing language the reader may find helpful in dealing with the above-described tax issues.

Conclusion

The disposition of SERP and other forms of unfunded deferred compensation does not involve the usual QDRO rules with which most family law practitioners have at least a passing familiarity. It does, however, generally admit to a logical analysis, which should ALWAYS start with a thorough understanding of the terms of the plan, particularly those relating to benefit accrual, vesting, the form and timing of benefit payments, and applicable tax and community property law. The reason for this is that non-qualified plans are not subject to the usual constraints on plan design that apply to qualified plans, which means that in the drafting of a suitable division order, there is no reliable substitute for a thorough review of the governing documents and a full understanding of the context in which they apply. With many SERPs providing benefits in the seven or even eight figure range, the failure to start with these basic steps and to seek expert assistance where appropriate could easily prove to be a very costly.

Appendix A

Request for Documents and
Authorization for Release of Information

Dear Employer, Service Recipient, Plan Sponsor, Plan Administrator or Contract Administrator:

For EACH retirement, deferred compensation or other benefit plan ("Plan"), as defined below, in which _____ ("Participant") now participates or in which s/he has ever participated or otherwise acquired any right, title or interest as an employee, member, partner, principle, director, contract service provider, or otherwise; please provide the undersigned with the document(s) described below that are currently in your possession or under your control, or which are otherwise reasonably available to you:

Note: As used herein, the term "Plan" is defined broadly to include any plan, fund, scheme, agreement, program, or arrangement, whether vested or contingent, under which Participant is or may become entitled to retirement benefits or any other form of deferred compensation of any kind (such as equity-based compensation, stock options, severance, performance-based compensation, residual commissions, "carry" or other profits participation interest); including but not limited to the following:

- *A plan designed to be qualified under §401(a) of the Internal Revenue Code of 1986, as amended ("Code"), (e.g., profit sharing, "401(k)", defined benefit or money purchase pension plan, stock bonus plan, target benefit plan, or ESOP).*

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- *A plan described in Code § 402(b) (a disqualified benefit plan and trust).*
- *A plan providing for elective deferrals as Roth contributions within the meaning of Code §402A.*
- *An annuity plan or contract described in Code § 403 (e.g., a tax sheltered annuity).*
- *A plan described in Code §457 (e.g., a governmental deferred compensation plan).*
- *A plan described in Code §457A or §404A (relating to deferred compensation from certain foreign corporations or other tax indifferent entities).*
- *An individual retirement account, individual retirement annuity, simplified employee pension, simple retirement account, or any other account described in Code §408.*
- *A non-qualified plan of deferred compensation as described in Code §409A, and regulations promulgated thereunder, (e.g., a Top Hat plan, a Supplemental Executive Retirement Plan, an Umbrella Retirement Plan), whether or not exempt from the application of such section under the short-term deferral rules or otherwise.*
- *A severance or separation pay plan.*
- *A plan described in Code §419 (a funded welfare benefit plan, such as a VEBA).*
- *A plan described in Code §415(m) (a governmental excess benefit arrangement).*
- *A stock option (statutory or non-statutory), stock bonus, restricted stock award, stock appreciation right, restricted stock unit; phantom stock, or other equity-based compensation plan or program (including any equity interest profits/carry interest) in a corporation, non-stock mutual company, LLP, LLC, partnership or joint venture).*
- *A split dollar insurance plan.*
- *An excess benefit plan.*
- *A foreign plan maintained with respect to Participant where contributions made by or on behalf of Participant are excludable for Federal income tax purposes under an applicable income tax treaty.*
- *A plan described in §1002 of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829, 942) (Sept. 2, 1974), as amended (ERISA), or that would be described therein but for the fact that such plan provides benefits solely to non-employee service providers such as independent contractors, partners, principals or sole proprietors or their spouses.*
- *A plan under which an active participant makes deductible contributions to a trust described in Code §501(c)(18).*
- *A plan described in §1022(i)(2) of ERISA (certain Puerto Rican Retirement plans).*
- *A window benefit plan (e.g., an early retirement incentive plan).*
- *A post-separation reimbursement plan.*
- *A bonus plan or program of any kind.*
- *A "forgivable loan" program or similar arrangement.*
- *A plan or tax equalization arrangement that would meet one or more of the definitions listed above, but for the fact that it is created, organized or maintained outside the United States, or Participant is employed by a foreign employer.*

Documents Requested (Only checked items are applicable):

[ ] Copy of each contract, instrument or other document constituting the Plan, or under which the Plan or any trust associated therewith is established, operated or maintained, including all amendments and restatements thereof (e.g., formal plan document, employment contract, insurance or annuity contract, operating agreement, memorandum of agreement, or trust agreement/rabbi trust agreement).

[ ] Copy of each document provided or made available to Participant describing the Plan or any of its features, (e.g., Summary Plan Description, Summary of Material Modification, Benefits Handbook, Offering Circular, Prospectus, SEC Filing).

[ ] Copy of each statement of benefits/account provided to, or made available to Participant as of each of the following dates: date of this request, date of marriage (October 12, 1991) and as of July 8 and July 13, 2011 (each, a possible date of separation).

[ ] Copy of any procedures or forms adopted for use with respect to the award, assignment, distribution or other alienation of benefits payable with respect to Participant under the Plan to an alternate payee (e.g., QDRO or DRO procedures, sample QDROs, etc.).

[ ] Copy of any document reflecting any election or agreement by Participant to defer or accelerate the receipt of any compensation, distribution, fee, interest, income or other amount otherwise payable to or on behalf of Participant under the Plan.

[ ] Copy of each document reflecting Participant's election to defer the receipt of cash compensation, pursuant to which the deferred amount is contributed or credited to the Plan

[ ] Copy of each document setting forth Participant's projected, anticipated or estimated benefits under the Plan (e.g., statement of vested or unvested benefits).

[ ] Copy of Participant's current Plan beneficiary designation form, if any, and of any spousal consent forms executed in connection therewith.

[ ] Copy of a screen shot of each website or web address on which Plan information in available, and a copy of each screen shot available on such site or at such address, showing information specific to Participant.

[ ] Copy of any statement filed with respect to the Plan under Labor Regulation §§ 2520.104-23, commonly referred to as a "Top Hat" statement.

[ ] Copy of any notice of examination or audit received from the US Department of Labor or Internal Revenue Service on or after _____ with respect to the Plan.

[ ] Copy of the most recent determination letter, if any, received from the Internal Revenue Service with respect to the Plan.

[ ] Copy of any pending or approved QDRO or other domestic relations order affecting benefits payable with respect to Participant under the Plan.

[ ] Copy of each cancelled check, Form W-2, Form 1099-R or other document reflecting the distribution, deemed distribution, withdrawal, loan or other disposition of Participant's benefits under the Plan, or any application therefore; and a copy of any loan documents or distribution notices sent to or completed by Participant in connection therewith.

[ ] Copy of the most recent Form 5500, if any, filed for the Plan with the IRS or Department of Labor, including all schedules and attachments.

[ ] Copy of any notice of regarding the funding status of the plan provided to Participant within the past 12 months.

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[ ] Copy of any notice of regarding the termination of the plan, or the substantial change in the rate of benefit accrual (e.g., NOIT or §204(h) notice).

[ ] Copy of any document containing current contact information for the Plan trustee, Plan sponsor, rabbi trust trustee, Plan administrator, and any third party administrative services provider for the Plan.

[ ] Copy of the most recent investment direction form, if any, filed with respect to the Plan by Participant.

[ ] Copy of each communication sent to, or received from Participant regarding any changes to or elections available under the Plan within the past ___ months.

[ ] Copy of each Form W-2 or Form 1099 reflecting any elective or voluntary contributions made by or on behalf of Participant under the Plan.

[ ] Copy of any report to shareholders, members or partners listing any plan under which benefits are or may be provided to Participant.

[ ] Copy of the plan document and most recent Form 5500 prepared for any terminated plan that was subject to the notice requirement under ERISA §205(h) and/or Code §4980A, and a copy of the termination resolution and "204(h)" notice, and any document evidencing the transmittal date of such notice to affected participants and beneficiaries.

[ ] Other: _____
_____
_____
_____

[ ] You are also requested to provide a copy of any contract of employment, or other agreement (not otherwise requested above) providing for the non-deferred payment of wages, salary, commission, bonus, draws, profits, or any other form of compensation for services provided by Participant in any capacity; as well as any documents specifically requested in the cover letter accompanying this Request.

This Request is made by the undersigned on behalf of Participant and/or Alternate Payee identified in and pursuant to the attached Authorization(s) for Release of Information, incorporated herein by this reference.

You are reminded that each unexcused failure to timely produce any document required by ERISA to be furnished on written request to the undersigned may subject the Plan administrator to a penalty of up to $110 per day per requested document, as provided in ERISA §502(c) [29 USC §1132(c)], which penalty is in addition to any other remedies available to the undersigned at law or in equity.

Documents requested may be delivered in hard copy by any recognized carrier (US Mail, Fed Ex, UPS, etc.) or electronically by email in "pdf" format to the address included in the attached Authorization for Release of Information.

Authorization for Release of Information

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The undersigned, _____, is or may be a participant or member with respect to one or more of the benefit plans described in the attached Request for Documents. Each person (including any individual or business entity) to whom this Request is addressed is hereby directed and authorized by me to provide as soon as administratively feasible all documents and related information responsive to such Request to my Attorney, whose mailing and/or email address is:

_____
_____
_____
_____

Email: _____

With a copy to the Attorney for _____ (my spouse or former spouse, child or other dependent) whose mailing and/or email address is:

_____
_____
_____
_____

Email: _____

This Authorization for Release of Information shall remain in effect until _____, unless earlier cancelled by written notice from the undersigned.

You are authorized to bill _____ for any legally permissible, appropriate and reasonable copying charges for the requested documents, for which charges I will be fully responsible.

☐ [applicable if checked] This Authorization shall also apply to any supplemental requests for documents or other information made by any of the above-identified persons or entities with respect to any Plan.

If you have any questions concerning the attached Request for Documents or need to make arrangement for payment of copying costs, please contact _____, by telephone (___) _____, or by email at _____.

Participant: _____

_____Date:_____
Signature

Authorization for Release of Information

The undersigned, _____, is a spouse or former spouse of _____, (Participant), who participated in and accrued a right to benefits under one or more of the Plans described in the attached Request for Documents during the parties' marriage and prior to separation. Accordingly the undersigned has a community property interest with respect to each of

such Plans under _____ law, and is or may be a prospective Alternate Payee of Participant under Federal law, including but not limited to ERISA.

Accordingly, each person (including any individual or business entity) to whom the attached Request for Documents is addressed is hereby directed and authorized by me, as an interested party, and/or prospective Alternate Payee to provide as soon as administratively feasible all requested documents and related to my Attorney, whose mailing and/or email address is:

_____
_____
_____
_____

Email: _____

With a copy to the Attorney for _____ (my spouse or former spouse) whose mailing and/or email address is:

_____
_____
_____
_____

Email: _____

This Authorization for Release of Information shall remain in effect until _____, unless earlier cancelled by written notice from the undersigned.

You are authorized to bill _____ for any legally permissible, appropriate and reasonable copying charges applicable to this request, for which charges I will be fully responsible.

☐ [applicable if checked] This Authorization shall also apply to any supplemental requests for documents or other information made by any of the above-identified persons or entities with respect to any Plan.

If you have any questions concerning the attached Request for Documents or need to make arrangement for payment of copying costs, please contact _____, by telephone (___) _____, or by email at _____.

Alternate Payee or prospective Alternate Payee with respect to benefit accrued by Participant:

_____Date:_____

Appendix B

Sample Provisions for Turnover Order (Spouse's share to be net of employment tax withholding only) covering tax matters and default.

A. Taxes/Indemnity.

1. **In general.** Each party (or such party's estate, as the case may be) shall be solely responsible for timely reporting all taxable income attributable to such party's share of all benefits awarded or confirmed to such party and received under this Order, and for timely paying all federal, state and local income taxes attributable thereto.
2. **Reporting and Allocation of Income**.
   - **a.** *Income Taxes*. The parties understand and acknowledge that so long as ABC Company (or its successor) will not pay W's awarded share of the Plan benefits to her directly and report such payment under her name and tax ID (social security) number, any taxable income and income tax withholding attributable to W's award under this Order will be reported by ABC Company to the taxing authorities under H's tax ID number.
     - **i.** Accordingly, H must report all such income on H's income tax returns and at the same time demonstrate a separate, offsetting reduction for the amount received by him as agent or nominee for W and paid over to her under this Order.
     - **ii.** When H is required to include on his income tax returns any income attributable to W's share of the Plan benefits paid over to her by H, H shall subtract such amount from his gross income, and W shall include such income on W 's tax returns. However, all income tax withholding shall be credited to H.
     - **iii.** Similarly, if for any reason W is required to include on her income tax returns any income attributable H's share of the Plan benefits, W shall subtract such amount from her gross income, and H shall include such income on H's tax returns.
   - **b.** *Self-Employment Taxes.* In general, each Party shall be solely responsible for any self-employment taxes due with respect to such party's share of the non-qualified benefits as awarded or confirmed to such party herein. Accordingly, the share paid over to W shall be net of any employment tax withholding applicable thereto.
   - **c.** *Cooperation in tax return preparation.* Under all of the above circumstances, the parties shall cooperate in the exchange of information and documentation necessary to facilitate the filing of tax returns that treat the above tax attributes of the receipt of non-qualified benefits on each party's tax returns in a consistent manner. In this connection, H shall provide in confidence to W's tax advisor upon reasonable request copies of the appropriate sections of his Forms W-2 and/or K-1 reflecting his receipt of any non-qualified benefits from ABC Company in which W has an interest. In addition, the parties shall cooperate to mutually include in their respective returns consistent explanatory language regarding this allocation of tax liability, unless both parties agree otherwise. The parties shall arrange to have their respective tax advisors investigate and negotiate any unsettled tax matters as appropriate.
   - ***d.*** *Indemnity/Failsafe.*
     - **i.** In general. Each party shall indemnify and hold the other harmless from any income tax, penalty or interest assessed against or incurred by the indemnified party arising out of or related to the share of the Plan benefits received by the indemnifying party.
     - **ii.** In addition, if the indemnifying party failed to comply with the tax and reporting requirements of this section relative to the income with respect to which such tax, penalty or interest was incurred or assessed, the indemnifying party shall also indemnify the indemnified party from any related cost or expense, including ac-

counting and other professional fees reasonably incurred by such party. The remedies established herein for failure to comply with this order shall be in addition to any other remedies available at law or in equity.

iii. Notwithstanding the foregoing, if any penalty, additional tax, or interest is assessed under Code §409A with respect to any non-qualified deferred compensation plan in which H participated during the marriage, H shall indemnify and hold W harmless from any such penalty, additional tax or interest that may be assessed to the extent attributable, directly or indirectly to H's negligent or willful failure to comply with the requirements of said Code section with respect to W's awarded share of such compensation.

B. Effect of Untimely Payment. If any funds are received from ABC Company by the recipient spouse (or estate) as agent for payment over to the other spouse (or to the other spouse's estate, designee or beneficiary) under this Order, and the recipient spouse fails to make such payment within 15 days business of receipt, then the recipient spouse shall be presumed to be in breach of this Order, in which case the other spouse's awarded share of such funds shall be increased by 10%, without prejudice to any remedies otherwise available to the other spouse (or the other spouse's estate, designee or beneficiary) at law or in equity for said breach.

C. Reservation of Jurisdiction, Costs and Professional Fees. The court shall reserve jurisdiction to resolve all disputes regarding the interpretation or implementation of this Order and the prevailing party in any such dispute shall be entitled to receive from the other party all attorney and other professional fees and costs reasonably incurred in connection therewith.

When You Can't Split the Baby: Custody of Frozen Embryos
By Valerie Bratt-Leal[1]

Introduction

Thanks to developments in medical science, couples who have difficulty getting pregnant the old-fashioned way can now take advantage of various forms of "assisted reproduction."[2] Most commonly, these procedures involve manual fertilization of eggs inside a petri dish and, frequently, subsequent freezing of the embryos for later implantation.[3] If all goes as planned, an expanded family will result. But what happens if a couple divorces or separates before those embryos are implanted? What if the woman still wants to use the embryos and the man wants them destroyed? Or vice-versa? Should one person's desire to conceive take precedent over the other's desire *not* to conceive? What if it may be one person's last chance to conceive a biological child? These are weighty questions, ones that courts have been grappling with ever since assisted reproduction became a viable option for hopeful, would-be parents.[4] In the United States, courts have taken four different approaches to the issue, grounded in freedom of contract, consent, the right to reproductive liberty, and public policy concerns.[5] An analysis of these various approaches leads to the conclusion that the most reasonable method of dealing with the

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[1] Ms. Bratt-Leal attended the University of Texas at Austin and graduated in May 2016. She may be reached at valerie.bratt.leal@gmail.com.

[2] "Assisted reproduction" refers to any fertility treatment where eggs are fertilized outside of the body. *See* Infertility FAQs, CDC.GOV, (September 16, 2015), http://www.cdc.gov/reproductivehealth/infertility/index.htm.

[3] Susan Storck et al., In Vitro Fertilization (IVF), NIH.GOV, (March 11, 2014), https://www.nlm.nih.gov/medlineplus/ency/article/007279.htm.

[4] *See* Roy Strom, Frozen Embryos: Who Do They Belong to?, CHI. LAW. MAG., (September 2014), http://chicagolawyermagazine.com/Archives/2014/09/Frozen-Embryos-Legal-Rights.aspx.

[5] *See id.*

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issue is a hybrid approach, involving enforcement of existing contracts, or in the absence of a valid contract, balancing the parties' interests.

When "Getting It On" Won't Get It Done

For some people their ultimate goal in life is to achieve a fulfilling career, buy a sprawling mansion, garner international fame, or travel around the globe. But for many, a compelling purpose in life is to bring a child into this world. Although the birth rate in the United States is generally on the decline,[6] data shows that "the general interest in having children has remained constant – and high."[7] According to a 2013 Gallup poll, "[m]ore than nine in ten adults say they already have children, are planning to have children, or wish that they had children."[8] Perhaps some parents-to-be are just following God's instructions in the Bible, where He tells Adam and Eve, "be fruitful and multiply."[9] But the desire to procreate does make sense – evolutionarily speaking, reproduction is a "biological imperative,"[10] whereby individuals pass their genes onto the next generation and ensure that some piece of them remains after they are gone. Of course, the desire to have sexual intercourse certainly plays a role too – recent statistics indicate about 37% of births in the United States were unintended at the time of conception.[11]

But what about those people who, for a multitude of reasons, are either unable or unwilling to go about things the "natural"[12] way? A woman who wants to conceive a biological child[13] may be infertile[14] or may simply wish to avoid putting her body through the taxing process of carrying a baby to term and giving birth. Alternatively, a woman may suffer from a condition related to infertility called "impaired fecundity," where she has difficulty getting pregnant or carrying a pregnancy to term.[15] Men can have infertility issues too, although that is less common.[16] According to the Center for Disease Control (hereafter CDC), these medical issues are fairly common.[17] As of 2015, about 6% of married women 15-44 years of age in the United States are infertile,[18] and 12% of women in that same age group (regardless of marital status) suffer from impaired fecundity.[19] The issue arises to find what recourse[20] these would-be parents have.

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[6] Joyce A. Martin, Brady E. Hamilton & Michelle J.K. Osterman, Births in the United States, 2013, CDC.GOV, 1 (December 2014), http://www.cdc.gov/nchs/data/databriefs/db175.pdf (stating that "[t]he number of U.S. births declined in 2013 for the sixth straight year to 3,932,181, down less than 1% from 2012 and 9% from the 2007 peak.").
[7] Frank Newport & Joy Wilke, *Desire For Children Still Norm in U.S.*, GALLUP.COM, (September 25, 2013), http://www.gallup.com/poll/164618/desire-children-norm.aspx.
[8] *Id.*
[9] *Genesis* 1:28 (King James).
[10] Jonathan M. Marks, HUMAN BIODIVERSITY: GENES, RACE, AND HISTORY 196 (1995).
[11] William D. Mosher, Jo Jones, & Joyce C. Abma, Intended and Unintended Births in the United States: 1982-2010, CDC. GOV, 1 (July 24, 2012), http://www.cdc.gov/nchs/data/nhsr/nhsr055.pdf.
[12] Emily Jackson, Regulating Reproduction: Law, Technology and Autonomy 171 (2001) (stating that "it is axiomatic that infertility treatment is not the natural way to reproduce").
[13] (meaning one who carries her genetic material, as opposed to an adopted child)
[14] "Infertile" is defined as "not being able to get pregnant (conceive) after one year of unprotected sex." Infertility FAQs, *supra* note 1.
[15] *Id.*
[16] A recent CDC study found that 7.5% of all sexually experienced men younger than age 45 reported seeing a fertility doctor during their lifetime. Of those, 18% were diagnosed with a male-related infertility problem, including sperm or semen problems (14%) and varicocele (6%). *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] There are medicines used to treat infertility in women, such as Clomid®, Repronex®, and Follistim®, but their effect on pregnancy rates has been slight. *See* Alexander Quaas & Anuja Dokras, Diagnosis and Treatment of Unexplained Infertility, 1 Reviews in Obstetrics & Gynecology 69, 74 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2505167/pdf/RIOG001002_0069.pdf.

Assisted Reproductive Technology (ART)

The answer to the question posed above, as is so often the case in these modern times, is technology – assisted reproductive technology, a.k.a. ART, to be specific. ART includes "all fertility treatments in which both eggs and sperm are handled outside of the body."[21] According to the CDC, approximately 1.5% of all babies born in the United States are conceived using ART.[22] Though perhaps the most familiar ART procedures are artificial insemination[23] or the use of a surrogate, the primary form of ART in use today is *in vitro*[24] fertilization (IVF),[25] where an egg and sperm are harvested and then combined in a laboratory dish.[26] If immediate[27] implantation is not desired, the fertilized egg, now an embryo, is preserved by cooling to sub-zero temperatures.[28] This process is referred to as "cryopreservation."[29] The exact durational limit of frozen embryos' viability is unknown, but embryos frozen as long as twelve years have resulted in live births.[30] Globally, IVF was performed successfully[31] for the first time in 1978 in Cambridge, England, with the birth of Louise Brown.[32] Since then, the process has become "increasingly simpler, safer, and more successful."[33] The first IVF procedure to result in a live birth in the United States was performed in 1981, in Norfolk, Virginia.[34] The CDC lists varying success rates for IVF, depending on the woman's age.[35]

Not surprisingly, IVF is a very expensive procedure.[36] The average cost in the United States is $12,400 per IVF cycle.[37] Those fees cover medicines, surgery, anesthesia, ultrasounds, blood tests, processing the eggs and sperm, embryo storage, and embryo transfer.[38] With success rates at 40% or lower,[39] the procedure may be repeated several times before resulting in a live birth – thus, the costs can add up quickly.

And it's not just the cost that takes a toll on the would-be parents; the additional physical demand the procedure exacts on a woman's body is quite considerable.[40] Before any eggs can be harvested from her ovaries, a woman must undergo what's termed "stimulation" or "super ovulation" – a fertility drug regimen, boosting egg production from one egg per month to several.[41] These drugs can cause bloating, abdominal pain, mood swings, headaches, and other side

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[21] Infertility FAQs, *supra* note 1.
[22] ART Success Rates, CDC.GOV, (October 13, 2015), http://www.cdc.gov/art/reports/.
[23] Artificial insemination, sometimes referred to as "intrauterine insemination," is a process whereby "specially prepared sperm are inserted into the woman's uterus." Infertility FAQs, *supra* note 1.
[24] "*in vitro*" is Latin for "outside the living body." Merriam-Webster Dictionary, 1190, 16th ed., 1971.
[25] *Id.*
[26] Storck et al., *supra* note 2.
[27] Embryos are usually transferred into the woman's womb 3-5 days following fertilization. *See id.*
[28] Wong, Mastenbroek & Repping, Cryopreservation of Human Embryos and its Contribution to *In Vitro* Fertilization Success Rates, NIH.GOV, (June 2, 2014), http://www.ncbi.nlm.nih.gov/pubmed/24890275.
[29] *Id.*
[30] Embryo Facts, MiraclesWaiting.org, http://www.miracleswaiting.org/factsembryos.html (last visited October 31, 2015).
[31] (meaning the procedure resulted in a pregnancy that eventually culminated in a live birth)
[32] In Vitro Fertilization (IVF), UCSFHEALTH.ORG, http://www.ucsfhealth.org/treatments/in_vitro_fertilization_ivf/ (last visited Oct. 30, 2015).
[33] *Id*.
[34] The US' First Test Tube Baby, PBS.ORG, http://www.pbs.org/wgbh/americanexperience/features/general-article/babies-americas-first/ (last visited October 31, 2015).
[35] (41-43% for women under age 35, 33-36% for women ages 35-37, 23-27% for women ages 38-40, and 13-18% for women age 41 and over) Infertility FAQs, *supra* note 1.
[36] Frequently Asked Questions About Infertility, The American Society for Reproductive Medicine, http://www.reproductivefacts.org/awards/index.aspx?id=3012 (last visited October 31, 2015).
[37] *Id.*
[38] Storck et al., *supra* note 2.
[39] Infertility FAQs, *supra* note 1.
[40] *See* Storck et al., *supra* note 2.
[41] *Id.*

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effects.[42] Some drugs must be administered by injection, multiple times a day, and those repeated injections can cause bruising.[43] A rare result of a fertility drug regimen is ovarian hyperstimulation syndrome (OHSS), which causes a buildup of fluid in the abdomen and chest.[44] The egg-harvesting process itself can also present complications, including reactions to anesthesia, bleeding, infection, and damage to structures surrounding the ovaries, including the bowel and bladder.[45] All of these possible side effects certainly detract from the appeal of IVF, but the potential end result makes it all worth it (at least, for the thousands of people who've tried it).[46][47]

"You Can Have the House, I'll Take the Embryos."

The overwhelming majority of legal actions stemming from IVF involve what happens when a couple, once hoping to conceive a child together via IVF and frozen embryos, divorces or legally separates. Division of assets is a familiar concept in family law, usually accomplished via a (pre-)marital agreement, arbitration, mediation, or property distribution through the court system.[48] This raises the issue of whether frozen embryos are really "assets." That depends on their legal status, and that's far from established.[49] Different states take remarkably different approaches to this issue.

In some states, such as New York and Texas, embryos are legally considered to be "property" and can be transferred from one party to another via contract.[50] On the other end of the spectrum, the states of Louisiana and Missouri endorse a "right to life" perspective, finding that an embryo is legally categorized as a person, with all the accompanying rights, from the moment of conception.[51] This directly contravenes the position taken by the United States Supreme Court in *Roe v. Wade*, where the Court held that no rights are instilled in a fetus until it is born.[52] [53] And finally, some states fall somewhere in the middle, utilizing a "special respect" approach.[54] In Tennessee, for example, the state supreme court held that embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[55] This perspective aligns with the position of the American Society for Reproductive Medicine (ASRM), which has recognized an embryo's elevated moral status[56] but has also stated that an embryo "should not be treated as a person,

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] About 113,000 IVF cycles were performed in 2003, and the number increased to about 165,000 in 2012. Michaeleen Doucleff, IVF Baby Boom: Births From Fertility Procedures Hit New High, NPR.ORG, (February 18, 2014), http://www.npr.org/sections/health-shots/2014/02/18/279035110/ivf-baby-boom-births-from-fertility-procedure-hit-new-high.
[47] 5,000,000 babies have been born via IVF in the last 35 years. Bonnie Rochman, 5 Million Babies Born Through IVF in Past 35 Years, Researchers Say, NBCNEWS.COM, (October 14, 2013), http://www.nbcnews.com/health/5-million-babies-born-through-ivf-past-35-years-researchers-8C11390532.
[48] *See* Thomas H. Oehmke & Joan M. Bovins, Mediation and Arbitration of Family Law Disputes – Property, Support, Custody, and Parenting Time, 118 Am. Jur. Trials 305 (updated October 2015).
[49] Cynthia S. Marietta, Frozen Embryo Litigation Spotlights Pressing Questions: What is the Legal Status of an Embryo and Can It Be Adopted?, HEALTH LAW PERSPECTIVES (Apr. 2010), https://www.law.uh.edu/healthlaw/perspectives/2010/marietta-embryolegal.pdf.
[50] *Id.*
[51] *See id.*
[52] 410 U.S. 113, 162 (1973) (stating that "the unborn have never been recognized in the law as persons in the whole sense.")
[53] This would clearly extend to embryos, because a fetus is much closer to viability than is an embryo.
[54] Marietta, *supra* note 44.
[55] *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).
[56] Report of the Human Embryo Research Panel, Nat'l Inst. of Health, (September 1994), https://repository.library.georgetown.edu/bitstream/handle/10822/559352/human_embryo_vol_1.pdf?sequence=1&isAllowed=y.

because it has not yet developed the features of personhood, it has not yet established as developmentally individual, and it may never realize its biological potential."[57]

Any consensus among the states regarding the legal status of an embryo is extremely unlikely, at least for the foreseeable future. Thus, the task of resolving disputes over custody of frozen embryos has fallen to individual courts, spread throughout the nation, which in general have taken four different approaches to the issue.[58]

Approach #1: Balancing the Interests

Using this approach, courts seek to weigh one person's desire to make use of the embryos against the other person's desire to have them destroyed,[59] with emphasis on the burdens imposed on the party whose interests are ruled against.[60] An often-cited case in support of this approach is *Davis v. Davis*, an opinion from the Supreme Court of Tennessee decided in 1992.[61]

In *Davis*, Mary Sue and Junior Lewis Davis went through 6 IVF cycles using "fresh" embryos,[62] but none resulted in a pregnancy.[63] They then opted to try cryopreservation, attempting a transfer of embryos to Mary Sue's uterus and freezing the remaining seven embryos for later transfer attempts.[64] The parties did not make an agreement concerning disposition of the embryos in the event of a divorce.[65] Like the previous six attempts, the seventh attempted transfer failed to result in implantation, after which Junior filed for divorce before another transfer could be attempted.[66] Mary Sue asked for custody of the frozen embryos, originally[67] intending that they later be transferred to her uterus.[68] Junior protested, stating that "he preferred to leave the embryos in their frozen state until he decided whether he wanted to become a parent outside the bounds of marriage."[69] [70]

Acknowledging that frozen embryos "occupy an interim category that entitles them to special respect because of their potential for human life," the court noted that any interest the parties had in the frozen embryos was "not a true property interest."[71] But the court clarified that the judicial system has "an interest in the nature of ownership, to the extent that it has decision-making authority concerning disposition of the [frozen embryos]."[72]

Next, the court considered various models for the disposition of frozen embryos in response to "unanticipated contingencies . . . such as divorce, death of one or both of the parties, financial reversals, or simple disenchantment with the IVF process."[73] Among these models were:

> . . . a rule requiring, at one extreme, that all embryos be used by the gamete[74]-providers or donated for uterine transfer, and, at the other extreme, that any unused

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[57] The Ethics Committee of the Am. Soc'y for Reproductive Med., Defining Embryo Donation, 92 FERTILITY AND STERILITY 1818, 1818-19 (Dec. 2009).
[58] Strom, *supra* note 3.
[59] *Id.*
[60] *Davis*, 842 S.W.2d at 603.
[61] *Id.* at 588.
[62] "Fresh embryos" are those that have not been frozen. Glossary of Terms Used in [ART 2011 Fertility Clinic Success Rates] Report, CDC.gov, (March 6, 2014), http://www.cdc.gov/art/ART2011/appixb.htm#F.
[63] *Davis*, 842 S.W.2d at 591.
[64] *Id.*
[65] *Id.* at 598.
[66] *Id.* at 592.
[67] Mary Sue later changed her mind, and asked for custody of the embryos for donation to another couple. *Id.*
[68] *Id.* at 589.
[69] *Id.*
[70] Junior later changed his mind as well, and asked that the embryos be discarded. *Id.*
[71] *Id.* at 597.
[72] *Id.*
[73] *Id.* at 590.
[74] "Gamete" refers to "a reproductive cell, either a sperm or an egg." Glossary of Terms, *supra* note 57.

