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

I am humbled and honored to assume the role as Chair of the Family Law Council this year. I follow in the footsteps of some of the best attorneys in Texas, and I am grateful for the opportunity to lead this dynamic organization and serve the family law attorneys in Texas. I want to take this opportunity to let you know what your Section has been doing.

Publications

The Family Law Section produces some of the best and most helpful publications to aid its members in the practice of law. Publications include the Family Law Checklists, Predicates Manual, Family Law At Your Fingertips, the Family Lawyer's Essential Toolkit, and the newest publication, the Client Handbook, which will be available at Advanced Family Law this year. The Section also sells DVDs that instruct and inform clients regarding depositions, trials, mediation and social media presence. I want to thank our publications committee, headed by Christina Molitor and Jim Mueller, for their hard work and dedication to ensure the publications are up-to-date and a great product. I would also like to thank Heather King for producing the DVDs. Norma Trusch and Georganna L. Simpson along with the Formbook Committee have volunteered hundreds of hours to update and revise the Texas Family Law Practice Manual.

As a member of the Family Law Section, you also receive this Section Report. Georganna Simpson is a tireless contributor of her time and knowledge to deliver legal articles and case law summaries to you through this Report. Thank you, Georganna.

Legislation

The 85th Regular Session of the Texas Legislature has been a roller coaster ride! A big thank-you goes to the volunteers who served on the Legislative Committee. Although this legislative session is wrapping up, they are already working to prepare the package for next legislative session. Thanks also goes to the Section members who gave a week of their time to be in Austin to meet with legislators, testify before legislative committees, and to be an expert on whichever bill was in front of them at the time.

The members of the Texas Family Law Foundation also deserve our gratitude. They worked tirelessly on trying to get the Section's legislative package passed, but they worked equally as hard, if not harder, on trying to stop bad law from becoming a reality. Steve and Amy Bresnen and Bresnen & Associates worked tirelessly on behalf of the Foundation in this regard.

For more information on the new legislation, please plan to attend the Family Law Section's Legislative Update CLE events in Houston on June 28; Dallas on June 30; and Austin on July 14. See www.texasbarcle.com for more information.

Pro Bono

I am so proud of the pro bono efforts on behalf of the Section. We have an active Pro Bono Committee that puts together live seminars across the state and via webcast. This past year, the Committee led CLE seminars in Plainview, Lufkin, San Angelo, Belton and El Paso. Indigent citizens in these areas can now receive the legal representation they need in their family law matter. The seminar is free with the commitment that the attendee will take two pro bono cases in a 12-month period. The volunteers who speak at these seminars travel on their own time and their own dime with no reimbursement. Thank you to the Pro Bono Committee for their hard work and the Section Members who volunteered.

Upcoming CLE

Annual Meeting will be June 22-23, 2017, at the Hilton Anatole in Dallas. The Family Law Section is providing CLE on Thursday June 22, 2017, from 1:25 p.m. to 5:00 p.m.

The Advanced Family Law Course is scheduled in San Antonio August 7-10, 2017, at the Marriott Rivercenter. The Course Directors, Jonathan Bates and Kimberly Naylor, have crafted a unique, entertaining, and informative seminar. For those of you new to family law, or just looking for

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an update on the basics, make sure and attend Family Law 101 (aka “Bootcamp”) on August 6, directed by Jeff Domen.

The highly-acclaimed Mastering Your Practice: Family Law and Estate Planning will take place at Horseshoe Bay on September 14-15, 2017. The course directors are Gary L. Nickelson and Tina R. Green. This innovative course brings together family law, estate planning, and probate. This program is designed to educate family and estate and probate attorneys in advancing their practice to a higher level, with each registrant working intensively in small groups with Masters. This course is limited to 60 attendees so make sure to register early!

Viva Las Vegas! In October, New Frontiers in Marital Property Law (directed by Kathy Kinser and Hon. Emily Miskel) will be in Las Vegas on 19-20, 2017. As usual, New Frontiers is a program that is designed to “think outside the box” and to stimulate discussion regarding complex marital property matters.

Advanced Family Law Drafting (directed by Charles Hardy) is scheduled in Fort Worth on December 7-8, 2017. Charles is planning an informative course with a plethora of documents that you will be able to take to your office and start using on a daily basis.

Innovations in Child Custody Litigation will be January 11-12, 2018 in New Orleans.

You can never have too much Vegas. The Texas Academy of Family Law Specialist’s Annual Trial Institute will take place in Las Vegas at New York, New York on February 15-16, 2018. See www.tafls.org for more information.

The course directors and planning committees, along with the State Bar staff, have spent countless hours crafting great CLE programs. Please check out all of the upcoming State Bar of Texas CLE seminars at www.texasbarcle.com.

This is an exciting time for family law attorneys. A past chair of this Section, Tom Vick, is taking the reins as President of the State Bar of Texas. I look forward to working with him for the betterment of the profession and for our members.

In closing, I want to thank the Executive Committee, Council Members, Committee Chairs and Members, Council Liaisons, and volunteer paralegals, attorneys, accountants and other professionals in the family law community for all of your hard work and commitment to the Family Law Section of the State Bar of Texas. I look forward to being a part of our continuing efforts to protect, advance and enhance the Texas family law community.

Cindy Tisdale
Chair, Family Law Section

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TEXAS ARTICLES

Digital Divorce, Pierre **Grosdidier**, 80 Tex. B.J. 230 (April 2017).

NON-TEXAS ARTICLES

What are Uniform Laws and How Do They Come Into Being?, Richard T. **Cassidy** & Debra H. **Lehrmann**, 39-SPG Fam. Advoc. 6 (Spring 2017).

The New UFLAA: Providing Needed Standards for Efficiency and Fairness, Barbara A. **Atwood**, 39-SPG Fam. Advoc. 38 (Spring 2017).

Family Tax Law: Improving the Organization of the Internal Revenue Code by Creating a Subdivision on Family Tax Law, Richard J. **Wood**, 35 Quinnipiac L. Rev. 243 (2017).

Enforcement of Foreign Judgments Under the UEFJA, Thad F. **Woody**, 39-SPG Fam. Advoc. 20 (Spring 2017).

In-Kind Child Support, Margaret **Ryznar**, 29 Am. Acad. Matrim. Law. 351 (2017).

Other Mothers, Kevin **Millard**, 85 Fordham L. Rev. 2629 (May 2017).

Using Uniform Laws to Support Your Case, Allen Gary **Palmer**, 39-SPG Fam. Advoc. 44 (Spring 2017).

Love Me, Love My Dog (Part Deux): Family Law and Fido, Mandy **McKellar, Esq.**, 25-MAY Nev. Law. 8 (May 2017).

Distributing Children as Property: The Best Interest of The Children or the Best Interest of the Parents?, Darya **Hakimpour**, 37 Child. Legal Rts. J. 128 (2017). *Bias in the Family: Race Ethnicity, and Culture in Custody Disputes*, Solangel **Maldonado**, 55 Fam. Ct. Rev. 213 (April 2017).

Uniform Acts Related to Family Law, 39-SPG Fam. Advoc. 7 (Spring 2017).

A Practical Guide to UIFSA, Joseph W. **Booth**, 39-SPG Fam. Advoc. 10 (Spring 2017).

The Modern Family, Steven H. **Snyder** & Richard B. **Vaughn**, 39-SPG Fam. Advoc. 32 (Spring 2017).

Divorce & Farmland: What is the Best Solution?, Note, Tara J. **Miller**, 22 Drake J. Agric. L. 89 (Spring 2017).

The 2017 UPA: Strengthening Protections for Children and Families, Harry L. **Tindall** & Elizabeth H. **Edwards**, 39-SPG Fam. Advoc. 30 (Spring 2017).

Your Money or Your Life: Indian Parents and Child Support Modifications, Marcia **Zug**, 29 J. Am. Acad. Matrim. Law. 409 (2017).

Co-Parenting With a Non-Cooperative Parent; Potential Alternatives to Reduce Conflict, David R. **Hartwig**, 30-JUN Utah B.J. 18 (May/June 2017).

Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children, Timothy **Sandefur**, 37 Child. Legal. Rts. J. 1 (2017).

Chickens and Eggs: Does Custody Move Support, or Vice-Versa?, Margaret F. **Brinig**, 29 J. Am. Acad. Matrim. Law. 269 (2017).

Premarital Agreements and the Uniform Acts, Linda J. **Ravdin**, 39-SPG Fam. Advoc. 34 (Spring 2017).*Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, Katharine K. **Baker**, 92 Chi.-Kent L. Rev. 135 (2017).

IN BRIEF

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

SCOTUS: Under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, military disposable retired pay is community property, but a veteran may waive that pay to receive disability benefits instead, which are not divisible upon divorce. When a veteran waived some of his disposable retired pay - which had been divided upon divorce - to receive disability benefits, the Arizona Supreme Court upheld a trial court's order that the veteran make up the amount of disposable retired pay lost to the ex-wife. The Supremes reversed, holding that state courts "may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits." *Howell v. Howell,* 137 S.Ct. 1400 (May 15, 2017).

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Child support: In a modification case, a New York trial court did not abuse its discretion when it imputed income to a father who held a Master's degree in civil and environmental engineering from Stanford University, had an employment history demonstrating that he could earn well in excess of the imputed amount, had decided to work for his wife's company at a significantly lower salary than he was capable of earning and resided in "very expensive housing" in Hermosa Beach, California, which the court described as having a "view of the Pacific Ocean." *Decker v. Decker,* 148 A.D.3d 1272 (N.Y.S. 2017). Although a Maine court may base child support on the "special circumstance" that parents are providing "substantially equal care" to their son, the trial court must hold an evidentiary hearing before deciding whether a special circumstance exists. *Mitchell v. Krieckhaus,* ___ A.3d ___, 2017 WL 1381583 (Me. 2017). The Georgia Supreme Court held that laches is not a defense to a belated claim for child support, holding that a mother who had under-calculated the amount of child support the father was ordered to pay by more than $72,000 could proceed with collection. *Wynn v. Craven,* ___ S.E.2d ___, 2017 WL 1374766 (Ga. 2017).

Custody: A New York trial court granted what it described as "tri-custody" of a child to a child's mother, his father and their non-biological, non-adoptive partner engaged in "intimate relations," considered themselves to be a family, and a relationship with all three of them was in the child's best interest. *Dawn M. v. Michael M.,* 47 N.Y.S.3d 898 (2017). In another decision involving a non-biological, non-adoptive partner, a New York trial court denied any visitation, finding that "over 36 days of testimony, . . . petitioner has on numerous occasions stated that she did not want to be a parent and gave no indication . . . that she either wanted this role or acted as a parent." *K v. C,* 51 N.Y.S.3d 838 (2017). In a case where a wife told the husband that she was a lesbian, and the trial court then appointed the father as the primary residential parent with sole authority over the children's education and religious upbringing, an en banc Washington Supreme Court reversed because "the trial court considered Rachelle's sexual

orientation as a factor when it fashioned the final parenting plan" and "improper bias influenced the proceedings." *In re Marriage of Black,* 380 P.3d 456, 186 Wash.2d 1001 (Wa. 2017) (en banc). The Georgia Supreme Court reversed a custody decision when the trial court considered information from an in-chambers interview with the children but denied the parties and counsel access to the reporter's record of the interview and sealed the record. *Altman v. Altman,* ___ S.E.2d ___, 2017 WL 2061666 (Ga. 2017).

Marital property: In Delaware, 100% of a bonus awarded to a spouse after separation, one-third of which was paid after separation but prior to divorce, was marital property subject to equitable division even when the bonus was subject to forfeiture after divorce. *King v. Howard,* ___ A.3d ___, 2017 WL 1023704 (Del. 2017). When a debtor-husband and non-debtor wife acquired property during marriage as joint tenants with right of survivorship, then transferred it, all the property was community property subject to disposition by the bankruptcy court, not just the debtor-husband's undivided one-half interest. *In re Brace,* 566 B.R. 13 (Bankr. Panel, 9th Cir. 2017). A Utah court of appeals held that a husband's premarital business interests remained his separate property upon divorce even though his wife, who did not work outside the home, claimed an equitable interest in them because she had helped to grow them by "entertaining and hosting business-related guests; discussing Mr. Lindsey's business in conversations with him; supporting Mr. Lindsey in his profession; and enabling Mr. Lindsey to attend to his business by caring for the parties' child and other children from prior marriages, maintaining the parties' residence, and attending to other household duties." *Lindsey v. Lindsey*, 392 P.3d 968 (Utah Ct. App. 2017).

Relocation: The Tennessee Supreme Court allowed relocation when it held that "the father stated a reasonable purpose for relocating to Arizona with the parties' child and that the mother did not carry her burden of establishing a ground for denying the father permission to relocate with the child." *Aragon v. Aragon,* 513 S.W.3d 447 (Tenn. 2017). A New Mexico court of appeals reversed a trial court's order requiring that the children return to Ruidoso, New Mexico, for the school year, after a stipulated order eight months earlier allowed the children to move to Phoenix, because the trial court failed to find that a material and substantial change of circumstances had occurred and that the move back would be in the children's best interests. *Hough v. Brooks,* ___ P.3d ___, 2017 WL 882083 (N.M. App. 2017). The Oklahoma Supreme Court held that "before a joint custodian can invoke the relocation provisions, the court must determine a primary physical custodian." *Boatman v. Boatman,* ___ P.3d ___, 2017 OK 27, 2017 WL 1229980 (2017).