> embryos be automatically discarded. Other formulations would vest control in the female gamete-provider – in every case, because of her greater physical and emotional contribution to the IVF process, or perhaps only in the event that she wishes to use them herself.[75] There are also two 'implied contract' models: one would infer from enrollment in an IVF program that the IVF clinic has authority to decide in the event of an impasse whether to donate, discard, or use the 'frozen embryos' for research; the other would infer from the parties' participation in the creation of the embryos that they had made an irrevocable commitment to reproduction and would require transfer either to the female provider or to a donee. There are also the so-called 'equity models': one would avoid the conflict altogether by dividing the 'frozen embryos' equally between the parties to do with as they wish; the other would award veto power to the party wishing to avoid parenthood, whether it be the female or the male progenitor.[76] [77]

In considering the merits of the various models, the *Davis* court recognized that the parties had a right to sole decisional authority as to whether the frozen embryos would be used,[78] thus eliminating as an option any model granting the clinic decisional authority. With that settled, the court then shifted to a balancing of the interests implicated by the dispute – Mary Sue's right to procreate and Junior's right to avoid procreation.[79] The court first placed the parties on equal footing, stating:

> We are not unmindful of the fact that the trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men. In this sense, it is fair to say that women contribute more to the IVF process than men. Their experience, however, must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood. As they stand on the brink of potential parenthood, Mary Sue Davis and Junior Lewis Davis must be seen as entirely equivalent gamete-providers.[80]

The court began its consideration of the implicated interests by looking at the burdens that would be imposed on each party by the denial of individual procreational autonomy.[81] Regarding Junior, the court acknowledged that the burden of unwanted parenthood, with all of its financial and psychological consequences, would have a particularly strong impact on him in light of his childhood experiences with divorce and separation from his parents.[82] [83] Turning then to Mary Sue, the court found that denying her custody of the frozen embryos would "impose on her the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the [frozen embryos] to which she contributed genetic material would never become children."[84] Weighing the two burdens against each other, the court found that Mary Sue's interest in donation of

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[75] (as opposed to donating them to another couple, or donating them to research)
[76] "Progenitor" is defined as "an ancestor in the direct line." Merriam-Webster Dictionary, 1812, 16th ed., 1971.
[77] *Davis*, 842 SW.2d at 590-91.
[78] *Id.* at 603.
[79] *Id.* (noting that "a right to procreational autonomy is inherent in our most basic concepts of liberty" and "is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.")
[80] *Id*. at 601.
[81] *Id.* at 603.
[82] *Id.* at 603-04.
[83] When Junior was five years old, his parents divorced. After his mother had a nervous breakdown, Junior and three of his brothers were sent to a home for boys. Junior testified that he had "severe problems" as a result of the separation from his parents, and as such, he was "vehemently opposed to fathering a child that would not live with both parents." Junior also opposed donation of the frozen embryos because of the possibility that the recipient couple would divorce and the child would not live with both parents. *Id.*
[84] *Id.* at 604.

the frozen embryos to another couple was not as significant as Junior's interest in avoiding parenthood.[85] Thus, the court granted decisional authority over the disposition of the embryos to Junior.[86]

Significantly, the court in *Davis* noted that there would have been a different outcome had Mary Sue wished to use the frozen embryos herself, but only if she could not achieve parenthood by any other reasonable means.[87] Finally, the court provided a neat summary of the "balancing of the interests" approach, stating:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the [frozen embryos] in question. If no other reasonable alternatives exist, then the argument in favor of using the [frozen embryos] to achieve pregnancy should be considered. However, if the party seeking control of the [frozen embryos] intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[88]

A more recent use of the "balancing of the interests" approach is found in the 2001 decision handed down by the New Jersey Supreme Court in *J.B. v. M.B*.[89] As in *Davis*, the parties in *J.B. v. M.B.* made no formal, written agreement concerning the disposition of their frozen embryos and found themselves thrust into a legal battle over their custody upon their divorce.[90] In *J.B. v. M.B.*, however, the *male* gamete-donor (M.B.) was the party wishing to preserve the frozen embryos for later implantation or donation to another couple, whereas the *female* gamete-donor (J.B.) wanted the frozen embryos destroyed.[91] In balancing the interests of the two parties, the court stated that the conflict between the parties' rights of procreational autonomy was "more apparent than real."[92] Because M.B. still had the capacity to father children with other women in the future, the court found that enforcement of J.B.'s right to avoid procreation would not seriously impair M.B.'s right to procreate.[93] If the court allowed the frozen embryos to be preserved for future implantation or donation, on the other hand, J.B.'s right to avoid procreation would essentially be extinguished, and that "could have life-long emotional and psychological repercussions."[94] Thus, the court ordered destruction of the frozen embryos, in accordance with the desires of J.B.[95] [96]

Overall, the "balancing of the interests" approach seems to satisfy general notions of fairness by considering the circumstances of each party in conjunction with their right to procreational autonomy. Kimberly Mutcherson, a professor at Rutgers School of Law who teaches a class called "Bioethics, Babies & Babymaking," notes that the approach allows courts to capture the variety and complexity that exist in embryo disputes.[97] However, one commentator has observed that the method can appear arbitrary in that it is impossible to assign a specific weight to each factor in a case.[98] Of course, this critique could be applied to several long-standing judicial

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *See* 783 A.2d 707, 716 (N.J. 2001).
[90] *Id.* at 714.
[91] *Id.* at 710.
[92] *Id.* at 716.
[93] *Id.* at 716-17.
[94] *Id.*
[95] *Id.* at 720.
[96] The Court noted that J.B. did not object to continued storage of the frozen embryos as long as M.B. was willing to pay the costs. The court directed M.B. to inform the trial court whether he wished to do so and stated that otherwise, the frozen embryos would be destroyed. *Id.*
[97] Strom, *supra* note 3.
[98] *See id.*

doctrines that involve a weighing or balancing of factors. In general, the "balancing of the interests" approach seems to make sense, in the absence of a formal, written agreement between the parties dictating disposition of the embryos in the event of "unanticipated contingencies."[99]

Approach #2: Contracts Guide the Outcome

If couples enter into a formal, written contract before they begin the IVF process, they could potentially save themselves a lot of trouble (not to mention attorneys' fees). States applying the contractual approach to resolving disputes over custody of frozen embryos include New York, Washington, Oregon, Florida, and Texas.[100] Notably, Florida has even codified this approach via statute, directing couples and their treating physicians to

> enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos[101] in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.[102]

Although "any other unforeseen circumstance" seems a little broad, Florida's legislative attempt to pre-empt disputes over custody of embryos is admirable. It's likely the courts appreciate it too – any such agreement, in states following the contractual resolution approach, certainly makes their jobs easier. There are several significant cases endorsing this approach, beginning with *Kass v. Kass* out of New York State.[103]

There, Steven and Maureen Kass opted to try IVF after several unsuccessful attempts to conceive via artificial insemination.[104] Maureen underwent the egg-harvesting process five times, and the couple attempted embryo transfer nine times.[105] Although Maureen became pregnant twice, one of those pregnancies ended in a miscarriage and the other was terminated as an ectopic pregnancy.[106] Frustrated but determined, the couple chose to try IVF once more – but this time, they'd take a slightly different approach.[107] After harvesting 16 more eggs from Maureen, doctors transferred four embryos to Maureen's sister, who had volunteered to be a surrogate.[108] Another five embryos were frozen.[109] However, Maureen's sister did not become pregnant and then withdrew her consent to participate.[110] Shortly thereafter, Steven and Maureen filed for divorce.[111] Maureen petitioned the court for custody of the frozen embryos, claiming they were "her only chance[112] for genetic motherhood."[113] Steven objected, requesting that the frozen embryos be donated to research as the couple had agreed.[114]

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[99] *See Davis*, 842 SW.2d at 590.
[100] Strom, *supra* note 3.
[101] The term "pre-embryo" is sometimes used to refer to an embryo for the first 14 days after fertilization. Jones & Telfer, Before I Was an Embryo, I was a Pre-Embryo: Or Was I?, NIH.GOV, (January 1995), http://www.ncbi.nlm.nih.gov/pubmed/11653031.
[102] Fla. Stat. § 742.17 (2015).
[103] 91 N.Y.2d 554 (N.Y. 1998).
[104] *Id*. at 557.
[105] *Id.* at 558.
[106] An ectopic pregnancy is one where "the fertilized egg implants in a location outside of the uterus—usually in the fallopian tube, the ovary, or the abdominal cavity. Ectopic pregnancy is a dangerous condition that must receive prompt medical treatment." Glossary of Terms, *supra* note 57.
[107] *Kass*, 91 N.Y.2d at 560.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] The opinion does not state why Maureen made this claim, and she made no showing of support for this claim. *See* David L. Theyssen, Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?, 74 Ind. L.J. 711, 722 (1999).
[113] *Id.* at 557.
[114] *Id.*

Significantly, before their final IVF attempt, Steven and Maureen signed four consent forms provided by the clinic.[115] These forms indicated, at several points, that the couple was required to make informed decisions as to the disposition of the embryos before any egg-harvesting process could begin.[116] The provision that the court would later find determinative read:

> In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes,[117] we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to (choose one):
> (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.[118]

After Maureen initiated the divorce proceedings, asking for sole custody of the frozen embryos, Steven counterclaimed for specific performance of the embryo agreement and requested that the frozen embryos be donated back to the clinic for research purposes.[119] The New York Court of Appeals agreed with Steven, stating that the parties clearly expressed their intent that in the circumstances presented the pre-zygotes would be donated to the IVF Program for research purposes.[120] [121]

In conducting its analysis, the *Kass* court considered dicta from *Davis*, the Tennessee case that most directly endorsed the "balancing of the interests" approach.[122] In *Davis*, where there was no written agreement among the parties, the Tennessee Supreme Court noted that

> . . . an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) *should be presumed valid and should be enforced* as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the pre-embryos, retain decision-making authority as to their disposition.[123]

Determining that the agreement signed by Steven and Maureen was dispositive, the *Kass* court applied principles of contract law to validate its finding:

> Here, the parties prior to cryopreservation of the pre-zygotes signed consents indicating their dispositional intent. While these documents were technically provided by the IVF Program, neither party disputes that they are an expression of their own intent regarding disposition of their pre-zygotes. Nor do the parties contest the legality of those agreements, or that they were freely and knowingly made.[124]

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[115] *Id.* at 560.
[116] *Id.*
[117] "Pre-zygotes" is yet another term for an early-stage pre-embryo, defined as "a fertilizing egg up to the time of syngamy, which is when the egg and sperm chromosomes assemble just before the first cell division." Helen B. Holmes, Issues in Reproductive Technology, 210 (1994).
[118] *Kass*, 91 N.Y.2d at 559-60.
[119] *Id.* at 560.
[120] *Id.* at 562.
[121] The court did not reach the question of the legal status of the frozen embryos, stating that the question of who had disposition authority was answered by the parties' agreement and thus the court had no purpose in determining the embryos' legal status. *Id.* at 564-65.
[122] *Id.* at 563.
[123] *Davis*, 842 SW.2d at 597 (emphasis added).
[124] 91 N.Y.2d at 566.

Thus, the court eliminated any possibility of a finding of duress or unconscionability that could invalidate enforcement of the agreement.[125] Maureen presented a weak argument that the relevant provision of the consent form was unclear, claiming it was "fraught with ambiguity" regarding disposition of the embryos.[126] The court handily swept that claim aside, stating that the "informed consents signed by the parties unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF Program."[127] As such, the court ordered that the frozen embryos be donated back to the clinic for research purposes, honoring the written consent agreements at issue.[128]

In endorsing the contractual approach, the *Kass* court encouraged the creation of written agreements in future IVF procedures, stating

> Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize understandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF Programs.[129]

Anticipating counter-arguments regarding the difficulties of binding parties to agreements dealing with the unknown future, the court stated that "[k]nowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process," and noted that "[a]dvance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree."[130] Essentially, the court was warning future IVF participants that they'd better think twice before signing any written agreement dictating future disposition of their frozen embryos.[131]

The contractual approach was further developed in *Roman v. Roman*, a Texas case upholding the validity of a consent agreement dictating destruction of frozen embryos in the event of divorce.[132] In *Roman*, after several attempts at conception via both traditional avenues and artificial insemination, Augusta and Randy Roman decided to try IVF.[133] Before beginning the process, the parties signed multiple documents at the IVF clinic, including a form entitled "Informed Consent for Cryopreservation of Embryos" ("embryo agreement").[134] This document specifically stipulated that the parties chose to discard the embryos in the event of divorce.[135] The document also contained a provision that allowed the parties to withdraw their consent to the disposition of the embryos and to discontinue their participation in the program.[136]

After harvesting eggs from Augusta, and fertilizing those eggs with Randy's sperm, the clinic froze three of the couple's embryos for later implantation.[137] On the night before the sched-

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[125] *See id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 569.
[129] *Id.* at 565.
[130] *Id.* at 566.
[131] This approach is modeled by the gestational agreements in the Texas Family Code. Tex. Fam. Code Ann. § 160 (Vernon 2002).
[132] 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. filed).
[133] *Id.* at 42.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*

uled implantation, Randy withdrew his consent to the procedure.[138] One month later, Augusta and Randy signed an agreement to unfreeze the embryos for implantation.[139] That agreement was contingent on the parties' obtaining approval from a counselor.[140] However, that agreement never took effect, as the parties never underwent counseling.[141]

Later that year, Randy filed for divorce and asked the trial court to uphold the embryo agreement mandating disposal of the couple's embryos upon divorce. [142]Augusta protested, requesting the embryos for her own use in producing a biological child.[143] The trial court awarded Augusta custody of the frozen embryos.[144] Subsequently, Randy sought parental rights to any child born from the embryos under the Uniform Parentage Act (UPA), specifically Section 160.706(a) of the Texas Family Code, which states:

> (a) If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child.[145]

In considering the case, the Houston Court of Appeals began its analysis by stating "[w]e answer the issue with which we are presented as narrowly as possible in anticipation that the issue will ultimately be resolved by the Texas Legislature."[146] After summarizing Randy's claim that the trial court erred in failing to enforce the embryo agreement dictating disposal of the embryos in the event of divorce, the court then noted that "no Texas case has ruled on whether these types of agreements are enforceable."[147] In fact, Augusta's claim that the trial court was correct in choosing not to enforce the embryo agreement was based on the fact that other state supreme courts had found similar agreements to be invalid.[148]

After a review of the scant case law on the issue of written agreements dictating disposition of frozen embryos, including *Davis* and *Kass*, the Houston Court of Appeals concluded that "[the] emerging majority view [is] that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of the agreement."[149] Because the court was not bound by decisions from other state courts, it then shifted to an analysis of Texas statues "to determine the public policy of this State in the context of embryo agreements."[150]

The UPA is codified in Texas in Sections 160.701-.707 of the Texas Family Code.[151] After a discussion of the various sections dealing with assisted reproduction and related paternity issues, the *Roman* court pointed out that "[n]oticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce."[152] The court next reviewed legislation concerning gestational agreements,

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[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] Tex. Fam. Code Ann. § 160.706(a) (Vernon 2002).
[146] *Roman*, 193 S.W.3d at 44. The author could find no evidence of subsequent or pending legislation in Texas dealing with this issue.
[147] *Id.*
[148] *Id.*
[149] *Id.* at 48.
[150] *Id.*
[151] *See* Tex. Fam. Code Ann. §§ 160.701-.707 (Vernon 2002).
[152] *Roman*, 193 S.W.3d at 49.

where a gestational surrogate[153] relinquishes all rights as a parent of a child conceived by means of assisted reproduction and the agreement provides that the intended parents become the parents of a child.[154]

From its review of the various sections of the Texas Family Code dealing with assisted reproduction, the court stated, "[w]e glean from these statutes that the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such as divorce, death, or changed circumstances."[155] Thus, the court recognized that an embryo agreement, subject to mutual change of mind, jointly expressed, does not violate Texas public policy.[156]

Next, the court shifted to an analysis of the embryo agreement entered into by Augusta and Randy Roman to determine if it manifested a voluntary unchanged mutual intention of the parties regarding disposition of the embryos upon divorce.[157] Recognizing the parties' freedom of contract and utilizing various principles of contract law, such as clarity and intent, the court came to the conclusion that "the language [of the embryo agreement] could not be clearer" and that "the evidence shows [Augusta] was aware of and understood the significance of her decision [to sign the embryo agreement]."[158] Thus, the court held that the trial court abused its discretion in not enforcing the embryo agreement, and ordered that the frozen embryos be discarded.[159]

Overall, the contractual approach seems attractive in that it respects freedom of contract while providing predictability and administrative efficiency.[160] But the model is flawed in that it does not allow for a change of heart that can result after "family and reproductive decisions . . . [that] are highly emotional in nature."[161] If, however, there is a congruous change of heart by all parties involved, that would be unlikely to lead to litigation.

Approach #3: Requiring Contemporaneous Mutual Consent

In what would likely appear to the layman as the most sensible approach, some courts require that both gamete-donors consent at the time of embryo transfer.[162] Currently, Iowa is the only state that endorses this method of resolving disputes over embryos.[163] The primary case endorsing this approach is the Iowa Supreme Court's decision in *In Re Marriage of Witten,* from 2003.[164]

In *Witten*, Arthur (known as "Trip") and Tamera Witten underwent several unsuccessful embryo transfers via IVF before filing for divorce. [165] Prior to beginning the IVF process, the parties signed informed consent documents provided by the clinic ("embryo storage agreement").[166] A relevant provision of those forms read:

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[153] A "gestational surrogate" is "a woman who gestates, or carries, an embryo that was formed from the egg of another woman. The gestational carrier usually has a contractual obligation to return the infant to its intended parents." Glossary of Terms, *supra* note 57.
[154] *See* Tex. Fam. Code Ann. § 160.752(a) (Vernon Supp. 2005).
[155] *Roman*, 193 S.W.3d at 49-50.
[156] *Id.*
[157] *Id.* at 50.
[158] *Id.* at 52.
[159] *Id.* at 54.
[160] *See* Angela K. Upchurch, The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process, 33 Fla. St. U. L. Rev. 395, 419-20 (2006).
[161] *In Re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003).
[162] *See* Strom, *supra* note 3.
[163] *Id.*
[164] 672 N.W.2d 768.
[165] *Id.* at 772.
[166] *Id.*

> Release of Embryos. The Client Depositors [Trip and Tamera] understand and agree that containers of embryos stored pursuant to this agreement will be used for transfer, release or disposition only with the signed approval of both Client Depositors.[167] [168]

At the time of trial, Trip and Tamera had seventeen frozen embryos in storage.[169] Tamera requested custody of the frozen embryos, intending to use them herself or have them transferred to a [gestational] surrogate mother in an attempt to produce a biological child.[170] Claiming that it would violate [Iowa's] public policy if Trip were allowed to back out of his agreement to have children,[171] Tamera testified in court that she was vehemently opposed to both destruction of the embryos and donation to another couple.[172] Trip, likely harboring some ill-will against his ex-wife,[173] testified that he didn't want the embryos destroyed, but he didn't want Tamera to use them, either.[174] However, he told the court that he'd be willing to donate the embryos to another couple.[175]

In its decision, the Iowa Supreme Court considered the enforceability of the embryo storage agreement under three methods of analysis: 1) the contractual approach; 2) the contemporaneous mutual consent model; and 3) the balancing test.[176] Discussing the contractual approach, the court noted the rationale of the New York Court of Appeals in *Kass* (quoted above) but then recognized that the approach has been criticized because it insufficiently protects the individual and societal interests at stake.[177] Essentially, the court acknowledged the difficulty of predicting how priorities and values might change in the future, especially with regards to human tissue with the potential to develop into a child.[178]

Next, the court considered the "contemporaneous mutual consent" model.[179] The primary question here is "at what time does the partners' consent matter?"[180] Noting that any decision about embryo disposition is an "intensely emotional matter," the court acknowledged that "it may be 'impossible to make a knowing and intelligent decision to relinquish a right in advance of the time the right is to be exercised.'"[181] Proponents of the "contemporaneous mutual consent" model say it alleviates concerns about the psychological impact of forced parenthood or forced destruction of embryos because any action regarding the embryos would need to be approved by both gamete-donors.[182] A particular advantage of this approach is that the embryos would remain frozen in storage until the parties reach an agreement, and that preservation of the status quo is not final and irrevocable.[183]

Finally, the court shifted to discussion of the "balancing test" approach.[184] Drawing from *J.B. v. M.B.*, the New Jersey case directly endorsing this model, the court touched upon public policy

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[167] *Id.*
[168] The documents also contained one exception to the joint-approval requirement, governing disposition of the embryos upon the death of one or both of the parties.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 773.
[172] *Id.* at 772-73.
[173] (surely not uncommon in divorce proceedings)
[174] *See id.* at 773.
[175] *Id.*
[176] *Id.* at 776.
[177] *Id.* at 777.
[178] *Id.*
[179] *Id.* at 777.
[180] *Id.* (quoting Coleman, *supra* note 170 at 91).
[181] *Id.* (quoting Coleman, *supra* note 170 at 98).
[182] *Id.*
[183] *Id.*
[184] *Id.* at 779.

concerns[185] favoring this approach over the contractual model.[186] However, the court then noted that the "balancing test" approach has an "obvious problem" – its "internal inconsistency."[187] Essentially, the court found that the same public policy concerns disfavoring the contractual approach also "demand even more strongly that we not substitute the courts as decision makers in this highly emotional and personal area."[188]

Turning to the facts of the case at hand, the court first dealt with Tamera Witten's argument that the embryo storage agreement violated Iowa's public policy because it "allow[ed] a person who has agreed to participate in [IVF] to later change his mind about becoming a parent.[189] Recognizing that "[t]he public policy evidenced by [Iowan] law relates to the State's concern for the physical, emotional, and psychological well-being of children who have been born, not fertilized eggs that have not even resulted in a pregnancy," the court found that there was no public policy that require[d] the use of frozen embryos over one party's objection.[190]

Next, the court transitioned to the more complex issue of the enforceability of prior agreements dictating embryo disposition when one of the donors is no longer comfortable with his or her prior decision.[191] Recognizing that "family and reproductive decisions . . . are highly emotional in nature and subject to a later change of heart," the court stated that enforcing an agreement under such circumstances would be against Iowa's public policy.[192] Thus, the court rejected the contractual approach and held that agreements entered into at the time *in vitro* fertilization is commenced are enforceable and binding on the parties, subject to the right of either party to change his or her mid about disposition up to the point of use or destruction of any stored embryo.[193] Regarding the Wittens, the court held that there could be no disposition of the frozen embryos unless the parties reached an agreement.[194]

Overall, the "contemporaneous mutual consent" model appears to accommodate public policy concerns regarding the propriety of binding parties to prior reproductive decisions[195], but this approach has one major flaw – what if an angry spouse, by refusing to consent to implantation, effectively holds frozen embryos "hostage" in divorce proceedings?[196] This would give improper leverage that would distort the fairness of any such proceeding.

Approach #4: Disposition Contracts Will Not Be Enforced as a Matter of Public Policy

Courts utilizing this approach to resolve disputes over frozen embryos refuse to enforce any agreements dictating the disposition of frozen embryos, grounding their considerations in concerns that "forced procreation is not an area amenable to judicial enforcement".[197] Currently, Massachusetts is the lone state that follows this approach, and the primary case in support is *A.Z. v. B.Z.*, a decision handed down in 2000.[198]

In *A.Z.*, a husband and wife opted to try IVF after various struggles with infertility, including an ectopic pregnancy that resulted in a miscarriage and the removal of the wife's left fallopian

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[185] Particularly, those that "underlie limitations on contracts involving family relationships." (quoting *J.B.*, 783 A.2d at 718). The court noted that regarding "matters of such fundamental importance, individuals are entitled to make decisions consisted with their contemporaneous wishes, values, and beliefs." (quoting Coleman, *supra* note 170 at 88-89).
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 780.
[190] *Id.*
[191] *Id.*
[192] *Id.* at 782.
[193] *Id.*
[194] *Id.* at 783.
[195] *See id.*
[196] *See* Strom, *supra* note 3.
[197] *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000).
[198] *See id.*

tube.[199] As a result of the IVF treatment, the wife became pregnant and gave birth to twin daughters.[200] Embryos that were not used in that implantation were frozen and put in storage.[201] A few years later, the wife secretly had one container of embryos thawed and one embryo was implanted, all without informing the husband.[202] [203] Not surprisingly, the relationship between the husband and wife subsequently deteriorated and the husband filed for divorce.[204] At that time, four frozen embryos remained in storage.[205] The husband requested a permanent injunction, barring the wife from unfreezing the four remaining embryos for her use.[206]

When the couple first began the IVF process, the clinic required both parties to sign certain consent forms concerning disposition of the frozen embryos.[207] The clinic also required both parties to sign consent forms before each egg-harvesting procedure (which the couple underwent several times over a period of years).[208] Significantly, "[e]ach time after signing the first consent form . . . the husband always signed a blank consent form. . . [e]ach time, after the husband signed the form, the wife filled in the disposition. . . and then signed the form herself."[209] Whenever the wife filled in the disposition, she specified that should they become separated, the frozen embryos would be returned to her for implantation.[210]

In analyzing the enforceability of the written consent forms as an agreement dictating the disposition of the embryos, the Massachusetts Supreme Court found it significant that the husband signed blank forms before they were filled in by the wife.[211] Because of this fact, the court stated that it "[could not] conclude that the consent form represent[ed] the true intention of the husband for the disposition of the pre-embryos."[212] Even without this fact, however, the court would not have enforced the agreement, stating "we conclude that, even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen pre-embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will."[213]

As support for this declaration, the court noted that the public interest in freedom of contract is sometimes outweighed by other public policy considerations.[214] Here, those public policy considerations focused primarily around "a reluctance to enforce prior agreements that bind individuals to future family relationships."[215] Additionally, the court noted that a decision not to enforce such an agreement is "grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship."[216] Thus, the court declined to enforce the consent form agreement against the husband, recognizing that doing so would require him to become a parent against his will.

Overall, courts' refusal to enforce embryo disposition agreements as a matter of public policy seems to contravene the general interest in freedom of contract. Additionally, this approach

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[199] *Id.* at 1052.
[200] *Id.* at 1053.
[201] *Id.*
[202] *Id.*
[203] No pregnancy resulted. The husband only learned of the secret procedure when he received a note from his insurance company.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* at 1057.
[212] *Id.*
[213] *Id.*
[214] *Id.* at 1058.
[215] *Id.*
[216] *Id.*

provides no predictability and creates difficulties in administration. It's admirable to adamantly refuse to force parenthood on someone, but when that someone signs a blank consent form for a procedure that *could eventually result in a baby*, they seem much less sympathetic and deserving of judicial protection.

Proposed Alternative: A Hybrid Approach Mandated by Statute

There are inherent difficulties in relying on the courts to fashion comprehensive rules for the disposition of embryos. Aside from the generally snail-like pace of the process, there's the possibility that different courts in the same state could produce inconsistent rules. In contrast, a state legislative remedy would answer questions in a more organized manner and would have the benefit of providing predictability and administrative efficiency. To that end, it is this author's proposal that each state enact a statute mandating a particular scheme for the disposition of frozen embryos upon dissolution of marriage. Furthermore, this author advocates a hybrid approach to the issue involving enforcement of existing contracts or, in the absence of a valid contract, balancing the parties' interests.

Although a contract-focused perspective can seem rigid when it comes to such personal, significant decisions involving biological parenthood, that rigidity is a necessary evil that allows for relatively simple resolution of custody disputes over frozen embryos. In essence, the standard principles of contract law, requiring intent to be bound by the contract's terms and invalidating any contract that is unconscionable or entered into under duress, are adequate protections against infringement of rights of procreational liberty. State legislation mandating the creation and enforcement of such valid contracts would play an important role in that it could require those contracts to contain provisions dictating the method of disposition of embryos in the event of certain contingencies.

Additionally, the proposed legislation would need to provide for situations where there is no valid contract in place. Under such circumstances, the statute would allow for a judicial balancing of the parties' interests in order to determine the method of disposition of the embryos. Ideally, the statute would enumerate a non-exhaustive list of factors that the court could take into account in its analysis of the interests, such as whether it might be one party's "last chance" at biological parenthood. No one factor should be dispositive, however, given the sensitive and intimate nature of the rights at issue.

Conclusion: Looking Forward

As medical science progresses, the law is always trying to catch up. In the coming years, advancements in ART technologies could obviate some disputed legal issues and will most likely create new ones. In response, it is the obligation of the legal profession to attempt to reconcile their clients' rights with the controlling law and the realities of the times. Custody disputes over frozen embryos will continue to clog the dockets of the courts until the state legislatures recognize the need for a clear directive mandating a uniform approach to their disposition in the event of certain contingencies.

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STEPPARENTS AND THE DEGREES OF CONSANGUINITY DON'T MIX

By Jesse Riley[1]

I. INTRODUCTION

Elizabeth, a six-year-old from West Virginia was born to Leonard and Patricia Honaker.[2] Her parents divorced when Elizabeth was a year old.[3] Patricia was given custody of Elizabeth, and Leonard "reasonable" visitation.[4] Leonard exercised his visitation rights, and made child support payments.[5] The next year, Elizabeth's mother remarried.[6] Bradley Tuckwiller and Patricia had one child together.[7] Tragically, just a few years later, Patricia was killed in an automobile accident.[8] In her last will and testament Patricia named Bradley as the guardian of her two children, Elizabeth included.[9] Despite the court's recognition of the "attachment and secure relationship" that Elizabeth felt with her stepfather, and the strong bond between Elizabeth and her brother, the court held that such a bond cannot defeat the natural rights of a parent.[10] Refusing to grant joint custody to the stepfather, Elizabeth was turned over to her natural father, Leonard.[11]

Paul and Gale married in January, and Laurie was born in June of the same year.[12] Gale discovered that she was pregnant after the parties began cohabitating.[13] Both parties were unsure if Paul was the father but he was present in the delivery room, cut the umbilical cord, and they decided to put his name on the birth certificate. Laurie called Paul "daddy," and he stayed home with her while Gale worked.[14] Although testing prior to trial proved that he was not the father, there was conflicting evidence as to whether Gale had known that was true.[15] The parties filed for dissolution of their marriage nearly two years later.[16] The California COA ultimately ruled that Paul would not be granted visitation with Laurie.[17]

It is unclear whether these cases would come out differently today. Some of the language in both decisions has been given negative treatment in subsequent opinions. An argument can be made that the courts today would look more favorably upon the relationship between the stepparent and the child, and would grant the stepparent access to the child. In fact, today, "most statutes incorporate a "best interests of the child" provision.[18] For example, in Texas, § 153.002 "is the most quoted section of the Family Code."[19] The statute reads:

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[2] Honaker v. Burnside, 388 S.E.2d 322 (W. Va. 1989).
[3] *Id*.
[4] *Id* at 323.
[5] *Id*.
[6] *Id.*
[7] *Id*.
[8] *Id.*
[9] *Id.*
[10] *Id* at 324.
[11] *Id.*
[12] In re Marriage of Halpern (1982) 133 Cal.App.3d 297, 302.
[13] *Id.*
[14] *Id*.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Robin L. Marshall, *IN THE BEST INTEREST OF THE CHILD: ESTABLISHING A RIGHT FOR HALF SIBLINGS TO REMAIN TOGETHER AFTER THE DEATH OF THE COMMON PARENT*, 22 J. Juv. L. 100, 101 (2001-2002) (discussing the best interests of a child in custody disputes).
[19] Sampson and Tindall's Texas Family Code Annotated, Comment 635 (2015).

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§ 153.002. Best Interest of Child

> The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.[20]

However, the best interest of a child standard "does not provide much guidance to predict the outcome of the case,"[21]"nonetheless, a best interest of the child analysis usually governs the decision-making process."[22]Texas courts have "extraordinarily broad" discretion in determining disputes concerning the possession and access of a child."[23] For both biological relatives and stepparents, the best interest of the child analysis means that they can gain access to a child in the event of a death to the parent, divorce, or when the circumstances suggest that the child's physical or emotional needs are not being met. Therefore, perhaps Elizabeth and Laurie's stepfathers would have been granted visitation in a modern courtroom. It's also reasonable to assume, based on the lack of statutory support for stepparents' rights to a child, the case would have the same outcome. The court would have ruled against granting the stepparent access to the child. Regardless, of the relationship, despite the family dynamic, the stepparent would not have access to the child in the event of death or divorce.

Today, stepparents still face an uphill battle at each step of the process due to the presumption that favors the natural parent. In addition, stepparents are not provided the same means of redress as grandparents, uncles, aunts, and siblings—blood relatives within the third degree of consanguinity.

This article examines a rapidly growing demographic, stepparents. An argument will be advanced that stepparents should be higher than they are, on the proverbial totem pole, when it comes to the access of a child. This article is not advancing an argument that stepparents should be treated equal to natural parents. Instead, an argument that stepparents' rights to access, because of the vital role they have in a child's upbringing, should be similar to that of blood relatives within the third degree of consanguinity. A person, a stepparent, who serves as a role model, a caregiver, a provider, both physically and psychologically, should have a legal right by statute to access that child in the event that the relationship between the natural parent and stepparent dissolves. More importantly, a child that calls a stepparent, "daddy"[24] or "mommy," a child who carries the last name of the stepparent[25], a child who loses a parent in a tragic car accident, who resides with the stepparent at the time of the accident[26], should have the legal support to continue that relationship.

Part II will examine stepparents as a growing demographic. Part III will outline the historical development of the legal rights of stepparents, third parties, and blood relatives. Comparing the development of statutory language protecting the interests of grandparents and other blood relatives, the reasons for those developments, to the lack of development in favor of stepparents. Part IV will examine how the current laws provide grandparents and biological relatives, those within the third degree of consanguinity, with visitation or access to a child. Part V will explore the factual and historical evolution of stepparents' legal obligations and rights when it comes to their stepchild, looking at various states followed by an examination of Texas statutes and case law. While expansion of stepparents' rights to access, specifically visitation, is the goal of this paper, stepparents are often the third choice when it comes to custody disputes. Therefore, I will

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[20] Tex. Fam.Code Ann. § 153.002 (West 2014).
[21] Sampson, *supra* note 18.
[22] Marshall, *supra* note 17, at 101.
[23] Sampson, *supra* note 18, at 635.
[24] Stamps v. Rawlins, 297 Ark. 370, 761 S.W.2d 933 (1988).
[25] *Id*.
[26] Honaker, 388 S.E.2d 322.

also explore the rights of biological relatives and stepparents to pursue custody. Part VI will address the Supreme Court's decision in Troxel v. Granville, and how the ruling effects the rights of grandparents, other blood relatives, stepparents, and other third parties. Finally, part VII will discuss recommendations that could assist the courts in dealing with the growing number of stepparents, including a proposal to expand stepparents' rights to access by statute.

I. STEPPARENTS: A GROWING DEMOGRAPHIC

"The family composition varies greatly across the nation."[27] Over the last few decades, the form and structure of the American family has changed dramatically."[28] "The increased mobility of society, the general breakdown of the extended family contract, and other societal pressures are among the reasons for the changing realities of the American family."[29] Although the divorce rate has decreased in recent years, there are more divorces in the United States because of the major increase in the population.

Moreover, a growing percentage of our population is remarried and is therefore in a "step" relationship.[30] According to Pew Research Center analysis, in 2013, "four-in-ten new marriages included at least one partner who had been married before, and two-in-ten new marriages were between people who had both previously stepped down the aisle."[31] Studies have projected that one in three children will reside in a stepfamily during their childhood.[32] In Texas, according to the Department of State Health Services, more than 62,000 children were affected by divorce in 2012.[33] Therefore, while finding exact estimations has proven difficult, it is reasonable to assume, coupled with the growing rate of remarriages, a large number of children in this state are in "step" families. "With the growing number of divorces and remarriage—possibly including a series of sequential marriages—more and more men and women possess the status of stepparent…"[34]

II. AN OVERVIEW: THE RIGHTS OF BLOOD RELATIVES WITHIN THE THIRD DEGREE OF CONSANGUINITY COMPARED TO STEPPARENTS

Historically, "parent" meant natural or biological parent. At common law, "natural parents had a prima facie legal right to the independent custody and visitation of their children to the exclusion of all others."[35] Since 1923, the United States Supreme Court has held that "a parent's right to the care, custody, and control of his or her children is a fundamental right under the Due Process Clause of the United States Constitution.[36] Therefore, non-parents, stepparents, and

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[27] Amanda Allison Catlin, *The Verdict is in-or is it?: The Constitutionality of the Texas Grandparent Visitation Statute in Doubt After Troxel v. Granville*, 33 Tex. Tech L. Rev. 405, 410 (2002) (discussing grandparent visitation statutes) (citing Troxel v. Granville, 530 U.S. 57, 64 (2000)).
[28] Michael Quintal, *Court-Ordered Families: An Overview of Grandparent Visitation Statutes*, 29 Suffolk U. L. Rev. 835, 835 (1995) (discussing the changing structure of the American family).
[29] Davis, *supra* note 3, at 737. But see Ronald W. Nelson, *Troxel v. Granville: The Supreme Court Wades into the Quagmire of Third-Party Visitation*, 12 Divorce Litig. 101, 101 (June 2000).
[30] Margorie Engel, *Pockets of Poverty: The Second Wives Club-Examining the Financial [IN] Security of Women in Remarriages*, 5 Wm. & Mary J. Women & L. 309, 313 (1999) (discussing the growing number of "step" families).
[31] Gretchen Livingston, *Four-in-Ten Couples are Saying "I Do," Again*, Pew Research Center (Nov. 14, 2014, http://www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again/#fn-19958-1.
[32] John C. Mayoue, *Stepping in to Parent, The Legal Rights of Stepparents*, 25-FALL Fam.Advoc.36, 36 (2002).
[33] Texas Department of State Health Services, http://www.dshs.state.tx.us/chs/vstat/vs12/nnuptil.shtm (Aug. 13, 2015).
[34] Janet Mary Riley, *Stepparents' Responsibility of Support*, 44 La. L. Rev. 1753, 1753 (1984) (discussing the increase in divorce and marriage).
[35] Stephen Hellman, *The Child, The Step Parent, and The State: Step Parent Visitation and the Voice of the Child*, 16 Touro L. Rev. 45, 45 (1990) (discussing the natural parents legal rights to their children).
[36] Holly M. Davis, *Non-Parent Visitation Statutes: Was Troxel v. Granville their Death-Knell?*, 23 Whittier L. Rev. 721, 721 (2002) (discussing parent's fundamental rights historically).

blood relatives had "no recourse through the judicial system," if the biological parents objected to possession and access.[37]

Legislative systems across this country eventually began to recognize the importance of a child's relationship with grandparents. In the last half of the 20th century, courts began adopting grandparent visitation statutes. While grandparents have long been revered, "as a result of these changes in the makeup of the American family, the societal perception of the importance of grandparents in the American family has also changed."[38] "Every time a child is born, a grandparent is born, too."[39] People age 65 and older are projected to represent 20% of the population by 2030.[40] Grandparents raising children is much more common.[41] In 2010, 7 million grandparents in the United States are living with grandchildren.[42] Moreover, 2.7 million grandparents are raising grandchildren under age 18.[43] According to the 2010 United States Census data, 257,074 grandparents in Texas had reported that they were responsible for their grandchildren residing with them.[44]

In Texas, biological relatives within the third degree of consanguinity have the same statutory rights to a child. Therefore, like grandparents, uncles, aunts, and siblings may file a suit requesting access to a child. However, family law has "largely ignored the stepparent-child relationship."[45] Courts began offering redress to interested "third-parties" in the 1990s. The enacted statutes cover stepparents, in most instances. However, it is also clear in the face of several growing demographics, that our society is approaching a point where the courts may still be ill-equipped to deal with the growing number of stepparents who have a role in raising children. While it is not difficult to explain the added rights for blood relatives such as grandparents, considering their increased role in the lives of children, it is difficult to justify the lack of legal rights for another growing demographic, stepparents.

III. THE THIRD DEGREE OF CONSANGUINITY

Simply put, outside of the first degree on consanguinity, parents and their children, there is no legal duty owed by family members to a minor child. Neither siblings and grandparents (2nd degree), great-grandparents or uncles and aunts (3rd degree), or other relatives such as cousins (4th degree) are responsible for the custody, care, and support of their child relative,[46]exceptions exist when the relative has legal custody, guardianship, or acts in loco parentis.[47]

Grandparents often seek possession and access of their grandchildren as the result of divorce, death, or perceived unfitness of the child's parent or guardian. Although natural parents have a paramount constitutional right to their children,[48] grandparents have occupied a more favorable position compared to other third parties.[49] As grandparents rights to petition courts for access to their grandchild continued to expand, courts became less reluctant to award visitation

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[37] *Id*. at 738.
[38] Maegen E. Peek, *Grandparent Visitation Statutes: Do Legislatures know the way to carry the sleigh through the wide and drifting law?*, 53 Fla. L. Rev. 321, 322 (2001) (discussing the growing number of grandparents in America).
[39] Ellen Marrus, *Over the Hills and Through the Woods to Grandparents House we go: Or do we, Post-Troxel?*, 43 Ariz. L. Rev. 751, 756 (2001) (discussing the bond between grandparents and grandchildren).
[40] Erica L. Strawman, *Grandparent Visitation: The Best Interests of the Grandparent, Child, and Society*, 30 U. Tol. L. Rev. 31, 40 (1998) (discussing the aging population in America).
[41] Troxel v. Granville, 530 U.S. 57, 63-4 120 S.Ct.2054, 147 L.Ed.2d 49 (2000).
[42] U.S. Census Bureau, American Community Survey (2010).
[43] *Id*.
[44] *Id.*
[45] Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 Fam. L.Q. 191, 192 (1993) (citing David Chambers, *Stepparents, Biological Parents, and the Law's Perception of "Family" after Divorce*, in DIVORCE REFORM AT THE CROSSROADS 102, 108 (Stephen D. Sugarman and Herma Hill Kay eds., 1990).
[46] In re Gollahon, 303 Ill.App.3d 254, 236 Ill.Dec. 608, 707 N.E.2d 735, 738 (1999).
[47] A.N. v. S.M., 333 N.J. Super. 566, 572 (App.Div.2000)
[48] Owenby v. Young, 563 S.E.2d 611 (N.C. Ct. App. 2002).
[49] Martinez v. Baxter, 725 A.2d 775 (Pa. Super. Ct. 1999).

to grandparents.[50] In fact, over the last forty years, every state has enacted a non-parent visitation statute.[51] Legislatures have fashioned laws in a manner that promotes and expands grandparent rights.[52]

In Texas, Section 102.003 permits grandparents, biological relatives and other third-parties, including stepparents, to demonstrate standing by showing that they had "actual care, control, and possession of the child for at least six months ending not more than 90 days proceeding the date of the filing of the petition."[53] If the parents and the child live with the biological relative, they can present evidence that they performed the day-to-day caretaking duties for the child.[54] A more in-depth discussion on Section 102.003, as it relates to stepparents, will follow in part V. The Texas Family Code also provides grandparents and biological relatives within the third degree of consanguinity with an additional avenue to gain access to a child compared to a stepparent attempting to gain access or possession to a stepchild. If the relative fails to establish the right by SAPCR,[55] Section 102.004 (a) permits biological relatives within the third degree of consanguinity to bring suit for access if:

> (a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:
>
> (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or
> (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.[56]

The additional avenue suggests that blood relatives within the third degree of consanguinity occupy a more favorable position than stepparents.

IV. THE FACTUAL AND HISTORICAL BACKGROUND OF STEPPARENTS' LEGAL OBLIGATIONS/DUTIES AND RIGHTS

A. United States—The National Picture

At common law becoming a stepparent did not create a duty to support. [57] Although marriage creates a legal relationship between the parent and spouse, the stepparent-child relationship does not create legal obligations.[58] The law is established that the biological parent, a.k.a. the natural parent, is the primary source for support of a child. [59] While the relationship of a parent and a child imposes rights and duties, the relationship between a stepparent and a stepchild does not impose those same rights and duties.[60] In fact, stepparent contributions to the step-

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[50] Catilin, *supra* note 25, at 410.
[51] *Id.*
[52] Marie A. Moses, The Constitutionality of Colorado's Grandparent Visitation and Third-Party Standing Statutes, 32 FEB Colo. Law. 51, 53 (2003).
[53] V.T.C.A., § 102. 003 (2015).
[54] In re M.J.G., 248 S.W.3d 753, 758 (Tex. App.—Fort Worth 2008, no pet.).
[55] Abbreviation for Suit Affecting the Parent-Child Relationship.
[56] V.T.C.A., Family Code § 102.004 (a).(2015).
[57] Rutkowski v. Wasko, 286 A.D. 327, 331 (N.Y. 1955).
[58] Bernard Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 Fam. L.Q. 209, 210 (1970).
[59] J.R. v. L.R., 386 N.J. Super. 475, 902 A.2d 261 (App. Div. 2006).
[60] Sargent v. Foland, 104 Or 296, 207 P 349.

child, at common law were voluntary and subject to being withdrawn by the stepparent.[61] Therefore, at common law, while contributing support to a stepchild is laudable, it is not required.[62]

There is a duty created if the stepparent places himself or herself in loco parentis,[63] i.e., in the place of the parent.[64] In loco parentis creates reciprocal rights and duties of a parent.[65] The doctrine is only imposed upon those who have the intention of treating the stepchild as his or her own.[66] In Gerdes v. Weiser, the Iowa court held that where the stepfather did not legally assume status with the child, he did become liable when he was taken into his family home and treated as his own.[67] While the doctrine can provide a legal duty to stepparents, some theorize that it does not meet the needs of the stepfamily in today's society.[68] The stepparent who intends to take the place of a custodial parent, can voluntarily terminate the relationship.[69] Therefore, "any in loco parentis relationship that existed during the marriage is seen as ending at divorce." [70]

The Federal Government has "left a bulk of the responsibility of implementing child support obligations to the states."[71] Some states have imposed a statutory duty on stepparents. Several states have imposed a duty based on mere status as a stepparent. [72] Other states have adopted the Uniform Civil Liability Support Act.[73] Others have imposed a financial obligation when there is an oral or written agreement to do so.[74] Iowa's definition of child includes a stepchild,[75] and others have defined the term parent to include a stepparent,[76] thereby creating obligations and duties for stepparents. Kentucky has required stepparents applying for public assistance to support stepchildren.[77] Missouri requires a stepparent to support a stepchild when living in the same home.[78]

There is no legal obligation for a stepparent to support a stepchild following the divorce of the marriage. Courts are inconsistent as to whether child support should be required in stepfamily relationships.[79] A number of courts have ruled that the divorce of a stepparent and a natural parent terminates the step relationship between the stepparent and the (former) stepchild. Natural parents have an obligation to support their children. That legal duty to support does not apply to stepchildren.[80] A step relationship continues as long as the marriage lasts between a stepparent and a natural parent.[81] In Eckhardt v. Eckhardt, the New York court modified a child

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[61] Zeller v Zeller, 195 Kan 452, 407 P.2d 478.
[62] In re Marriage of Edwards, 369 Ill. App. 3d 1035, 308.
[63] Gerber v. Bauerline, 17 Or. 115, 117-19 Pac. 849.
[64] Rey v. State (Cr.App. 2009) (citing Black's Law Dictionary, supra note 96, at 787)
[65] *Id*.
[66] Schneider v. Schneider, 52 A.2d 564 (1947).
[67] Gerdes v. Weiser, 54 Iowa 591, 7 N.W. 43 (1880).
[68] Margorie Engel, *Pockets of Poverty: The Second Wives Club-Examining The Financial [IN] Security of Women in Remarriages*, 5 Wm. & Mary J. Women & L. 309, 324 (1999).
[69] *Id*.
[70] *Id*.
[71] Janet Mary Riley, Stepparents' Responsibility of Support, 44 La. L. Rev. 1753, 1766-1767 (1984) (discussing federal policy defining the stepparent, stepchild relationship).
[72] Neb. Rev. Stat §§ 28-705 (1978). S.D. Codified Laws Ann. § 25-7-8 (Supp. 1983). Vt. Stat. Ann. Tit. 15 § 291 (Supp. 1983).
[73] California, Maine, New Hampshire, and Utah. Cited by Janet Mary Riley, Stepparents' Responsibility of Support, 44 La. L. Rev. 1753, 1766-1767 (1984) (statutory duty of stepparents with regard to their stepchildren).
[74] *Id. but see* Alaska Stat. § 25.24.160 (Michie 1998).
[75] Iowa Code §§ 252A.2, 252B.1 (Supp. 1997).
[76] N.J. Stat. Ann. § 9:6-2 (West 1998).
[77] Ky. Rev. Stat. Ann. § 205.310 (Michie 1995).
[78] Mo. Ann. Stat. § 453.400 (West 1997).
[79] Paul J. Buser, *Introduction: The First Generation of Stepchildren*, 25 Fam. L.Q. 1, 8-9 (1991). Cited by Margorie Engel, Pockets of Poverty: The Second Wives Club-Examining The Financial [IN] Security of Women in Remarriages, 5 Wm. & Mary J. Women & L. 309, 324 (1999) (discussing stepparents financial responsibility to stepchildren).
[80] Brown v. Brown, 42 A.2d 396 (Md. 1980).
[81] Peake v. Peake (1954) 205 Misc. 393, 128 NYS2d 631.

support order that had granted the biological mother child support from the stepdaughter.[82] The New York appeals court, in Chiarello v. Chiarello, held that the father was no longer liable for support of the stepchildren following the divorce.[83] Furthermore, stepparents' obligations to support a stepchild do not necessarily extend in the event of a death to a child's natural parent.[84]

In the family law context, standing is the right for a party to seek possession and access to a child. The concept is introduced in the Constitution.[85] Despite state courts not being constitutionally bound to adhere to justifiability limitations like federal courts, they do apply standing.[86] "The threshold question of standing is extremely crucial in child custody and visitation cases to protect parents and children from the custodial interference of those who do not know the child, from those who do not have any legal right or obligation to the child, or who do not have a legitimate interest in access to the child."[87]

Standing requirements vary greatly across the United States. Few state statutes refer to stepparents in particular; instead most of the statutes are broad and refer to third parties.[88] The Uniform Marriage and Divorce Act (UMDA) states that a third-party may bring an action only if the child is not in the physical custody of one of his parents.[89] The Utah Supreme Court developed a case-by-case approach to determine whether a stepparent had standing.[90] Maine requires that the third party make a prima facie showing of de facto parenthood.[91] Kentucky requires one have physical custody or have had physical custody for six consecutive moths within one year of the commencement of the proceeding.[92] Virginia grants standing to third parties with emotional ties creating a "parent-like relationship."[93] Despite third-party standing statutes that permit stepparents to file suit for custody or visitation, the doctrine of many courts hold that they have no jurisdiction to consider a custody award to a stepparent.[94]

The common law presumed that the best interest of the child was by having them raised by the natural parents.[95] While origin is difficult to trace, at common law the parents of a child had rights over children similar to property rights.[96] The rule is based upon the perceived experience of mankind that blood is thicker than water.[97] Moreover, a natural parent will expend more effort and sacrifice than will a stranger or third party, especially in tough times.[98] In the 1970s, the preference for a natural parent was defended as a constitutional right.[99] "The right has been ex-

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[82] Eckhardt v Eckhardt, (1971) 37 App Div 2d 629, 323 NYS2d 611.
[83] Chiarello v. Chiarello (1976, App Div) 381 NYS2d 156.
[84] Erie County Board of Social Welfare v. Schneider (1957) 6 Misc 2d 374, 163 NYS2d 184.
[85] U.S. CONST. Art. III § 2, cl.1.
[86] Helen Hershkoff, *State Courts and the "Passive virtues": rethinking the judicial Function*, 114 HAR V.L.REV. 1833, 1836 (2001) cited in Kendra Huard Fershee, *The Prima Facie Parent: Implementing A Simple, Fair, and Efficient Standing Test In Courts Considering Custody Disputes By Unmarried Gay or Lesbian Parents*, 48 Fam. L.Q. 435, 449-50 (2014) (discussing the concept of standing).
[87] Kendra Huard Fershee, *The Prima Facie Parent: Implementing A Simple, Fair, and Efficient Standing Test In Courts Considering Custody Disputes By Unmarried Gay or Lesbian Parents*, 48 Fam. L.Q. 435, 452 (2014) (discussing the concept of standing)
[88] Richard S. Victor, Michael A. Robbins, and Scott Bassett, *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19, 30 (1991)
[89] §401(d)(2) of the Uniform Marriage and Divorce Act (UMDA). (cited in *Id*.)
[90] State ex rel. J.W.F., 799 P.2d 710 (Utah 1990).
[91] Pitts v. Moore, 2014 ME 59, 90 A.3d 1169 (Me. 2014).
[92] Coffey v. Wethington, 421 S.W.3d 394 (KY.2014).
[93] Va. Code. Ann. §20-124.1.
[94] Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 Cornell L. Rev. 38, 62-65 (1984).
[95] Bryan v. Bryan, 645 P.2d 1267 (Ariz. Ct. App. 1982); Honaker v. Burnside, 388 S.E.2d 322, 324-25 (W. Va. 1989).
[96] W. Blackstone, Commentaries On The Laws of England, 446, 452-53 (17th ed. 1830).
[97] In re Custody of Hampton, 5 Adams Co. L.J. 84, 91 (Pa.C.P.1963).
[98] *Id.*
[99] Quilloin v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (cited by *Id.*)

pressed as a freedom of personal choice in matters of family life protected by the Due Process Clause of the Fourteenth Amendment."[100] In many jurisdictions that presumption still exists today.[101] The Kansas court in Sheppard v. Sheppard, stated that it is clear under the decision of the United States Supreme Court that a natural parent's right to the custody of his children is a fundamental right.[102] "The interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interest recognized by this Court."[103]

Strictly applied, the presumption will automatically award custody to the natural parent.[104] Therefore, in custody disputes between a natural parent and a non-natural parent will favor the natural parent.[105] However, a few states will focus solely on the best interest of the child.[106] The majority standard, however, allows the presumption to be rebutted but it requires evidence that the natural parent is unfit or has forfeited the right to custody.[107] The hybrid view combines the two standards, holding that the natural parent presumption remains but that the best interest of the child is controlling.[108] In custody disputes between a natural parent and a third-party the burden of proof is usually on the third-party.[109]

Historically, proof must be clear and conclusive[110] or substantial.[111] New York and Florida have held that a natural parent can only be deprived of custody upon a showing of "exceptional circumstances" that it would benefit the child's welfare.[112] North Carolina requires a clear and convincing standard post-Troxel.[113] Others require the proof be "clear" and "cogent."[114] However, some courts have held that a preponderance of the evidence is sufficient.[115]

It's clear under the decision of the United States Supreme Court that a natural parent's right to the custody of his children is a fundamental right.[116] However, a majority of the states statutorily provide courts the ability to provide custody to third parties.[117] Hawaii's statute allows custody to persons other than biological parents when it's in the best interests of the child.[118] While at least one state specifically references stepparents in terms of custody rights, few states have statutory language that applies to stepparents receiving custody or joint custody of their former

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[100] Eric P. Salthe, Note, *Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone's Best Interest* (citing Santosky v. Kramer, 455 U.S. 745 (1982)).
[101] Sheppard v. Sheppard, 230 Kan. 146, 152, 630 P.2d 1121, 1127 (1981); In the Matter of Michael B., 604 N.E.2d 122, 127-28 (N.Y. 1992).
[102] *Id* at 1127.
[103] Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).
[104] Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 Nova L. Rev. 733, 734 (1992) (discussing the parental presumption)
[105] Ex parte Mathews, 428 So. 2d 58 (Ala. 1983); In re D.A. McW., 460 So 2d 368 (Fla. 1984); Blackburn v. Blackburn, 249 Ga. 689, 292 S.E.2d 821 (1982); McGregor v. Phillips, 96 Idaho 779, 537 P.2d 59 (1975) (cited in *Id.*).
[106] Lindsey A. White, *FAILING TO TEMPER THE NATURAL PARENT PRESUMPTION IN THIRD-PARTY CUSTODY CASES UNDERMINES THE BEST INTEREST OF THE CHILD*, 65 Md. L. Rev.1177, 1177 (2006) (discussing the natural parent presumption in custody disputes involving a third-party).
[107] *Id* at 1186.
[108] *Id*.
[109] In re Guardianship of L.R.T., 979 N.E.2d 688 (Ind. Ct. App. 2012).
[110] In re Sweet, 1957 OK 250, 317 P.2d 231 (Okla. 1957).
[111] Shorty v. Scott, 87 N.M.490, 535 P.2d 1341 (1975).
[112] In re Marriage of Matzen, 600 So. 2d 487 (Fla. Dist. Ct. App. 1st Dist. 1992); Lightbourne v. Lightbourne, 179 A.D.2d 562, 578 N.Y.S.2d 578 (1st Dep't 1992).
[113] Adams v. Tessener, 354 N.C. 57, 550 S.E.2d 499 (2001).
[114] Nunn v. Nunn, 791 N.E.2d 779 (Ind. Ct. App. 2003).
[115] In re Marriage of Wilson, 199 Or. App. 242, 110 P.3d 1106 (2005).
[116] Sheppard, 230 Kan. 146, 152, 630 P.2d 1121, 1127 (1981).
[117] Richard S. Victor, Michael A. Robbins, and Scott Bassett, Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support, 25 FAM. L.Q. 19, 20 (1991)
[118] HRS § 571-46 cited by David R. Fine and Mark A. Fine, *Learning From Social Sciences: A Model For Reformation of the Laws Affecting Stepfamilies*, 97, Dick. L. Rev. 49, 56-57 (1992) (discussing custody rights for third-parties)

stepchildren.[119] Moreover, third-party standing statutes that permit stepparents to file suit for custody or visitation, the doctrine of many courts hold that they have no jurisdiction to consider a custody award to a stepparent.[120]

At common law stepparents had no visitation rights.[121] However, today, some jurisdictions are friendlier toward stepparents who petition for access to a child. Courts long have held that the best interests of a child should prevail when determining visitation.[122] Therefore, unlike custody disputes involving a stepparent and a natural parent, courts are more likely to award visitation to a stepparent if it's in the best interests of the child. In fact, some third-party statutes do provide stepparents with visitation rights.[123] According to the United States Supreme Court, "the States' nonparental visitation statutes are…supported by a recognition that children should have the opportunity to benefit from relationships with statutorily specified persons … The extension of statutory rights … comes with an obvious cost…[A] n independent third-party interest in a child can place a substantial burden on the traditional parent—child relationship."[124]

Regardless, stepparents still face difficulty overcoming the parental presumption when petitioning the court for access in many jurisdictions. In Texas, despite the child's best interest standard, stepparents are still placed in an unenviable position when they go before the court to petition for access.

B. Texas—The Local Picture

Similar to common law, in Texas a stepparent does not have a legal relationship with a child.[125] The law does not require the stepfather to provide for his wife's child by a previous relationship.[126] However, Texas courts will bind a stepparent for support and maintenance if the stepparent holds his stepchild out to the world as his own.[127] If the stepparent takes a child into his home where the child lives as a member of the family, and the stepparent took care of the child with the joint support of the spouse, it can be said that the stepparent voluntarily assumed the parental relationship with the child.[128] However, like the common law interpretation of loco parentis, Texas courts have held that loco parentis is a temporary status.[129] In loco parentis can be terminated voluntarily by the stepparent and ends at divorce. To be clear, in Texas the status of a stepparent does not obligate the stepparent to the stepchild.[130]

Similar to a majority of states, the Texas standing statute does not refer to stepparents in particular. Regardless, in Texas, stepparents' rights concerning stepchildren are not much different than non-parent or third-party rights. The standing to sue provision, originally enacted in 1973, allowed any person with an interest in the child to bring suit affecting the parent-child rela-

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[119] Susan L. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights And Obligations*, 48 Fam. Ct. Rev. 528, 533-34 (2010) (discussing custody rights among the 50 states) see 13 DEL. C. § 733 (West, Westlaw through 77 laws 2010, chs. 1-232.

[120] Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 Cornell L. Rev. 38, 62-65 (1984).

[121] Matter of Maricopa County Juvenile Action Nos. JS-4118/JD-529, 134 Ariz. 407, 656 P.2d 1268 (Ct. App. Div. 1 1982).

[122] Wendi Swinson Slechter, *The Visitation Rights of Former Stepparents or the Visitation Rights of Former Stepchildren: Which is it Really?*, 32 U. Louisville J. Fam. L. 901, 903 (1994) (discussing visitation rights for stepparents) citing to Shoemaker v. Shoemaker, 563 So. 2d 1032 (Ala. Civ. App. 1990).

[123] Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 Cornell L. Rev. 38, 62-65 (1984).

[124] *Id*. citing Troxel v. Granville, 530 U.S. 57, 64 (2000).

[125] McGee v. McGee, 936 S.W.2d 360, 369 (Tex. App.—Waco 1996).

[126] Drescher. V. Morgan, 251 S.W.2d 173, 174 (Tex. Civ. App.—Fort Worth 1952).

[127] *Id.*

[128] Frank v. Franks, 138 S.W. 1100 (Tex. Civ. App.—Austin 1911, writ refused).

[129] Coons-Andersen v. Andersen, 104 S.W.3d 630 (Tex. App.—Dallas 2003).

[130] Rey v. State, 280 S.W.3d 265, 268 (Tex. Crim. App. 2009).

tionship.[131] Fortunately the law in Texas has evolved; the current formulation is more restrictive than its predecessor.[132] Prior to a 1993 amendment to the Texas Family Code, a stepparent could not bring suit for rights to the child without substantial past contact with the child plus a showing that the child's environment posed a threat to the child's welfare.[133] In addition, the parents were defined as the mother and the biological father.[134] In Jacobs v. Balew, the court held that a child's former stepfather, despite "substantial past contact" with the child could not bring an action to obtain conservatorship.[135] However, stepparents were able to bring suit as a nonparent if they had actual possession and control of the child for the six months immediately preceding the filing of the suit.[136]

The legislature did adopt a "stepparent statute" in 1993.[137] Although the statute did not specifically refer to stepparents, the amendment was primarily implemented to give standing to a stepparent who assisted in the raising of a child *in the event of the death* of the child's parent.[138] To date, stepparents, nonparents, and third parties have been able to file suit under if the person who has actual care, control, and possession of a child for at least six months.[139]

A stepparent is only going to meet that standard with "parental or conservator consent, actual or constructive, such as where a parent leaves a child in the care of other people for more than six months.[140] Stepparents in most instances have no legal rights to make any decision pertaining to the child, and showing parental or conservator consent following a divorce proceeding involving that parent could prove difficult. In In re A.C.F.H., the stepparent was granted standing when the record indicated that the children lived with the stepfather for five years.[141]

Texas has also followed the common law presumption that natural parents have a paramount right to the custody of their child.[142] Moreover, parent is defined in biological terms.[143] Texas also follows the majority view standard that allows the natural parental presumption to be rebutted by a positive disqualification.[144] Custody would only be denied if there is evidence that the parent would impair the child's physical health or emotional development.[145] Evidence that the child is in an unstable environment is evidence that may rebut the presumption.[146] While recent case law suggests that wrongdoing by a parent is not necessary to overcome the presumption if it's in the child's best interest,[147] today's Texas courts hold that the natural parent presumption still prevails.[148] Moreover, this rule is clearly the statutory law. Section 153.131 provides the strongest presumption in favor of parental custody, stating:

> (a) Subject to the prohibition in Section 153.004, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator

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[131] Sampson and Tindall's Texas Family Code Annotated, August 2015 Edition § 102.003, Comment (2015); Acts 2015, 84th Leg., ch. 1 (S.B. 219), § 1.029, eff. April 2, 2015.
[132] *Id.*
[133] Jacobs v. Balew, 765 S.W.2d 532, 533 (Tex. App.—Beaumont 1989, no writ).
[134] TEX.FAM.CODE ANN. § 11.03 (Vernon Supp.1992).
[135] Jacobs, 765 S.W.2d 532.
[136] T.W.E. v. K.M.E., 828 S.W.2d 806, 808 (Tex.App.—San Antonio 1992, no writ).
[137] TEX.FAM CODE § 11.03(a)(10). (1993).
[138] *Id*.
[139] V.T.C.A., Family Code § 102.003 (2015).
[140] *Id*. at 536.
[141] In re A.C.F.H., and D.A.B.H., Children, 373 S.W.3d 148 (Tex.App.—San Antonio 2012, no pet.).
[142] Hull v. Hull, 332 S.W.2d 758 (Tex. Civ. App. San Antonio 1960), writ refused n.r.e., (May 25, 1960).
[143] T.W.E. v. K.M.E., 828 S.W.2d 806, 809 (Tex. App.—San Antonio 1992, no writ).
[144] Moring v. Dodd, 380 S.W.2d 777 (Tex. Civ. App.—Amarillo 1964), writ refused n.r.e., (Oct. 28 1964).
[145] Ybarra v. Texas Dept. of Human Services, 869 S.W.2d 574 (Tex. App.—Corpus Christi 1993, no writ).
[146] Ray v. Burns, 832 S.W.2d 431 (Tex. App.—Waco 1992, no writ).
[147] In re R.T.K., 324 S.W.3d 896 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).
[148] In re M.T.C., 299 S.W.3d 474 (Tex. Civ. App.—Texarkana 2009, no pet).

or both parents shall be appointed as joint managing conservators of the child.