Spousal support: In a Maine case in which the husband agreed to pay his wife monthly spousal support of $3,000 until he reached the age of 60, after which spousal support would drop to $1 per year, the ex-wife successfully prosecuted a motion to modify spousal support to require the ex-husband to pay $3,000 per month until he reached age 65, based upon a change in the law extending the ex-husband's retirement age to 65. *Savage v. Savage,* 157 A.3d 252, 2017 ME 47 (Me. 2017). An Ohio court of appeals reversed a trial court for failing to terminate spousal support based on cohabitation when the ex-wife "testified that she had been in a relationship with her boyfriend for four or five years; that she stays at her boyfriend's house four or five nights per week, during which time her boyfriend provides food; and that the two have frequent sexual relations." In addition, the boyfriend "cosigned for her vehicle, [paid] for their travel expenses, and provided her $20,000 over eight months for certain expenses, including car expenses, doctor fees, dentist fees, attorney fees, medication, and gifts for her children." *Czalkiewicz v. Czalkiewicz,* ___ N.E.3d ___, 2017-Ohio-747, 2017 WL 823855 (Ohio App. 2017).

Switcheroo: Observing that *Obergefell v. Hodges,* No. 14-556 (U.S. June 26, 2015) (legalizing same-sex marriage), "does not create 'rights' based on relationships that mock marriage, and no court has so held," the Fifth Circuit upheld the firing of two Louisiana sheriff's deputies who moved in with each other's wives and families prior to getting divorced from their current wives, finding no violation of any constitutional rights. *Coker v. Whittington,* ___ F.3d ___, 2017 WL 2240300 (5th Cir. 2017).

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

I've been thinking of places that don't exist anymore. It's a strange phenomenon, isn't it, when you think of, say, a building that has long been torn down, possibly replaced, and yet lives on in your mind in the exact same indistinguishable manner as you would think of a the court-house that does in fact exist and to which you may return tomorrow. Do you ever feel a responsibility to preserve this memory as a bulwark against nihilism? Because maybe if you don't remember a particular place, then no one else will, and what happens then?

What about people? Maybe there is someone you know, maybe an older lawyer or a teacher, for example, who was a mentor to you but was not particularly famous in the community, who is long dead, and now for-gotten. Was that person's life meaningless? Maybe it's the Romantic in me, but I reject that idea. If that person influenced you, and you then influence others, as you are bound to do, then that person lives on, and on, as will you.

The Truth is that, from day to day, we really don't know what influence we have on those around us. You should be sure of one thing, though: you do have an influence. Each one of us leaves a wake behind us. So if you are pleasant and civil to your legal assistant, for example, then your legal assistant is more likely to be pleasant to the receptionist, and so on. The added benefit here is that by being civil and courteous to one person, you will feel better about yourself and will, in turn, treat others well, which will make you feel even better about yourself .... and the next thing you know, you've reduced the world's jerkiness level by one degree. *This is an estimate based on the UN Jerkiness Quotient Index for 2015.

So, what the heck, be nice to someone today. If you really want to achieve maximum effect, be pleasant to an opposing counsel or party. It baffles them. And then you're the nice guy, Sure, it may cause a ripple effect of civility in your community, but it will also make you feel better, too, and your dog will appreciate not being kicked. I already feel better after writing this, and I'm going to go smile at someone.

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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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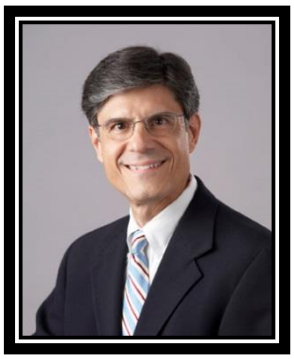
IS THE EXPERT A GOOD FIT?

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



Is the expert a good "fit?" That is, does the expert "have expertise concerning the actual subject about which she is offering an opinion?" Focus on this key relevance concept when you propose court-appointed evaluators, retain testifying experts, or prepare to depose or cross examine experts. Experts must have expertise regarding the actual subject about which they are offering an opinion. *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). A federal case excerpt nicely illustrates the issue: "Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease." *Whiting v. Boston Edison Co*., 891 F.Supp. 12, 24 (D.Mass 1995).

Fit is particularly important in child custody evaluations where evaluators, even when meeting statutory qualifications for court appointments, may not be competent to assess certain key case issues or offer opinions on those issues. For example, the Texas child custody evaluation statute notes that "a court may order preparation of a child custody evaluation regarding *any issue or question relating to the suit* . . . ." Tex. Fam. Code § 107.103(a)(2) (emphasis added). Too often, lawyers assume that mental health professionals are qualified to address any mental health issue that might arise in an evaluation. Not true.

If the case includes one or more of the following questions, consider whether the mental health professional is competent to evaluate them and offer reliable testimony on her findings:

- Does the child have special needs such as a learning disability or attention problems that affect the child's school performance?
- Do the child's behaviors suggest that he might be diagnosed with an autism spectrum disorder? What kind of parenting attention is required for that child?
- Does a parent have a substance abuse concern or disorder that would compromise the child's safety and, if so, what recommendations might the court adopt to sufficiently protect the child?
- Is either parent affected by a serious mental disorder such that the parent's caretaking of the child would compromise the child's safety and emotional well-being?
- Is the child affected by a mental disorder that requires specific advocacy and attention by the parent on behalf of the child?
- Is a family member misusing prescription medications or not complying with medication directives in a manner that would compromise the child's safety and emotional well-being?
- Does the evaluator have expertise in psychological testing to assess questions raised about a parent's mental health concerns?

And even if the evaluator, lacking expertise to assess a certain issue, refers that issue to another professional to assess, is the evaluator then sufficiently competent in that issue to gauge the reliability of the consulting professional's opinions and to accurately incorporate those opinions into her report?

Make sure the expert is a good fit with the particular subject matters of her evaluation and testimony. Absent fit, an expert's opinion is "mere speculation"—a matter of relevance addressed by Rule 702 of the Federal and Texas Rules of Evidence as well as by Rules 401 and 402.

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[1]***John A. Zervopoulos, PhD, JD, ABPP*** *is a forensic psychologist and lawyer who directs* ***PsychologyLaw Partners****, an expert consulting service that assists lawyers with psychology-related issues, materials, and testimony. His most recent book, Confronting Mental Health Evidence: A Practical PLAN to Examine Reliability and Experts in Family Law—Second Edition, was published by the ABA in 2015. How to Examine Mental Health Experts: A Family Lawyer's Handbook of Issues and Strategies, also published by the ABA, was released in 2013. He is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

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ROLE OF THE FINANCIAL PLANNER IN THE PRE-DIVORCE PROCESS

By Christy Adamcik Gammill, CDFA[1]

Although most financial planners have the relevant tax and financial knowledge to act as traditional "outside experts," their best contributions come from a more intimate involvement in the divorce process. The broad educational background of the financial planner is ideally suited to this type of work. Because planners have traditionally helped individuals achieve long-term financial goals, eg, saving for college or retirement, they have specialized training and skills that enable them to analyze financial issues in their long-term economic contexts. During the divorce process, this often sets a more positive and productive tone for discussion, provides reality checks, empowers individuals to make wise and workable decisions and hard, but often necessary, lifestyle adjustments. It also enables them to address insecurities about financial consequences, power imbalances and emotional agendas that often impede the decision-making process. The parties frequently feel more comfortable and secure with the choices they are considering, find workable solutions more quickly (often at less cost) and become more aware of post-divorce changes in standard of living, ultimately making them less likely to need to revisit support issues in the future.

Top Five Reasons for Using A Certified Divorce Financial Analyst During the Divorce Process:

1) Financial analysis conducted early in the divorce process can save time.

The average length of the U.S. divorce process is one year. In the beginning stages of the process, both parties spend a great deal of time trying to get a clear understanding of the financial aspects and terminology of the separation. A Certified Divorce Financial Analyst (CDFA) can explain all financial aspects of the pending legal documents and help to empower their client to make educated decisions throughout the proceedings.

2) A CDFA can help their client save money during the divorce process.

By using a CDFA, you can have a clearer view of your financial future. Only then can you approach a legal settlement that fully addresses your financial needs and capabilities. A legal settlement that floats back and forth between attorneys, without the client having a clear understanding of all financial ramifications, can be detrimental and time consuming. CDFAs can educate their clients by providing a thorough knowledge and understanding of the often-complicated financial proceedings.

3) A CDFA can help their clients to avoid long-term financial pitfalls related to divorce agreements.

Working with a client and their attorney, a CDFA can forecast the long-term effects of the divorce settlement. This includes detail of all tax liabilities and benefits. Developing a long-term forecast for their financial situation is far better than a short-term snapshot. Financial decisions must be made that not only take care of immediate family needs, but retirement needs as well.

4) CDFAs can assist their clients with developing detailed household budgets to help avoid post-divorce financial struggles.

A CDFA can help clients think through what the divorce will really cost in the long run and develop a realistic monthly budget during the financial analysis process. Expenses such as life insurance, health

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[1] 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.

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insurance and cost of living increases must be taken into consideration when agreeing on a final financial settlement.

5) Using a CDFA can reduce the amount of apprehension and misunderstanding about the divorce process.

Misinformation and misconceptions about the divorce process can be detrimental. Many have false expectations that they will be able to secure a divorce settlement allowing them to continue with their accustomed style of living. Financial divorce analysis helps to ensure a good, stable economic future and prevent long-term regret with financial decisions made during the divorce process.

PRE-DIVORCE CHECKLIST

Start collecting financial documents.

- *It's critical that you immediately gather all your financial records, including bank account information, mortgage statements, credit card bills, wills, trusts, etc. (See footnote below for a complete list of potential paperwork.)

Check your credit report.

- Once you have the report, monitor your score carefully so you'll be the first to know if any unusual activity occurs.
- If you haven't done so yet, start establishing your own credit
- Pay the balance on joint debt

Make a budget.

- Start planning for your post-divorce life by calculating your anticipated income and
- Focus on what it will cost you to live, plus other required monthly commitments such as child support.
- Most divorce professionals agree that you need to look ahead several years when setting up a budget after a divorce

Income Sources

- Alimony
- Asset Interest or Depletion
- Business or Partnership Interests
- Child Support
- Non-Earned Income – Dividends, Investment Interest, Rental Property, Royalties

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* These documents may include:

- income tax returns for at least the last three years (federal, state and local)
- proof of both spouses' income (w-2 and 1099 forms)
- statements of any financial accounts, including checking and savings accounts, certificates of deposit, mutual funds and money market accounts
- all real estate records, including the martial home and unimproved land, (particularly related paperwork such as the deed, the promissory note, mortgage, statement from the lender showing the balance due, any appraisals of property, and the most recent tax bill)
- personal property, such as automobiles, furnishings, collections (art, stamp, coin)
- stocks, bonds, annuities, retirement plans, particularly pensions and profit sharing plans
- accrued vacation time
- medical savings accounts
- whole life insurance policies
- records of credit cards
- vehicle loans, including the title(s), promissory note if the vehicle is encumbered, payment coupon or invoice from most recent payment
- mortgages and home equity loans
- promissory notes
- student loans
- other loans

- Pension Plan or IRA Distributions
- Royalties, Rents
- Salaries, Wages or other Earned Income
- Social Security

Spousal Maintenance/Alimony

- Texas Statutes on Alimony
- Who is Eligible
- Taxable as Ordinary Income to Recipient
- Tax Deductible by Payor
- Taxable to Recipient
- Court Ordered Alimony
- Contractual Alimony

Child Support

- Tax - Free Income to Recipient
- Texas Law on Guideline Child Support
- Example: $7,500/month net income
  - 2 children = 25% or $1,875/month
  - 3 children = 30% or $2,250/month

Open new accounts in your name.

- Open new accounts (bank, credit, etc..) at a different bank from the one you currently have joint accounts at
- New federal regulations making it harder to establish credit for women with little personal income
- Avoid starting investments and/or business agreements with your spouse

Begin securing funds for legal and other professional fees.

- Have you thought about securing full-time employment to maintain your previous lifestyle?
- Do not acquire more debt

Change your will, medical directives/living will, etc.
Set money aside for retirement in your own name.

- If your spouse contributes to an employer-sponsored plan, you should still have **your own retirement plan** (like an IRA or ROTH IRA) so that you can maintain some control over your finances in your senior years.

Change beneficiaries on life insurance policies, IRAs, etc

- Many 401K plans will not remove a spouse as beneficiary without their written consent

Take an inventory of all personal (non-marital) property

- Separate vs. Community Property
- Know the benefits of having your name on marital assets.

Fixed vs. Variable Expenses

- Mortgage, Rent, Property Taxes
- Installment Payments – Auto, loans, insurance premiums
- Fuel
- Utilities
- Groceries, Toiletries
- Clothing

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Take Stock of Your Net Worth

- Make a list of your family's assets and liabilities and indicate whether each one is yours, his or joint.
- Organize your financial file to include tax returns for the past five years, retirement account records, insurance policies (including life, disability, long-term care, health, homeowners, auto, and umbrella), investment account statements (including brokerage accounts, mutual funds, IRAs, SEPs, custodial and 529 plans), wills, living wills, trusts and powers of attorney and other important legal/financial documents. This will serve as a reference when assets and liabilities are divided.

Understand the Value of Assets

1) Cash, Checking, CD's, and Money Market funds
2) Business Equity
3) Home Equity
4) Stocks, Bonds, Mutual Funds
5) Stock Options, Stock Purchase Plans
6) Retirement Plans: 401(k), IRAs, Pension
    - Early withdrawals may have penalties prior to 59 ½
    - There are ways to access prior to 59 ½ without penalty if done correctly

Account for the Cost Basis When Dividing Investments

- A percentage of an investment's sales proceeds (the difference between the original investment amount -cost basis- and the sale value) is taxed and will reduce the final amount available. Different assets with the same value on paper can have vastly different net values once they are sold, unintentionally shortchanging one party.

Consider the Short- and Long-Term Impact of Dividing Assets

- Think about assets that will appreciate and provide long-term security, such as retirement accounts as opposed to keeping the house and other personal assets that won't necessarily help long-term financial security.
- Establish Assets & Liabilities of the Estate
- All assets are not treated equally
- Can I afford to keep the House?
- Checking, Money Markets, CDs
- Brokerage Accounts
- Retirement Accounts
- Property Settlement Payout-Note

Business Financial Concerns

- Entity Structure – Sole Proprietor, LLC, LLP, or S Corporation
- Percentage Ownership
- Partnership Agreements
- Key Man Benefits?
- Balance Sheet
- Independent Third Party Business Valuation – versus the person doing the books already

Insure Alimony and Child Support Correctly

- Most divorce attorneys will insist that the person paying alimony take out a life insurance policy to assure payments continue in case of death. In most cases, the payor owns the policy and the spouse is the beneficiary. There is no assurance, however, that the payor will continue to pay the premiums or keep the spouse as the beneficiary. Making the alimony recipient the owner and beneficiary of the policy can protect against these problems.
- Has it been decided which spouse will get dependency exemption?

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Taxes

- The year the divorce decree is signed is the year each party files as a single taxpayer. By reviewing the tax implications, you can decide whether it is best to sign a decree before or after January 1. Reaching the 10th Anniversary mark? Marriages of ten years or more entitle both parties to payments equal to half of the other's social security benefits or 100% of their own, whichever is greater. Nine years, 11 months and 30 days does not.
- Consider All Income Sources
    - Consider Tax Bracket
    - Ordinary Income or Capital Gains?
        - 0% - 15% vs. 10% - 35%
    - Alimony is income tax deductible to Payor
    - Alimony is taxable Income to Recipient
    - Dependent Exemptions – Who gets to take the kids as dependents?
- Liquidation of Assets: House/Stocks/Retirement
    - House: 250k per person capital gain exclusion
    - Stocks – Short or Long-term capital gains
    - Retirement – Ordinary Income

Retirement planning

- Have retirement plans been listed and interests in retirement plans been reviewed?
- Will the divorce decree provide a payout from the plan?
- If so, will a qualified domestic relations order (QDRO) be used?
- Should beneficiary designations be changed?
- Will any IRS penalties apply?
- Can retirement money be rolled over to IRA?

Mortgage

- Determine if the home will be sold or refinanced
- Determine who will retain possession of the home
- Determine if vacating spouse will be compensated and Determine how the equity of the home can be accessed
- Determine value of the home
- Review options with Mortgage Planner regarding qualifying for a new home purchase or the refinance of a current home
- If child support and/or alimony will be used for qualifying for new loan discuss current lender guidelines with Mortgage Planner

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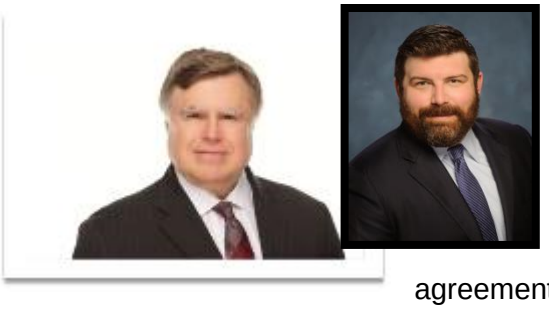
ARTICLES

BUT I CHANGED MY MIND – SETTLEMENT AGREEMENTS

Larry Martin and Nicholas V. Rothschild[4]



I. INTRODUCTION

Lawyers settle the vast majority of their family law cases. Family Law settlement agreements fall into multiple categories. Each category has its respective advantages and disadvantages. One must be cautious of the variables. Further, counsel must remember that the client does not receive the "deal" that counsel negotiated. Rather, the client receives that which is set forth in the settlement agreement – and then only to the extent that the settlement agreement is enforceable. Settling family law ligation is replete with many pitfalls and traps.

Generally speaking, family law settlement agreements fall into one or more of six distinct categories:

- Rule 11 Agreements;
- Agreements Incident to Divorce;
- SAPCR Agreements under Family Code Section 153.007;
- Informal Settlement Agreements;
- Mediated Settlement Agreements; and
- Agreements in Collaborative law cases.

II. RULE 11 AGREEMENTS

Rule 11 of the Texas Rules of Civil Procedure provides:

> Unless otherwise provided in the Texas Rules of Civil Procedure, no agreement between attorneys or parties touching any suit pending is enforceable unless it is in writing, signed and filed with the papers as part of the record, or is made in open court and entered of record.

See TEX. R. CIV. P. 11.

A. The Prerequisites of an Enforceable Rule 11 Agreement

1. Stipulation and Agreements to Settle .

A stipulation is "an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys," and limits or excludes the issues that can be tried. *Basic Energy Service, Inc. v. D-S-B Properties, Inc.,* 367 S.W.3d 254, 269 (Tex. App.-Tyler 2011, no pet.) (quoting *Rosenboom Machine & Tool, Inc. v. Machala*, 995 S.W.2d 817, 821 (Tex. App.– Houston [1st Dist.] 1999, pet. denied)). A stipulation "obviate[s] the need for proof on [one or more] litigable issue[s]." *Id*. A stipulation must comply with the mandates of Rule 11 or it is without effect. *See Caprock Investment Corp. V. FDIC,* 17 S.W.3d 707 (Tex. App.– Eastland 2000, pet. denied).

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The authors wish to express their sincere appreciation for the permission of JoAl Cannon Sheridan to use substantial portions of her article entitled "Deal, or No Deal???" presented at the State Bar of Texas, Advanced Family Law Course, in August of 2014.

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A compromise and settlement of a claim prior to the filing of a suit does not fall within the ambit of Rule 11. *See, e.g., Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 393 (Tex. 1993). An agreement concerning a pending lawsuit, which falls under Rule 11, and a lawsuit concerning an agreement, which is merely a suit on a contract, are distinct. *Id. See also Recio v. Recio*, 666 S.W.2d 645, 648 (Tex.App.—Corpus Christi 1984, no writ).

Banda v. Garcia, 955 S.W.2d 270 (Tex. 1997) is illustrative. Although *Banda* does not address Rule 11 directly, it does shed light on the enforceability of oral pre-suit agreements. In *Banda*, Garcia's attorney made an offer to settle with Banda's attorney prior to filing suit. Garcia claimed an oral acceptance of the offer and filed suit to enforce the agreement. *Id.* The trial court found that an oral agreement existed, but the court of appeals reversed, stating the unsworn testimony of the attorney was not enough to support a finding of an enforceable settlement agreement. *Id.* The Texas Supreme Court reversed the court of appeals, holding that the attorney's comments were some evidence of an enforceable pre-suit settlement agreement. *Id.* at 272.

Rule 11 requires that settlement agreements in a pending lawsuit be in writing, but is silent on the issue of settlement offers. "Rule 11 requires that settlement *agreements* be in writing, not that settlement *offers* be in writing." TEX. R. CIV. P. 11; *Trinity Univ. Ins. Co. v. Bleeker*, 944 S.W.2d 672, 675 (Tex. App.—Corpus Christ 1997), *rev'd in part on other grounds*, 966 S.W.2d 489 (Tex. 1998). *See also Carter v. Allstate Ins.*, 962 S.W.2d 268, 271 (Tex. App.—Houston [1st Dist.] 1998, pet denied)(alleged pre-suit oral agreement to settle did not violate rule requiring agreements "touching any suit pending" to be in writing).

2. Material Terms and Merger

A settlement agreement is enforceable, even if the Judgment need not contain all the terms of a settlement agreement. *Compania Financiara Libano v. Simmons,* 53 S.W.3d 365, 368 (Tex. 2001). Rather, a settlement agreement is enforceable as a contract even though its terms are not incorporated in the judgment. *Id.* The settlement agreement does not merge into the judgment.

The Rule does require that the agreement must be complete "as to every material detail" and must contain "all the essential elements of the agreement so that the contract can be ascertained from the writing, without resort to oral testimony." *CherCo Traps. v. Law, Snakard & Gambill, P.C.*, 985 S.W.2d 262, 265 (Tex. App. – Fort Worth 1999, no pet.). A stipulation must be clear enough so that enforcement of the agreed terms can be accurately reflected in a judgment. A trial court has no power to supply terms, provisions, or details not previously agreed to by the parties. *In the Interest of S.A.H.,* No. 14-99-00996-CV, 2001 WL 124493, at *3 n. 4 (Tex. App.—Houston [14th Dist.] Feb. 15, 2001, no pet.)(citing *Tinney v. Willingham*, 897 S.W.2d 543, 545 (Tex. App.—Fort Worth 1995, no writ). If a judgment does not conform to the settlement agreement, it will be rendered unenforceable. *Bachus v. Bachus*, No. 13-01-00628-CV; 2002 WL 1965458 (Tex. App.—Corpus Christi Aug.22, 2002, no pet.).

3. Clear and Unambiguous .

An agreement or stipulation must be clear enough so that enforcement of the agreed terms can be accurately reflected in a judgment. Further, an agreement or stipulation that is ambiguous or unclear should be disregarded by the court. *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 821 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Laredo Medical Group v. Jaimes*, 227 S.W.3d 170, 174 (Tex. App.–San Antonio 2007, pet. denied). To construe a stipulation, a court must "determine the intent of the parties from the language used in the entire agreement, examining the surrounding circumstances, including the state of the pleadings, the allegations made therein, and the attitude of the parties with respect to the issue. *Rosenboom*, 995 S.W.2d at 821 *Laredo Medical Group*, 227 S.W.3d at 174. But a stipulation should not be given greater effect than the parties intended, nor should it be construed as an admission of fact intended to be controverted. *Rosenboom*, 995 S.W.2d at 822, *Laredo Medical Group*, 227 S.W.3d at 174.

4. In Writing .

The Rule requires that agreements, "between attorneys or parties concerning a pending suit to be in writing, signed and filed in the record of the cause to be enforceable." *London Mkt. Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991); *El Paso Independent School Dist. v. Alspini*, 315 S.W.3d 144, 150 (Tex. App.–El Paso 2010, no pet.). Unless the claimed agreement meets the specific requirements of Rule 11, no agreements between counsel are enforceable. *El Paso Indep. Sch. Dist. v. Alspini*, 315 S.W.3d 144, 150 (Tex. App.—El Paso 2010, no pet.). Rule 11 exists because verbal agreements of counsel respecting the disposition of cases are likely to be misconstrued and forgotten and to lead to misunderstandings and controversies, *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *Kosowska v. Kahn*, 929 S.W.2d 505, 507 (Tex. App.–San Antonio 1996, writ denied).

Literal compliance with the rule is important. A settlement agreement dictated during a deposition that the court reporter transcribed, filed, and signed (but the parties or attorneys did not sign) was found not enforceable as a Rule 11 agreement. *Tindall v. Bishop, Peterson and Sharp*, 961 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1997, no writ). The court specifically found that the agreement was neither "(1) in writing, signed and filed with the papers as part of the record, nor was it (2) made in open court and entered of record." *Id.* Conversely, another court held that when counsel dictated their agreement to the court reporter in the lawyer's office, the agreement was enforceable as a Rule 11 agreement. *Kosowska v. Kahn*, 929 S.W.2d 505, 507-08 (Tex. App.—San Antonio 1996, writ denied). Thus, prudence dictates that, if parties dictate an agreement to a court reporter (outside of the presence of the court), the parties should obtain a copy of the transcription and execute a Rule 11 agreement that may attach the court reporter's transcript.

The landmark Rule 11 case is *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984). This multi- party suit involved a stock sale. All of the parties, except Kennedy, signed a Rule 11 agreement in regard to their respective claims. The settling parties then amended their pleadings and alleged that Kennedy, who refused to sign the Rule 11 agreement, had orally agreed to the settlement. *Id.* at 526. In response, the trial court severed the causes and proceeded with a jury trial on the issue of enforcement of Kennedy's alleged oral contract to settle.

The Texas Supreme Court reversed, holding that once it was determined that Kennedy had not signed the Rule 11 agreement, the lower courts erred by permitting a trial on the enforceability of the alleged oral agreement. The Texas Supreme Court specifically rejected the court of appeals statement that "the purpose of Rule 11 is to authorize rendition of agreed judgments." *Id.* at 528. The Supreme Court stated, "[t]he oral agreement was disputed and unenforceable at the moment its existence was denied in the pleadings. Rule 11 prohibits further inquiry." *Id.* at 530.

5. Exceptions to"In Writing" Requirement .

The Texas Supreme Court has balanced the requirement that Rule 11 agreements be in writing, with the ability of parties to make oral agreements. *See Anderson v. Cocheu,* 176 S.W.3d 685 (Tex. App.–Dallas 2005, pet. denied) *citing Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984). This has resulted in certain exceptions to rule 11's writing requirement. *See Id; see also Ebner v. First State Bank of Smithville*, 27 S.W.3d 287, 299 (Tex. App.—Austin 2000, pet. denied). One exception to the writing requirement arises when the oral agreement is undisputed. *Anderson v. Cocheu,* 176 S.W.3d 685 (Tex. App.–Dallas 2005, pet. denied) *citing Thomas v. Smith*, 60 S.W.2d 514, 516 (Tex. App.–Texarkana 1933, no writ). In cases where the existence of the agreement and its terms are not disputed, the agreement may be enforced despite its literal noncompliance with the rule. *Id.*, *citing Kennedy*, 682 S.W.2d at 529. Such an exception recognizes that, in the absence of a dispute over the oral agreement, the trial court would not be called upon to resolve misunderstandings about the terms of the agreement. *Anderson,* 176 S.W.3d at 689.