(b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.[149]

In re P.D.M., interpreting 153.131, states that the legal presumption that the child raised by its natural parent is paramount, and in the child's best interest.[150] Texas courts are given wide latitude when determining the best interests of a child.[151] However, as discussed, the parental presumption is "one of the strongest presumptions known."[152] Texas does not have a statute authorizing custody specifically to stepparents. However, in step with a majority of states that do statutorily provide courts with the ability to provide custody to third parties,[153] Texas courts can appoint conservatorship rights and duties to a stepparent under § 153.371.[154] Moreover, the rights and duties are not different than the rights and duties assigned to a parent as a managing or joint conservator.[155]

Texas does not have any statutes regarding visitation rights for stepparents. The parental presumption that they be appointed conservator, however, does affect visitation or access for stepparents. Accordingly, if a stepparent can demonstrate that it has the required six months possession to bring suit, the stepparent can conceivably ask the court for access. However, the lack of statutory language places stepparents in a difficult position if they hope to continue their relationship. Despite the circumstances being in favor of continuity of relationships, it is reasonable to assume, that in Texas, Elizabeth and Laurie's stepfathers would have been unsuccessful in a petition for access.

V. TROXEL V. GRANVILLE; HOW THE SUPREME COURT DECISION IMPACTS THE RIGHTS OF STEPPARENTS, AND BLOOD RELATIVES WITHIN THE THIRD DEGREE OF CONSANGUINITY

A. The National Picture

It is important to mention that since the Supreme Court's decision in Troxel, third-person visitation rights including those reserved to grandparents, other biological relatives, and stepparents, are now in question. Moreover, many state statutes may be unconstitutional depending on the states court's interpretation.[156]

The United States Supreme Court decision in Troxel reaffirmed the fundamental right of parents to raise their children.[157] The Supreme Court decided that a Washington State statute, as applied to the facts of the case, was unconstitutional.[158] Because there was no majority decision in Troxel, states today are grappling as to whether their own statutes are constitutional.[159] In Troxel, Jenifer and Gary Troxel wanted to spend more time with their granddaughters, and filed suit in Washington State Court.[160] Tommie Granville, the child's mother, wanted to limit the

[149] Tex. Fam. Code § 153.131 (2015).
[150] In re P.D.M., 117 S.W.3d 454 (Tex. App.—Fort Worth 2003).
[151] Gillespie v. Gillespie, 644 S.W.2d 449 (Tex. 1982).
[152] Lewlling v Lewelling, 796 S.W.2d 164 (Tex. 1990).
[153] Richard S. Victor, Michael A. Robbins, and Scott Bassett, *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support,* 25 FAM. L.Q. 19, 20 (1991).
[154] V.T.C.A., Family Code § 153.371 (2015).
[155] V.T.C.A., Family Code § 153.132 (2015).
[156] Catlin, supra note 25, at 140.
[157] *Id*. at 65.
[158] *Id*. at 49.
[159] Suzanne C. McAllister, *What's Become of Grandma, Grandpa, and The Troxels? An Update on Grandparent Visitation Rights in Kansas*, 75 AUG J. Kan. B.A. 34, 34 (2006) (discussing the ramifications of the Troxel decision).
[160] *Id.* at 61

grandparents to one day of visitation per month.[161] The statute in question permitted "any person" at "any time" to petition for visitation rights.[162] The trial court awarded the Troxel's visitation for one weekend a month, a week during the summer, and four hours on both grandparents' birthdays.[163] After multiple appeals, the Supreme Court granted certiorari.

The plurality opinion written by Justice O'Connor held that the statute was too broad.[164] It allowed "any person" to seek visitation. [165] It also failed to limit the circumstances in which a suit for third party visitation could be granted.[166] Finally, it did not grant any special weight to the parents' desires and decisions regarding visitation.[167] Post-Troxel, some states have relied on O'Connor's opinion and reexamined their own third-party visitation statutes.[168] Other states amended the statutes, while others abolished them.[169] Some states, however, have reached the opposite conclusion. Troxel seems to have had no impact on grandparent visitation.[170]

B. The Local Picture

Disputes over third-party rights to have possession of and access to a grandchild continue to be debated in the Texas legislature post Troxel.[171] Governor Greg Abbott (then Attorney General) issued an opinion on the constitutionality of the Texas statutes governing the grandparent rights to access of their grandchild.[172] "The opinion concluded that the statutes could be constitutionally applied."[173] The principles of Troxel, however, must be observed.[174] The Texas statutes are more specific than the Washington State statute that was at issue in Troxel.[175] It's important to note, that the Washington State statute that was at issue in Troxel, was not ruled unconstitutional. Instead, the statute was ruled unconstitutional in the application to the facts and circumstances of the case.

Due to Attorney General Abbott's opinion, and the Troxel decision, Texas rewrote their grandparent visitation statutes in 2005.[176] The 2009 amendments "raised the bar for grandparental visitation," requiring the grandparent to file an affidavit alleging and supporting facts that grandparental visitation would be in the child's best interests, and otherwise would greatly impair the child's physical health or emotional well-being.[177] Court's must also conduct a preliminary determination that the facts would demonstrate that allegation.[178] The Texas Supreme Court interpreted Troxel in a similar case. After the child's father died, the trial court granted the paternal grandparent visitation with the child for one weekend a month, two weeks per summer, four days during the Christmas vacation period, and alternating Thanksgiving weekends.[179] The

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[161] *Id.*
[162] *Id.* (citing WASH. REV. CODE § 26.10.160(3)).
[163] *Id.*
[164] *Id.*
[165] *Id.* (citing Troxel, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49, 67).
[166] *Id*. at 73.
[167] *Id.* at 67.
[168] Suzanne Valdez Carey, *"Grandparents' Issues: Kinship Caregiving, Visitation, and Related Matters," Advising the Elderly Client*, (Chapter 37) (West Group, 2003) (with Laurie Hanson).
[169] *Id.*
[170] Moses, supra note 51, at 55.
[171] Sampson and Tindall's Texas Family Code Annotated, Introductory Comment 667 (2015).
[172] *Id.*
[173] *Id*.
[174] *Id.*
[175] James W. Paulsen, *Family Law: Parent and* Child, 54 SMU L. Rev. 1417, 1421 (2001) citing See generally Tex. Fam. Code Ann. §§ 153.431 (Vernon 1996 & Supp. 2001).
[176] *Id*.
[177] *Id.*
[178] *Id*.
[179] In re Mays-Hooper, 189 S.W.3d 777 (Tex.2006).

court held that the as long as the parent adequately cares for their child, there will not be a reason for the State to "inject itself into the private realm of the family."[180]

While it is unclear what impact the Troxel decision will have on grandparents going forward, it is also unclear as to how the decision will impact the legal rights of other biological relatives. It is reasonable to assume, however, that in Texas, the impact will be similar for those relatives within the third degree of consanguinity. For stepparents, their already limited rights, may be further limited.

VI. RECOMMENDATIONS

A. Requiring Stepparents to Support the Child

The following proposals suggest approaches that the legislature and judicial system can take to give stepparents' access to a child. However, an argument can be made that the added access should be coupled with increased responsibility. Requiring the stepparent who seeks access to show financial support is only one part of the equation. Obligating that the stepparent whom are granted access to support the child could be recommended. "Such a means certainly would provide an additional means for financial support."[181] However, for stepparents, it could discourage marriage.[182] Adults may be hesitant to marry a person who has a child if they may be held responsible to support that child. Moreover, it may be unfair to require stepparents who do not seek access after the dissolution of marriage to provide support for the child.

B. Nonexclusive Parenthood Alternatives

The proposal "demands that the state permit visitation to persons with whom the child has established a parent-child relationship."[183] The proposal would grant access to the stepparent who has raised the child as his or her own, the child who calls the stepparent "daddy,"[184] and the child who would benefit from having the stepparent in their life in the event of separation by the stepparent and natural parent.

There are potential pitfalls. "The key disadvantages of broadening access to parenthood are that it may increase the number of adults making claim to a child and enhance the indeterminacy that already exists in child custody law."[185] It is not far fetched to imagine a scenario where a third-party living with a child, perhaps babysitting that child virtually full time when the parent is at work, who then utilizes the alternative status to gain access to that child over the objection of the parent.

C. The Psychological Parent Doctrine as a Statute

Some jurisdictions, South Carolina for example, provide psychological parent's rights to a child.[186] In fact, "psychological parenthood is one of the most widely embraced methods of accounting for and protecting children's emotional well-being."[187] A child separated from a psychological parent is not equipped to handle stress as an adult.[188] Therefore, recognition and permanence should be given to the psychological parent, more so for the benefit of the child.[189]

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[180] Id at 778 (citing to Troxel, 530 U.S. 57, 120 U.S. 57, at 80-102, 120 S. Ct. 2054.).
[181] Engel, *supra* note 28, at 339.
[182] *Id*.
[183] Katharine T. Bartlett, *RETHINKING PARENTHOOD AS AN EXCLUSIVE STATUS: THE NEED FOR LEGAL ALTERNATIVES WHEN THE PREMISE OF THE NUCLEAR FAMILY HAS FAILED*, 70 VA. L. Rev. 879, 944 (1984) (discussing alternatives to exclusive parenthood).
[184] In re Marriage of Halpern 133 Cal.App.3d 297, 302 (1982).
[185] Bartlett, *supra* note at 945.
[186] Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006).
[187] Lauren Valastro, *Training Wheels Needed: Balancing the Parental Presumption, the Best Interest Standard to Protect Children*, 44 TEX. TECH L. REV. 503, 522 (2012).
[188] *Id*. at 523.
[189] *Id*. at 524

The psychological parent is not required to be a natural parent, "and the child's best interests lie with this person."[190] For stepparents, the psychological parent doctrine would allow them access to the child if they have a significant relationship, or if the child lives with the stepparent.[191] The doctrine is based on four components: (1) the child's need for continuity of relationships should be safeguarded, (2) the dispute should be resolved quickly, (3) the court should not try to make long-term decisions, and (4) the decision "should provide the least detrimental available alternative for safeguarding the child's growth and development."[192]

The statute is designed as a four-part test.[193] For stepparents, the statute awards access if the following elements are met: (1) the natural, biological, or legal parent consented to and fostered, the establishment of a parent-like relationship between the stepparent and the child; (2) the stepparent lives or lived in the same household with the child prior to the filing of the suit; (3) the stepparent undertook parental obligations, including, but not limited to the care, education, and development of the child, and contributed to the child's support without the expectation of financial repayment; and (4) that the stepparent has assumed a parental role for a significant period of time.[194]

While the groundwork for the statute is in place, the legislature would need to further tweak the language of the doctrine in several ways. First, the legislature would need to define what constitutes a "significant period of time." The legislature would want to eliminate the scenario where a stepparent, without a sufficient relationship, would be able to petition the court for access. Therefore, perhaps requiring that the stepparent assume the parental role for at least one year. However, an arbitrary length of time should not be recommended. Instead, a study should be conducted, researching the recommended length of time at which the parent-child relationship is established. Perhaps the length of time will vary as to the age of the child.

The statute could also be applied to all third parties that meet the criteria, and not limited to stepparents. In addition, the legislature will need to further define the filing deadline. Divorce proceedings are, in some cases, lengthy processes. They also don't materialize quickly in all circumstances, because some couples separate in an effort to deal with marital issues before ultimately deciding to file for divorce. The legislature should permit stepparents, who are not currently residing with the child, the ability to bring a suit for access. The length of time should not be unlimited, however.

This doctrine impacts the child who has lived with a stepparent for an extended period. If the court decides that placement with that individual satisfies the doctrine, the court would be able to provide access even at the expense of the natural parent's desires. This approach, unlike the nonexclusive parenthood alternative, is not associated with as many potential pitfalls. The doctrine does not allow caretakers, babysitters, nannies, and friends to become psychological parents barring unusual circumstances.[195] The doctrine suggests continuity of an established environment is important.[196] However, the doctrine is imperfect. A dispute between a natural parent and a stepparent will likely be a result of a preceding or concurrent divorce, therefore, the child's environment is likely to have already undergone significant changes. Significant changes that the doctrine attempts to alleviate. Moreover, the doctrine is based on factors that the courts may currently take into account based on the child's best interest standard. If the doc-

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[190] William Link, *LOOKING FOR THE BEST INTERESTS OF THE CHILD IN CUSTODY DISPUTES BETWEEN A NATURAL PARENT AND A THIRD PARTY IN MICHIGAN*, 88 U. Det. Mercy L. Rev. 335, 342 (2010) but see Joseph Goldstein, Anna Freud, & Albert J. Solnit, *Beyond the Best Interests of the Child*, 18, 19 (1973).
[191] *Id*.
[192] *Id*. at 31-53.
[193] Valestro, *supra* note 186, at 524.
[194] *Id*.
[195] *Id*.
[196] Link, *supra* note 189, at 343.

trine was adopted, without the recommended legislative changes, it may further aggravate an unclear process.

However, the doctrine, if strictly applied, should aid the court in disputes. The doctrine should not be in addition to the child's best interest standard, nor should it replace the standard. Instead, the doctrine should function as a tool for the courts to achieve the child's best interest. The court should utilize the tool in cases involving stepparents, and afford stepparents access to a child when it's clear that they meet the criteria.

VII. CONCLUSION

Elizabeth, a child of two failed divorces, should be able to visit her stepfather.[197] Especially considering that she had recently lost her mother to a tragic car accident, coupled with the attachment and bond she had with her stepfather.[198] Paul was the only father figure that Laurie knew, and she called him "daddy."[199] Laurie lived with her stepfather since birth, and the stay-at-home dad cared for Laurie while her mother worked.[200] In both cases, the court ruled against access to the stepfather. However, if a psychological parent statute governed the courts, the cases would likely have been resolved in favor of visitation rights for both stepfathers.

Similar situations are likely to exist in Texas courts going forward because of the growing stepparent demographic. The Texas legislature should be proactive and adopt the psychological parent doctrine as a statute. The doctrine favors the continuity of the relationships between stepparents and children, and satisfies the child's best interest standard. Furthermore, the doctrine resolves disputes involving children such as Elizabeth and Laurie by providing the court with criteria as to what constitutes a child's best interest.

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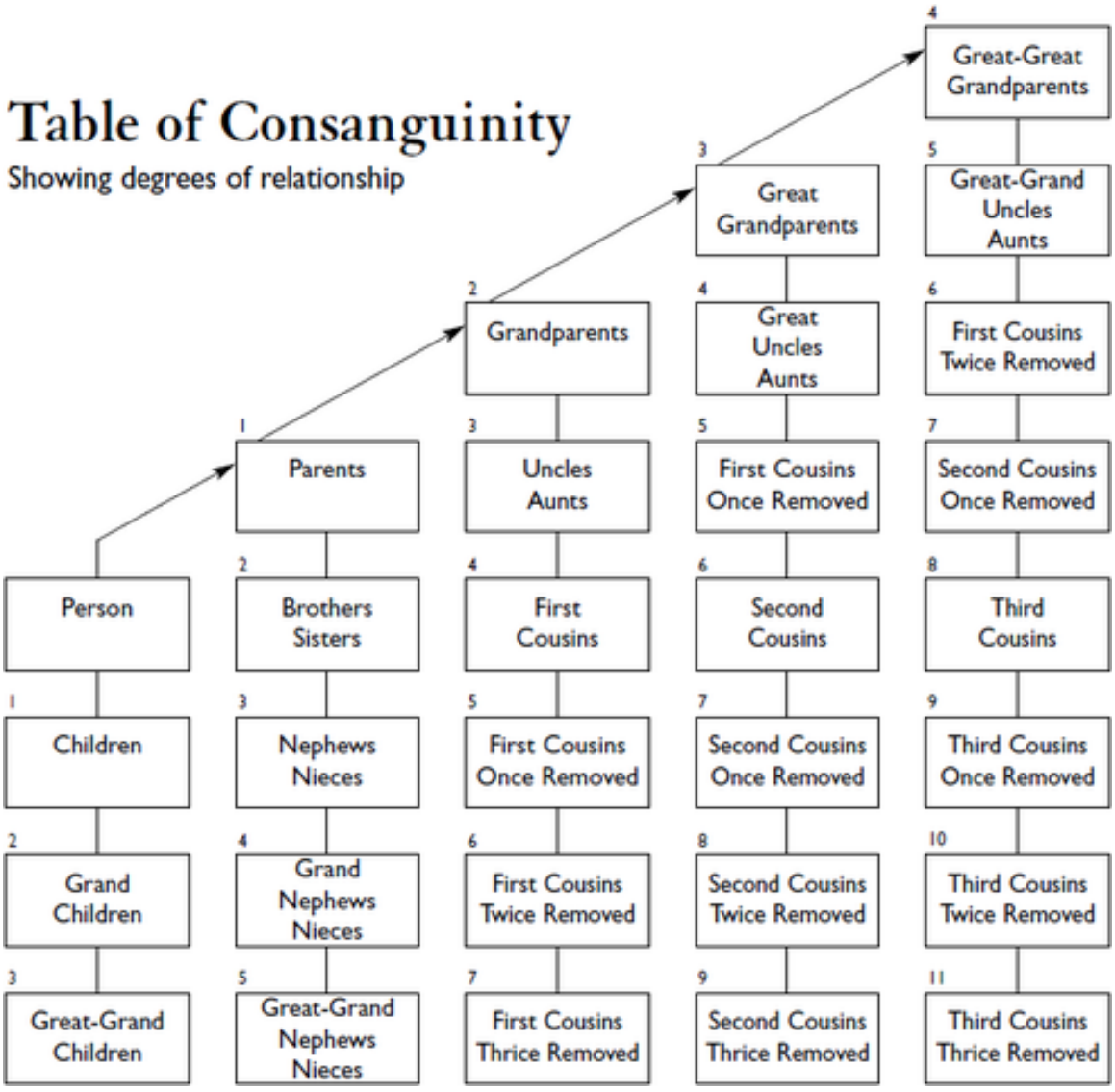
[197] Honaker, 388 S.E.2d 322.
[198] *Id.*
[199] In re Marriage of Halpern (1982) 133 Cal.App.3d 297, 302.
[200] *Id.*



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Guest Editors this month includes Sallee S. Smyth (*S.S.S.*), Jimmy Verner (*J.V.),* Michelle May O'Neil (*M.M.O.)*, Rebecca Tillery Rowan (*R.T.R.*), and Jessica H. Janicek (*J.H.J.*)

DIVORCE
VALIDITY OF MARRIAGE

SUFFICIENT EVIDENCE SUPPORTED EXISTENCE OF VALID NIGERIAN "PROXY" MARRIAGE.

¶16-3-01. ***Adeleye v. Driscal*****,** No. 14-14-00822-CV (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (03-08-16).

Facts: Wife testified that she and Husband married in a traditional Nigerian ceremony, even though neither party was present at the ceremony. During the marriage, they had three children. A few years after they married, Husband arranged for Wife to marry Husband's co-worker so that she could get a green card and then later help Husband do the same. That marriage was never consummated, and the co-worker died before Wife obtained a green card.

During the divorce proceedings, Husband argued that he married another woman before marrying Wife, making that marriage an impediment to his marriage to Wife. However, Husband's brother testified that he had never heard of the other wife. Husband also alleged that he could not be married to Wife under Nigerian law because he had never agreed to marry her.

The trial court held that a valid marriage existed between Husband and Wife and divided the community estate. Subsequently, among many other issues, Husband challenged the factually sufficiency of the trial court's finding that a valid marriage existed between the parties.

Holding: Affirmed

Opinion: Husband asserted that the evidence only showed that he and Wife had entered an "engagement" and not a marriage. However, Wife, Husband's brother, and an attorney licensed in Nigeria and New York testified that a wedding in Nigeria is often referred to as an "engagement." There was evidence that the wedding took place, even if the parties did not attend the ceremony. Additionally, the attorney—who testified as an expert on Nigerian weddings—confirmed that "customary law by proxy" marriages occur when the parties are not physically present for the wedding ceremony. Rather, the families of the couple meet and agree on a "bride price," and then family members or personal representatives of both sides must meet along with two witnesses for the marriage to take place. The attorney further testified that such marriages are recognized as valid pursuant to the United States Citizenship and Immigration Service Policy Manual. Wife presented a letter from Husband's brother to her father approving the marriage and letter from friends congratulating her on the "engagement." The couple lived together, moved together, had three children together, and held themselves out as being married. There was no evidence that the marriage had been dissolved.

The divorce decree produced by Husband showing his dissolution of marriage from the other woman included a date of divorce after he and Wife married, but it did not include a date of the other marriage. Thus, the divorce decree alone was insufficient to overcome the presumption that his current marriage to Wife was valid.

Further, Wife testified that her alleged marriage to another man—while she was married to Husband—was a sham marriage to obtain a green card. She met the man once, the marriage was never consummated, and the man died before the current divorce proceeding.

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Editor's comment: *The pro se husband claimed the court had no jurisdiction over him, but he did not file a special appearance; he failed to object to the Wife's late designation of the expert on Nigerian law; and he failed to object to the Wife's untimely request to apply Nigerian law (see Tex. R. Evid. R. § 203). J.V.*

TRIAL COURT REQUIRED TO DETERMINE TO WHAT EXTENT BANKRUPTCY STAY AFFECTED DIVORCE PROCEEDINGS.

¶16-3-02. ***Adeleye v. Driscal*****,** ___ S.W.3d ___, No. 14-14-00822-CV, 2016 WL 1714657 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (subst. op.) (04-28-16).

Facts: After the appellate court affirmed Husband and Wife's final decree of divorce, Husband filed a motion for rehearing alleging that he filed for Chapter 13 bankruptcy before the divorce was filed and that the bankruptcy was not discharged until after the divorce decree was signed. Thus, Husband argued that due to the automatic stay, the trial court lacked jurisdiction to divide the marital estate.

Holding: Abated and Remanded

Opinion: Any action taken in violation of an automatic bankruptcy stay is void, not merely voidable. The appellate court remanded the case to the trial court to determine whether the alleged stay prohibited proceedings in this case.

Editor's comment: *This case is a constant reminder that if a bankruptcy is at issue, the underlying property division is essentially frozen until the Bankruptcy court lifts the stay. Not only is the divorce void, the attorneys could be subject to a multitude of sanctions for violating the orders of the Bankruptcy court. This is also another reminder to always ask, in a prove-up, if the parties are still in bankruptcy at the time of the divorce. J.H.J.*

DIVORCE
INFORMAL MARRIAGE

EX-HUSBAND'S CIRCUMSTANTIAL EVIDENCE THAT EX-WIFE WAS INFORMALLY MARRIED COULD NOT OVERCOME DIRECT EVIDENCE THAT EX-WIFE AND NEW BOYFRIEND NEVER AGREED TO BE MARRIED.

¶16-3-03. ***Assoun v. Gustafson*****,** ___ S.W.3d ___, No. 05-14-01463-CV, 2016 WL 2747225 (Tex. App.—Dallas 2016, no pet. h.) (05-03-16).

Facts: Husband and Wife divorced in 1997, and the London divorce order required Husband to pay $132,000 in annual alimony to Wife until she remarried or until further order of the court. In 2013, the judgment was modified to increase the alimony to $380,000 per year. Subsequently, Wife sought to enforce the obligation. Husband filed a petition against Wife and her boyfriend asserting that the two were informally married. Wife and her boyfriend each filed motions for summary judgment attaching affidavits explicitly stating that they had never agreed to be mar-

ried. Husband served Wife and her boyfriend with extensive discovery requests, and the trial court limited the discovery to a few years and to tax returns and similar documents. The trial court granted summary judgment against Husband. Husband appealed, challenging the summary judgment and the court's refusal to allow further discovery.

Holding: Affirmed in Part

Majority Opinion: The circumstantial evidence of a marriage failed to create a fact issue on the first element of an informal marriage—an agreement to be married—in light of the putative spouse's direct evidence that they never agreed to be married and never held themselves out to government entities as anything other than single.

Husband failed to establish he was entitled to further discovery because he did not explain with specificity why the desired evidence was necessary for his case. His conclusory allegations were insufficient.

Dissenting Opinion: (J. Whitehill) The question presented was whether any amount of circumstantial evidence could ever raise a genuine fact issue on the agreement-to-be-married element of an informal marriage if both putative spouses deny that they so agreed.

The legislature did not bar adversely affected third parties from proving an informal marriage through circumstantial evidence. Further, the putative spouses did not proffer any legal impediment that would prevent them from marrying. Finally, despite the putative spouses' assertions to the contrary, Husband was not attempting to impose a marriage on them without their consent; he was trying to prove that they in fact consented.

Editor's comment: *Proof of an informal marriage requires that after an agreement to be married, the parties live together in Texas and there represent to others that they are married. Tex. Fam. Code § 2.401(a)(2). Footnote 5 of the Court's opinion states, "Anais and John did not challenge the other two elements of an informal marriage." But wouldn't the burden be on Yan to prove those elements? Also, the parties disputed these elements in their briefs to the Court. It appears that the Court could have affirmed the summary judgment of no marriage in a one-paragraph memorandum opinion, holding that regardless of whether the parties agreed to be married, Yan failed to prove these other two elements. What am I missing? J.V.*

Editor's comment: *This case is a must-read. Every case involving common-law marriage claims is interesting and always boils down to the particular facts of the case. However, here, the court of appeals appears to issue a new directive – if the supposed married couple both execute affidavits swearing that they never agreed to be married (one of the three essential elements to a common law marriage claim), then that direct evidence can trump plenty of circumstantial evidence of a marriage. I don't recall any other reported decision that appears to give more weight to a particular form of evidence over another. To get there, the Court is citing to cases from the 1940s. Interesting. The Court does try to say that their holding is specific to the facts of this case – in that the Appellant failed to bring forward ENOUGH circumstantial evidence to negate the power of the affidavits, but I still think this case is going to be slippery slope for further expansion. Personally, I think the Court got it wrong especially considering the fact that this was a summary judgment proceeding and a scintilla of evidence is such a light burden. I think the dissenting opinion by Justice Whitehill is persuasive. My take-away? If I'm asserting a common-law marriage claim, affidavits of my client and the alleged spouse are now, more than ever, the most important piece of evidence. R.T.R.*

DIVORCE
STANDING AND JURISDICTION

PLEA IN ABATEMENT MUST BE TIMELY: FATHER COULD NOT RAISE DOMINANT JURISDICTION ARGUMENT AFTER FINAL DEFAULT JUDGMENT.

¶16-3-04. *Gutierrez v. Gutierrez*, No. 05-14-00803-CV, 2016 WL 1242193 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-30-16).

Facts: Mother filed for a divorce with children in Dallas County. After the court rendered a default judgment against Father, he filed a motion for new trial asserting that the Dallas court lacked jurisdiction because he had filed for divorce in Webb County before Mother filed her petition. He also filed a post-judgment motion to transfer and plea in abatement asserting Webb County had dominant jurisdiction. The trial court did not rule on Father's motions, and his motion for new trial was overruled by operation of law. Father appealed.

Holding: Affirmed

Opinion: Father did not dispute that Mother met the domiciliary requirements alleged in her petition, so Dallas was a proper venue for the divorce. Further, a dominant jurisdiction complaint must be timely asserted, and Father did not file a plea in abatement until after the Dallas County court rendered its final judgment. Additionally, Father failed to show that Webb County would have been a proper venue for the divorce.

Editor's comment: *The due order of pleadings can make or break your case. Venue issues are particularly tricky, as attacks to venue must be filed simultaneously with any other responses or answers. In this case, the Husband was defaulted for failure to file ANY pleadings or responses. He could not then turn around and file pleadings as part of his new trial. Once the final judgment was rendered, Husband no longer had the ability to make a jurisdictional argument. J.H.J.*

PURSUANT TO FAMILY CODE, SAPCR COULD NOT BE SEVERED FROM DIVORCE.

¶16-3-05. ***In re B.T.G.***, ___ S.W.3d ___, No. 05-13-00305-CV, 2016 WL 1367073 (Tex. App.—Dallas 2016, no pet. h.) (04-06-16) (on reh'g).

Facts: Husband and Wife were married for one year and had one Child of the marriage. Wife also had a teenage son from a previous marriage. During the marriage, the parties accumulated no community property or debt other than personal belongings.

The trial court entered temporary orders in the SAPCR, found that Husband had committed family violence, appointed Wife temporary sole managing conservator of their Child, and granted Wife temporary exclusive possession of the parties' marital residence. Subsequently, because Husband refused to move out of the marital residence, and Wife and her children were forced to sleep at shelters or with friends. In order to provide for a more permanent home, Wife obtained financing to buy a HUD home. She moved to sever the divorce from the SAPCR because if the divorce was not finalized "soon enough" she would lose out on the opportunity to buy a home at price she could afford.

The trial court severed the divorce from the SAPCR and proceeded with a bench trial on the divorce. A divorce was granted on the ground of insupportability and provided that the child-related issues would be addressed in the pending SAPCR. The severance order and the divorce decree stated that severance was in the best interest of the Child.

Husband appealed arguing that the trial court erred in severing the divorce from the SAPCR.

Holding: Vacated and Remanded

Opinion: Under the Tex. R. Civ. P., a trial court generally has broad discretion in ruling on a motion for severance. However, the Tex. Fam. Code trumps the Tex. R. Civ. P., and under the Family Code, a divorce suit involving children must include a SAPCR for the children of the marriage. Further, because a property division must be included in a divorce, and a court's division of property must have due regard for the rights of the children of the marriage, a SAPCR and divorce should not be severed.

Editor's comment: *So, was Wife able to buy the house based on the severed divorce judgment? J.V.*

Editor's comment: *Yes, Wife was able to purchase the house based on the severed divorce judgment. Unfortunately, despite prevailing on the appeal and obtaining a remand, Husband, who is representing himself and who has been granted indigency status, has filed another motion for rehearing requesting the Court to set aside the divorce, not just the severance, in an apparent attempt to get a share of the HUD house that Wife purchased to give herself and the parties' child a home after Husband refused to move out of the marital residence. G.L.S.*

TRIAL COURT ERRED BY ENTERING TEMPORARY ORDERS IN DIVORCE WHEN 90-DAY RESIDENCY REQUIREMENT NOT MET.

¶16-3-06. *In re Paul*, No. 10-16-00004-CV, 2016 WL 2609599 (Tex. App.—Waco 2016, orig. proceeding) (mem. op.) (05-05-16).

Facts: Mother was a Texas resident, and Father was an Oklahoma resident. The couple lived together in Johnson County but did not formally marry. Father filed a petition to adjudicate parentage of the parties' Child. Mother filed a counterpetition, asserting an informal marriage. Father moved to dismiss Mother's counterpetition because she had not lived in Johnson County for the 90 days prior to filing but had been living temporarily with her mother in Fort Worth. The trial court denied Father's motion, held that Mother made a prima facie showing of an informal marriage, and entered temporary orders that Father pay interim attorney's fees even though Mother had not lived in Johnson County for 90 days. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: While not jurisdictional, the 90-day residency requirement is mandatory and cannot be waived. A trial court should abate the case if doing so will allow the petitioner or respondent to meet the residency requirements. Here, Mother did not live in Johnson County for the 90 days prior to filing her petition. However, the court noted that Mother testified that she currently lived in Johnson County and considered it her home. Until Mother lived in Johnson County for the requisite 90 days, the trial court could not issue temporary orders.