6. Filed With the Court or on the Record .

When made in open court, the Rule is satisfied if the terms of the agreement are dictated before a certified reporter, and the record reflects who was present, the settlement terms, and the parties' acknowledgment of the settlement. *Cantu v. Moore*, 90 S.W.3d 821,824 (Tex. App.– San Antonio 2002,

pet. denied); *Columbia Rio Grande Healthcare, L.P. v. De Leon*, 2011 WL 227669 at *3 (Tex. App.–Corpus Christi 2011, no pet.). Be mindful, however, that the overall purpose of Rule 11 is "to avoid disputes over the existence or terms of an oral agreement between counsel." *London Mkt. Cos.*, 811 S.W.2d at 552 (citing *Kennedy*, 682 S.W.2d at 526-27). "To have a binding, open-court stipulation, the parties must dictate into the record all material terms of the agreement and their assent thereto." *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.—Corpus Christi 1994, writ denied). The courts have construed the "made in open court" option in the Rule to provide an alternative means to establish an agreement between the parties when it is not practical to have a written agreement prepared. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979).

In *Enber v. First State Bank of Smithville*, the parties drafted an “assignment” document and agreed to it beforehand. Neither side presented it to the court or filed it at a hearing. 27 S.W.3d 287, 295-96 (Tex. App.-Austin 2000, pet. denied). Disputes arose. The bank argued that, since the parties' lawyers agreed to an unfiled “assignment document” in open court, they thereby made the agreement on the record. *Id.* at 296. The court of appeals held that the record of the hearing failed to establish as a matter of law that the parties entered into an oral Rule 11 agreement regarding the unfiled “assignment document.” *Id*. In so doing, however, it noted that "to allow a written statement to be 'supplemented' by the parties or their attorneys' subsequent in-court oral statements leads to the very mischief that the rule seeks to prevent." *Id.*

Rule 11 does not require a party to file a writing in the trial court before the other party withdraws his consent. The filing requirement is satisfied so long as the agreement is filed before enforcement is sought. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). The Supreme Court noted that "[a]lthough Rule 11 requires the writings to be filed in the court record, it does not say *when* it must be filed." *Id.* at 461. To require that the papers be filed before a party withdraws consent would not further the purpose of the rule–to avoid disputes over the terms of oral settlement agreements. *Id*. The purpose of the rule is to put the agreement before the judge so that he could determine its importance and proceed with the orderly progression of the suit. *Id.* The Court held that "[t]his purpose is satisfied so long as the agreement is filed before it is sought to be enforced.” *Id*.

B. No Agreed Judgment If a Party Revokes Consent Before the Court Renders

A party may prevent an agreed judgment by withdrawing consent before the court renders judgment. In other words, a party may revoke consent to a settlement agreement at any time before rendition of a judgment. *San Antonio Restaurant Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995). However, as discussed below, even though a trial court may not enter a “consent judgment” if a party has revoked consent prior to rendition, the aggrieved party may nevertheless still have a suit for breach of the settlement agreement.

A judgment routinely goes through three stages: (1) rendition; (2) signing; and (3) entry. *Wittau v. Storie*, 145 S.W.3d 732, 735 (Tex. App. – Fort Worth 2004, no pet.). Generally, a court renders a judgment when the decision is officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly. *Garza v. Tex. Alcoholic Beverage Comm'n,* 89 S.W.3d 1, 6 (Tex. 2002); *Comet Aluminum Co. v. Dibrell,* 450 S.W.2d 56, 58 (Tex. 1970). The entry of a written judgment is merely a ministerial act that reflects the court’s action. *Cook v. Cook*, 888 S.W.2d 130, 131 (Tex. App.—Corpus Christi 1994, no writ). A party can revoke his consent to settle a case at any time before the judgment is rendered. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874-75 (Tex. 1982). A judgment rendered after a party revokes his consent is void. *Id.* at 875.

In *San Antonio Restaurant Corp.*, after counsel rend the settlement agreement into the record, the defendants attempted to withdraw consent based on newly discovered evidence. The trial court refused to consider the new evidence and signed the judgment based on the previously announced settlement agreement. Texas Supreme Court held that, because there was no clear language in the record of the trial court’s intention to render judgment when the agreement was read into the record, the settlement agreement was subject to revocation. *Id*. at 858. The Court noted that the operative language of the trial court was “ . . . once this judgment is signed and I approve it, … it’s full, final and complete . . . I’ll approve the settlement.” *Id*. The Supreme Court held that this language was not sufficient to ex-

press a clear intent to render judgment in the case. Therefore, the defendant could still revoke the agreement and the court could not render a judgment based on the agreement.

The authors located no case holdings that adding the phrase "THIS AGREEMENT IS NOT SUBJECT TO REVOCATION" to a Rule 11 agreement somehow makes it irrevocable.

In re Joyner,196 S.W.3d 883 (Tex. App.—Texarkana 2006, pet. denied), addresses the rendition issue. The trial court announced "your divorce is granted." The parties had signed a mediated settlement agreement that addressed most issues. *Id.* at 886. The parties attended a "final hearing" to address the few remaining property issues not resolved in mediation. *Id.* The next day, the husband purchased a lottery ticket, which won over two million dollars. *Id.* Almost a year later, the wife filed a motion for a final trial setting, claiming that the divorce was not final. *Id.* The trial court disagreed with wife and signed a "Final Decree of Divorce," stating that the court judicially pronounced judgment at the earlier hearing. *Id.* The wife appealed, claiming that the divorce was not final until the later hearing. *Id.* The court of appeals disagreed. The appellate court observed that a trial court can render judgment either orally or in writing. *Id.* (*citing James v. Hubbard*, 21 S.W.3d 558, 561 (Tex. App.—San Antonio, 2000, no pet.)). If rendered by oral pronouncement, the entry of the written judgment is merely a ministerial act. *Id.* (*citing Keim v. Anderson*, 943 S.W.2d 938, 942 (Tex. App.—El Paso 1997, no pet.)). But in order to be an official judgment, the oral pronouncement must indicate intent to render a full, final and complete judgment when recited. *Id.* (*citing S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995)). It cannot allude to a future act that will decide the issues before the court. *Id.* at 887(*citing Woods v. Woods*, 167 S.W.3d 932, 933 (Tex. App.—Amarillo 2005, no pet.).

In *Joyner*, the appellate court held that the intent of the trial court to render judgment was "undeniably there." *Id.* at 887. The trial judge expressly stated: "*your divorce is granted*" in the midst of other statements indicating present intent. *Id.* The judge also referred to the wife as "former wife." *Id.* The court of appeals found the judge's statement to indicate a "clear, present intent" that the judge was going to "rule immediately" and then did so. *Id.* at 888.

Another case demonstrates the importance of the oral rendition being clear as to whether the agreement announced on the record disposes of all issues. *See Keim v. Anderson*, 943 S.W.2d 938 (Tex. App.—El Paso 1997, no writ). After reviewing the agreement, the trial court pronounced, "I will grant the divorce as of this time on June 30, 1995." *Id.* at 942. The stipulation did not address the resolution of any outstanding temporary orders, or a prior award of attorney's fees granted to wife's attorney as discovery sanctions. Later that same day, the wife's prior attorney filed an intervention for attorney's fees previously awarded as a discovery sanction. *Id.* at 940. At the entry hearing, the trial court ruled that the Rule 11 agreement did not seek to withdraw or vacate the prior award of attorney's fees; therefore they should be included in the decree. *Id.* at 941. In remanding the case, the appellate court held that the trial court could consider the intervention, filed after rendition, only if it had set aside the prior judgment. *Id.* at 945. The trial court had no authority to modify the agreement. *Id.*

Another rendition case arose in the context of an injunction suit, *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874 (Tex. 1982). The parties announced a settlement to the trial court. The trial court stated that "all of you did agree in open Court to this settlement, the Court approves the settlement . . . and orders all parties to sign any and all papers necessary to carry out this agreement and . . . the agreement that was . . . dictated into the record." *Id.* at 874. The day after the stipulation, the defendant revoked consent to the agreement. The Supreme Court held that the revocation was too late because the court's statement on the record constituted a rendition of judgment. *Id.* at 875.

These cases clearly demonstrate the absolute necessity of obtaining a clear ruling on the record that the trial court is rendering judgment effective immediately, and that the court is adopting the agreement of the parties as its judgment.

C. Uses for Rule 11 Agreements

Agreements or stipulations are useful tools that one may utilize for many purposes. One may utilize such agreements to narrow complex issues, alleviate the need to call witnesses, or resolve the entire lawsuit. But if not properly implemented, another lawsuit inevitably follows.

A fundamental difference exists between an agreement concerning a law suit and a suit concerning an agreement. The remedy for revoked settlement agreement is a suit for breach of contract. In that

situation, not only is the underlying case not resolved, but potentially, counsel must initiate a new suit to enforce the attempted agreement. It is, therefore, imperative that counsel follow the applicable rules strictly.

Further, stipulations pursuant to Rule 11 refer only to agreements in regard to facts; legal conclusions cannot be stipulated. A stipulation of a legal conclusion is not binding on a court or the parties. *Cartwright v. Mbank Corpus Christi, N.A.*, 865 S.W.2d 546, 549 (Tex. App.-Corpus Christi 1993, writ denied). For example, in *Caprock Investment Corp. v. Federal Deposit Ins. Co.*, the court noted that the question of whether Caprock was the proper plaintiff was a question of law, so the stipulation could not be determinative. 17 S.W.3d 707, 713 (Tex. App.– Eastland 2000, pet. denied).

D. Modification and Supplementation of a Rule 11 Agreement

A trial court has no power to supply terms, provisions, or details not previously agreed to by the parties. *In the Interest of S.A.H.,* No. 14-99-00996-CV, 2001 WL 124493, at *3 n. 4 (Tex. App.—Houston [14th Dist.] Feb. 15, 2001, no pet.) (*citing Tinney v. Willingham*, 897 S.W.3d 543, 545 (Tex. App.–Fort Worth 1995, no writ). If a judgment does not conform to the settlement agreement, it is unenforceable. *Nuno v. Pulido*, 946 S.W.2d 448, 451 (Tex. App.–Corpus Christi 1997, no writ). The trial court does, however, have the power and duty to supply additional terms when the additional term are needed to effectuate the parties' agreement and the additional terms do not "alter, change, amend, and/or modify" the material terms to which the parties have already agreed. *Beyers v. Roberts*, 199 S.W.3d 354, 362 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)(trial court did not alter agreement by adding terms to effectuate parties' intent regarding private school); *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.–Dallas 2006, no pet.)(trial court did not alter settlement agreement by adding terms regarding exercise of stock options); *McLendon v. McLendon*, 847 S.W.2d 601, 606 (Tex. App.—Dallas 1992, writ denied)(trial court had power to add terms to effectuate agreement's substantive terms).

In re Nolder, 48 S.W.3d 432, 434-35 (Tex. App.—Texarkana 2001, no. pet.) illustrates how far a trial court may press this distinction. The trial court modified a provision of a Rule 11 settlement agreement that awarded the wife 55% of the husband's stock options. The husband had failed to disclose that he had already exercised the options and sold the stock. The court held that, because husband misrepresented that he could divide stock when he was aware he had already exercised the stock options and sold the stock, wife was entitled to the benefit of her bargain. In order to enforce the terms of the agreement, wife was entitled to receive an equitable solution and modify the agreement and render a judgment that awarded the wife 55% of the cash value of the options. *Id.*

In addition, it should be noted that, if the Rule 11 agreement does not dispose of all issues upon which the court is required to rule, the trial court has a duty to resolve the issues not addressed by the agreement. *See In re Hallman*, 2010 WL 619290 at *4 (Tex. App.–Texarkana, 2010, pet. denied)(trial court had authority to decide tax liability not addressed in parties' Rule 11 agreement).

E. Actions of an Associate Judge

An associate judge has only limited authority to render and sign a final judgment which incorporates the terms of a Rule 11 agreement. The associate judge may only sign a judgment that is "agreed to in writing as to both form and substance by all parties" or he may sign "a final default judgment." Tex. Fam. Code § 201.007(a)(14)(A),(B).

In *Stein v. Stein*, the parties entered into a settlement agreement that was initialed (but not signed) by an associate judge. 868 S.W.2d 902, 903 (Tex. App.—Houston [1st Dist.] 1994, no writ). Before the referring court could sign the settlement, one of the parties revoked consent to the settlement. *Id.* The court of appeals determined that the associate judge never generated a *signed* report and therefore the provisions of former section 54.010 of the Government Code did not apply. *Stein*, 868 S.W.2d at 904. The court of appeals further held that no rendition of judgment occurred until the referring court signed the settlement agreement. Because this came after one of the parties had revoked consent, the judgment was void. *Id.* This rule comports with the previous discussion that a trial court cannot render judgment on a Rule 11 agreement after one side has withdrawn consent.

In *Clanin v. Clanin*, the appellate court upheld a Rule 11 agreement entered by an associate judge. 918 S.W.2d 673 (Tex. App.—Fort Worth 1996, no writ). The parties in *Clanin* entered into a Rule 11 agreement filed in court with the associate judge. *Id.* at 675. Three months later, the referring court signed a final order on the matter. *Id.* After the referring court signed the final order, one of the parties attempted to repudiate the agreement, which the trial court denied. *Id.* On appeal, the appellate court held that "the statement of facts clearly shows that the parties and attorneys announced in open court they had reached an agreement and that the agreement was dictated into the record in the form of sworn testimony of the parties. Further, the handwritten statement styled 'Rule 11 Agreement,' announcing their agreement and that the terms of the agreement had been entered of record, was signed by the parties and attorneys and filed with the papers as part of the record. Clearly, there was sufficient evidence for the court to conclude the existence of a valid Rule 11 agreement." *Clanin*, 918 S.W.2d at 677. Note the distinction between *Stein* and *Clanin*. In *Stein*, one party repudiated before rendition of judgment, so no consent judgment was appropriate. On the other hand, in *Clanin*, the party attempted to repudiate **after** rendition. *See also Sohocki v. Sohocki*, 897 S.W.2d 422 (Tex. App.-Corpus Christi 1995, no writ) (signing decree based on Rule 11 agreement improper when wife revoked consent before special master made recommendation and trial court adopted recommendation).