Editor's comment: *Normally, a party cannot obtain and meet jurisdictional requirements by filing a suit and waiting. The jurisdictional requirements must be met at the time the original suit was filed. With that being said, venue issues are not technically jurisdictional. As a result, if venue requirements are not yet met, the court can abate the proceedings in order to allow venue requirements to be met. As a result, one has to wonder if filing a mandamus specifically and only as it relates to this issue would really, in the long run, allow success to a party challenging venue. It seems to me that while venue may not have been proper at the time the suit was filed, if the court can abate the proceedings and allow the 90 days to pass, that mandamus may not be the most cost-effective method of attack. J.H.J.*

DIVORCE
GROUNDS FOR DIVORCE

TRIAL COURT NOT REQUIRED TO GRANT DIVORCE ON GROUND OF CRUELTY EVEN IF EVIDENCE MAY SUPPORT SUCH A FINDING.

¶16-3-07. *Portillo v. Portillo*, No. 02-14-00124-CV, 2016 WL 1601113 (Tex. App.—Fort Worth 2016, no pet. h.) (mem. op.) (04-21-16).

Facts: Father filed for divorce on the grounds of cruelty, adultery, and insupportability. Mother filed a counterpetition for divorce on the grounds of cruelty and insupportability. There was evidence that Father was physically abusive (punching, strangling) to Mother on multiple occasions. Additionally, there was evidence that Mother once pulled a knife on Father. The trial court granted a divorce on the ground of Father's cruelty to Mother and further concluded that Father was guilty of cruelty towards himself. Father appealed arguing that the evidence was legally and factually insufficient to support the judgment.

Holding: Affirmed

Opinion: The Tex. Fam. Code provides that a trial court *may* grant a divorce on the grounds of adultery or cruelty, but it is not required to do so even if evidence supports such a finding. Additionally, the finding that Father was guilty of cruel treatment towards himself was supported by the evidence because Mother testified that Father admitted to her that he punched himself in the face.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

WIFE COULD NOT USE REPRESENTATIONS FROM MEDIATION TO UNDO EXISTING MSA.

¶16-3-08. *Triesch v. Triesch*, No. 03-15-00102-CV, 2016 WL 1039035 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (03-08-16).

Facts: During Husband and Wife's divorce, they disputed the character some real property. A portion of the property was purchased by Husband before marriage, and an adjacent tract was purchased during marriage. In a mediated settlement agreement, Husband was awarded all of the real property.

After the MSA was signed, but before a final decree was signed, Wife "discovered" documents showing that she had an interest in the real property and sought to set aside the MSA. During a hearing on Wife's motion to set aside the MSA, he trial court sustained Husband's objection when Wife attempted to offer statements made by Husband during mediation. The trial court denied Wife's request to set aside the MSA and entered a final decree consistent with the MSA. Wife appealed, alleging in part that the trial court erred in excluding the statements made during mediation.

Holding: Affirmed

Opinion: Wife failed to make an offer of proof, so she failed to preserve her complaint regarding the excluded statements. However, even if she preserved error, the communications related to the subject of any dispute made by a participant in mediation is confidential. Wife could not use representations from mediation to undo the existing settlement agreement.

Editor's comment: *This case is important as it shows that disclosures made during the mediation process remain confidential, and cannot be used to show proper disclosure. As a result, if a disclosure was made regarding value or character in the mediation, it is good practice to place those disclosures in the actual mediated settlement agreement. J.H.J.*

CLARIFICATION ORDER COULD NOT BE USED TO MAKE SUBSTANTIVE CHANGE TO MSA.

¶16-3-09. *Weido v. Weido*, No. 01-15-00755-CV, 2016 WL 1355764 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (mem. op.) (04-05-16).

Facts: Mother and Father entered an MSA that provided that Father had the exclusive right to designate the Child's residence within Pearland city limits and that the Child would either attend private school at Father's expense or public school in Pearland ISD. Initially, Father sent the Child to private school, but when he began considering sending the Child to public school, he sought a clarification of the MSA. Father's home was within Pearland city limits but was not within Pearland ISD. Father argued that the MSA was ambiguous and asked the trial court to remove the ambiguity. Father argued that he understood the term to allow him to enroll the Child in the school district in which they lived. The trial court granted Father's motion because

an "impossibility of performance exist[ed]. The court opined that to enroll the Child in Pearland ISD, Father would either have to move or lie about where the Child lived. Mother appealed.

Holding: Reversed and rendered in part; Reversed and remanded in part

Opinion: Even if an error exists in an MSA, a clarification order is not appropriate if the change would be substantive rather than clerical. An error is clerical if fixing the error does not require "additional judicial reasoning." Here, the MSA unambiguously provided two options for the Child's school. He would attend private school or a school within the named school district. Changing the school district would be a substantive change, not a clarification.

Editor's comment: *The remand was on attorney's fees. The mom argued that she did not prevail in the trial court but did on appeal, so the case should be remanded for the trial court to reconsider the issue of attorney's fees. The Court agreed. J.V.*

DIVORCE
DIVISION OF PROPERTY

WIFE'S UNDISPUTED TESTIMONY SUFFICIENT TO ESTABLISH SEPARATE CHARACTER OF PROPERTY.

¶16-3-10. *Lopez v. Lopez*, No. 01-15-00618-CV, 2016 WL 1056701 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (mem. op.) (03-17-16).

Facts: During their marriage, Husband and Wife lived in a house owned by Wife's mother. When Wife received an interest in real property as inheritance from her father's estate, she allowed her brother and sister to buy out her interest. Wife invested the check from her brother, and she used the check from her sister to pay off the mortgage on the house in which she and Husband lived. Wife's mother then deeded the house to Wife individually. In the final decree, the trial court confirmed the house as Wife's separate property. Husband appealed.

Holding: Affirmed

Opinion: At trial there was testimony that Wife's mother owned the house in which Wife and Husband lived and that Wife subsequently paid off the house with money Wife inherited from her father. Wife's sister testified that she recognized the check as the one she wrote for Wife's share of the inheritance. Husband did not contradict any of these assertions. Here, court found that undisputed testimony is sufficient to establish separate character of the property.

Editor's comment: *There is a lot of argument that it's necessary for an expert to be hired to testify as to the characterization of property as separate. But, that's just not the case. In this case, the evidence provided by wife was uncontradicted, and as a result, it was not necessary for her to hire an expert to trace her separate property interest. If your client is on a budget, or you believe the evidence will be uncontroverted, it might be beneficial to your client's case to send admissions or do a quick deposition specifically on the characterization issue. J.H.J.*

Editor's comment: *Testimony of a party has always been some evidence of characterization of the asset. M.M.O.*

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REIMBURSEMENT AWARD AGAINST WIFE'S SEPARATE ESTATE INAPPROPRIATE WHEN HUSBAND DID NOT PLEAD FOR SUCH RELIEF.

¶16-3-11. *Trevino v. Garza*, No. 13-15-00241-CV, 2016 WL 1072627 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (03-17-16).

Facts: In his divorce pleading, Husband requested "reimbursement from the community estate for any monies wasted by [Wife] during the marriage." Husband made no other reference to reimbursement. In the final decree, the trial court confirmed Wife's separate property, which included two pieces of real property and a business, and awarded Husband a reimbursement award for his uncompensated time, toil, talent, and effort expended in enhancing the value of Wife's separate property. Wife appealed, arguing that the judgment did not conform to the pleadings.

Holding: Reversed and Rendered

Opinion: Husband made no claim for reimbursement for his time, toil, and effort expended in enhancing Wife's separate property. Husband asked to be reimbursed for waste of community resources by Wife. Waste is an issue a trial court considers in determining the just and right division of the community estate and is distinct from an order for reimbursement. Additionally, there was no evidence that the issue was tried by consent. Although some evidence offered during trial may have been construed as supporting a reimbursement claim, that evidence was also relevant to the pleaded issues before the court: the value of disputed assets.

Editor's comment: *In the Court's words, "evidence on an unpled issue is not evidence of trial by consent if that evidence is relevant to another issue before the court."• When you think about it, in family law cases trial by consent ought to be difficult to establish because so much of the evidence is relevant to more than one issue. But in this case, there was no trial by consent because neither attorney realized until the final hearing that the trial court intended to award reimbursement. J.V.*

Editor's comment: *Remember that your pleadings must conform to the relief requested and granted. We have loose pleadings in family law, but not that loose. The pleadings must still provide fair notice of the claims. M.M.O.*

WIFE FAILED TO ESTABLISH VALUE OF REIMBURSEMENT CLAIM BECAUSE SHE DID NOT PROVE THAT ENHANCED VALUE WAS ATTRIBUTABLE TO CAPITAL IMPROVEMENTS.

¶16-3-12. ***In re Marriage of McCoy and Els*****,** ___ S.W.3d ___, No. 14-14-00870-CV, 2016 WL 1444139 (Tex. App.—Houston [14 Dist.] 2016, no pet. h.) (04-12-16).

Facts: Husband and Wife were married 25 years and lived in a home Husband inherited. During the divorce, Wife sought reimbursement to the community for capital improvements to Husband's separate property. Wife testified to the value of the home at the time of marriage and the time of divorce. Additionally, she testified to the type and cost of the improvements to the property. The court found the reimbursement claim was equal to the enhanced value and split that

value equally between the parties. Husband appealed arguing that the evidence was insufficient to support the trial court finding regarding the value of the reimbursement claim.

Holding: Reversed and Remanded

Opinion: To be reimbursable, a property's enhanced value must be "attributable to the community expenditures." A determination must be made as to the value at the date of dissolution had the improvements not been present on the property.

Here, Wife testified to the value of the property at the time of marriage. She testified to many capital improvements likely entitled to reimbursement, but only provided dates for improvements that occurred fifteen years after the marriage. Additionally, the present value was assessed ten years after that. There was no competent evidence of the property's value without the improvements. The court noted that this determination would have been easier if the improvements had been done closer in time to the two valuations.

Editor's comment: *The COA noted that while an owner can testify as to value of their property, they cannot simply offer conclusory testimony as to fair market value without supporting the basis for their lay opinion, noting that information to support fair market value is readily available today from many sources. S.S.S.*

Editor's comment: *The Court quotes St. Mary's Professor Leopold on how to prove enhancement: "First, the fair market value of the property in its improved condition is determined as of the date of the dissolution of the marital relationship. Then, a determination is made as to what the fair market value of the property would have been at the date of the dissolution had the improvements not been present on the property. The difference between these two value calculations is the amount of the reimbursement claim." J.V.*

Editor's comment: *Note that this case provides insight in the measure of value of improvements. Good case to follow if you have this issue. M.M.O.*

PASTOR-HUSBAND'S INCOME INCLUDED "GIFTS" RECEIVED FROM HIS CHURCH; PARTIES' HOUSE COMMUNITY PROPERTY BECAUSE WIFE DID NOT SIGN DEED TRANSFERRING TO CHURCH.

¶16-3-13. *West v. West*, No. 01-14-00350-CV, 2016 WL 1719328 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (op. on rhrng.) (mem. op.) (04-28-16).

Facts: Husband was a pastor of a church. During the marriage, the church wanted to give Husband a house, but it could not obtain financing. Instead, Husband purchased a house, and the church provided him with an annual $50,000 housing allowance. After purchasing the house, Husband and Wife deeded the house to the church. Subsequently, when interest rates dropped, the church wanted to refinance the mortgage on the house, but it was still unable to obtain financing. Thus, the church deeded the house back to Husband and Wife, who refinanced the mortgage. Subsequently, Husband deeded the house back to the church, but Wife did not sign that deed.

In its final decree of divorce, the trial court divided the assets relatively equally, with Husband receiving the house and Wife receiving a number of bank accounts. Husband appealed, arguing that the trial court erred in including the house in the property division and in characterizing the bank accounts into which his "gifts" were deposited as community property. Husband also challenged the attorney's fees award to Wife.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: Here, not only did Wife not sign Husband's deed to the church, but there was no evidence offered at trial of a power of attorney, or other written agreement between Husband and Wife to dispose of the house as set forth in the deed. Thus, Husband's 2007 warranty deed to the church is void. This result preserves the character of the house, which Husband and Wife acquired as community property.

Courts have held that while an occasional unsolicited gift from a church congregant to a pastor may constitute a "gift," where a religious institution is intrinsically involved in facilitating the collection of funds from congregants for its pastor under a regularly conducted program, and the pastor receives little other compensation, the contributions constitute income. Here, Husband testified that each year he receives an anniversary and birthday gift in the range of $16,000 to $24,000. And every fifth Sunday, he receives a "love gift" of approximately $1,150. Wife, who was employed as the church's bookkeeper, explained that the church took a collection from the congregation to pay these gifts. And the gifts have a total value almost equivalent to Husband's $35,000 salary. Thus, the evidence establishes that the church is substantially involved in facilitating the collection of funds from its congregants for the benefit of Husband under a regularly conducted program; therefore, these contributions constitute income, and income earned by the parties during marriage constitutes community property.

The record shows that Wife's counsel testified regarding his qualifications, that he charges an hourly rate of $300, and that he had "completed many hours" on this case. He explained that the case had been "prolonged" due to having to involve the church in the property ownership issue. And he "believe[d] that [a] fee of $20,000 ha[d] been earned," along with costs and fees, which he did not quantify.

To support an award of attorney's fees, evidence should be presented on the "hours spent on the case, the nature of preparation, complexity of the case, experience of the attorney, and the prevailing hourly rates" in the community. Here, there is no evidence in the record regarding the time that Wife's counsel spent on the case, beyond "many hours," and no billing statements or time records were offered. And counsel did not testify regarding the prevailing hourly rates in the area or the reasonableness of the fees. Also, expert testimony as to the reasonableness of the attorney's fees is required to support an award.

WIFE HAD NO CAUSE OF ACTION FOR MALPRACTICE AGAINST ATTORNEY WHO AIDED HUSBAND IN TRANSFERRING COMMUNITY PROPERTY INTO HUSBAND'S NAME DURING MARRIAGE.

¶16-3-14. ***Kite v. King*****,** ___ S.W.3d ___, No. 07-15-00324-CV, 2016 WL 2766123 (Tex. App.—Amarillo 2016, no pet. h.) (05-11-16).

Facts: Husband and Wife acquired a home during the marriage, but Husband led Wife to believe that the property was his separate property. The couple hired an Attorney to assist them in setting up a residential trust, and Wife was asked to transfer whatever interest she had in the home to Husband. Although she signed the documents, Wife was unaware that she potentially had any interest in the home and was not advised about her potential interests. During the subsequent divorce, Wife began to question the transaction and raised the issue of fraud on the community. However, that claim was not formally adjudicated as part of the divorce by the trial court. After a decree was entered, Wife sued the Attorney who had assisted setting up the trust and transferring the property for legal malpractice. The Attorney filed a motion for summary judgment, asserting that Wife's only remedy was for fraud on the community, which was re-

quired to be addressed during the divorce. The trial court granted the summary judgment, and Wife appealed.

Holding: Affirmed

Opinion: A third party cannot be held liable in tort when community property is taken by one of the spouses. The wronged spouse's remedy is restricted to pursuing a just and right distribution of the marital estate. However, if the claim itself is separate property, then the claim is susceptible to prosecution by the wronged spouse after the divorce.

Here, Wife complained of "lost valuable rights in *community* property." Thus, her cause of action was community property, and the trial court presumably compensated Wife for any loss to the community in dividing the community estate.

Editor's comment: *The Court observed that Wife also had been free to seek a reconstitution of the community estate per Texas Family Code section 7.009. J.V.*

Editor's comment: *A community property tort can only be compensated through the division of the community estate during divorce. There's no independent claim for damages. M.M.O.*

DIVORCE
RETIREMENT BENEFITS

WIFE'S INTEREST IN RETIREMENT BENEFITS INCLUDED ALL BENEFITS TRACEABLE TO COMMUNITY ASSETS EARNED DURING THE MARRIAGE.

¶16-3-15. ***Howard v. Howard*****,** ___ S.W.3d ___, No. 01-14-00761-CV, 2016 WL 1267810 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (03-31-16).

Facts: During their marriage, Husband worked for the police department. The parties' agreed divorce decree awarded Wife "[o]ne-half of any and all sums related to any vested profit sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan or accrued unpaid bonuses, or other benefit programs existing by reason of [Husband]'s employment during the marriage."

At the time of divorce, Husband's interest in the employee retirement plan had not yet vested. If Husband was terminated from his employment at that time, he would have been entitled only to a reimbursement of his payroll contributions to the plan. After the marriage, a new benefit was added to which Husband was entitled because of his employment with the department during the marriage.

After Husband retired, the trial court entered a QDRO interpreting the decree and awarding benefits. The trial court determined that because, at the time of divorce, Husband was only entitled to reimbursement for his contributions to the plan, Wife only had a 50% interest in that reimbursement. Wife appealed.

Holding: Reversed and Remanded

Opinion: Husband and the trial court's interpretation of the retirement award ignored the decree's use of the terms "all sums related to" and benefits "existing by reason of" employment during the marriage, which was broader than sums that were "then-existing." Additionally, if the

intent was to only award Wife a half portion of Husband's payroll contributions at the time of the divorce, that value was readily ascertainable at the time of the divorce. Further, the limiting provisions in the decree were forward-looking and contemplated a future-contingent interest in all retirement benefits that Husband became entitled to as a result of his employment during the marriage. Moreover, the agreement provided for an interest in a retirement benefit, not in a right to a refund of an employee's contribution on termination of employment.

Editor's comment: *This case is another example of how important it is not only to understand how different retirement plans actually work, but further to specify exactly what portion of a retirement plan a spouse will be taking. For example, if the idea is to only transfer a portion of vested funds to one spouse, it is good practice to award only that portion of the vested funds to that spouse and to award 100% of everything else to the party that actually owns the plan. The words "any and all" or "related to" can be very scary when dealing with retirement plans. J.H.J.*

Editor's comment: *Sloppy drafting can come back to haunt you. Here, language in a 1988 divorce decree (some of which appears to be typical "formbook" language when awarding retirement all to one spouse) is interpreted to give the ex-wife an interest in a new benefit that was added to the ex-husband's retirement plan post-divorce. Critically analyze every property provision of your decree, but especially retirement plans! R.T.R.*

A JUDGE'S INTENTION TO RENDER A QDRO IN THE FUTURE CANNOT BE A PRESENT RENDITION OF A QDRO. FAMILY CODE REQUIRED A NEW PETITION FOR TRIAL COURT TO SIGN QDRO.

¶16-3-16. ***Araujo v. Araujo*****,** ___ S.W.3d ___, No. 04-15-00503-CV, 2016 WL 3030942 (Tex. App.—San Antonio, no pet. h.) (05-25-16).

Facts: Husband and Wife divorced. The agreed divorce decree was signed by the trial court on April 21, 2015. The decree awarded Husband various assets including the following:

> All interest in the Railroad Retirement Board pension arising out of Miguel A. Araujo's employment during the parties' marriage, except that amount specifically awarded to Yolanda R. Araujo in this Decree and *the Order Dividing Railroad Retirement Benefits to be entered after this Decree*.

The decree awarded Wife in part the following:

> A portion of the community property interest in the Railroad Retirement Board pension non-tier I benefits arising out of [Husband's] employment during the parties' marriage . . . *as more particularly specified in the Order Dividing Railroad Retirement Benefits to be entered after this Decree*.

No appeal from the decree was taken, and the decree became final on May 21, 2015. On June 19, 2015, Wife filed a "Motion to Enter" in which she asked the trial court to sign her attached Railroad Retirement Order. Husband responded by arguing that the trial court lacked jurisdiction to sign the order because it had lost plenary power and its jurisdiction had not been properly invoked to sign the QDRO. The trial court signed the QDRO. Husband appealed.

Holding: Reversed and Rendered

Opinion: Wife asserted that signing the Railroad Retirement Order was merely a ministerial act because doing so reflected the trial court's judgment in the divorce decree and the provisions of the Family Code applicable to obtaining a post-judgment QDRO do not apply in this case be-

cause the divorce decree rendered the relief available—a QDRO—and, by doing so, the trial court retained plenary power until the final Railroad Retirement Order was signed.

The language of the decretal paragraph awarding Wife her interest in Husband's Railroad Retirement Board pension does not constitute the rendering of a QDRO. A judge's intention to render a QDRO in the future cannot be a present rendition of a QDRO. In this case, the twice-used language "in the Order Dividing Railroad Retirement Benefits to be entered after this Decree" indicates an intention to render a QDRO in the future.

Here, the trial court rendered an agreed divorce decree that divided Husband's Railroad Retirement Board pension, but it did not render or sign a QDRO. Under such circumstances, Texas Family Code §§ 9.101. 9.103, and 9.104 "provide for limited, post-judgment jurisdiction that may be invoked only in particular circumstances, rather than for plenary, original jurisdiction." This limited, post-judgment jurisdiction is invoked when "[a] party. . . petition[s] [the] court to render a qualified domestic relations order or similar order. . . ." Wife is required to comply with the provisions of Family Code chapter 9 to obtain a post-judgment QDRO.

Editor's comment: *Always remember to get your QDRO entered within plenary power or you have to file a new suit, which means new court costs, service of process, notice of hearing, etc. M.M.O.*

Editor's comment: *Save yourself the trouble, and get your QDROs ready at the same time as you are drafting the decree, and get the Judge to sign everything at once. R.T.R.*

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

JURY LIKELY PREJUDICED BY ERRONEOUS, PARTIAL, NO-EVIDENCE SUMMARY JUDGMENT.

¶16-3-17. *McDonald v. McDonald*, No. 05-15-00338-CV, 2016 WL 2764881 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (05-11-16).

Facts: In their agreed divorce decree, Father agreed to pay Mother contractual alimony so long as she remained the primary caretaker for their Child. The decree provided that one of the reasons for which Mother would not be considered the primary caretaker would be if the child attended full-time after school care.

After the divorce, Mother allowed Father more time with the Child than what was provided for in the decree. Father was consistently late making his alimony payments. Mother attempted to condition Father's visitation on his timely payment of alimony. When that did not work, Mother filed claims for breach and anticipatory breach. Father raised an affirmative defense claiming that he had no obligation to pay because Mother was no longer the primary caretaker of the Child. After the parties exchanged some discovery, Mother filed a no-evidence motion for summary judgment, attacking Father's affirmative defense. The trial court granted the summary judgment with respect to the past breach, but the claim for anticipatory breach went to a jury. Over Father's objection, references to the summary judgment were made throughout the trial, and the order granting the summary judgment was entered into evidence as published to the jury. The jury found Father anticipatorily breached the alimony agreement and awarded Mother damages. Father appealed.

Holding: Reversed and Remanded

Opinion: A respondent to a no-evidence motion for summary judgment is not required to marshal its proof but only needs to point out evidence that raise a fact issue on the challenged element. Father's wife's affidavit averred that the Child was in an after-school gymnastics program for 2 to 3.5 hours four days a week and that the Mother was working full-time. This evidence was sufficient to raise a fact issue.

Further, the trial court's summary judgment permeated the entire trial and likely prejudiced the jury to such a degree that it would have been nearly impossible for them to consider the elements of anticipatory breach without the corresponding influences of the judge's opinion. Given that the ruling was incorrect, its impact was even more devastating and complete.

Editor's comment: *Sloppy drafting strikes again. If you are going to let your client sign onto a deal to pay a lot of alimony for a long time, at least make sure that any termination provisions are crystal clear. R.T.R.*

SAPCR
PROCEDURE AND JURISDICTION

FATHER FAILED TO PRESENT ANY EVIDENCE TO JUSTIFY TRIAL COURT'S USE OF TEMPORARY EMERGENCY JURISDICTION UNDER THE UCCJEA.

¶16-3-18. ***In re Salminen*****,** ___ S.W.3d ___, No. 01-14-01021-CV, 2016 WL 1356840 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (04-05-16).

Facts: Mother was a Finnish citizen, Father lived in New York, and the Child was a dual citizen of the U.S. and Finland. Two prior orders for conservatorship had been entered in Finland.

Mother and the Child moved temporarily to Texas, where Mother filed a petition to enforce Father's child support obligation. Father challenged the trial court's subject matter and personal jurisdiction under UIFSA and alternatively asked the trial court to exercise temporary emergency jurisdiction under the UCCJEA. Father claimed that he had been denied visitation and that Mother habitually exercised global forum shopping. The trial court denied Father's special appearance and plea to the jurisdiction and stated that it would "take general jurisdiction" under the UCCJEA. The trial court signed a temporary order giving Father immediate physical custody of the Child. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Although Mother initially pleaded that she and the Child lived in Texas at the time she filed, she later filed a motion indicating that they had returned to Finland. Nothing in the record supported a finding that the Child's home state was Texas.

Additionally, the evidence did not support an exercise of temporary emergency jurisdiction. There was no evidence that the Child had been abandoned or was subjected to or threatened with mistreatment or abuse. Further, even though Father testified that he had missed two visitations, he did not testify that Mother was to blame for the missed visitations.

Moreover, the trial court failed to comply with the UCCJEA's requirements that the court recognize the prior orders in its order, that it specify a period that it considered adequate to al-

low Father to obtain an order from the Finnish court, or that it made any effort to communicate with the Finnish courts.

FATHER NOT ENTITLED TO MANDAMUS REVIEW WHEN DENIED UIFSA-BASED PLEA TO JURISDICTION BECAUSE TEXAS ORDER FOR CHILD SUPPORT ONLY ORAL PRONOUNCEMENT, NOT SIGNED, WRITTEN ORDER.

¶16-3-19. *In re Sanders*, No. 05-16-00332-CV, 2016 WL 2935754 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.) (05-17-16).

Facts: Mother and Father divorced in Colorado. Subsequently, Mother and the Child moved to Texas. A few years later, an agreed order was signed in the Colorado trial court that included orders relating to expenses of the child. However, there was no order specifically for "child support." A few years later, Mother filed a petition in a Texas court asking that Father be ordered to pay monthly child support. Father objected to the court's jurisdiction, arguing that under UIFSA, only the Colorado court had jurisdiction to enter orders regarding monetary support of the Child. The Texas trial court orally denied Father's plea to the jurisdiction and ordered Father to pay child support and health insurance premiums. After the trial court signed an order denying Father's plea to the jurisdiction, he filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: Mandamus actions based oral pronouncements are generally discouraged, and the only written order here addressed a plea to the jurisdiction—not child support. Thus, without addressing whether the Texas trial court had jurisdiction to hear argument or make orders regarding child support, the appellate court noted that rulings on pleas to the jurisdiction are considered incidental rulings, which are not usually entitled to mandamus relief. Here, there were no extraordinary circumstances—such as two conflicting orders for child custody—that would justify mandamus review.

WIFE'S PLEADING FAILED TO PROVIDE HUSBAND FAIR NOTICE THAT SHE SOUGHT POST-DIVORCE SPOUSAL MAINTENANCE.

¶16-3-20. ***In re Marriage of Day*****,** ___ S.W.3d ___, No. 14-15-00326-CV, 2016 WL 2997141 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (05-24-16).

Facts: Wife filed a petition for divorce and served it on Husband. Husband did not answer or appear. Wife presented evidence, and the trial court granted her a default judgment, divided the community property, and ordered Husband to pay spousal maintenance for 5 years. Subsequently, Husband filed a restricted appeal, arguing that the trial court abused its discretion in entering an order that did not conform to Wife's pleadings.

Holding: Affirmed as Modified

Opinion: Wife's pleadings asked only for temporary spousal support during the pendency of the divorce, not for spousal maintenance after the decree was signed. Despite Wife's contention to the contrary, her plea for general relief combined with her request for a disproportionate division of the property based on her "need for future support" was insufficient to support the award.

Wife requested a disproportionate division of the *community*, but an award of post-divorce maintenance is an award of Husband's future *separate* property.

Editor's comment: *The Court included this incorrect and unnecessary sentence in its opinion: "An award of post-divorce spousal maintenance is, in effect, an award of the husband's future separate property following the division of community property."• An order to pay maintenance imposes a personal obligation on the obligor. A maintenance order does not, and cannot, divest a person of his separate property post-divorce because there is no separate or community property after divorce. After divorce, a single person owns his or her property, period. There is nothing separate or community about it. J.V.*

Editor's comment: *This case is an example how very important it is to specifically plead for every bit of requested relief. Do not hope that a general request for relief will cover your client. In most cases, it will not, and it is a valid attack as to pleadings that the pleadings did not provide fair notice of the relief requested. J.H.J.*

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT ABUSED DISCRETION BY ENTERING POSSESSION ORDER THAT SUBSTANTIALLY ALTERED THE TERMS OF THE PARTIES' MSA.

¶16-3-21. *In re H.W.G.*, No. 05-15-00114-CV, 2016 WL 1179495 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-25-16).

Facts: In a SAPCR, Mother and Father entered an MSA that gave Mother visitation in four incremental stages subject to certain drug testing requirements. Per the MSA, to move from Step 1 to Step 2, Mother had to exercise supervised visitation for 10 consecutive weeks and submit to random standard 10 panel monthly drug tests. Five weeks after the final order was entered, Mother filed a motion for enforcement of possession under Step 2. Mother asserted that she had been sober for six months and had several negative drug tests in that time. However, she had not undergone any drug tests as described in the final order. Father argued that Mother was still in Step 1 because she had not submitted to the random drug testing. At the hearing's conclusion, the trial court denied the motion for enforcement and held that Mother was in Step 4 of the possession order because she had satisfied the requisites of the order. Father appealed arguing that the trial court abused its discretion in awarding Mother additional visitation because no party requested it, and the evidence did not support the order.

Holding: Reversed and Remanded

Opinion: Despite the trial court's recitation, the undisputed evidence did not support a finding that Mother satisfied the prerequisites to advance to Step 4 visitation. One perquisite for Mother to advance beyond Step 1 was that she submit to random drug tests. That had not occurred. Although a trial court may provide clarification necessary to implement an MSA, a court may not substantially alter an MSA's terms.

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BECAUSE ARBITRATOR DID NOT EXCEED HIS POWER, TRIAL COURT ERRED BY GRANTING FATHER'S MOTION TO VACATE ARBITRATION AWARD.

¶16-3-22. *Eddleman v. Ocker*, No. 13-15-00217-CV, 2016 WL 1732428 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (04-28-16).

Facts: Mother moved from Victoria County to Tarrant County. After the move, Father filed a motion to modify in Victoria County, and the parents entered into an MSA that resolved all issues except the Children's health insurance. Under the MSA, drafting disputes would be resolved by mediation, and if litigation was brought to construe or enforce the MSA, the prevailing party would be entitled to fees.

Subsequently, Mother filed a motion to enter judgment pursuant to the MSA and stated that the parties had reached an agreement on the health insurance issue. Mother further asserted that Father drafted a proposed final order that included additional terms and modifications that were not agreed upon during mediation. Father filed a motion to enforce the MSA arguing that disputes had arisen regarding the interpretation of the MSA and asked that the trial court require the parties to attend mediation or arbitration. The trial court ordered the parties to mediation.

Subsequently, Father filed a breach of contract suit in Nueces County, alleging Mother refused to attend mediation scheduled for the next day unless certain preconditions were met, which constituted an effective breach of the MSA. Mother filed an answer with a motion to abate and a motion to transfer the venue to Victoria County, where the divorce was pending.

While the motion to abate was pending in Nueces County, the Victoria County court rendered an order that largely effectuated the MSA. Father appealed that order to the 13th District Court of Appeals.

Father then moved the Nueces County court to compel arbitration. The parties attended an unsuccessful mediation and afterwards agreed that the matter would be submitted to binding arbitration. The arbitrator found that the issue was not a drafting dispute, that Father had attempted to inject new terms into the final order that were not contained in the MSA, that Mother's proposed MSA accurately reflected the MSA, that the breach of contract suit was filed in the wrong court and should be consolidated with the divorce proceeding, that the breach of contract suit and the appeal of the final decree should be dismissed, that Mother had complied with the MSA, and that she was entitled to the recovery of fees incurred to construe and enforce the MSA.