F. Judicial Admissions from Rule 11 Agreements

Once parties make a clear and unambiguous stipulation to specific facts pursuant to Rule 11, that stipulation becomes a judicial admission and is conclusive on all parties. This estops the complaining party from further disputing the stipulated facts. *Shepherd v. Ledford*, 962 S.W.2d 28, 33 (Tex. 1998). A judicial admission is a formal waiver of proof usually found in pleadings or the stipulations of the parties. *Hennigan v. I.P. Petroleum Co.*, 858 S.W.2d 371, 372 (Tex. 1993). A true judicial admission is conclusive on the party making the admission and, not only relieves the opposing party the duty of from making proof of the fact admitted, but also bars the admitting party from disputing the admission made. *Id.*; *Gevinson v. Manhattan Const. Co. of Okla.*, 449 S.W.2d 458, 466 (Tex. 1969). In contrast, a Rule 11 stipulation is sometimes a contractual agreement, which must include the following–-express or implied–-an offer, acceptance, and consideration. At other times, it is a mere concession or admission made by one or both parties to save time and expense, requiring none of the usual contractual elements. *Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 887 (Tex. App.—El Paso 1993, orig. proceeding). The actual stipulation filed with the court or dictated into the record that meets the requirements of Rule 11 is controlling, not the erroneous recitation by the trial court of the agreement. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.—Corpus Christi 1994, writ denied).

G. Enforcing a Repudiated Rule 11 Agreement vs. A Consent Judgment

As stated, trial court cannot render judgment on a Rule 11 agreement repudiated before rendition of judgment. *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App.-Houston [1st Dist.] 1996, no writ). A party who desires to enforce a settlement agreement after revocation may do so. In *Davis*, the parties had reached a Rule 11 agreement signed by all parties. Prior to rendition of judgment, the husband repudiated the agreement. The wife's attorney filed a motion to enter final judgment based upon the agreement. *Id.* at 416. The trial court granted the motion and signed a judgment. The court of appeals reversed, holding that, because the husband revoked the agreement, the court was without power to enter a binding final judgment. The Appellate court noted that the issue of whether the Rule 11 agreement should be enforced was not before the court, *citing Padilla*, the appellate court opined that, before the trial court could have considered the enforcement issue, the wife would have to have proper pleadings on file, and would have to introduce proper proof. *Id.* at 416-17. *See also Sampson v. Ayala*, 2010 WL 1438932 at *4-6 (Tex. App.– Houston [14 Dist.] 2010, no pet.).

Padilla v. LaFrance is the leading Supreme Court case to provide guidance, and provides a warning not to "confuse the requirements for an agreed judgment with those for an enforceable settlement agreement." *Padilla*, 907 S. W.2d at 461. The Texas Supreme Court explained:

> Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the

> settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.

Id.

In *CherCo Prop., Inc. v. Law, Snakard, & Gambill, P.C.*, 985 S.W.2d 262 (Tex. App.—Fort Worth 1999, no pet.), the parties reached an agreement in a malpractice case. Plaintiffs withdrew consent because the agreement did not include a time for performance. Defendants filed a motion to enforce the agreement, together with a motion for summary judgment in support of their contention, which the trial court granted. In upholding the trial court's ruling, the appellate court stated that "although withdrawal of CherCo's consent to the agreement may have been fatal to an agreed judgment, it has no effect on Law's motion to enforce the settlement as a contract," and "under the facts of this case, a time for performance is not a material term, and thus its omission does not render the parties' settlement agreement unenforceable." *Id.* at 266.

A recent family law case addressing rendition after repudiation is *In re Marriage of Dixon,* No. 12-13-00324-CV, 2014 WL 806373 (Tex. App. – Tyler February 28, 2014, no pet.)(mem. opinion). The parties presented a Rule 11 agreement regarding divorce, conservatorship, access and support as well as a division of property at a temporary orders hearing. The parties read the Rule 11 agreement into the record and both parties acknowledged their agreement. The trial court approved the agreement, adopted it for incorporation into a final decree, and granted the divorce subject only to the passage of the statutory required 60 day waiting period.

Prior to signing the final decree, husband filed a document revoking his consent to the Rule 11 agreement. The trial court signed the decree and husband appealed. Husband argued that the trial court was without authority to sign the decree because he had revoked the agreement prior to "rendition" of judgment. The appellate court agreed. When the trial court originally accepted the Rule 11, the trial court had no authority to presently render a divorce. Thus, the court's pronouncement was made "subject to" the passage of the waiting period. Rendition in this case did not occur until the judge signed the final decree. Husband had revoked prior to that event. Thus, the case was reversed and remanded for further proceedings. *Id.*

H. The Relationship Between Rule 11 and Other Statutory Authorities for Settlement Agreements

Several statutory provisions govern settlement agreements and impact the practice of family law. Examples include Section 154.071 of the Texas Civil Practice and Remedies Code, and Sections 7.006 and 153.007 of the Texas Family Code.

1. Section 154.071 of the CPRC

Section 154.071 of the Texas Civil Practice and Remedies Code provides that written agreements that settle and dispose of a pending lawsuit are enforceable in the same manner as any other written contract. Tex. Civ. Prac. & Rem. Code § 154.071(a). A written settlement agreement executed pursuant to section 154.071 may be enforced under Rule 11. *Compania Financiara Libano, S.A. v. Simmons*, 53 S.W.3d 365, 366-67 (Tex. 2001).

In *Compania Financiara Libano, S.A. v. Simmons*, the underlying lawsuit claimed a fraudulent transfer of property interests. 53 S.W.3d at 366. The parties subsequently entered into a settlement agreement, which was filed as a Rule 11 and signed by the court. However, the judgment did not contain all the provisions of the agreement. The judgment also contained a "Mother Hubbard" clause. *Id.* *Compania Financiara Libano* filed a timely motion to modify the judgment, but it never sought a ruling. The motion was overruled by operation of law. *Id.* Later, *Compania Financiara Libano* filed suit against Simmons to compel performance of the agreement, claiming breach of contract, fraud, tortuous interference, and specific performance. *Id.*

The trial court granted *Compania Financiara Libano*'s summary judgment and ordered Simmons to specifically comply and pay attorney fees. *Id.* The court of appeals reversed, holding that the action was an impermissible collateral attack, and that the settlement agreement had been "merged into" the agreed judgment. *Id.* The Texas Supreme Court reversed, holding that nothing in the settlement agreement stated that all the terms were intended to be in the judgment. *Id.* at 367. The statute sets out

that a settlement agreement may be enforced as a contract. *Id.* The Texas Supreme Court concluded that all settlement terms are not required to be incorporated into a judgment to be enforceable. *Id.*

2. Texas Family Code Section 153.007 .

Family Code Section 153.007 provides that parties may enter into a written agreement concerning division of the property, the liabilities of the spouses, and maintenance. Tex. Fam. Code § 7.006(a). These agreements are commonly termed agreements incident to divorce or "AIDs". Unlike a Rule 11 agreement, this section provides that this agreement may be "revised or repudiated" before the rendition of the divorce or annulment unless the agreement is binding under other rules of law." A more detailed discussion of these agreements appears below.

I. Rule 11 Agreements in the Digital Age

Lawyers often communicate using e-mail and even social media. A question exists regarding how Rule 11 agreements do or do not adapt to evolving communication methodologies. The Uniform Electronic Transactions Act governs electronic transactions. Tex. Bus. & Com. Code Chapter 322. Section 322.002 defines electronic as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." Tex. Bus. & Com. Code § 322.002(5). Section 322.002 defines an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Tex. Bus. & Com. Code § 322.002(8). Section 322.002 defines record as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Tex. Bus. & Com. Code § 322.002(12).

The critical elements of a Rule 11 Agreement are (1) an agreement between attorneys or parties, (2) in writing, (3) signed, and (4) filed with the papers as part of the record. Section 322.007 provides:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
(c) If a law requires a record to be in writing, an electronic record satisfies the law.
(d) If a law requires a signature, an electronic signature satisfies the law.

Tex. Bus. & Com. Code § 322.007.

Section 322.007, creates a substantial impediment to the use of e-mail or other digital medium for the creation of a Rule 11 agreement, unless one carefully complies with the necessary prerequisites to create an electronic signature. The key uncertainty involves the electronic signature. Is having a name typed at the end of an e-mail an "electronic signature?" Must an electronic symbol over actual signature exist? Will a "signature block" automatically added to a e-mail suffice"

In *Cunningham v. Zurich American Ins. Co.*, 352 S.W.3d 519 (Tex. App. – Fort Worth 2011, no pet.), the appellate court analyzed whether an e-mail exchange created a Rule 11 agreement. The appellate court considered whether Grabouski's email to Youngblood includes some marking executed or adopted by Grabouski with the intent to sign the email. The email did not contain a graphical representation of Grabouski's signature, an "s/" followed by Grabouski's typed name, or any other symbol or mark that unequivocally indicates a signature. *Id.* at 529-530. The court noted that the email did conclude with what is commonly referred to as a "signature block," (a block of information beginning with Grabouski's name followed by her contact information). The court further noted that there is nothing to show that the signature block was typed by Grabouski and not generated automatically by her email client. The appellate court commented that nothing in the email suggested that Grabouski intended that the block be her signature. And no evidence indicated that the parties agreed to conduct the settlement transaction by electronic means.

The appellate court declined to hold that the mere sending of an email containing a signature block satisfies the signature requirement when no evidence suggests that the information was typed purposefully rather than generated automatically, that Grabouski intended the typing of her name to be her signature, or that the parties had previously agreed that this action would constitute a signature. Because there is no other evidence of an electronic signature, the appellate court held that the email was not

signed, and did not meet the requirements of Rule 11. *Id.* at 530. *See also In re Rhett*, 481 B.R. 880, 894-95 (Bankr. S.D. Tex. 2012). *See* Jennifer Stanton Hargrave, E-MAIL AGREEMENTS: CAN THEY SATISFY RULE 11 REQUIREMENTS?, Family Law Section Report Volume 2009-3 (Summer) p. 12 ("If attorneys are seeking to enter into enforceable agreements via e-mail that comply with the requirements of Rule 11, the attorneys should clearly express their intent in the e-mail correspondence."). *See also Nanda v. Huinker*, No. 13-13-00615-CV, 2015 WL 5634367 (Tex. App.–Corpus Christi September 24, 2015 no pet.)(enforcing email rule 11 agreements without discussion).

Accordingly, prudence dictates great caution with respect to attempting to use an exchange of emails as a Rule 11 agreement. The safer course of action is to utilize a hand-signed document. Given the current state of law, relying upon an e-mail Rule 11 agreement appears to be risky, at best, unless one makes absolutely certain that both parties have undertaken actions that clearly and undeniably establishes the intent that the "electronic signature" is specifically intended to be an electronic signature.

III. AGREEMENTS INCIDENT TO DIVORCE

To promote amicable settlement of disputes in a suit for divorce or annulment, spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. *Engineer v. Engineer*, 187 S.W.3d 625, 626 (Tex. App.—Houston [14th Dist.] 2006, no pet.); Tex. Fam. Code § 7.006(a). The parties may revise or repudiate the agreement at any time before rendition of the divorce or annulment unless the agreement is binding under another rule of law. Tex. Fam. Code § 7.006(a). *See, e.g., Michael Mantas, M.D. v. The Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996); *Padilla v. LaFrance*, 907 S.W.2d at 461. If the trial court finds that the terms of the agreement are just and right, those terms are binding on the court. Tex. Fam. Code § 7.006(b). If the trial court approves the agreement, the court may set forth the agreement in full, or incorporate the documents by reference in the final decree. But if the trial court finds that the terms of the agreement are not just and right, it may either request that the spouses submit a revised agreement or set the case for a contested hearing. Tex. Fam. Code § 7.006(c). These agreements are commonly referred to as "agreements instance to divorce" ("AIDs").

A trial court is not bound to accept the parties' agreement. *In re McFarland*, 176 S.W.3d 650, 659 (Tex. App.—Texarkana 2005, no pet.). Thus, a trial court has only two options when it finds that the terms are not just and right: it can request the parties to revise the agreement or set a hearing on the matter. There is no discretion to do otherwise; it cannot change an agreement before entering it.

An AID signed under Section 7.006 may be revised or repudiated before rendition of the divorce or annulment "[u]nless the agreement is binding under another rule of law." *See* Tex. Fam. Code § 7.006 (a). The literal wording of the statute creates a quagmire. If every AID is enforceable under Rule 11, then the provision in section 7.006 permitting a party to revise or repudiate the agreement before rendition, becomes largely a nullity. This begs the question—when is an AID binding under another rule of law? Several Texas courts have addressed this issued by analyzing whether an AID may be otherwise binding under Rule 11 of the Texas Rules of Civil Procedure. Under Rule 11, parties may enter into a written agreement signed and filed with the papers of a court that becomes enforceable as a contract:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed, and filed with the papers as part of the record, or unless it be made in open court and entered of record.

Tex. R. Civ. P. 11. In *Markowitz v. Markowitz*, 118 S.W.3d 82, 90 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), the husband filed for divorce and presented the wife with an agreed decree of divorce. Wife signed and initialed "AMW" (the wife's testimony at trial established this was intended to mean "against my will"). The court rendered judgment and signed the agreed decree. The wife later claimed that the husband coerced her to sign the agreed decree. She filed a motion for new trial. The court granted the motion for new trial. After a jury trial, the court granted judgment *non obstante veredicto* (JNOV) and disregarded the jury's finding that the wife failed to comply with her contractual obligations under the final decree of divorce. The husband appealed, claiming the trial court erred by granting the JNOV because the trial court's decision to grant a new trial altered the parties' contractual division of assets and liabilities in the agreed decree. The appellate court held as follows:

> By vacating the original judgment, the trial court clearly withdrew its approval of the terms in the agreement. Additionally, in its Findings of Fact and Conclusions of Law, the trial court concluded that the terms of the agreement were not just and right. Thus, without approval from the trial court, there was no longer a written agreement capable of being enforced.
>
> In considering whether the agreement in this case is "binding under another rule of law," we are mindful of the line of cases establishing the enforceability of a Rule 11 agreement before or after rendition of a final decree. However, we believe any cases on this issue that are outside of the family law context do not control.
>
> A Rule 11 agreement is a contract, governed by contract law. We acknowledge that agreements incident to divorced become enforceable contracts when they are incorporated into a final decree . . . . However, we do not believe our application of Section 7.006 of the Family Code in the instant case conflicts with these settled principles.
>
> . . . .
>
> Accordingly, we hold that any contractual obligation arising from the decree was extinguished when the trial court concluded that it was not 'just and right.'

Markowitz, 118 S.W.3d at 89-90 (internal citations omitted). Accordingly, the *Markowitz* case resolved the apparent conflict between Rule 11 and Family Code Section 7.006 (a), when it held that, when the trial court determined that the division was not "just and right", the finding vitiated the ability to enforce the AID as a contract under Rule 11.

In *Cook v. Cook*, 243 S.W.3d 800, 802-03 (Tex. App.—Fort Worth 2007, no pet.), the husband asserted that the trial court erred by signing an agreed decree of divorce despite the husband's prior revocation of an AID. The appellate court held that the husband revoked his consent to the AID before the court rendered the divorce. The appellate court rejected the wife's argument that the case should not be reversed because she could enforce the AID as a contract under Rule 11 even if the judgment were void:

> The fact that the judgment is void does not preclude the trial court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.

Cook, 243 S.W.3d at 802. The appellate record did not demonstrate that the wife sought to enforce the AID as a contract through pleadings and proof. Accordingly, the court of appeals remanded the case for a new trial, without prejudice to the parties' rights to seek or avoid the enforcement of the AID as a contract under Rule 11. *Id*. at 803.

Finally, in *Byrnes v. Byrnes*, 19 S.W.3d 556 (Tex. App.—Fort Worth 2000, no pet.), the divorcing spouses signed an AID. The husband filed an answer repudiating the AID prior to rendition of a final decree of divorce. The wife argued that the court should uphold the parties' AID as a contract or, alternatively, as a partition agreement. On appeal, the wife challenged the trial court's refusal to enforce the parties' agreement and argued that the agreement was a valid, enforceable contract when signed. Affirming the trial court's decision not to enforce the AID, the appellate court first noted language in the AID regarding the trial court's appeal and then held that:

> 'This agreement will be submitted to the court for approval. This agreement is made in accordance with [section 7.006] of the Texas Family Code.'
>
> Nothing in the parties' agreement indicated that the parties intended to effect an immediate transfer of interest upon the signing of this agreement, or that the parties intended the document to constitute a binding contract.

Byrnes, 19 S.W.3d at 560 (emphasis added). Therefore, because the wife did not establish that the document was "binding under another rule of law," the appellate court held that the trial court did not err in impliedly finding that the husband's repudiation of the AID before rendition of the divorce was valid. *Id.*

Since, unlike AIDs, a mediated settlement agreement is not subject to repudiations, a question may arise as to whether an agreement falls under the provisions of section 7.006 (AIDs) or under the mediated settlement agreement provisions of sections 6.602 or l53.007l. In *Lee v. Lee*, 158 S.W.3d 612 (Tex. App.—Fort Worth 2005, no pet.), the parties met without a mediator and negotiated an agreement

to settle their divorce case. Except for the first page, which was prepared by the husband's attorney, the entire document was prepared by the husband. *Id.* at 612. The agreement was titled "Binding Settlement Agreement" and contained following statement on the first page: "PURSUANT TO SECTION 6.602 OF THE TEXAS FAMILY CODE, THIS AGREEMENT IN [SIC] NOT SUBJECT TO REVOCATION." *Id.* Both parties signed the agreement. *Id.* Before rendition of the divorce and the property division, however, the husband attempted to revoke his consent. *Id.* The trial court found the agreement between the parties to be a valid settlement agreement and not revocable under section 6.602 of the Family Code. *Id.* at 612-13.

The issue was whether the parties could validly execute a “mediated settlement agreement” without a mediator. On review, the appellate court noted that the ordinary meaning of the word "mediation" was "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." *Id.* at 613. The court of appeals reversed, holding that "[b]ecause there was no third party present at the settlement conference between [the parties], there was no mediated settlement agreement." *Id.* at 614. In doing so, the court reasoned that "[g]iven that section 7.006(a) of the Texas Family Code, which has been in force for many years, already allows divorcing parties to enter into written agreements without requiring mediation concerning the division of the community assets and liabilities as well as spousal maintenance,", we "decline[d] to carve a common-law exception into section 6.602(b) that allows an unmediated settlement agreement to morph into a mediated settlement agreement based on mere form." *Id.* at 613-14. The document in dispute was held to be "an agreement under section 7.006(a)," which can be "revised or repudiated before the divorce is rendered unless the agreement is binding under another rule of law." *Id.* at 614.

IV. AGREEMENTS TO SETTLE SAPCR ISSUES

Family Code Section 153.007 is similar to Section 7.006 (AIDs), but deals with child conservatorship and possession. Family Code Section 153.007 encourages parties to settle their disputes amicably and allows parties to enter into agreements concerning possession of their children. Tex. Fam. Code § 153.007(a); *Wyatt v. Wyatt*, 104 S.W.3d 337, 339 (Tex. App.—Dallas 2003, no pet.). Such an agreement must be in writing or be made part of the record in open court. *Wyatt*, 104 S.W.2d at 339; *Skidmore v. Glenn,* 781 S.W.2d 672, 674-75 (Tex. App.—Dallas 1989, no writ). If the trial court finds the agreement is in the children's best interest, then the court is to render an order in accordance with the agreement. Tex. Fam. Code § 153.007(b); *Wyatt*, 104 S.W.2d at 339.

An important distinction between section 153.007 and section 7.006 is that, under Texas Family Code section 153.007, an agreement regarding conservatorship, child support and possession is **not** enforceable as a contract. Tex. Fam. Code § 153.007(c); *In re T.J.K.*, 62 S.W.3d 830 832-33 (Tex. App.—Texarkana 2001, no pet.). As such, agreements regarding conservatorship, child support and possession are construed differently than property settlement agreements, which are construed under the law of contracts. *See Hill v. Hill,* 819 S.W.2d 570, 572 (Tex. App.—Dallas 1991, writ denied). If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan or the court may render an order for the conservatorship and possession of the child. Tex. Fam. Code § 153.007(d).

V. FAMILY CODE INFORMAL SETTLEMENT AGREEMENTS

In 2005, the Legislature added section 6.604 to the family code. This provision permits parties to enter into a generally enforceable agreement to settle their divorce case (without the necessity of mediation), but does not apply to cases involving children.

Section 6.604 provides:

(a) The parties to a suit for dissolution of a marriage may agree to one or more informal settlement conferences and may agree that the settlement conferences may be conducted with or without the presence of the parties' attorneys, if any.

(b) A written settlement agreement reached at an informal settlement conference is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type or in capital letters or underlined, that the agreement is not subject to revocation;

(2) is signed by each party to the agreement; and
(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(c) If a written settlement agreement meets the requirements of Subsection (b), a party is entitled to judgment on the settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(d) If the court finds that the terms of the written informal settlement agreement are just and right, those terms are binding on the court. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.

(e) If the court finds that the terms of the written informal settlement agreement are not just and right, the court may request the parties to submit a revised agreement or set the case for a contested hearing.

Section 6.604 essentially permits parties to enter into a written informal settlement agreement without attorneys or mediators. The informal settlement agreement is binding on the parties if it otherwise complies with the requirements of an enforceable mediated settlement agreement.

A. "Just and Right" Review

Informal settlement agreements under section 6.604 are subject to review by the trial court. *See* Tex. Fam. Code § 6.604 (e). The terms of the informal settlement agreement are binding on the trial court if the trial court finds that the terms of the written informal settlement agreement are "just and right." If the trial court finds that the terms of the written informal settlement agreement are not just and right, the terms of the informal settlement agreement are not binding on the trial court. The trial court may then request the parties to submit a revised agreement or set the case for a contested hearing. *See In re M.A.H.,* 3655 S.W.3d 814 (Tex. App.–Dallas 2012, no pet.). The possibility of either party demanding a "just and right" review materially limits the certainty and efficiency of informal settlement agreements.

A hearing to determine whether an informal settlement agreement signed under Section 6.604 is "just and right" is tantamount to a final divorce trial. If a party signs a Section 6.604 agreement and subsequently requests that the court review the agreement, the trial court must, essentially, conduct a divorce trial and receive evidence regarding characterization, valuation, and tracing. to determine whether the agreement is "just and right." The trial court may also need to consider factors to reach a just and right division, such as which spouse has primary custody of any children of the marriage, the education and employability of the spouses, the size of either spouse's separate estate, the parities respective health and physical conditions, and any wrongful or unjust conduct, among others. *See Murff v. Murff*, 615 S.W.696, 699 (Tex. 1981) (non-exclusive factors when considering just and right division).

If the trial court concludes that an informal settlement agreement is not just and right, then the Trial court must either request that the parties to submit a revised agreement or set the case for a contested hearing. *M.A.H.*, 365 S.W.3d 814 (Tex. App. – Dallas 2012, no pet.). In *M.A.H.*, the trial court conducted an evidentiary hearing and determined that the informal settlement agreement was just and right.

B. Waiver of Just and Right review

To avoid a "just and right" review, counsel might consider attempting to waive this right. The authors have been unable to locate an appellate opinion that permits parties to contractually waive a "just and right" review under Section 6.604. By comparison, as discussed below, courts have held that parties may contractually agree to waive the right to a "best interest" review of an arbitration award by the referring court in SAPCR proceedings. *See In the Interest of C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.–San Antonio 2004, pet. denied); *see also In re T.B.H.-H.*, 188 S.W.3d 312, 315 (Tex. App.-Waco 2006, no pet.).

In *C.A.K.*, the parties waived the right to a judicial determination that the arbitrator's award is not in the child's best interest, as created by Section 153.0071(b) of the Texas Family Code. *Id*. The appellate court acknowledged that the public policy of Texas is to encourage the peaceable resolution of disputes, particularly those involving child related issues. The appellate court held that parties may waive

their right to a "best interest" review of an arbitration award in SAPCR proceedings. *Id.* The appellate court further acknowledged that "subjecting arbitration awards to judicial review adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes." *Id.* The same logic *could possibly* apply to the waiving the right to a "just and right" review of informal settlement agreements.

C. Court Cannot Modify 6.604 Informal Settlement Agreements

A court may not modify a Section 6.604 informal settlement agreement, to resolve ambiguities or otherwise, before incorporating it into a decree. *See Roth v. Roth*, 13-08-00640-CV, 2010 WL 5541701 (Tex. App.–Corpus Christi Dec. 30, 2010, no pet). A trial court's modification of a settlement agreement is grounds for reversal where the modifications "add terms, significantly alter the original terms, or undermine the intent of the parties." *Id.* In *Roth*, the parties entered into a written settlement agreement regarding the division of property that met the requirements of Section 6.604. In particular, the agreement provided that the parties would file separate federal income tax returns for 2007 and 2008. The parties agreed to partition their respective incomes for those years. The parties further agreed that each party would pay taxes on this or her individual personal earnings and on any property or business. However, the parties' 6.604 agreement was silent as to the treatment of any estimated or withholding of tax payments made during the relevant time period. Nevertheless, the divorce decree stated:

> IT IS FURTHER ORDERED AND DECREED that each party is awarded and shall use as a credit against his or her tax liabilities one-half (½) of any estimated tax payments or current or prior year overpayments made during the time period above and one-half (½) of any withholding tax payments. Further, any tax expenditures that are tax deductible are assigned to the party who made those payments.

Roth, 2010 Tex. App. LEXIS 10252 at *9-10. The husband argued the parties' agreement did not address the allocation of estimated or withholding tax payments. The appellate court agreed and reversed the trial court holding that the decree provisions regarding estimated tax payments improperly added material terms. *Id*. At *15.