Father moved the Nueces County court to vacate the arbitration award on the grounds that the arbitrator exceeded his authority, which the Nueces County court granted. The court agreed with Father that the arbitrator exceeded his authority in considering the motions to abate and to transfer and the appeal because those issues had become moot when the parties agreed to arbitration. Mother filed an interlocutory appeal.

Holding: Reversed and Remanded

Opinion: The letter agreement to arbitrate provided that the arbitration was intended to resolve all pending issues in both the Nueces County trial court and the 13th District Court of Appeals. When the Nueces County trial court granted Father's motion to compel arbitration, it expressly reserved judgment on Mother's motion to abate and transfer venue to Victoria County. Thus, those issues were not moot and were subject to arbitration. As long as an issue was subject to arbitration under the applicable agreement to arbitrate, even a clear error of law by the arbitrator will not support vacatur of an arbitration award.

SAPCR
CONSERVATORSHIP

GRANDMOTHER HAD STANDING TO SEEK CONSERVATORSHIP BECAUSE SHE EXERCISED ACTUAL CARE, CONTROL, AND POSSESSION OF THE CHILDREN.

¶16-3-23. ***In re K.S.***, ___ S.W.3d ___, No. 14-15-00008-CV, 2016 WL 1660366 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (04-26-16).

Facts: Mother, Father, and their nine Children lived in Maternal Grandparents' house. When Grandmother filed her original petition seeking sole managing conservatorship, five of the children were minors. At the time of the appeal, only three were still minors.

Grandmother was the primary caregiver for the Children, and she and her husband supported the family financially. Father had a history of physically abusing the Children, and Mother took no steps to stop the abuse. TDFPS conducted an investigation, and at trial, representatives from TDFPS testified, as well as some of the adult Children. The trial court appointed Grandmother sole managing conservator, granted Mother limited, supervised visitation with the Children, and ordered that Father have no access to or possession of the Children. The parents appealed, arguing in part that Grandmother lacked standing to seek sole managing conservatorship of the Children.

Holding: Affirmed

Opinion: The 14th District Court in Houston has previously held that Tex. Fam. Code § 102.003(a)(9)'s "actual care, control, and possession" does not require exclusive control, legal control, or that the parent relinquished care, control, and possession. Rather, the party seeking standing must show that she developed and maintained a relationship with the children entailing the actual guidance, governance, and direction similar to that typically exercised by parents with children.

Here, Grandmother was the primary caretaker for the Children, bought most of their food clothes, health care, and dental care, took them to and picked them up from school, and attended the Children's activities. This evidence was corroborated by multiple witnesses.

Editor's comment: *There is still a division on this issue with regards to the different courts of appeal. Some courts of appeal, like the Fort Worth Court of Appeals, have held that it is required that the Movant have sole, exclusive care, possession, and control. Make sure when you file a case, and standing may be an issue, to check the jurisdiction where your client lives in order to make sure that you understand what is required by the jurisdiction in order to have standing. J.H.J.*

Editor's comment: *Be aware of the split of appellate authority on what exactly constitutes actual "care, control, and possession" for a nonparent to seek custody under the general standing statute of Texas Family Code § 102.003. Some courts require exclusivity; this court (Houston) does not. R.T.R.*

SAPCR
CHILD SUPPORT

TRIAL COURT NOT REQUIRED TO USE FEDERAL TAX REGULATIONS IN CALCULATING NET MONTHLY RESOURCES FOR SELF-EMPLOYED FATHER.

¶16-3-24. *In re B.Q.T.*, No. 05-14-00480-CV, 2016 WL 861633 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-07-16).

Facts: Mother and Father were unmarried, but they purchased a house together and had one Child. When Father moved out, he and Mother agreed that in lieu of child support, Father would give Mother his interest in the house (about $8500). Less than a year later, the OAG filed a SAPCR, seeking appointment of conservators and an order for current and retroactive child support and medical support. Father introduced evidence of his self-employment income, and the trial court ordered him to pay $903 per month for child support and $200 per month for medical support. Additionally, the trial court ordered retroactive child support in the amount of $6,534. On appeal, Father argued the evidence was insufficient to support the trial court's finding regarding his net resources, and that the trial court erred in failing to consider the parties' prior agreement when calculating retroactive child support.

Holding: Affirmed

Opinion: Father's gross income was $131,000 in 2011, a loss of $311 in 2012, and $129,000 in 2013. Father testified that he was injured in 2012 and could not work; however, bank statements showed deposits of $19,000 in the first six months of 2012. His tax returns showed that after expenses, Father's income was $7000 in 2011, -$311 in 2012, and $13,000 in 2013. The federal income tax regulations are distinct from the rules for computing net resources under the Family Code. The trial court's finding of monthly gross resources of $6,598.11 was somewhat less than Father's average gross income for the three available years of tax information. Further, while the trial court *may* exclude certain expenses from self-employment income, it is not required to do so, and Father presented no evidence that would have allowed the trial court to do so in this case.

The agreement concerning support between the parties would not reduce or terminate the retroactive support that the OAG could request unless the OAG was party to the agreement.

OBLIGEE FATHER BORE BURDEN TO SHOW HE TIMELY DELIVERED RECEIPTS OF UNINSURED MEDICAL EXPENSES BEFORE OBLIGOR MOTHER'S OBLIGATION TO REIMBURSE WAS TRIGGERED; UCCJEA DOES NOT APPLY TO TRAVEL EXPENSES ASSOCIATED WITH VISITATION OF A CHILD.

¶16-3-25. *In re M.S.C.*, No. 05-14-01581-CV, 2016 WL 929218 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-11-16).

Facts: Mother and Father's divorce decree appointed them joint managing conservators of their four Children and granted Mother the exclusive right to designate the Children's primary residence. Subsequently, Mother and the Children moved to California.

A few years later, the Texas trial court determined that although it retained jurisdiction over the Children (because Father continued to live in Texas), California was a more convenient forum for addressing custody issues. The Texas trial court retained jurisdiction over child support issues.

A California court determined that due to the costs associated with the youngest Child's physical disabilities, Father could better care for that Child. The California court granted Father sole legal custody of the youngest Child and ruled that Mother could visit the youngest Child in Texas one weekend a month with adequate notice to Father. Additionally, the California court ordered Father to pay for transportation and accommodations for Mother for three of her visits with the Child each year.

Father filed a SAPCR in Texas, asking the Texas trial court to order Mother to pay child support for the youngest Child, to reimburse him for 50% of the youngest Child's uninsured medical expenses pursuant to the divorce decree (which amounted to $125,697.25), and to order that she visit the youngest Child at her own expense. The Texas trial court awarded Father a judgment for the unreimbursed medical expenses, ordered Mother to pay child support for the disabled Child, and ordered that Mother pay the expenses associated with her visitation with the youngest child.

Mother appealed, arguing that the evidence was insufficient to support the judgment for unreimbursed medical expenses and that the Texas trial court lacked jurisdiction to modify the California court's "visitation" order pursuant to the UCCJEA.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: The final decree required Father to send proof of medical expenses to Mother within ten days of incurring the expense. Father failed to prove he timely sent the documents to Mother. Thus, Father failed to establish that Mother's obligation to reimburse was ever triggered. Whether the documents were timely sent was an element of Father's burden of proving an arrearage and was not an affirmative defense that Mother was required to assert at trial.

The UCCJEA does not apply to orders relating to child support or another monetary obligation of an individual. Because the Texas trial court retained jurisdiction to determine custody issues, the California trial court lacked jurisdiction to order Father to pay for Mother's travel expenses to visit the Child. Additionally, because the California court lacked subject-matter jurisdiction to enter the order regarding travel expenses, the doctrines of comity, disfavoring collateral attacks on foreign judgments, and the Full Faith and Credit Clause of the U.S. Constitution did not apply.

Editor's comment: *I hate this holding, and others similar to it, that require the parent to comply to the letter of the decree in terms of sending the other parent proof of uninsured health care expenses in order to be successful on an enforcement action of those unpaid expenses. In this day and age, I think it is unrealistic to ask our parents to send all the paperwork to the other parent within 30 days of the expense. We need to change the language in our decrees to provide for a more realistic manner of exchange. R.T.R.*

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SAPCR
MODIFICATION

TRIAL COURT ENTITLED TO DETERMINE AWARD FOR CHILD SUPPORT BECAUSE NOT ADDRESSED IN MSA.

¶16-2-26. *In re Marriage of Wolfe*, No. 05-14-01279-CV, 2016 WL 772640 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-29-16).

Facts: Mother and Father, both pro se, entered a mediated settlement agreement that addressed conservatorship, access, and possession of their Child, but not child support. The associate judge entered temporary orders that addressed conservatorship, access, and possession, and child support. Before the final bench trial, both parents asked the trial court to "modify" conservatorship, access, and possession, and child support. While the MSA provided that Mother would have the exclusive right to designate the Child's primary residence, the final decree granted that right to Father. Mother was ordered to pay child support. Mother appealed, arguing that she was entitled to a judgment that complied with the MSA.

Holding: Reversed in Part; Rendered in Part; Remanded in Part

Opinion: Without a finding of family violence, the trial court lacked discretion to modify the MSA based on the Child's best interest. Further, Mother stated no ground on which the MSA could be set aside. However, because the MSA did not address the issue of child support, the trial court had the authority to include an order for child support in the final decree. Because the appellate court reversed and rendered the ruling on conservatorship, access, and possession, it also reversed and remanded the case for further determination on the issue of child support.

EVIDENCE SUPPORTED CHANGING PARENT WITH RIGHT TO DESIGNATE CHILDREN'S PRIMARY RESIDENCE.

¶16-3-27. *In re A.J.M.*, No. 10-14-00284-CV, 2016 WL 936869 (Tex. App.—Waco 2016, no pet. h.) (mem. op.) (03-10-16).

Facts: A prior order appointed Mother and Father joint managing conservators of their two Children and granted Mother the exclusive right to designate the primary residence of the Children within Ellis County and contiguous counties. Mother married a man who was in the military, and without notice to Father, Mother and the Children moved with Mother's new husband to Georgia. Father filed a motion for enforcement, and the trial court granted Father the temporary right to designate the Children's primary residence and ordered Mother to pay $50 a month in child support. [Note: Mother did not contest this order.] Mother moved back to Ellis County and alleged that her new husband had been transferred to Fort Hood and that they planned to find a house in Waxahachie so her new husband could commute to work. Mother failed to pay child support for two months and then paid three months at once. She was one month behind on child support at the final hearing. Although she was qualified to be a nurse, she was working part-time at a convenience store because she said she did not want to get a full-time job until the trial was over. After the final hearing, the trial court granted Father the exclusive right to des-

ignate the Children's primary residence. Mother appealed, arguing that the evidence was insufficient to support the judgment. Mother also argued that there was insufficient evidence to establish a material and substantial change in circumstances. She contended that her remarriage and third child did not constitute a material and substantial change because Father had also remarried, and his new wife was pregnant.

Holding: Affirmed

Opinion: Both parties had remarried and had or were expecting another child, which was sufficient to constitute a material and substantial change. Additionally, Mother twice violated court orders: once in moving without notice, and again in failing to pay the nominal award for temporary child support. Contrarily, Father had a stable home, and the Children did well in his care.

WITHOUT EVIDENCE OF CURRENT IMPAIRMENT, TRIAL COURT COULD NOT MODIFY MOTHER'S RIGHT TO DESIGNATE CHILD'S PRIMARY RESIDENCE THROUGH TEMPORARY ORDERS DURING PENDING SAPCR

¶16-3-28. *In re Johnson*, No. 07-16-00123-CV, 2016 WL 2609651 (Tex. App.—Amarillo 2016, orig. proceeding) (mem. op.) (05-05-16).

Facts: Mother had the exclusive right to designate the Child's primary residence within a geographical restriction. Mother sought to move outside that restriction in order to find a better job. On one occasion, when the parents were exchanging the Child for Father's visitation, the parents argued about Mother's proposed move, and the Child became upset. Father called the police.

Subsequently, without notice, Mother and the Child moved outside the geographically restricted area. Father filed a motion to modify, seeking sole managing conservatorship. Mother testified that the Child was healthy, happy, and well-cared for in her new home. Father argued that the move negatively impacted his visitation with the Child.

The trial court found Mother in contempt and granted Father the exclusive right to designate the Child's primary residence. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A temporary order in a pending SAPCR may only modify a conservator's right to designate the child's primary residence under certain circumstances, including if the child's present circumstances would significantly impair the child's physical health or emotional development. This is a high standard imposed by the Tex. Fam. Code.

Here, there was no evidence of impairing conduct by Mother in the Child's present circumstances. Rather, the evidence focused on Mother's pre-move conduct, which could not be used to infer the Child's present circumstances. Further, even if the prior conduct were to continue, there was no evidence that the conduct would significantly impair the Child's physical health or emotional development.

TRIAL COURT ERRED IN DENYING MOTION TO TRANSFER WHEN "CONTROVERTING AFFIDAVIT" WAS UNTIMELY AND UNVERIFIED AND FAILED TO ADDRESS THE CHILD'S RESIDENCE.

¶16-3-29. *In re Sheard*, No. 01-15-01027-CV, 2016 WL 2586777 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (mem. op.) (05-05-16).

Facts: In a prior order, Mother was appointed possessory conservatory of the Child, and Maternal Aunt and Uncle were appointed joint managing conservators. Mother filed a petition to modify and a motion to transfer the case to the county where Aunt, Uncle, and the Child were living. Mother set her motion for a hearing. Aunt and Uncle filed a petition to terminate Mother's parental rights and sought to have the previously-appointed attorney ad litem appointed again to represent the Child. At the hearing on Mother's motion, Aunt and Uncle stated that the requested transfer was for their convenience, and they did not want the case transferred. They wanted to keep the same attorney ad litem and did not want to require that attorney to travel to a different county. Mother replied that the transfer was mandatory under the Tex. Fam. Code. The trial court denied the motion to transfer. The next day, Aunt and Uncle filed an unverified "Controverting Affidavit" asserting that Mother failed to present evidence justifying a transfer. An order denying the transfer was signed that day. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: When a motion to transfer is filed pursuant to Tex. Fam. Code § 155.204, a transfer is mandatory if no controverting affidavit is filed. Here, the only affidavit filed addressed the issue of convenience of the parties; it did not controvert the Child's residence. Moreover, the affidavit was filed two days after the deadline. Additionally, Mother setting her motion for hearing despite the lack of a controverting affidavit did not "invite the error." Although no hearing was necessary, Mother did not take any position contrary to the relief she was requesting.

SAPCR
CHILD SUPPORT ENFORCEMENT

TIME RESTRICTION ON COURT'S JURISDICTION TO CONFIRM AND ENTER MONEY JUDGMENT FOR CHILD SUPPORT ARREARAGES WAS NOT A STATUTE OF LIMITATION, AND LEGISLATURE'S REMOVAL OF THE TIME RESTRICTION DID NOT IMPOSE A NEW SUBSTANTIVE OBLIGATION ON FATHER.

¶16-3-30. ***Dise v. Dise*, ___ S.W.3d ___, No. 01-15-00407-CV, 2016 WL 2342346 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.)** (05-03-16).

Facts: Mother and Father divorced in 1986, and Father was ordered to pay child support. Father failed to pay, and in 2003, the Child turned 18. In 2010, the OAG obtained an order confirming child support arrearages.

Before he received notice of the arrearages order, Father filed for bankruptcy. The OAG filed a complaint in the bankruptcy court seeking to have the child support debt exempt from discharge. Father argued that under a prior version of Tex. Fam. Code § 157.005, a judgment for arrearages could only be entered if the motion to confirm the arrearages was filed within 4 years of the Child's 18th birthday. Father contended that the 4-year restriction was a statute of

limitations on the enforcement of his debt and that applying the Legislature's subsequent removal of the restriction to this case constituted an unconstitutional ex post facto law.

Holding: Affirmed

Opinion: The statute's prior restriction was on the court's jurisdiction to order withholding was not a statute of limitations on the obligation itself. Allowing a court to confirm an arrearage and enter a writ of withholding is merely a procedural vehicle to secure fulfilment of the existing obligation.

Additionally, the court noted that the statute was amended to remove the restriction before the Child turned 18.

FINAL DECREE'S PROVISION ABATING CHILD SUPPORT OBLIGATION DURING INCARCERATION WAS TRIGGERED DESPITE FATHER'S "EMPLOYMENT" IN PRISON.

¶16-3-31. *In re P.G.G.*, No. 05-14-01217-CV, 2016 WL 2621064 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (05-06-16).

Facts: The parties' final decree provided:

> [s]hould [Husband] be incarcerated in a full detention facility that prevents him from any employment for a period in excess of thirty days, his child support and medical support shall be abated from the date of his incarceration until the first day of the month next after his release.

Father was incarcerated in federal prison six months after the decree was signed, released to a halfway house three years later, and released on probation six months after that. While incarcerated, he was required to work at various prison jobs and was minimally compensated. While living in the halfway house, he temporarily worked for a tax-preparation company. He paid no support while incarcerated or while in the halfway house. About six months after being released on probation, during which time he failed to pay his support obligations in full, he filed a motion to reduce his support obligations, which the trial court granted. Subsequently, Mother filed a motion to enforce and confirm arrearages. Mother argued that Father's child support was not abated while incarcerated or in the halfway house because Father was consistently employed. The trial court disagreed and determined that Father's prison employment did not count as employment under the incarceration provision of the decree. The trial court found that Father's child support arrearages were $16,302.09, and the judgment included a provision stating that all relief not expressly granted was denied. Mother appealed, arguing the trial court erred in finding that Father's obligation was abated while he was imprisoned. Mother further argued that the evidence did not support the arrearages finding.

Holding: Reversed and Remanded

Opinion: The incarceration provision of the final decree plainly intended to abate Father's payment obligation while he was incarcerated. The evidence regarding Father's "employment" while incarcerated did not qualify as employment within the plain meaning of the decree.

Wife presented evidence that Father's total arrearages—including child support and medical support—was $16,302.09 and included dates beyond what the judgment for arrearages purported to include. The judgment provided that Father's child support arrearages were $16,302.09 and made no explicit finding regarding medical support arrearages, so that request-

ed relief was impliedly denied. There was no evidence to support the trial court's finding that the child support arrearage alone was $16,302.09 and medical support was $0.

★★★TEXAS SUPREME COURT ★★★

COMPTROLLER'S DUTY TO DETERMINE COMPENSATION FOR UNPAID CHILD SUPPORT DURING WRONGFUL IMPRISONMENT PURSUANT TO TIM COLE ACT IS A MINISTERIAL DUTY WITH NO ROOM FOR DISCRETION.

¶16-3-32. ***In re Phillips*****,** ___ S.W.3d ___, No. 14-0797, 2016 WL 2764576 (Tex. 2016) (orig. proceeding) (05-13-16).

Facts: In 1978, an Arkansas court ordered Father to pay about $100 a month as child support. Over the next four years, he made two payments. In 1982, Father was wrongfully convicted in Texas for burglary and aggravated sexual abuse and sentenced to 30 years in prison. In 2001, the Texas Legislature enacted a provision that permitted a convicted person to move for DNA testing, which Father did. Six years later, Father's DNA was tested, and he was exonerated. Father was given a lump sum of $2 million under the Tim Cole Act (the "Act"). Mother and Father each requested from the State of Texas compensation for Father's unpaid child support, but the Texas Comptroller stated that compensation could only be made to the state disbursement unit in Arkansas. Arkansas authorities refused payment because there was no open enforcement proceeding. Mother filed an enforcement action in Texas and obtained a no-answer default judgment for $304,861.74. Father asked the Comptroller to pay the child support. The Comptroller calculated that the compensation due under the act was $25,125.69 ($246,123.38 less than the Arkansas judgment). Father petitioned the Texas Supreme Court to direct the Comptroller to pay the remainder of the judgment.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Under the Act, the Comptroller's authority is to determine the appropriate compensation for child support arrearages owed to the obligor by the State of Texas, not the arrearages owed to the obligee by the obligor. The Comptroller was not required to adopt the Arkansas judgment. However, there is no room for any discretion, the Comptroller's duty is ministerial.

Based on Arkansas case-law precedent, the Comptroller misapplied the Arkansas statute regarding the application of post-judgment interest to child support arrearages. The Comptroller should have applied 10% interest on all of Father's arrearages, not 6%.

Further, under UIFSA, when an out-of-state child-support order is registered in Texas, the longer of the two states' statute of limitations applies. In Texas, there is no statute of limitations on the accrual of interest. Thus, the Comptroller erred in terminating interest accrual in 1999.

Finally, the language of the Act applies to "interest on child support arrearages that accrued during the time served in prison." "*That accrued*" modifies "*interest*." Thus, the Comptroller erred in refusing compensation for interest that accrued during Father's incarceration on his pre-incarceration arrearages. However, the Comptroller did not err in excluding interest that accrued post-incarceration.

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SAPCR
TERMINATION OF PARENTAL RIGHTS

WITHOUT ANY EVIDENCE FATHER WAS UNABLE TO PROVIDE SAFE AND STABLE ENVIRONMENT, TDFPS FAILED TO ESTABLISH TERMINATION IN CHILD'S BEST INTEREST.

¶16-3-33. ***In re J.K.V.***, ___ S.W.3d ___, No. 06-15-00098-CV, 2016 WL 975205 (Tex. App.—Texarkana 2016, no pet. h.) (03-15-16).

Facts: Mother and Father never married. Mother had one Child with Father and two children from a previous relationship. Father attempted to stop Mother from using drugs—sometimes with physical force. Because Father would not allow Mother to continue her drug use, she left Father. After Father returned to Mexico, Mother told him that he had a Child with her. However, at other times, Mother also said that the Child was not his. The two older children were removed from Mother's care and were placed with their father. Mother's parental rights to all three children were terminated. TDFPS also sought to terminate Father's parental rights to his Child. The trial court terminated Father's rights on the grounds that he knowingly placed the Child with a person who engaged in conduct that endangered the physical or emotional well-being of the Child and that he constructively abandoned the Child. Further, the trial court found termination was in the Child's best interest. On appeal, Father challenged only the best interest finding.

Holding: Reversed and Rendered

Opinion: The record established that

- Father was served with the petition to terminate his rights less than a month before the termination hearing;
- TDFPS offered no services to Father; and
- there was no evidence that Father was unable to provide the Child with a safe and stable environment.

Additionally, Father tried to reform Mother's drug habits and care for her, but Mother left Father because he insisted that she remain drug free. Father did not learn of Mother's whereabouts until the Child's birth—after Father returned to Mexico. Further, nothing in the record suggested that Father intended to continue a relationship with Mother.

MOTHER'S AGREEMENT TO SIGN RELINQUISHMENT OF PARENTAL RIGHTS AS PART OF PLEA DEAL NOT EVIDENCE OF COERCION OR DURESS.

¶16-3-34. ***In re J.H.***, ___ S.W.3d ___, No. 05-15-01338-CV, 2016 WL 1042980 (Tex. App.—Dallas 2016, no pet. h.) (03-16-16).

Facts: After TDFPS filed a petition to terminate Mother's parental rights, she was indicted for child endangerment. Mother admitted to "coming down" from methamphetamine use when the Children were injured (burned by grease in the kitchen). During mediation, Mother signed an irrevocable affidavit of voluntary relinquishment of her parental rights. Mother testified that she

"pled out" her criminal case earlier that day and that part of the agreement was to relinquish her parental rights. Two weeks later, Mother filed a motion for new trial, claiming that the affidavit was signed involuntarily. Mother also challenged the trial court's finding that termination was in the Children's best interest.

Holding: Affirmed

Opinion: There was no evidence that Mother was misled about the effect of her relinquishment affidavit. Mother's attorney testified that the meaning of relinquishment was explained to Mother three or four times. Mother read the affidavit and asked the attorney questions about it.

Further, at the hearing on Mother's motion for new trial, the trial judge stated that Mother's testimony that she felt pressured to sign the affidavit was not credible. Pressure or emotional upset by itself does not render an affidavit involuntary. Moreover, communications from Mother while in jail indicated that she was fully aware of her situation and, thus, had sufficient time to consider and weigh her options before signing the affidavit.

A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit or relinquishment of parental rights is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit. Thus, Mother was barred from challenging the sufficiency of the evidence to support the trial court's best interest finding.

EVIDENCE SUPPORTED TERMINATION OF FATHER'S PARENTAL RIGHTS BECAUSE HE FAILED TO COMPLY WITH TDFPS'S SERVICE PLAN. EVIDENCE SUPPORTED TERMINATION OF MOTHER'S PARENTAL RIGHTS BECAUSE OF DRUG USE, INCARCERATION, POOR PARENTING SKILLS, AND FAILURE TO COMPLETE SERVICE PLAN.

¶16-3-35. *In re K.R.*, ___ **S.W.3d** ___**,** No. 06-15-00100-CV, 2016 WL 1467560 (Tex. App.—Texarkana, no pet. h.) (04-14-16).

Facts: TDFPS filed a petition to terminate Mother's and Father's parental rights to their children, seven-year-old K., and eighteen-month-old twins, A and O. Trial court terminated Mother's and Father's parental rights after finding that (1) they engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their physical or emotional well-being, (2) they failed to comply with the provisions of a court order that established the actions necessary for them to obtain the return of the children after they were left in conservatorship of TDFPS for not less than nine months as a result of their removal for abuse or neglect, and (3) termination of their parental rights was in the children's best interests.

Holding: Affirmed.

Opinion: Evidence sufficient to terminate Father's parental rights. The evidence at trial established that Father was under court order to comply with all requirements of TDFPS's family service plan. Under that plan, Father was required to maintain contact with the caseworker on a monthly basis, maintain stable housing, complete a twenty-eight week anger management course, and submit to random drug tests. Father failed to maintain contact with TDFPS and failed to demonstrate that he was maintaining stable housing. Father admitted that he failed to complete TDFPS's anger management course. TDFPS proved that Father did not submit to random drug tests, and Father admitted that he tested positive for methamphetamine in the month of the termination trial.

Evidence sufficient to terminate Mother's parental rights. Twins to young to verbalize their desires. However, Mother incarcerated shortly after the twins were born, and children had not

seen Mother for months. Twins were bonded to their foster parents and referred to them as "Mom" and "Dad." From this evidence, the trial court could infer that the twins would prefer to remain in the foster parents' stable, loving environment. Evidence also showed that Mother could not meet the emotional and physical needs of the children and that she posed a danger to the children. Mother had poor parenting skills and had a history of methamphetamine abuse. Her drug use led to the removal of her older children and caused K. to test positive for methamphetamine. Mother admitted that she used drugs in the home while the children were present. She also had a history of incarceration and demonstrated an inability to remain out of jail due to her drug use and poor choices. As a result of Mother's parenting, A. and O. were behind developmentally and K. required special counseling as a result of his emotional issues. Also, Mother appeared to support herself and the children by committing acts of theft. Further, Mother failed to complete her family service plan.

BILL OF EXCEPTION DID NOT EXCUSE REQUIREMENT FOR MOTHER TO TIMELY RAISE ISSUES BEFORE THE TRIAL COURT AS PREREQUISITE TO PRESENTING COMPLAINT FOR APPELLATE REVIEW.

¶16-3-36. ***In re K.O.,*** ___ S.W.3d ___, No. 06-15-00100-CV, 2016 WL 1467560 (Tex. App.—Texarkana, no pet. h.) (04-24-16).

Facts: Mother's and Father's parental rights were terminated to their 3 children. During pendency of case, Mother incarcerated in Gregg County Jail. She was transferred to Galveston County Jail on eve of trial, in order to give birth to another child. As a result, notice of the date of trial reached Mother later than her counsel anticipated and resulted in her absence at trial. Without a motion for a bench warrant, Mother's counsel announced ready for trial.

Following trial court's termination of Mother's parental rights, Mother's counsel filed a motion for new trial arguing that the evidence was legally and factually insufficient to support the court's ruling. In a single sentence, the motion also stated, "Furthermore, because of Movant's health conditions at the time of trial, she was unable to attend the final hearing to present testimony on her behalf." Yet, the motion did not complain that any error resulted from Mother's absence. The trial court held a brief hearing on the motion for new trial, which comprised less than eight pages of transcript. At that hearing, counsel stated, "I will rest on the contents of my motion for new trial and the text there." After explaining the difficulty that he had in communicating with Mother because she was in a different facility, counsel stated, "But we had already received an extension in this case, we were up against the drop dead date for going to trial. With that, I'll rest." Counsel did not argue that trying the case in Mother's absence was error. Further, he did not attempt to ask the court to consider any additional evidence that Mother might have provided. The trial court denied the motion for new trial on December 4, 2015, and Mother appealed.

Thereafter, Mother filed a bill of exception. Her appellate complaints that the trial court violated her due process rights by trying the case and hearing the motion for new trial in her absence were first raised in a memorandum of law in support of the bill of exception filed on January 5, 2016. The bill of exception included an affidavit signed by Mother explaining the circumstances of her transfer to a different facility, which left her only a few days to communicate with counsel. Her affidavit stated, "I did not know at the time that there was also available the option of the court appearance by telephone . . . . I would have liked to appear telephonically if the bench warrant was not possible. However, a telephonic appearance was not offered to me; so I was not able to appear using that telephonic means." Mother swore that she would have testified about the services that she completed. With respect to the best-interest finding, Mother stated, "I would have also testified that I love my children and believed that it was in their best interests to be re-united with me, and that it would not be in their best interests for termination of

the parental bond between us."

The trial court held a hearing on the bill of exception. Because the memorandum supporting the bill and Mother's affidavit were all created after the motion for new trial was denied, the Department argued that the bill of exception was being used to create new evidence. Following this argument, the court noted that the issues raised in the bill of exception were novel issues, not previously brought to the trial court's attention. The court also reminded counsel that it never received a request for a bench warrant and was never asked to secure Mother's presence by telephone. The trial court added that "[t]here was no evidence presented at all at the motion for new trial. There [were] no affidavits presented. . . . There was no evidence whatsoever presented to this Court that his client was -- had any type of health issue that prevented her from being here, that he had ever asked the Court to have her here, or anything of the like."

Nevertheless, the trial court found and approved a bill of exception that stated (1) that Mother was incarcerated at the time of trial in Galveston County, (2) that Mother's counsel was unaware that she was giving birth to a child in a facility different than the one to which he had sent correspondence, (3) that Mother did not receive counsel's correspondence until a week before trial, (4) and that Mother's reply did not reach him until a few days before trial, "perhaps upward of a week before trial, thereby lending him little time to communicate with her." The court also took judicial notice of the availability of telephonic hearing.

Holding: Affirmed

Opinion: Mother failed to preserve her complaints for appeal. Mother, who was incarcerated at the time of trial, argued the trial court erred when it held, in her absence, the final hearing and hearing on a motion for new trial.

The rules governing error preservation must be followed in cases involving termination of parental rights, as in other cases in which a complaint is based on constitutional error. Mother relied on the bill of exception to preserve her first two complaints on appeal. The purpose of a bill of exceptions is to allow a party to make a record for appellate review of matters that do not otherwise appear in the record, such as evidence that was excluded. The bill of exception does not excuse the requirement for an appellant to timely raise issues before the trial court as a prerequisite to presenting a complaint for appellate review.

UNDER *ELDRIDGE,* FATHER DENIED DUE PROCESS WHEN HE WAS NOT ALLOWED TO PARTICIPATE AT TRIAL.

¶16-3-37. ***In re D.W.*,** ___ S.W.3d ___, No. 01-15-01045-CV, 2016 WL 2930516 (Tex. App.—Houston [1st Dist.], no pet. h.) (05-17-16).

Facts: Mother's and Father's parental rights were terminated to their child. The trial court appointed separate counsel to represent Mother and Father. Substitute counsel appeared, without Father, at the pretrial hearing on behalf of Father's appointed counsel, but substitute counsel said little. The trial court asked if Father had previously appeared, and the Department's counsel confirmed that he had. Trial began on November 30, 2015. That morning, Father's counsel filed a verified motion for continuance with the trial court. In the motion, Father's counsel averred: This attorney has been unable to contact her client and believed he was in jail.