D. Section 6.604 Agreements Do Not Apply to SAPCR Proceedings

Section 6.604 informal settlement agreements do not apply to suits affecting the parent-child relationship. *In re M.A.H.*, 365 S.W.3d 814 (Tex. App.–Dallas 2012, no pet.). In *M.A.H.* the parties negotiated an agreement without attorneys concerning the division of property, spousal maintenance, possession and conservatorship of the children and child support. The husband's attorney subsequently prepared a written rule 11 agreement incorporating the agreement. *Id.* at 816. The wife later revoked her consent and attempted to set aside the agreement. *Id.* However, the trial court signed a final judgment consistent with the agreement. *Id.* at 817. The appellate court recognized that the agreement met the requirements of Section 6.604(b) and was binding on the parties insofar as it concerned the dissolution of the marriage, division of the marital estate and spousal maintenance, and that the trial court found that the agreement was just and right. *Id.* at 820. The appellate court also recognized that agreements regarding child support, conservatorship and possession are revocable, and that the Wife revoked her consent to the agreement before the trial court rendered. The appellate court reversed and remanded the entire case to the trial court, reasoning that since the determination of child support, conservatorship, and possession may cause the trial court to reconsider the terms concerning the division of property, having due regard for the rights of the parties and their children. *Id.* at 822.

VI. MEDIATED SETTLEMENT AGREEMENTS

A written mediated settlement agreement in a suit affecting the parent-child relationship is enforceable notwithstanding Rule 11. *See* Tex. Fam. Code § 153.0071(d),(e). A written mediated settlement agreement in a suit for divorce is enforceable in the same manner. *See* TEX. FAM. CODE § 6.602(b). Under these provisions, a mediated settlement agreement is binding if it:

(1) provides, in a prominently displayed statement that is in boldfaced type **or** capital letters **or** underlined, that the agreement is not subject to revocation;
(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

Id. §§ 6.602(b); 153.0071(d) (emphasis added). If a mediated settlement agreement meets these requirements, a party is entitled to judgment on the mediated agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law. *Id.* §§ 6.602(c); 153.0071(e). Notwithstanding the preceding subsections, a court may decline to enter a judgment on a mediated settlement agreement under section 153.0071 if the court finds that (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; **and** (2) the agreement is not in the child's best interest. *Id.* § 153.0071(e-1) (emphasis added).

The Texas Supreme Court upheld the binding nature of mediated settlement agreements in the case of *In re Lee*, 411 S.W.3d 445 (Tex. 2013). The parties attended mediation and executed a mediated settlement agreement ("MSA") providing that the father would have the exclusive right to determine the primary residence of the child and the mother's husband would be enjoined from coming within 5 miles of the child. Father later informed the court that mother's husband was a registered sex offender and that mother had allowed her husband to sleep naked with the child in the bed. Based on the testimony of father, the trial court refused to enter judgment on the MSA, finding that entry was not in the best interest of the child. Mother petitioned the court of appeals for a writ of mandamus. The court of appeals upheld the trial court's judgment, again based on the best interest test. Mother then petitioned the Texas Supreme Court for a writ of mandamus.

In its 5-4 decision, the Texas Supreme Court held that a trial court cannot decline to enter judgment on a validly executed MSA based solely on an inquiry into whether the MSA was in the child's best interest. In so holding, the Court held that parents are in a position to know what is in the best interest of their children and that successful mediation of child-custody disputes, conducted within statutory parameters, furthers a child's best interest by putting a halt to a potentially lengthy and destructive custody litigation. The Texas Supreme Court further noted that the rules of statutory construction require that the more specific and more recently enacted provision of Section 153.0071 prevails over the more general provision of Section 153.002 of the Texas Family Code.

Part of the take-away of *Lee* is that Sections 6.602(b) and 153.0071(d) are virtually identical and are construed the same way. *See, e.g., In re Joyner*, 196 S.W.3d 883 (Tex. App.—Texarkana 2006, pet. denied); *Beyers v. Roberts*, 199 S.W.3d 354 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *In re Calderon*, 96 S.W.3d 711 (Tex. App.-Tyler 2003, orig. proceeding); *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.). Both have very limited exceptions upon which the court may refuse to render judgment on mediated settlement agreements. The trial court must make specific findings in accordance with the intent of those statutes to do so.

The family code mediation statute, in addition to applying original actions, also applies to post suit disputes. *In re J.A.W-N*, 94 S.W.3d at 119 (Tex. App.—Corpus Christi 2002, no pet.). *J.A.W.-N*. involved a dispute about modification of the terms and conditions of a pre-existing order. Appellant argued that section 153.0071 applies to pending suits only and did not apply to later disputes. As support for this argument, he pointed to the language of section 153.0071(c), which states that "the court may refer a suit affecting a parent-child relationship to mediation." *Id.* at 123. The court stated that, as the parties had "agreed to mediation without court intervention" and also "came within the statute by satisfying the elements of section 153.0071(d)," the section applied to the case. The appelate court affirmed the judgment of the trial court. *Id.* at 123. *See also Kilroy v. Kilroy*, 137 S.W.3d 780, 789 (Tex. App.-Houston [1st Dist.] 2004, no pet.) (parties' Rule 11 agreement did not require petition to trial court before initiating arbitration proceedings, and no requirement under section 153.0071(c) or any other rule to do so).

It is not unusual for courts to order parents to mediate controversies before setting a hearing or initiating discovery in a suit for modification of the terms of an order. However, *In the Interest of K.L.D.*, 2012 WL 2127464 (Tex. App.—Tyler 2012, no pet.), the appellate court held that the trial court abused its discretion when it ordered the parties to mediate before setting any hearing or discovery in a suit for modification of the terms and conditions of conservatorship, possession or support. *Id.* at *8.

A. Strict Compliance

Family Code Sections 6.602 and 153.0071, clearly states that, if the agreement complies with the terms of either section 6.602(b) or 153.0071(d), a party is **entitled to judgment on the mediated settlement agreement**. Clearly, this means that there is no requirement for a separate suit to enforce the agreement. A party cannot repudiate the agreement to prevent judgment on the agreement. *See Beyers v. Roberts*, 199 S.W.3d 354, 358 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Additionally, "[a] fundamental principle of statutory construction is that a more specific statute controls over a more general one." *Id.* at 359. (*citing Horizons/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000)). Thus, Family Code Sections 6.602 and 153.0071 control over any over general provision in regard to settlement agreements. *See Id.* (holding that section 153.0071(d) controls over section 153.133, which deals with agreed parental plan that create joint managing conservatorships); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 331 (Tex. App.—Dallas 2004, no pet.)(holding that section 153.0071 controls over 153.007, because section 153.0071 deals specifically with mediated settlement agreements, while section 153.007 deals generally with agreements for joint managing conservatorships).

A mediated settlement agreement must meet all of the requirements of the Family Code in order to bind the parties. *See* Tex. Fam. Code § 153.0071(d),(e); *Beyers v. Roberts*, 199 S.W.3d 354 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In *Vickery v. American Youth Camps, Inc.*, the Texas Supreme Court held that a final judgment founded upon a mediated settlement agreement must be in strict and literal compliance with the agreement. 532 S.W.2d 292, 292 (Tex. 1976).

In *Spinks v. Spinks*, the parties reached an agreement through court-ordered mediation. 939 S.W.2d 229, 229 (Tex. App.—Houston [1st Dist.] 1997, no writ). The agreement provided for custody, property division, child support, alimony and insurance. *Id.* It also contained a statement that the parties stipulated and agreed that the agreement was not subject to revocation. *Id.* The appellant repudiated the agreement. The trial court rendered a decree based on the mediated settlement. *Id.* Appellant appealed. Because the statement in the mediated settlement agreement that the agreement was not revocable was not underlined (which was the statutory requirement at the time), the appellate court was reversed and remanded. *Id. See Streety v. Hue Thi*, 2010 WL 2278617 at *4 (Tex. App.–Dallas 2010, no pet.)(mediated settlement agreement contained no language that agreement not subject to revocation). The teaching from these cases is clear. Counsel must be cautious to fully comply with the mediated settlement agreement statute in all respects.

In *In re A.H*, 114 S.W.3d 750, 752¬53 (Tex. App.—Dallas 2003, no pet.), the appellant argued that the statement, "[t]his is a binding and IRREVOCABLE agreement" was located in paragraph eight of the agreement, and thus was insufficient to meet the statutory requirement of the phrase being prominently displayed. The appellate court rejected this argument. In addition to the language above, the bottom of pages two and three also contained the following statement: "THE PARTIES AGREE THAT THIS SETTLEMENT AGREEMENT IS BINDING AND NOT SUBJECT TO REVOCATION. THIS AGREEMENT MEETS THE REQUIREMENTS OF SECTION 153.0071 OF THE TEXAS FAMILY CODE." *Id.* at 753. The court held that this statement clearly complied with statutory requirements regardless of the statement made in the body of the agreement. *Id.*

In *J.A.W.-N.*, 94 S.W.3d at 119 (Tex. App.—Corpus Christi 2002, no pet.), the parties agreed to meet with a mediator regarding a SAPCR proceeding. *Id.* at 120. They signed a "Mediated Settlement Agreement" that modified the terms of support and possession of and access to the child. *Id.* The parties, and their attorneys, signed and initialed each page. *Id.* Later, appellant repudiated the agreement. The trial court signed a written order based on the agreement. *Id.* On appeal, appellant argued that the agreement was not a statutory mediation agreement because the court did not refer the parties to the mediation as set out in section 153.0071(c). *Id.* The appellate court rejected that argument, holding that nothing in that section requires a written request or written order of referral based in either the parties' or the court's own motion in order for parties to mediate their differences and execute an enforceable mediated settlement agreement. *Id.* at 121.

In *Woody v. Woody*, 429 S.W.3d 792 (Tex. App.—Houston [14th] 2014), the father (former husband) sought enforcement of terms of a prior decree pertaining to property division, and sought a reduction of child support. The mother (former wife) sought a modification of child support and enforcement of unreimbursed medical expenses. At some point, the parties participated in formal mediation

and supposedly reached agreements on all issues. However, the parties reduced nothing to writing at the mediation. The mediator testified at a subsequent hearing that an agreement had been reached. Father testified at the hearing that he had withdrawn his consent that the amount of support as agreed. Father appealed. On appeal, Father again argued that the alleged agreement did not meet the requirements of a Rule 11 agreement or a mediated settlement agreement. The court of appeals held that whether construed as a Rule 11 or other type of agreement, Father withdrew his consent. Thus, the trial court erred when it incorporated the alleged agreement into the final order.

B. Section 6.602 Mediated Settlement Agreement May Require Written Agreement or Court Order

Under both of Family Code Sections 6.602 and 153.0071, the court may refer dissolution cases and suits affecting the parent child relationship to mediation "[o]n the written agreement of the parties or on the court's own motion." *See* Tex. Fam. Code §§ 6.602 (a), and 153.0071(c). At least one Texas appellate court has held that a mediated settlement agreement signed under Section 6.602 is invalid without a written agreement to mediate, or a court order referring the case to mediation. *See Lee v. Lee*, No. 10-03-00182-CV, 2004 WL 1794473 (Tex. App.–Waco Aug. 11, 2004, pet. denied). In *Lee*, the parties signed a mediated settlement agreement (MSA). The wife filed a motion to enter, and the husband filed a motion to reform the MSA. At the hearing, the mediator acknowledged a missing term should have been included in the MSA. The court denied both motions and set the case for a jury trial. On appeal, the wife argued she was entitled to judgment on the MSA under Section 6.602 and that the trial court erred by not signing a decree, which conformed with the MSA. *Id.* The appellate court held Section 6.602 did not require the trial court to enter judgment on the MSA because there was no written agreement to mediate, and there was no referral to mediation by the trial court based on a written agreement or on the court's own motion. *Id* at *3. The appellate court acknowledged that its holding appeared to be inconsistent with the result of three other appellate courts that addressed the same issue regarding MSAs signed in SAPCR proceedings under Section 153.0071. *Id.; see also In re J.A.W.-N.*, 94 S.W.3d 119 (Tex. App.–Corpus Christi 2002, no pet.)(order of referral or written agreement not prerequisite to mediation under Section 153.0071(d)); *In re Circone*, 122 S.W,3d 403 (Tex. App.–Texarkana 2003, no pet.); *Kilroy v. Kilroy*, 137 S.W.3d 780 (Tex. App.–Houston [1st Dist.] 2004, no pet.).

In reaching this result, the appellate court in *Lee* reasoned that although Sections 6.602 and 153.0071(e) are "strikingly similar," Section 153.0071 only entities a party to a judgment if the MSA meets the statutory requirements of Section 153.0071(d), which provides that an MSA must contain a prominently displayed statement that the agreement is not subject to revocation and is signed by the parties, counsel, and the mediator. *Lee*, 2004 WL 179443 at *1. The court reasoned that, unlike Section 6.602(c), Section 153.0071(e) does not specifically reference Section 153.0071(d), which provides for referral to mediation by agreement or court order. *Id.* By contrast, Section 6.602 states that a party is entitled to judgment on an MSA that meets the requirements of "this section", i.e. the entirety of Section 6.602, which provides that a court may only refer a case to mediation on written agreement or court order. *Id.* Accordingly, counsel should obtain a court order or written agreement to mediate before mediation to ensure her client will be entitled to judgment on the MSA.

C. Cannot Withdraw Consent

In re Circone, 122 S.W.3d 403, 404 (Tex. App.—Texarkana 2003, no pet.),involved an argument that the court erred when, after the parties signed a mediated settlement agreement, it refused to permit the appellate to introduce evidence about the actions of the attorney ad litem who represented the children. *Id.* at 406. The appellate court noted that the section 153.0071 (c)-(e) requirements were met, thus "the trial court had no authority to go behind the signed agreement of the parties, which explicitly. . . stated in underlined capital letters that agreement was not subject to revocation." *Id.* at 406.

The Corpus Christi court held that a trial court is required to enter judgment on a mediated settlement agreement even if the mediation is not under the direction of the court. *See In re J.A.W.-N.*, 94 S.W.3d 119, 121 (Tex. App.-Corpus Christi 2002, no pet.); *See also In re Lee*, 411 S.W.3d. 445 (Tex. 2013), discussed below.