Later in the pre-trial hearing, the trial court indicated that the motion for continuance was denied. Without Father being present, trial began that afternoon, and the jury was selected. The second day of trial the Department had presented several witnesses. At the end of the third day of trial, the Department requested to call Father as a witness. Father's attorney objected on the basis that Father had not participated in the first two days of trial. The trial court ruled that it

would permit the Department to call Father as a witness. Father's attorney continued her objection. The next morning, the fourth day of trial, the Department abandoned its request to call Father to testify. Trial concluded at the end of the fourth day. On fifth day of trial, Friday, December 4, 2015, the jury returned its verdict, finding that the parent-child relationship between Mother and D.W. and between Father and D.W. should be terminated.

The trial court stated on the record that it would render judgment based on the jury's verdict. The court also stated that the attorneys representing the parents would be released after the court signed the termination orders. Father's attorney indicated that she would be filing a notice of appeal and requested the trial court to wait on releasing counsel. The trial court stated that it would sign the final termination orders on Monday, December 7, 2015, to give the attorneys adequate time to file notices of appeal before releasing them. Mother's counsel filed a notice of appeal on December 7, 2015, the same day the judgment was signed. Father's counsel filed a notice of appeal on December 8, 2015. She also filed a motion to withdraw as Father's counsel. The trial court signed an order permitting Father's attorney to withdraw that same day.

Appellate counsel was not appointed to represent Father until December 30, 2015. On January 12, 2016, appellate counsel filed a motion for extension of time to file Father's brief in this Court. She stated that she had not received notice of her appointment to represent Father until January 6, 2016.

Holding: Reversed and Remanded in Part and Affirmed in Part

Opinion: Father asserts that he was denied due process because he was not permitted to participate at trial in a meaningful manner as a result of the trial court's denial of his attorney's request for a continuance and the trial court's refusal to consider his participation at trial by teleconference. To assess what process Father was due, we weigh the three factors developed by the United States Supreme Court in *Eldridge*: (1) the private interest affected by the proceeding or official action; (2) the countervailing governmental interest supporting use of the challenged proceeding; and (3) the risk of an erroneous deprivation of the private interest due to the procedures used. Courts must weigh these factors to determine whether the fundamental requirements of due process have been met by affording an opportunity to be heard at a meaningful time and in a meaningful manner under the circumstances of the case.

1. Private Interests Affected by the Proceeding

The considerations involved in this case—namely, Father's fundamental liberty interest in maintaining custody and control of D.W., the risk of permanent loss of the parent-child relationship between them, and Father's and D.W.'s interest in a just and accurate decision—weigh heavily in favor of providing Father with an opportunity to communicate with his attorney and participate in the termination proceedings, even if that required a continuance of trial and participation by teleconference.

2. The State's Interest in the Proceeding

Permitting Father to participate in trial by telephone, as requested by his attorney, would not have placed the case in jeopardy of dismissal pursuant to Family Code § 263.401(b). While Father did not have an absolute right to appear personally in court in a civil case, an inmate may not be denied reasonable access to the courts. Even though granting a continuance or permitting Father to participate by telephone may have increased the time that it took to resolve the case, "the State's interests in economy and efficiency pale in comparison to the private interests at stake, and to the risk that a parent may be erroneously deprived of his or her parental rights and the child may be erroneously deprived of the parent's companionship."

3. Risk of Erroneous Deprivation of Parent-Child Relationship

While Father was represented at trial, his counsel made clear that she had been appointed to replace Father's first-appointed counsel. She informed the trial court that she had never spoken to Father. She was unaware of Father's position on the claims made by the Department or what evidence he had to offer relevant to the parent-child relationship. Appointed counsel told the trial court that she did not have a witness list because she had not been able to communicate with Father.

At trial, the Department presented nine witnesses. These witnesses included Mother and the Department caseworker, who each provided damaging testimony against Father. The Supreme Court of Texas has stated that "[t]he right to cross examination is a vital element in a fair adjudication of disputed facts[,]" and it includes "the right to cross examine adverse witnesses and to examine and rebut all evidence[.]" Because he did not participate during trial, Father's counsel was unable to communicate with him regarding strategy for cross-examining the Department's witness or regarding the presentation of evidence to rebut the witnesses' testimony.

Additionally, despite his representation by counsel at trial, Father was effectively without appellate counsel during the 30-day period—following the signing of the termination orders—in which he was permitted to file a motion for new trial. The trial court signed the judgment terminating Father's parental rights on December 7, 2015. The next day, his counsel filed his notice of appeal, and the trial court signed an order permitting Father's counsel to withdraw from representing him. Appellate counsel was not appointed by the trial court until December 30, 2015. In a motion for extension of time to file Father's appellate brief, Appellate counsel informed this Court that she did not receive notice, informing her that she had been appointed to represent Father, until January 6, 2016, one day before the 30-deadline to file a motion for new trial. Thus, Father was afforded little opportunity to file a motion for new trial in which he could have explained what evidence he would have offered to defend against the Department's evidence if he had been permitted to participate in trial by teleconference.

Interestingly, the record shows that, during the first year the case was pending, Father appeared at numerous hearings and court-ordered mediations with his first-appointed counsel. The last hearing that Father attended with his first-appointed counsel was a permanency hearing on April 2, 2015. He also attended a court-ordered pre-trial mediation on April 10, 2015. Trial was originally set for May 18, 2015, but the trial court granted Mother's request for a six-month continuance, re-setting trial to November 30, 2015. The trial court coordinator made a notation in the case summary record on June 26, 2015, indicating that Father's first-appointed counsel, who had been appointed in June 2014, was "removed from the case" and that new counsel was appointed to represent Father. After that time, Father made no more appearances in the trial with his newly-appointed counsel. There is nothing in the record to show that [Father] was notified of this change in counsel.

To the extent that Father could have addressed whether he had been informed of the change in counsel in a motion for new trial, he was effectively denied that right because he was without appellate counsel for 29 days of the 30-day period to file a motion for new trial. An attorney may withdraw from representation of a client only if the attorney satisfies the requirements of Rule 10 of the Rules of Civil Procedure. If no counsel is substituting for the withdrawing attorney, counsel's motion to withdraw must state "that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and deadlines. Father's trial counsel's motion to withdraw, filed the day after the judgment was signed, satisfied none of these requirements.

After considering the circumstances of this case, and the procedure that was used, the Court concluded that, under the third *Eldridge* factor, there was a significant risk of erroneous deprivation of the parent-child relationship between Father and D.W. Under the unique circumstances of this case, the trial court should have considered Father's participation by telephone

and given his counsel time to facilitate his participation. Balancing the three *Eldridge* factors, we hold that Father was denied procedural due process. In short, he was denied a meaningful opportunity to participate in the proceedings.

Here, when it effectively denied Father any method of meaningful participation at trial, the trial court foreclosed the presentation of evidence by Father to counter that offered by the Department. Moreover, Father was unable to show what that evidence may have been because he was effectively denied counsel during the time period in which he could file a motion for new trial. Thus, the denial of procedural due process in this case "probably prevented [Father] from properly presenting the case" on appeal.

EVIDENCE OF PARENT'S COURSE OF CONDUCT, EVEN WHEN PARENT IS NOT IN POSSESSION OF THEIR CHILD, CAN SUPPORT A FINDING OF ENDANGERMENT

¶16-3-38. ***In re K.P.***, ___ S.W.3d ___, No. 01-15-01095-CV, 2016 WL 3023987 (Tex. App.—Houston [1st Dist.], no pet. h.) (05-26-16).

Facts: Mother's parental rights to her 12-year-old son were terminated on the grounds of endangerment.

Holding: Affirmed

Opinion: Mother concedes that "drug abuse and its effect on the ability to parent can be part of an endangering course of conduct." She contends, however, that "in this case, the weight to be given to the positive drug test results and, therefore, how mother's drug use many have endangered KP remains mainly speculative. She points out that "DFPS failed to call any expert to interpret the results" of her positive drug tests, and that the caseworker agreed she was not competent to interpret them. Without such evidence, Mother argues, the fact finder could not determine the amount of frequency of usage; whether the positive reading could have been caused by mere exposure or for some other reason.

While it is true that it has been a long time since KP has resided with Mother, the cases interpreting section 161.001(1)(b)(E) demonstrate that evidence of a parent's course of conduct, even when the parent is not in possession of their child, can support a finding of endangerment. There is evidence here that Mother has had trouble maintaining a stable living environment for several years. In fact, a case worker testified that Mother had never been able to show her an actual residence. Mother testified that, if she was reunited with KP, they would be living with TR. There was evidence of a course of conduct of positive drug tests by both Mother and TR between the time of the 2012 order and the 2015 termination hearing.

Endangering conduct may include the parent's actions before the child's birth, while the parent had custody of older children, including evidence of drug usage. Under this reasoning, Mother's repeated use of drugs while she retains custody of KY is evidence of endangerment as it relates to KP, even though KP was in the Department's custody. Although Mother claimed that the results of any positive drug test relating to her or her fiancé TR were false, the trial could have believed that evidence was not credible.

Mother testified that she has had a job for several months, but did not testify to having a residence. The record reflects that Mother has a diagnosis of bipolar disorder and depression, but there is no indication that she is being treated, and she refused to continue with the therapist that the Department arranged for her to see.

Given the evidence of (1) Mother's course of conduct of drug use while still maintaining custody of KY, (2) Mother's long-term lack of residence or stable living arrangements, (3) Mother's sporadic and inconsistent visitation of KP, (4) Mother's untreated mental illnesses, and (3)

Mother's testimony that she and KP would live with TR, who also failed drug tests shortly before trial, the trial court's endangerment finding under section 161.001(1)(b)(E) is supported by legally and factually sufficiency evidence.

Under *Holley* factors, termination also in best interest of the Child.

SAPCR
ADOPTION

AUNT'S PETITION FOR ADOPTION UNTIMELY BECAUSE NOT WITHIN 90 DAYS OF TERMINATION OF PARENT-CHILD RELATIONSHIP.

¶16-3-39. *In re E.G.*, No. 14-14-00967-CV, 2016 WL 1128137 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (mem. op.) (03-22-16).

Facts: The trial court terminated Father's parental rights and appointed TDFPS as the Child's managing conservator. Subsequently, Aunt (Father's sister) filed a petition for adoption, asserting that no court had continuing exclusive jurisdiction. Aunt's suit was randomly assigned to a district court and then transferred to the court that ordered the termination. TDFPS filed a motion to dismiss Aunt's petition, and the amicus filed special exceptions asserting that Aunt lacked standing under the Texas Family Code. The trial court granted TDFPS's motion to dismiss and the amicus's motion to strike and dismissed Aunt's petition. Aunt appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 102.006 limits standing by providing that a biological aunt may file a suit requesting managing conservatorship not later than the 90th day after the date of termination of the parent-child relationship. The date of termination occurred when the judge orally rendered his judgment. The signing and entry of the judgment were ministerial acts. Here, Aunt filed her petition for adoption more than 90 days from the date of oral rendition.

ADULTS CANNOT BE ADOPTED BY ESTOPPEL.

¶16-3-40. ***Dampier v. Williams*, ___ S.W.3d ___, No. 01-15-00670-CV, 2016 WL 1658772** (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (04-26-16).

Facts: Applicant met Decedent when Applicant was 19 and Decedent was about 50 years old. Applicant testified that Decedent expressed an intent to adopt him. After living with Decedent for a few years, Applicant moved out and lived on his own. About 20 years after that, Decedent moved in with Applicant, and Applicant cared for Decedent until Decedent died. Applicant testified that Decedent always intended to adopt Applicant, always referred to Applicant as his son, and appointed Applicant as his agent in his power of attorney and medical power of attorney. However, Decedent never filed a petition to adopt Applicant and died intestate.

After Decedent's death, Applicant filed an application for determination of heirship, asserting he was Decedent's adopted son by estoppel. Decedent's niece and grand-niece filed a traditional motion for summary judgment arguing that Applicant failed to establish that he was or could be Decedent's son. The trial court granted the motion for summary judgment. Applicant appealed.

Holding: Affirmed

Opinion: No Texas law has previously applied adoption by estoppel to an adult. Unlike a child, an adult is capable of caring for himself and contracting for himself at the time of the adoption. Allowing a claim of adult adoption by estoppel would open the door to many fraudulent claims. Additionally, had Decedent wished for Applicant to inherit, Decedent could have executed a will.

MISCELLANOUS

WIFE ESTABLISHED PROBABLE RIGHT TO RECOVERY UNDER ICA AND HACA BECAUSE, WITHOUT WIFE'S KNOWLEDGE OR CONSENT, HUSBAND RECORDED CONVERSATIONS BETWEEN HIMSELF AND WIFE AND PHOTOGRAPHED TEXT MESSAGES BETWEEN WIFE AND ANOTHER PERSON.

¶16-3-41. *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 WL 836775 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-03-16).

Facts: Husband and Wife began dating when they were teenagers. Before they married, Wife opened an art gallery. Husband occasionally worked for the art gallery.

Husband suspected Wife of cheating on him with an artist and accessed her cell phone while she was sleeping to take photographs of text messages between her and the artist. Additionally, Husband put a digital recording device in Wife's car and also started recording conversations between the two of them. Husband kept a log of the recordings and of Wife's daily activities. When Wife discovered the log, it was 150 pages. Wife filed for divorce.

During the divorce proceedings, Wife produced a general ledger from the gallery for use during mediation and to allow Husband to value the business. A confidentiality order was in place during the proceedings but was later vacated.

After the divorce was final, Husband began "wag[ing] a public campaign to disparage" Wife and the art gallery and to interfere with the gallery's business. Wife and the art gallery filed claims against Husband based on violations of the Texas Uniform Trade Secrets Act, the Interception of Communications Act ("ICA"), the Texas Theft Liability Act, and the Harmful Access by Computer Act ("HACA"); tortious interference, defamation, invasion of privacy, and intentional infliction of emotional distress. The trial court granted Wife and the gallery a temporary injunction. Husband appealed the injunction, arguing it included an unconstitutional prior restraint against disparaging the art gallery and that Wife and the gallery failed to show they were entitled to a temporary injunction, including establishing a probable right to recovery under the ICA and the HACA.

Holding: Affirmed as Modified

Opinion: The remedy for defamation is an award of damages, not the prevention of the right to speak freely. Injunctive relief in defamation or business disparagement actions may be permissible only when essential to the avoidance of an impending danger, and when it is the least restrictive means. Here, there was no evidence that Husband's speech presented any impending danger.

To obtain temporary injunctive relief, Wife and the gallery were required to show a probable right to recover; they were not required to establish that they would prevail at final trial.

Husband argued that he did not violate the ICA because he—a party to the communication—consented to the recordings between himself and Wife. A common law right to privacy exists under Texas law, and no authority suggests that this right is limited to unmarried individuals. A spouse's actions, whether personally or through an agent, in making a surreptitious recording of the other spouse, who believes she is in a state of complete privacy, could be an invasion of privacy. Further, nothing in the ICA precludes a common law claim for invasion of privacy for communications not covered by the ICA.

Husband asserted that taking photographs of Wife's phone did not qualify as "access" under the HACA, and that even if it did, he had effective consent because the phone was community property. "Access" includes making use of any resource of a computer. Neither party disputed that the phone qualified as a "computer." Husband "accessed" the data on the phone by retrieving the text messages for the purpose of photographing them. Further, the HACA does not incorporate community property for the purpose of establishing ownership. Rather, it defines an "owner" as a person with a greater right of possession and the right to restrict access to the property. Wife had a superior right of possession to the phone as it was the "only way to reach" her, she used it on a daily basis, and she had the right to place a password on the phone.

APPELLANT FAILED TO PUT ON ANY EVIDENCE TO SUPPORT MOTION TO SUSPEND ENFORCEMENT OF JUDGMENT.

¶16-3-42. *In re Guardianship of Laroe*, No. 05-15-01006-CV, 2016 WL 861687 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-07-16).

Facts: After the trial court appointed Appellee as the guardian of the Ward, Appellant filed a motion with the trial court to suspend enforcement of the judgment. The trial court denied the motion. Appellant then filed a motion with the appellate court seeking an independent review of the motion to suspend enforcement of the judgment or, alternatively, review of the trial court's order denying the motion.

Holding: Motion Denied; Judgment Affirmed

Opinion: Rather than put on any evidence at the hearing on her motion to suspend the judgment, Appellant relied solely on the trial testimony that led to the trial court's judgment. Thus, the trial court did not abuse its discretion in denying the motion to suspend enforcement of the judgment.

FATHER'S ATTORNEY NOT DISQUALIFIED BASED ON LAWYER-WITNESS RULE BECAUSE MOTHER DID NOT ESTABLISH ATTORNEY'S TESTIMONY WAS NECESSARY TO ESTABLISH AN ESSENTIAL FACT.

¶16-3-43. *In re Groves*, No. 01-15-00537-CV, 2016 WL 921645 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (mem. op.) (03-10-16).

Facts: During a SAPCR, Father alleged that the Child made an outcry against her step-father. Before filing Father's affidavit, Father's Attorney spoke with the Child to make sure that the Child understood the difference between the truth and a lie. Father's Attorney later stated that it slipped his mind that an amicus attorney was to be appointed for the Child. Mother filed a motion to disqualify Father's Attorney from representing Father because Father's Attorney had made himself an essential fact witness and would be prejudiced by his dual role as an advocate

and a witness. The trial court granted Mother's request to disqualified Father's Attorney from the case and ordered him to take the ad litem's CLE that is offered for CPS cases and to pay a fine of $2500. Father and Father's Attorney filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The court's power to sanction exists only to the extent necessary to deter, alleviate, and counteract bad-faith abuse of the judicial process, such as significant interference with core judicial functions. The trial court entered no findings to support its award of sanctions. Additionally, no evidence was introduced at the hearing. Motions and arguments of counsel do not constitute evidence for purposes of a sanctions proceeding.

Further, disqualification based on the lawyer-witness rule is only appropriate when there is a genuine need for the attorney's testimony to establish an essential fact. Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice.

GRANDPARENTS LIABLE FOR AIDING MOTHER IN PREVENTING FATHER'S VISITATION AND FOR MAKING FALSE AND INCOMPLETE STATEMENTS TO STATE OFFICIALS DURING INVESTIGATIONS INTO MOTHER'S FALSE ALLEGATIONS OF ABUSE AGAINST FATHER.

¶16-3-44. ***Bos v. Smith*****,** ___ S.W.3d ___, No. 13-14-00456-CV, 2016 WL 1317691 (Tex. App.—Corpus Christi 2016, pet. filed on 05/11/16) (03-10-16).

Facts: Father had twin daughters from a prior relationship, and Mother had a daughter from a prior relationship. Together, Mother and Father had two other Children. During their divorce proceeding, Mother falsely accused Father on multiple occasions of sexually abusing his children. Mother's parents (the "Grandparents") supported and promoted Mother's accusations. In a separate proceeding, Father sued the Grandparents for negligence, defamation, interference with custody rights, and conspiracy. The Grandparents moved to designate Mother as a responsible third party and argued that she was negligent by fabricating the allegations of sexual abuse, by coaching the Children to repeat the allegations, and by deceiving the Grandparents and the State authorities regarding the allegations.

A court-appointed psychologist testified that Mother suffered from anxiety, depression, bipolar disorder, borderline personality disorder, and narcissism and that the disorders would have manifested around age 18 or 19, which should have been apparent to the Grandparents. When Mother was a teenager she was admitted to a psychiatric hospital for inpatient treatment, though the Grandfather claimed not to recall any particular diagnosis. Mother threatened suicide on multiple occasions and at one point threatened to kill herself and the Children. Before her relationship with Father, Mother had been sued by an ex-boyfriend for bringing false criminal charges against him, and the Grandparents paid the settlement on Mother's behalf.

Mother's false allegations led to multiple, invasive interviews of Father and of all his children. Father testified that the feelings of betrayal and fear were gut wrenching and horrifying. He further testified that during the ordeal he was unable to function, he had extreme difficulty sleeping, and his law practice was almost destroyed. There were days that Father was physically ill or in a daze. After the many investigations, TDFPS ultimately ruled out all of the charges.

In the negligence and defamation suit, the trial court found the Grandparents liable for making defamatory statements to TDFPS and conspiring to interfere with Father's possession. The court awarded Father $4,500,000 in damages for mental anguish, $5,736,000 in damages for injury to reputation, and $236,000 in economic damages for attorney's fees. Mother agreed to

terminate her parental rights to avoid jail time. The Grandparents raised 21 issues in their appeal.

Holding: Affirmed in part; Reversed and rendered in part; Reversed and remanded in part

Opinion: Mother nearly always made long phone calls to the Grandparents before and after denying Father visitation. On one occasion, Grandmother was aware of Father's right to possession but took the Child to a birthday party to prevent Father's visitation.

During the CPS investigations, the Grandparents failed to respond fully to CPS and the police regarding Mother's history of fabricating allegations. They failed to inform CPS or the police of Mother's psychological problems or of Mother's prior charges for false criminal accusations.

Further, based on the facts and circumstances of this case, the Grandparents owed a fiduciary duty of care to place the interests of the Children before their own, to protect the Children, and to prevent a dangerous person, Mother, from harming them and others associated with them. The Grandparents had previously filed suit against Mother to obtain custody of her oldest daughter, and they had paid $20,000 on Mother's behalf to settle a lawsuit in which it was alleged that Mother made false criminal allegations against her ex-boyfriend. By turning a blind eye to Mother's shortcomings as a parent, the Grandparents breached their duty to the Children.

Father established that he was entitled to some attorney's fees but failed to segregate recoverable fees from non-recoverable fees. Thus, the appellate court remanded that issue for further proceedings. Because the appellate court remanded the economic damages award, it was required to remand the whole case for a new trial on both liability and damages. However, the court noted that the error regarding economic damages could be cured if Father were to voluntarily remit the award for economic damages within 15 days of the appellate court's judgment.

Supplemental Opinion (03-31-16)**: Judgment, but not opinion, vacated and modified: Affirmed in part; Reversed and rendered in part**. Because Father timely filed his consent to the suggestion of remittitur, the appellate court modified the trial court's judgment to delete Father's economic damages. A new trial was no longer necessary.

APPELLATE COURT REMANDED PROCEEDINGS WHEN NO PARTY ASKED FOR TRIAL COURT'S JUDGMENT TO BE AFFIRMED.

¶16-3-45. *In re J.W.*, No. 13-14-00559-CV, 2016 WL 1316687 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (03-10-16).

Facts: TDFPS initiated a suit seeking protection for the Parents' youngest Child. Initially, TDFPS was named temporary sole managing conservator of the Child, but TDFPS was later dismissed as a party. The trial court set a hearing for which neither the Parents nor their attorney appeared, at the conclusion of which, the trial court appointed the Child's Aunt as the permanent managing conservator. The Parents appealed, arguing that neither they nor their trial counsel received notice of the final hearing and, in the alternative, their trial counsel rendered ineffective assistance of counsel for failing to appear at the final hearing. TDFPS also asked the appellate court to reverse and remand the case because the Parent's trial counsel rendered ineffective assistance of counsel.

Holding: Reversed and Remanded

Opinion: No party asked the appellate court to affirm the trial court's judgment. Because the court of appeals could not grant relief not requested, it reversed and remanded the case for further proceedings.

HUSBAND'S GUARDIAN HAD RIGHT TO SUSPEND ENFORCEMENT OF JUDGMENT FOR DEBT EVEN THOUGH UNDERLYING DEBT WAS FOR TEMPORARY SPOUSAL SUPPORT.

¶16-3-46. ***Mathis v. Benavides*****,** ___ S.W.3d ___, No. 04-15-00555-CV, 2016 WL 1039135 (Tex. App.—San Antonio 2016, no pet. h.) (03-16-16).

Facts: Husband had been declared legally incapacitated, and his Permanent Guardian filed for divorce from Wife. Wife and the Permanent Guardian entered into a Rule 11 agreement providing that the Permanent Guardian would pay Wife temporary spousal maintenance. However, the Permanent Guardian subsequently stopped making payments. Wife filed a cross-claim for breach of the Rule 11 agreement in a separate on-going civil suit. The court granted Wife a partial summary judgment and severed the breach of contract action, making the order a final appealable judgment. The Permanent Guardian appealed that order and pending the appeal, the Permanent Guardian filed a notice of supersedeas deposit in lieu of bond to suspend enforcement of the judgment. Wife filed a motion to strike arguing that the deposit was an improper attempt to supersede the judgment because the judgment was an order fixing temporary spousal support, and such an order may not be superseded. The trial court granted Wife's motion to strike, and the Permanent Guardian filed a motion with the appellate court to review the trial court's determination of whether to permit suspension of enforcement.

Holding: Vacated

Opinion: TRAP 24.1 provides that unless the law or TRAP provides otherwise, a judgment debtor may supersede a judgment by making a deposit with the trial court clerk in lieu of a bond. Under the Texas Family Code, an order for temporary spousal support may not be superseded. Here, although the underlying agreed order was in part for the purpose of spousal maintenance, the judgment for the debt was a final appealable judgment. No exception to TRAP 24.1 applied.

STATUTE REQUIRING COURTS TO APPOINT FIRST-LISTED APPOINTEE IN ROTATION LIKELY CONSTITUTIONAL BECAUSE APPOINTMENT IS AN ADMINISTRATIVE FUNCTION, NOT SUBSTANTIVE, CORE JUDICIAL POWER.

¶16-3-47. Tex. Att'y Gen. Op. No. KP-0071, 2016 WL 1554215 (03-16-16).

Issue: Whether Senate Bill 1876 (the "Bill) from the 84th Legislative Session modifying Tex. Gov't Code §§ 37.003 and 37.004 is unconstitutional.

The Bill requires a court using a rotation system for appointment of attorneys ad litem, guardians ad litem, mediators, and guardians to appoint the person whose name appears first on the applicable list maintained by the court, unless (1) otherwise agreed by the parties and the court; or (2) a person's special expertise, prior involvement, or geographic location is required to handle a complex matter.

Judge Olsen, a Tarrant County probate judge, questioned the constitutionality of the Bill, arguing that the Bill deprives judges of discretion in the appointment process.

Holding: Likely Constitutional

Opinion: Judicial appointments of ad litems and mediators do not constitute an exercise of a substantive, core judicial power but are more properly characterized as administrative functions necessary for the efficient and uniform administration of justice. Thus, it is unlikely that the Bill violates the separation of powers clause of the Texas Constitution.

Additionally, the term "qualified" (e.g., "qualified mediator") has a commonly understood meaning and is not unconstitutionally vague.

MOTHER'S ATTORNEY OBTAINED SUMMARY JUDGMENT AGAINST FATHER IN SEPARATE TRIAL COURT FOR BREACH OF CONTRACT WHEN FATHER FAILED TO PAY ATTORNEY'S FEES AS AGREED.

¶16-3-48. ***Nuszen v. Burton*****,** ___ S.W.3d ___, No. 14-15-00393-CV, 2016 WL 1072489 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (03-17-16).

Facts: In a child-custody proceeding in a Family Court, Father was ordered to pay Mother's Attorney $50,000 in interim attorney's fees. Father filed a petition for writ of mandamus, which was denied. Subsequently, the Attorney and Father orally agreed on the record that Father would pay $30,000 instead, in installments. When Father failed to pay, the Attorney sued Father by filing an original petition in a different District Court. The Attorney filed a motion for summary judgment in the District Court. Father filed an amended motion to dismiss, which was liberally construed as a response to the Attorney's motion for summary judgment. After reviewing the record, the District Court granted the Attorney a summary judgment and denied Father's motion to dismiss. Father appealed that judgment, arguing that because the Family Court declined to award attorney's fees in its final judgment, the District Court was barred from granting summary judgment on the theory of res judicata.

Holding: Affirmed

Opinion: The appellate record did not include a copy of the Family Court's final judgment, and Father did not request the clerk to supplement the appellate record. When the summary judgment record is incomplete, the omitted documents are presumed to establish the correctness of the judgment.

Regardless, even if Father had supplemented the appellate record, his res judicata argument still failed because:

1. the Attorney was not a "party" to the child-custody dispute, and the agreement entered into between the Attorney and Father was not in furtherance of any issue before the family court; and
2. the issue between the Attorney and Father was a breach-of-contract action based on an entirely different subject matter from the child-custody dispute in the family court.

Additionally, in his summary judgment evidence, the Attorney established all the elements of a contract, including consideration: while the Attorney was originally owed $50,000, he agreed to be paid only $30,000.

HUSBAND'S PLEADING AND TESTIMONY SUFFICIENT TO ESTABLISH WIFE WAS A DOMICILIARY OF TEXAS AFTER WIFE FAILED TO FILE AN ANSWER IN DIVORCE PROCEEDING.

¶16-3-49. *Guadalupe v. Guadalupe*, No. 11-14-00061-CV, 2016 WL 1072651 (Tex. App.—Eastland 2016, no pet. h.) (mem. op.) (03-17-16).

Facts: Wife was in the U.S. Air Force when Husband filed a petition for divorce. He alleged that Wife had been a domiciliary of Texas for six months. Wife was served at Dyess Air Force Base in Taylor County. She did not file an answer. Husband filed an amended petition and served Wife with the amended petition in Puerto Rico by certified mail. She did not file an answer to the amended petition. The trial court heard the prove-up of the default divorce and signed a final decree. Less than six months later, Wife filed a restricted appeal.

Holding: Affirmed

Opinion: To be entitled to a restricted appeal, a party must establish error on the face of the record. Here, Wife did not allege that service was improper. She alleged that Husband's petition improperly recited that she was a domiciliary of Texas. In a suit for divorce, when a party fails to answer, the allegations in the petition are deemed admitted if more than a scintilla of evidence sufficiently supports the allegations. Here, during the prove-up hearing, Husband testified that Wife had been a domiciliary of Texas for six months. Additionally, Husband testified that Wife was stationed in Taylor County at the time she was served.

Further, that Wife moved to Puerto Rico after Husband served her with the original petition was of no consequence. Accordingly, Wife was not entitled to a restricted appeal.

HUSBAND NOT ENTITLED TO CONTINUANCE BECAUSE CAUSE HAD BEEN PENDING FOUR YEARS, AND HUSBAND'S NEW COUNSEL AGREED TO REPRESENT HIM AT TRIAL KNOWING SHE HAD ONLY SIX DAYS TO PREPARE.

¶16-3-50. ***In the Matter of the Marriage of Ramsey and Echols***, ___ S.W.3d ___, No. 10-14-00252-CV, 2016 WL 1239072 (Tex. App.—Waco 2016, no pet. h.) (03-24-16).

Facts: Husband and Wife's divorce proceeding lasted almost 4 years. During the course of the proceedings, Husband had five attorneys. An agreed scheduling order included a date for final trial. Soon before trial, the court moved up the date of trial, allowed Husband's fourth attorney to withdraw, and refused to grant Husband a continuance. At the conclusion of the final bench trial, the trial court confirmed the parties' separate property and divided the community estate. Husband appealed, arguing that the trial court mischaracterized a community-property framing business as Wife separate property and his separate-property fencing business as community property.

Holding: Affirmed

Majority Opinion: (J. Scoggins, J. Davis) Husband had five attorneys during the four-year divorce proceeding. His fourth attorney withdrew because Husband had not been making payments. The attorney who represented Husband at trial knew of the trial date when agreeing to take the case.

Wife filed an assumed name certificate for the framing business before marriage, the business was listed as a sole proprietorship in the parties' tax returns, and Husband never received

compensation from the business. The trial court did not err in finding the framing business was Wife's separate property

Even if the trial court erred in characterizing the fencing business as community property, Husband failed to show that the error resulted in "a disparity in the property division of such substantial proportions that it constituted and abuse of discretion"

Concurring Opinion: (C.J. Gray) "A client's legal position should not be made impossible by allowing, over the client's objection, the late withdrawal of an attorney (after a trial has been scheduled by agreement and then moved up) and not also establishing a new schedule that will allow the client to obtain and give new counsel time to prepare and present a complicated case." "Where was the harm in a one month continuance?" However, "[t]he overall result of the characterization and division of property [did] not appear to have been adversely impacted by the limited time to prepare for trial." Thus, "the error [was] harmless."

JUDGMENT NUNC PRO TUNC PROPER MECHANISM TO CORRECT ENFORCEMENT ORDER WHEN COURT SCANNER FAILED TO FULLY SCAN HANDWRITTEN PORTIONS OF ORDER.

¶16-3-51. ***In re A.M.C.*****,** ___ S.W.3d ___, No. 14-15-00060-CV, 2016 WL 1165858 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (03-24-16).

Facts: Father filed a motion for enforcement of possession, and the trial court found Mother in contempt for violating the divorce decree. When the enforcement order was scanned into the court's file, some handwritten orders in the margin of the typed order were clearly "cut off" by the court's scanner. Father filed a motion for judgment nunc pro tunc to correct the enforcement order to include the omitted language. Initially, the trial court attempted to find the original copy of the order, but it could not be located. Father's counsel testified that Mother's attorney had kept a copy of the order and, upon request, had emailed a copy to Father's counsel. The emailed copy was reviewed during the hearing on Father's motion for judgment nunc pro tunc but was not included in the appellate record. The trial court granted Father's motion and entered a corrected order. Mother appealed, arguing that the trial court added conditions on her contempt probation that were not in the original enforcement order.

Holding: Affirmed

Opinion: When determining whether an error is clerical, as opposed to judicial, an appellate court will defer to the trial court's fact-finding if some probative evidence supports it. Here, the missing language in the scanned order was clearly omitted due to the scanner failing to pick up the full image. Further, the evidence supported a finding that shortly after the final hearing, Mother's counsel emailed a complete copy of the signed order to Father's counsel.

HUSBAND HAD ADEQUATE TIME FOR DISCOVERY BEFORE COURT GRANTED NO-EVIDENCE SUMMARY JUDGMENT; WIFE'S FAILURE TO DISCLOSE APPRAISAL OF FAMILY BUSINESS WAS NOT EXTRINSIC FRAUD.

¶16-3-52. *Saldana v. Saldana*, No. 10-15-00411-CV, 2016 WL 1238730 (Tex. App.—Waco 2016, no pet. h.) (mem. op.) (03-24-16).

Facts: During their divorce proceedings, Husband and Wife agreed to temporary orders that granted Wife exclusive use and possession of the family business. Immediately after the temporary orders were entered, Husband began to doubt Wife's ability to run the business and spent every day parked a quarter-mile away and in an attempt to see what Wife was doing. When Husband tried to approach the property, Wife told him to leave or else she would call the police.

In Husband's inventory and appraisement, he asserted that the business was worth at least two million dollars. In her inventory and appraisement, Wife state that the value of the business would be supplemented. Wife informed husband that she was having the business appraised. At 4:25pm the day before mediation, an appraisal was faxed to Wife's lawyer. The appraisal valued the business at about $350,000 and was not disclosed during mediation. Believing the business to be worth over two million dollars, but not waiting for the expected appraisal, Husband agreed to pay Wife $2.6 million in exchange for the business. A final decree was entered incorporating the agreement.

After the divorce, Husband filed for bankruptcy. Through the bankruptcy proceeding, Husband learned that Wife had received the appraisal before mediation, although she claimed not to have seen it before mediation. The bankruptcy court stayed the proceedings so the family court could determine whether Husband had a legitimate fraud-based claim against Wife.

Husband filed a petition for bill of review in the family court asserting that Wife committed extrinsic fraud by misrepresenting the value of the business. Wife filed traditional and no-evidence motions for summary judgment asserting that Husband was not entitled to a bill of review. The trial court granted Wife a summary judgment and dismissed Husband's petition for bill of review. Husband appealed arguing that he had not been afforded adequate time for discovery and that more than a scintilla of evidence existed of extrinsic fraud.

Holding: Affirmed

Opinion: A party may move for no-evidence summary judgment after "adequate time" for discovery has passed. Here, in asserting that he had not been afforded adequate time for discovery, Husband simply made generalized statements that he needed more information to buttress his bill-of-review claims. Husband made no effort to specify the additional evidence needed or the reason he did not obtain the evidence during the discovery period. Additionally, he did not state how much time he had for discovery, what discovery was completed, or why the time was not adequate. An appellate court will not make an appellant's arguments for him.

Further, at best, Wife's nondisclosure of the appraisal amounted to intrinsic fraud, which would not support fraud in a bill of review.

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EVIDENCE SUPPORTED DISMISSAL OF JURORS BECAUSE ONE WAS STATUTORILY DISQUALIFIED AND OTHER WAS CONSTITUTIONALLY DISABLED FROM SERVING.

¶16-3-53. ***In re M.G.N.*****,** ___ S.W.3d ___, 04-12-00108-CV, 2015 WL 1238224 (Tex. App.—San Antonio 2016, no pet. h.) (03-30-15) (on reh'g).

Facts: The Parents had been appointed joint managing conservators of their two Children. A few years later, Father filed a SAPCR, and Mother filed a counter-petition, with each parent seeking sole managing conservatorship.

During the cross-examination of a witness, Mother's attorney suggested that the witness had been responsible for running a certain business to the ground. Subsequently, a juror informed the court that he was in the same type of business and knew the individuals in question. Further, the juror stated that he knew that the business struggles were due to the economy and not due to anything the witness had done. The trial court dismissed that juror, noting that there was an alternate juror to take the dismissed juror's place.

Subsequently, on the morning of the last day of trial, a juror contacted the court to report that he had been up sick the entire night before and that he did not know when he would be well enough to return to court. The trial court proceeded without the sick juror, and a verdict was returned by the remaining eleven jurors.

After a final judgment was signed, Father appealed arguing that the trial court abused its discretion by dismissing the jurors, excluding certain evidence during the trial, and ordering him to pay 75% of the Children's dental care when Mother's pleadings had not sought such relief.

Holding: Affirmed

Opinion: A juror is statutorily disqualified if the juror admits bias or prejudice. Here, the first-dismissed juror stated that it would be difficult for him not to convey his understanding of the "true" source of the business's economic problems to the other jurors. Further, the trial judge is in the best position to evaluate the sincerity and attitude of a juror. Additionally, any error in dismissing the first-dismissed juror was harmless because the alternate juror was qualified to sit as a juror and heard all the same evidence.

A jury of less than twelve people if, during trial, no more than three juror die or become disabled from sitting. A juror can be dismissed if he suffers from a constitutional disability that is in the nature of physical or mental incapacity. The second-dismissed juror was physically incapable of sitting for the last day of trial and could not determine when he would be well enough to return. The trial court was in the best position to determine whether the second-dismissed juror was physically incapable of attending trial.

After determining there was no error in allowing a panel of eleven jurors to return a verdict, the court of appeals addressed the merits of Father's appeal. However, Father waived the majority of his complaints because he rested his case-in-chief without obtaining rulings on his objections to the trial court's exclusions of his proffered evidence. Although Father made offers of proof after resting, his late offers of proof failed to preserve his complaints for appeal.

Additionally, although Father argued that Mother's pleadings did not support the court's order regarding payment for the Child's dental care, that issue was tried by consent because it was addressed at length during trial.

During the initial trial, Father did not challenge Mother's failure to adequately segregate her attorney's fees. However, after its initial judgment, the trial court granted Father a new trial to address certain issues, including attorney's fees. During the new trial, Father complained of Mother's failure to adequately segregate her attorney's fees and, thus, preserved the issue for appeal. Nevertheless, the record belied Father's assertions. Each of Mother's three attorneys testified as to how much time was spent on each matter.

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HUSBAND'S HEIRS LACKED STANDING TO BRING CLAIM OF FRAUD ON THE COMMUNITY AGAINST SURVIVING SPOUSE.

¶16-3-54. *Grothe v. Grothe*, No. 11-14-00084-CV, 2016 WL 1274059 (Tex. App.—Eastland 2016, no pet. h.) (mem. op.) (03-31-16).

Facts: Husband and Wife were married for more than twenty-five years when he died. Husband had two children from a prior marriage. Before he died, Husband filed for divorce but no final judgment was rendered. The children filed a handwritten will that they later withdrew because they became uncertain as to whether it was entirely in Husband's handwriting. The children also asserted that Wife had committed fraud against the community. Wife filed an application to probate a will that purported to leave all of Husband's property to her. A jury determined that the will filed by Wife did not meet the requirements of a valid will and that Wife had depleted the community estate by about $130,000. The trial court entered a judgment denying probate and awarding damages against Wife. In her appeal, Wife argued that the Children did not have standing to assert a claim of fraud on the community.

Holding: Affirmed in part; Reversed and rendered in part

Opinion: There is not an independent tort for fraud on the community. To have standing to bring a claim of fraud on the community, a party must have a justiciable interest in the community property.

★★★TEXAS SUPREME COURT ★★★

DISTRICT CLERK HAD MINISTERIAL DUTY TO TABULATE COURT COSTS AND APPLY UNCONTESTED AFFIDAVITS OF INDIGENCY.

¶16-3-55. ***Campbell v. Wilder*****,** ___ S.W.3d ___, No. 14-0379, 2016 WL 1267876 (Tex. 2016) (04-01-16).

Facts: Six named Petitioners filed for divorces in Tarrant County, and each filed uncontested affidavits of indigency in lieu of paying costs. The Petitioners' final decrees each provided that costs of court were to be borne by the party who incurred them. Each Petitioner subsequently received collection notices from the District clerk, demanding court costs and threatening to have their property seized to satisfy the debt. The Texas Advocacy Project protested on the Petitioners' behalf. The Clerk responded that he was bound by the allocation of costs in the decrees and encouraged the Petitioners to return to family court to have costs re-taxed. The Petitioners sued for mandamus, injunctive, and declaratory relief in a district court that had not rendered any of the Petitioners' divorce decrees. That court temporarily enjoined the Clerk from "continuing his policy of collection of court costs from indigent parties who have filed an affidavit on indigency." The Clerk appealed, and a divided appellate court vacated the injunction and dismissed the case for want of jurisdiction. Petitioners sought review from the Texas Supreme Court.

Holding: Reversed and Remanded

Opinion: The Clerk contended that the Texas Civil Practices & Remedies Code deprived the civil district court of jurisdiction. Tex. Civ. Prac. & Rem. Code § 65.023(b) provides that "[a] writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered." The purposes of the statute are "to protect the judgments and processes of one court from interference by another by direct attack" and to "prevent[] a defeated party from proceeding from one court to another, after his defeat, or in the hope of avoiding defeat, in an attempt to relitigate the case." However, courts must consider whether, under the specific circumstances of each case, the requested injunction may be issued independently of the judgment.

Here, despite the Clerk's assertion, the divorce decrees did not require the Petitioners to pay costs. The decrees only allocated costs between the parties of each case, requiring each party to bear his or her own costs—whatever they were. Thus, the injunction was independent of the matters adjudicated in the divorce, and Tex. Civ. Prac. & Rem. Code § 65.023(b) did not apply. When a party files an uncontested affidavit of inability to pay costs, there are no costs to bill. It is the ministerial duty of the Clerk to tabulate the costs and apply the affidavit of indigency.

The Clerk further argued that injunctive relief was improper because Petitioners had an adequate remedy at law. Generally, the existence of an adequate remedy at law will bar equitable relief. However, if an otherwise complete and adequate remedy at law would lead to a multiplicity of suits, that relief is not adequate. It would be wasteful to force each individual Petitioner to file a motion to re-tax costs when a single injunction would do.

Finally, contrary to the Clerk's contention, the injunction was not overly broad by applying to all indigent parties because when a policy or procedure is challenged as being in conflict with state law, any injunction that issues will necessarily affect individuals beyond the named parties.

LEGAL CONCLUSION NOT PROPER SUBJECT FOR JUDICIAL ADMISSION.

¶16-3-56. *In re R.M.R.*, No. 05-14-01247-CV, 2016 WL 1321141 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (04-05-16).

Facts: Mother filed a motion for damages for failure to honor a child-support lien, which she served on a Tenant living on Father's property. Upon receipt of the notice, the Tenant opened a savings account and began depositing the monthly rent into that account rather than giving the money to Father. Subsequently, the Tenant made plans to leave the property because of interference with his "peaceable possession" and dissolved the savings account.

The Tenant filed a general denial as an answer to Mother's motion but did not appear at the final hearing. The final non-evidentiary hearing addressed a procedural issue not relevant to this appeal. At the hearing's conclusion, the trial court entered a default judgment against the Tenant. He appealed, arguing that the evidence was insufficient to support the judgment. In response, Mother argued that the Tenant's affidavit attached to his answer judicially admitted that he was properly served with notice of the child-support lien.

Holding: Reversed and Remanded

Opinion: When a respondent files an answer but fails to appear at trial, the petitioner must offer evidence and prove all aspects of her claim. Here, no evidence was offered.

Additionally, a legal conclusion is not a proper subject for judicial admission, so Tenant's affidavit in which he stated that he was told by a Louisiana attorney that the notice was of "legal lien" was not sufficient evidence that the notice complied with the Texas Family Code.

Further, Mother improperly equated the terms "dissolved" and "disposed of." There was no evidence that the Tenant disposed of the money from the dissolved savings account.

TRIAL COURT CORRECTLY RECHARACTERIZED MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT.

¶16-3-57. ***In re Child*, ___ S.W.3d ___, No. 02-15-00118-CV, 2016 WL 1403320 (Tex. App.—Fort Worth 2016, no pet. h.)** (04-07-16).

Facts: Mother and Father signed affidavits of voluntary relinquishment of their parental rights to the Child. They also signed an agreed judgment terminating their parental rights. Mother and Father believed they had a "contact agreement" with the adoption agency, which would allow them some access to the Child. However, when that agreement was not honored, Mother and Father challenged the adoption through a petition for bill of review, alleging the affidavits were procured by fraud. The adoption agency filed a motion to dismiss the bill of review. Mother and Father argued that a motion to dismiss was inappropriate and that the proper vehicle would have been a motion for summary judgment. Thus, the trial court determined that the motion was "inartfully named" and gave Mother and Father additional time for discovery and to file a response. After a hearing, the trial court granted summary judgment for the adoption agency. Mother and Father appealed.

Holding: Affirmed

Majority Opinion: (J. Walker, J. Dauphinot) The substance of the motion to dismiss alleged that Mother and Father could not satisfy the third bill-of-review element. Further, justice required a recharacterization because a motion for summary judgment was the proper procedural vehicle to contest the petition for bill of review. Thus, the trial court correctly recharacterized the motion as a motion for summary judgment.

Awareness of a legal remedy and decision not to pursue it precludes subsequent equitable relief through a bill of review. Mother and Father were not entitled to bill of review because they chose not to timely pursue legal remedies out of fear they would jeopardize their contact with the Child.

Concurring Opinion: (J. Sudderth) The motion to dismiss bore no resemblance to a motion for summary judgment. Additionally, summary judgment cannot be granted on grounds not expressly presented in the motion. However, a trial court's discretion gives it "the right to be wrong, as long as it does no harm."

Here, no harm was done because the trial court gave the parents notice that it was considering the motion to dismiss as a motion for summary judgment on the narrow ground articulated, provided additional time for discovery, and granted an extension to file a response to the re-designated motion.

Justice Sudderth concurred only in the outcome because "the majority's conclusion that the trial court's decision was legally correct, rather than harmless error, creates an unnecessary trap for practitioners and trial courts alike."

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MOTHER NOT REQUIRED TO SEGREGATE ATTORNEY'S FEES FOR ENFORCEMENT FROM MODIFICATION BECAUSE THE TWO ACTIONS WERE INEXTRICABLY INTERTWINED.

¶16-3-58. *Lewis v. Vasquez*, No. 07-14-00170-CV, 2016 WL 1398505 (Tex. App.—Amarillo 2016, no pet. h.) (mem. op.) (04-07-16).

Facts: After Father failed to pay child support, Mother filed a motion for enforcement. Father filed a counter-petition seeking to reduce his child support obligation. The trial court found Father in contempt, ordered him jailed for thirty days, determined his arrearages, granted his requested child-support reduction, and awarded Mother attorney's fees as additional child support. Father appealed, arguing that the award for attorney's fees was improper because Mother failed to segregate the fees for the enforcement action from those for the modification action.

Holding: Affirmed

Opinion: Because Father failed to object at trial to Mother's failure to segregate fees, his objection was waived for appeal. Further, when services rendered are in connection with claims arising out of the same facts or transaction and their prosecution of defense entails proof of essentially the same facts, attorney's fees need not be segregated.

***Editor's comment**: It is often typical for a party facing child support enforcement to file a motion to modify. This strategic decision will have to be considered more carefully now since it would appear that this decision offers a way to secure the payment of all fees as "child support" even when modification fees could not normally be collected in this manner if those claims are tried together. Under this opinion, the party facing enforcement would be wise to insist upon separate trials and if retroactive modification of support was requested, argue that the modification claims must be tried first. S.S,S.*

TRIAL COURT ERRED IN GRANTING BILL OF REVIEW SUMMARY JUDGMENT BECAUSE HUSBAND RAISED A FACT ISSUE REGARDING WHETHER HE WAS NEGLIGENT IN NOT PURSUING TIMELY RELIEF.

¶16-3-59. ***Bowers v. Bowers*, ___ S.W.3d ___, No. 08-13-00346-CV, 2016 WL 1403227 (Tex. App.—El Paso 2016, no pet. h.) (04-08-16).

Facts: Husband and Wife met through church and described themselves as devoutly Christian. Husband owned his own business that was occasionally successful, depending on economic conditions. Wife was a dermatologist with her own practice and earned almost $1 million a year. They had two Children. Husband took care of the Children and the home, while Wife managed the family's finances.

Husband and Wife had a living trust, and the trust attorney advised Husband that removing his name from the trust would help insulate the assets if Husband's business failed.

Wife talked to a friend who'd written a book on porn addiction. Wife later asked Husband if he ever viewed porn. When he said yes, Wife said she could no longer trust him and asked him to sign a post-nuptial agreement so she could regain her trust. Wife reassured Husband that the agreement was not an attempt to "get back at" him but to help her feel confident in their relationship. The post-nuptial essentially gave Wife everything she had earned and gave Husband the debt associated with his business.

Subsequently, Wife suggested a divorce to provide the couple with a "clean slate." Wife also explained to Husband that a "technical" divorce would shield their assets from liability. She also asked Husband to keep the divorce a secret. Although Husband lived with his parents during this time, he continued to do the household chores.

After the agreed divorce decree was signed, Wife emailed Husband to say that she had moved on with her life of being a single mother and advised him that "[e]ven if God lays his hand on my heart, erases the past, and changes you into a person I would marry, it would realistically take at least a year." After the trial court's plenary power expired, Wife sent Husband another email saying she was dating. She remarried a fellow dermatologist about six months later.

Husband filed a petition for bill of review. Wife moved for summary judgment contending only that Husband provided no evidence that his injury was unmixed with his own negligence or fault. The trial court granted Wife's motion, and Husband appealed. While the appeal was pending, Wife moved for temporary attorney's fees pursuant to Tex. Fam. Code § 6.709, which allows a trial court to issue temporary orders in the event of an appeal of a divorce decree.

Holding: Reversed and Remanded

Opinion: The scope of review was on the issue of whether Wife proved a double negative: that Husband offered no evidence that he was not negligent or at fault.

Coercion by one spouse that led the other not to seek relief can raise a fact issue as to whether the failure to act was negligent. Here, Wife's misleading emails could have reasonably led Husband to believe that a chance of reconciliation was still possible.

Attorney's fees cannot be awarded in a bill of review proceeding pursuant to Tex. Fam. Code § 6.709 because that section applies to divorces, and a bill of review is a separate action from the divorce. Due to the procedural posture of this case, that Section did not apply.

However, the court did not foreclose on the possibility that a party could obtain temporary orders under Tex. Fam. Code § 6.709 where a bill of review is *granted* and a divorce is reopened. In that situation, the two causes merge together, the divorce decree would be overturned, litigation would resume, and the appeal of the bill of review would necessarily implicate a suit for the dissolution of marriage.

HUSBAND ENTITLED TO BILL OF REVIEW AFTER WIFE HAD QDRO SIGNED WITHOUT NOTICE TO HUSBAND.

¶16-3-60. *McElwrath v. McElwrath*, No. 03-14-00487-CV, 2016 WL 1566624 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (04-13-16).

Facts: In their final divorce decree, Wife was awarded one-half of Husband's retirement. No QDRO was signed. About ten years later, Wife sent Husband a proposed QDRO, which he refused to sign. A few months after that, Wife sent the proposed QDRO to the trial court via letter asking for the court's signature. The request was sent under a pending cause number involving child support. The trial court signed the QDRO. Husband asserted that he first learned of the signed QDRO from his employer. Husband filed a petition for bill of review, which was denied. Husband appealed, and Wife argued that because both parties were before the court, her request for the QDRO was "tantamount" to seeking additional relief in pending litigation and the Tex. Fam. Code's notice requirements did not apply.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code does not contain any exception to notice requirement for a request for a QDRO during ongoing litigation. Nothing in the record indicated Husband was served with notice or participated between the date of her letter to the court requesting a QDRO and the date the order was signed.

DISTRICT CLERK ERRED IN NOT FILING AFFIDAVIT OF INDIGENCY THAT LISTED THREE DIFFERENT CAUSE NUMBERS IN EACH OF THE THREE-LISTED CAUSES.

¶16-3-61. *Sanders v. Sanders*, No. 05-16-00248-CV, 2016 WL 1469613 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (04-14-16).

Facts: Appellant, who was a party in three pending cases in different courts, filed with the Collin County Clerk a single affidavit of indigency that listed the three cause numbers. The clerk only filed the affidavit in the first-listed cause number. Appellant appealed from the first-listed proceeding and filed a copy of the file-stamped affidavit of indigency with the appellate court, which then notified the parties, the clerk, and the court reporter of the affidavit. Subsequently—a month after the affidavit had originally been filed with the Collin County Clerk—the court reporters in the second-listed and third-listed cause numbers contested the affidavit. During the hearing on the contest, the Clerk testified that it was the "practice" of the clerk's office that a document with multiple cause numbers must be filed separately in each cause. The trial court sustained the reporters' contest to indigency. Appellant argued that the trial court erred because the court reporters' contest was not timely filed.

Holding: Granted and Reversed

Opinion: A clerk has a mandatory, ministerial duty to file all documents submitted for filing. An instrument is deemed filed when it is delivered to the clerk. A diligent party should not be penalized by the errors and omissions of the court clerk. Because a contest to an affidavit of indigency must be filed within ten days after the date an affidavit is filed, the reporters' contest was untimely.

TRIAL COURT COULD NOT RENDER SUMMARY JUDGMENT AFTER NOTICE OF NONSUIT

¶16-3-62. *In re Marriage of Montgomery*, No. 14-15-00203-CV, 2016 WL 1533930 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (mem. op.) (04-14-16).

Facts: Wife filed a civil suit against several Defendants, who Wife alleged had defrauded her of her community property. The Defendants filed a motion for summary judgment asking the court for a take-nothing judgment against Wife. Before the hearing on the motion for summary judgment, Wife filed a notice of nonsuit. Over a week later, the trial court signed an order granting the Defendants' motion for summary judgment and awarding the Defendants sanctions against wife. The trial court signed a separate order granting Wife's nonsuit. Wife appealed.

Holding: Affirmed as modified

Opinion: Wife's case was rendered moot immediately by the notice of nonsuit, so the trial court could not subsequently render a summary judgment on the merits. Additionally, the Defendants' motion for sanctions, filed after Wife's notice of nonsuit, was untimely.

ASSOCIATE JUDGE'S "FINAL ORDER" WAS NOT A FINAL APPEALABLE ORDER.

¶16-3-63. ***Gerke v. Kantara*****,** ___ S.W.3d ___, No. 01-14-00082-CV, 2016 WL 1590847 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (04-19-16).

Facts: After a 7-day trial of a modification proceeding, the associate judge signed an order of modification. During the trial, the parties twice waived a de novo hearing on the record, but the order contained no waiver of appeal. The referring court never signed the order. Mother appealed.

Holding: Dismissed

Majority Opinion: An associate judge has the authority to recommend a ruling to the referring court, and a proposed order becomes appealable only after it is adopted by the referring court. While Tex. Fam. Code § 201.007(a)(14) gives an associate judge authority to sign a final order in certain circumstances (default judgment, agreed decree), those circumstances were not present here.

Additionally, Tex. Fam. Code § 201.007(a)(16) gives an associate judge the power to sign a final order if the right to appeal to the referring court has been waived. However, it does not give the associate judge authority to *render and* sign a final order. Regardless, because Tex. Fam. Code § 201.007(a)(16) does not give the associate judge the authority to render judgment, the order signed by the associate judge was not a final appealable order.

Concurring Opinion: The majority addressed a question that was unnecessary to dispose of this appeal. Tex. Fam. Code § 201.007(a)(16) only applies to final orders "that include[] a wavier of the right of appeal [to the referring court]." Because the order in question contained no such waiver, the majority should not have addressed the broader question of whether an associate judge's "final order" entered pursuant to Tex. Fam. Code § 201.007(a)(16) could be appealed to the court of appeals.

Editor's comment: **This Opinion warrants an OMG!** *Clearly this opinion will spark a great deal of activity, interest and controversy. In larger counties where AJ's function with substantial autonomy, trying cases, rendering decisions and signing final orders without any involvement from the presiding judge, this decision now declares those orders interlocutory. This could involve hundreds if not thousands of orders which parties, counsel and courts have thought were final, but now they are not. The implications of this decision are far reaching if it stands and is followed in other appellate jurisdictions. For example, you thought you were divorced, you remarried and now you find out your divorce is not final. If an AJ can only recommend, not render, how could any ruling they made under (a)(16) be made retroactive? In this situation, when does the community estate end? Does this now create a plethora of undivided property? What about federal income tax filing status for those who thought they were single but are still married? If parties' have remarried, is that relationship only putative? Will property acquired by one spouse with a new spouse after remarriage now be partially community property of the former marriage? What about terminations and adoption orders? What about people who have been held in contempt and jailed based on these final orders? These questions could go on and on and until this Opinion is further vetted within the appellate system, attorneys and parties should take*

great care to make sure (1) the de novo waiver language is included within any final order issued and signed by an AJ under TFC 201.007(a)(16) and (2) that any such final order is subsequently approved by the presiding judge of the referring court. Following these steps should eliminate any potential problems for these orders. Those who have an order which falls within the parameters of this Opinion must either stay tuned or take steps to secure approval of the presiding judge as a precaution, especially if your order is from a county within the Houston appellate court's jurisdiction or you consider it likely that any other applicable appellate jurisdiction could adopt the First Court's current rationale. S.S.S.

TRIAL COURT ERRED IN FORCING FATHER TO ELECT BETWEEN WAIVING HIS FIFTH AMENDMENT RIGHT AND NOT TESTIFYING AT TRIAL.

¶16-3-64. *In re Marriage of Cone*, No. 10-14-00179-CV, 2016 WL 1722821 (Tex. App.—Waco 2016, no pet. h.) (mem. op.) (04-28-16).

Facts: During their divorce, Mother accused Father of emotional abuse, infidelity, controlling behavior, and assault. Father accused Mother of being insane and suicidal. A psychologist who evaluated both parties stated that Mother showed a form of psychosis and that Father was impulsive and had grandiose opinions. During the final hearing, Father was arrested on a charge by Mother of stalking by allegedly placing a tracking device on her car. The trial continued two months later. While Father was testifying, he stated his intent not to testify about the facts pertaining to his pending criminal charges. The trial court interrupted Father and told him he had to choose whether to testify or assert his privilege and that he could not "pick and choose. It's an all-or-nothing thing." After the trial court rendered a final judgment, Father filed a motion to reconsider and reopen testimony. At the hearing on Father's motion, he presented offers of proof for the testimony and evidence he intended to introduce during the trial. The trial court signed an order that comported with its earlier judgment, and Father appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: In a criminal proceeding any testimony at trial by the defendant waives the Fifth Amendment privilege, but in a civil proceeding, the witness must assert the privilege in response to specific questions, and the trial court must rule on each question individually. Further, Father's offers of proof indicated that he would have been able to establish that property awarded to Mother was his separate property, so he was entitled to a new trial.

FATHER ENTITLED TO 45-DAY NOTICE OF FINAL TRIAL BECAUSE HE FILED ANSWER, EVEN THOUGH ANSWER FILED A YEAR AFTER DEADLINE.

¶16-3-65. *In re L.H.*, No. 05-15-00886-CV, 2016 WL 2586148 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (05-04-16).

Facts: Mother and one of the Children moved to Texas. Father and the other Child remained in Illinois. Mother filed for divorce in Texas. Father did not answer by the answer deadline. Almost a year later, Mother filed a motion to appoint a receiver to sell the house in Illinois. The trial court expressed concern about its authority to do that and asked Mother to provide a brief on the property issue. The trial court granted a default divorce that day but took the property issue under advisement. Less than two weeks after that hearing, Father filed an answer. A year later, the court signed a no-answer default final decree. Father timely moved for new trial and argued

that he had not received notice of the final hearing. The trial court stated that because Father's answer was untimely, Mother was entitled to a default judgment. Father stated that he was not receiving timely notice of anything in the case. Mother did not object or otherwise argue that notice had been sent. The trial court denied Father's motion for new trial. Father appealed.

Holding: Reversed and Remanded

Opinion: A trial court does not have discretion to grant a no-answer default judgment when an answer has been filed, even if the answer is filed late. Additionally, a party who has filed an answer is entitled to 45-days' notice of the contested trial setting. In a footnote, the court also noted that Mother's failure to object to Father's unsworn statements at the hearing on his motion for new trial waived the oath requirement.

PRIOR WAIVER OF OBJECTION TO ASSOCIATE JUDGE DID NOT AFFECT WIFE'S RIGHT AFTER A PARTIAL REMAND TO OBJECT TO ASSOCIATE JUDGE AND DEMAND A JURY.

¶16-3-66. ***In re Baker*****,** ___ S.W.3d ___, No. 14-16-00101-CV, 2016 WL 2605766 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (05-05-16).

Facts: Husband and Wife waived their objection to their divorce being heard by an associate judge, and the associate judge signed a final decree of divorce. Wife appealed the final decree, and the appellate court affirmed the granting of divorce, but reversed and remanded for a new trial on the issues of conservatorship, various claims including assault and battery, and the division of the community estate.

On remand, Wife requested a jury trial and timely paid the requisite fee. The trial judge notified Wife that the case had been assigned to the associate judge. Wife timely filed an objection. The trial judge overruled Wife's objection, stating that "the affirmed issues have been ruled upon" and that the objection was raised "long after the trial on the merits commenced." Further, the trial judge held that "it is appropriate that the remanded portion be tried by the same trier of fact," which was the associate judge. Wife filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Waiver of a jury in one trial does not affect either party's right to demand a jury in the second trial after remand. A partial remand should be treated the same as if the entire case had been reversed. Wife timely filed a request for a jury trial and an objection to the associate judge. Therefore, the trial judge was required to preside at a jury trial.

FATHER'S AGREED OBLIGATION IN DIVORCE DECREE TO PAY CHILDREN'S COLLEGE TUITION WAS ENFORCEABLE AS A CONTRACT.

¶16-3-67. ***Seabourne v. Seabourne*****,** ___ S.W.3d ___, No. 06-15-00088-CV, 2016 WL 2986067 (Tex. App.—Texarkana 2016, no pet. h.) (05-20-16).

Facts: In their final decree of divorce, Mother and Father included a provision stating that each would pay 50% of their two Children's college tuition. The party receiving the tuition statement was to deliver the statement to the other parent, and each would pay the college within 30 days of receipt. Both Children went to college out of state. Mother received the tuition statement and delivered it to Father. However, Father refused to pay. Mother paid 100% of the tuition and filed

a motion to enforce the college tuition provision of the final decree. Father argued that he did not intend to pay because he had not agreed to pay out-of-state tuition. The trial court awarded Mother 50% of the tuition plus reasonable attorney's fees and costs. Father appealed, arguing that the trial court erred in awarding post-majority support and that the provision was too ambiguous to enforce.

Holding: Affirmed

Opinion: This case did not involve a continuation of a preexisting child support obligation and was not included in the "Child Support" portion of the final decree. Rather, it was an independent contractual promise falling under the caption of "College Tuition." Thus, the agreement was enforceable as a contract. Further, since it was a private agreement, it did not need to be specific enough to be enforceable by contempt because the agreement, by its nature, could not be enforceable by contempt.