D. Best Interest of the Child

As noted above, the Texas Supreme Court has held that a best interest finding is not required pre-requisite to judgment on a mediated settlement agreement that meets the requirements of TFC 153.0071(d). In fact, even if the trial court determines that entry of judgment on the mediated settlement agreement in a SAPCR is not in the child's best interest, to refuse to enter judgment is reversible error, because best interest alone does not meet the exceptions to entry of judgment set forth in TFC 153.0071(e-1). *See In re: Lee*, 411 S.W.3d. 445 (Tex. 2013).

Family Code Section 153.0071(e-1) provides that "a court may decline to enter a judgment on a mediated settlement agreement if the court finds that: (1) a party to the agreement was a victim of family violence, and that circumstances impaired the party's ability to make decisions; **and** (2) the agreement is not in the child's best interest. Tex. Fam. Code § 153.0071(e-1) (emphasis added). Thus, a court may not decline to enter a judgment on a mediated settlement agreement if the court finds **only** that the agreement is not in the child's best interest when family violence is an issue.

An unresolved issue may exist regarding a court's discretion to refuse to render judgment on a mediated settlement agreement in a SAPCR if the court is concerned about the safety of a child. In *Lee*, the majority opinion noted that the dissent was particularly concerned that the court's holding would inevitably require a trial court to overlook evidence of child endangerment. However, the court declined to decide this case in the context of child endangerment because the only basis for the trial court's refusal to enter judgment on the mediated settlement agreement was best interest (and not endangerment or some other safety issue). In her concurrence, Justice Guzman notes that, while insufficient evidence existed of child endangerment in the *Lee* case, a trial court does not abuse its discretion by refusing to enter judgment on a mediated settlement agreement that could endanger the safety and welfare of a child. Of note, neither Justice Guzman in her concurrence nor the dissent define child endangerment or specify what elements would be necessary to prove endangerment and whether a party would be required to specifically plead endangerment to be entitled to a finding of the same.

E. MSA Signed in Termination Proceedings Subject to Best-Interest Review

At least one appellate court has held that Section 153.0071(e) does not foreclose a best-interest review after parties sign mediated settlement agreements in termination cases brought by the Texas Department of Family Protective Services (the "Department"). *In the Interest of K.D.*, 471 S.W.3d 147 (Tex. App.—Texarkana 2015, no pet). In *K.D.*, the Department filed to terminate mother's parental rights. *Id*. While the case was pending, the Department and mother attended mediation and all parties executed a mediated settlement agreement. *Id.* Mother also simultaneously executed an affidavit of voluntary relinquishment of parental rights, which was incorporated into the mediated settlement agreement (the "Affidavit").

Shortly thereafter, the mother sought to set aside the mediated settlement agreement and Affidavit. *Id*. The Texarkana court of appeals held that the trial court was not bound by the parties' agreement that termination of a mother's parent rights was in the child's best interest. *Id.* The court reasoned that the best-interest issue in Section 153.002 is different from the best-interest issue in Section 161.001(2). *Id.* Section 153.002 states that "[t]he 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." *Id.*, citing Tex. Fam. Code § 153.002. By contrast, Section 161.001(2) states that "[t]he court may order termination of the parent-child relationship if the court finds by clear and convincing evidence: . . . (2) that termination is in the best interest of the child." *Id.* Thus, the court recognized that different standards of review are applied to a trial court's best-interest finding under Chapters 153 and 161.

More recently, one of the Houston court of appeals has also held that Section 153.0071(e) does not apply in termination of parental rights in non-Department cases even when both parties agree unless the parties put on sufficient evidence that the termination in is in the best interest of the child. *In re Morris,* 498 S.W.3d 624 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (06-22-16). In *Morris,* the mother and the father were named joint managing conservators of their child. Ten years later, the mother signed a voluntary relinquishment of her parental right to the child, which waived her right to service and stated that termination was in the child's best interest. However, the affidavit provided no

facts to support that conclusion. The father filed a petition to terminate the mother's parental rights, and the parties signed a mediated settlement agreement that stated, "the terms of settlement are to enter the order of termination as attached." Subsequently, the father filed the MSA and appeared to prove up its terms. The father presented no evidence beyond the parties' agreement that the termination was in the child's best interest. The trial court refused to enter the judgement pursuant to the MSA because there was no evidence that termination would be in the Child's best interest. The father filed a petition for writ of mandamus, which the court of appeals denied. The father then filed a petition for writ of mandamus with the Texas Supreme Court to which the mother agreed. However, the Texas Supreme Court denied the parties' agreed petition, thereby essentially adopting the court of appeals' decision.

In *Morris*, the court of appeals opined that Texas Family Code Section 161.001 permits a trial court to terminate a parent-child relationship if clear and convincing evidence establishes one of the enumerated acts in Subsection (1) and that termination is in the Child's best interest. A voluntary affidavit of relinquishment satisfies the first requirement but does not conclusively establish the second. The court then found that the father introduced no evidence to support a best interest finding, and the mother's affidavit merely stated that termination was in the child's best interest without providing any relevant facts. Further, although the father argued that the parties agreed to render an order, contracting parties cannot agree to "render" an order, as that is the office of the court. Contracting parties can agree to submit a proposed order to a court and request the court to sign the proposed order. Additionally, pursuant to the plain language of Texas Family Code Section 153.0071, any suit affecting the parent-child relationship—including a termination suit—can be referred to mediation. However, Section 153.0071(e) (providing that a party meeting certain prerequisites is entitled to a judgment on an MSA) only applies to suits under Chapter 153, or suits for conservatorship, possession, and access. By not including any suit affecting the parent-child relationship in section 153.0071(e), the legislature likely considered the finality and irrevocability of terminations as opposed to suits for conservatorship, possession, and access, which can be modified. Another concern is that a termination impacts the fundamental liberty interests of the child, who is typically not a party to the parents' mediated settlement agreement.

F. Deviations Modifications Versus Implementations

As a general rule, a court has no authority to alter, change, amend, or modify the agreed material terms by inserting additional terms into the Court's order enforcing the agreement. *Vickrey v. American Youth Camps, Inc.*, 532 S.W.2d 292 (Tex. 1976); *In re Marriage of Ames*, 860 S.W.2d 590, 594 (Tex. App.—Amarillo 1993, no writ); *McLendon v. McLendon*, 847 S.W.2d 601, 610 (Tex. App.—Dallas 1992, writ denied).

For example, in *Garcia-Udall v. Udall*, 141 S.W.3d 323, 327 (Tex. App.—Dallas 2004, no pet.), temporary orders gave one parent the exclusive right to consent to "invasive medical, dental, or surgical treatment." The parties subsequently executed a Section 153.0071 mediated settlement agreement that incorporated the temporary orders into the agreement, and also provided that one parent would have the final decision "in the event parties cannot agree on medical, dental or surgical treatment involving invasive procedures." *Id*. at 327-28. The appellant argued the provision in the mediated settlement agreement changed the decision on invasive treatment from appellee's exclusive right to a joint right of the parties, with appellee having the authority to make the decision if they cannot agree. *Id.* at 328. Recognizing that an unambiguous contract must be interpreted as a matter of law, and ambiguity does not arise merely because the parties advance differing interpretations, the court of appeals held that the adjectives "medical, dental or surgical" modified the same noun, "treatment" and the phrase "involving invasive procedures" modified the noun "treatment" and was not limited to surgical treatment. *Id.* The court of appeals reversed the trial court and modified the decree to make the decree conform to the mediated agreement. *Id.* at 329. The court observed that "[t]he fact that the trial court interpreted the mediated settlement differently is irrelevant, because the trial court has no discretion to misapply the law." *Id.*

However, a trial court **does** have the power and duty to supply additional terms when the additional terms are needed to effectuate the parties' agreement and the additional terms do not alter, change, amend, or modify the material terms to which the parties have already agreed. *Beyers v. Roberts*, 199 S.W.3d 354, 362 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Haynes v. Haynes*, 180 S.W.3d 927,

930 (Tex. App.—Dallas 2006, no pet.); *In re Kasschau*, 11 S.W.3d 305, 311 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding); *McLendon*, 847 S.W.2d at 606. In *Beyers*, the husband and the wife entered into a mediated settlement agreement which provided, among other things, that the child would attend a certain private school. *Beyers*, 199 S.W.3d at 357. After the mediation, the husband moved to rescind the agreement because the private school the parties agreed upon could not accept the parties' child. *Id.* The trial court refused to rescind the agreement, and entered a modification order that required the child to remain in his current school. *Id.* On appeal, the husband argued that the trial court exceeded its authority by entering a final order that included terms to which the parties never agreed. The court of appeals rejected husband's argument holding that the additional terms were only a slight modification and were needed to effectuate the intent of the parties' agreement. *Id*. at 362-63.

Similarly, in *Haynes*, the husband and the wife entered into a mediated settlement agreement. *Haynes*, 180 S.W.2d 928. Attached to the agreement was a single page spreadsheet with "*Haynes v. Haynes* Property Division" handwritten at the top of the page. The main settlement agreement provided that its terms would be incorporated into a final decree of divorce following the forms published in the Texas Family Law Practice Manual. Wife's attorney prepared an agreed final divorce decree containing detailed procedures for the exercise and division of the stock options and making the husband constructive trustee for the options awarded to wife. The husband objected to the procedures relating to the options because they imposed additional duties, liabilities, and burdens on him. The trial court signed the proposed decree with some modifications.

On appeal, the husband argued that he never agreed to the specific terms regarding the stock options. *See Haynes*, 180 S.W.3d at 929. The court of appeals rejected the husband's argument on the grounds that the additional terms did not materially alter the parties' agreement. Instead, the additional terms were necessary to effectuate the intent of the parties' agreement. *Id.* at 930.

In summary, a court has no authority to alter, change, amend, or modify the material terms to which the parties have agreed by inserting additional terms into the court's order enforcing the agreement. However, a court does have the power to enter an order which effectuates the true intent of the parties' agreement.

G. Fraud and Failure to Disclose

A material misrepresentation by one party to a mediated settlement agreement can vitiate a mediated settlement agreement. *See Boyd v. Boyd*, 67 S.W.3d 398, 404-405 (Tex. App.—Fort Worth 2002, no pet.). A failure to disclose material information by one contracting party can lead to the rescission of an otherwise enforceable settlement agreement under what is essentially a fraudulent inducement theory. *Id. Boyd* involved undisclosed retirement accounts, stock options, and an earned, unpaid bonus. After the parties entered into a mediated settlement agreement, the wife repudiated the agreement, contending that the husband failed to make proper disclosures. The trial court denied enforcement of the agreement because it failed to include substantial assets of the parties. The appellate court agreed, stating that a duty to speak exists when "the parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them." *Id.* at 405. “[W]hen one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression.” *Id.* (*quoting World Help v. Leisure Lifestyles, Inc*., 977 S.W.2d 662, 670 (Tex. App.—Fort Worth 1998, pet. denied). The *Boyd* mediated settlement agreement included a full disclosure provision, which stated: “[e]ach party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them.” *Id* at 404. The court further held that "inserting a catchall provision" like "[a]ny undisclosed property is specifically awarded in equal shares to the parties" into a mediated settlement agreement "while at the same time intentionally withholding information about substantial marital assets will not save the mediated settlement agreement from being held unenforceable." *Id.*

H. Illegal Provisions

A settlement agreement may be unenforceable, even though it meets the requirements of sections 6.602(c) or 153.0071(d). Contracts, including mediated settlement agreements, are void if the agreement results in fraud, or if its provisions are illegal. Although, contracts are generally voided for illegality

only when performance requires fraud or a violation of criminal law. *Beyers*, 199 S.W.3d at 358 (*citing In re Kasschau*, 11 S.W.3d 305, 314 (Tex. App.—Houston (14th Dist.] 1999, orig. proceeding)).

In *Kasschau*, husband brought a mandamus action following the trial court's refusal to enter judgment based upon a mediated settlement agreement. The appellate court denied the mandamus on multiple grounds. In the agreement, the husband had agreed to turn over certain telephone recordings he had made of the wife, without her consent. The settlement also provided that these recordings would be destroyed. The trial court found, and the appellate court agreed, that these actions were illegal since it contemplated the destruction of evidence related to a possible criminal proceeding.

I. Limitations on Settlement Agreements

Parties cannot contract around the mandatory jurisdiction transfer requirements in the Family Code. *See In re Calderon*, 96 S.W.3d 711 (Tex. App.—Tyler 2003, orig. proceeding). In *Calderon*, the parties entered into a mediated settlement agreement. *Id.* at 714. The agreement provided that jurisdiction would remain in Smith County for three years. *Id.* at 715. The trial court approved the agreement and incorporated its terms into its order. *Id.* Seventeen months later, the wife filed a motion to transfer to Bexar County and sought modification of the trial court's order. *Id.* The husband objected because the order expressly stated that jurisdiction would remain in Smith County for three years. *Id.* The trial court denied the motion to transfer. The wife filed a petition for writ of mandamus seeking to have the appellate court order the transfer of proceedings to Bexar County. *Id.*

Citing *Cassidy v. Fuller*, 568 S.W.2d 845, 847 (Tex. 1978), the court of appeals first noted that the language of the statute in the Family Code was mandatory in a SAPCR suit. A trial court has no discretion but to transfer the proceeding if the child has resided in another county for six months or more. *Id.* at 716. The court based its decision, in part, on *Leonard v. Paxson*, 654 S.W.2d 440 (Tex. 1983). The *Leonard* court held that, despite an agreement to the contrary, a trial court has a mandatory duty to transfer such a proceeding. *Leonard*, 654 S.W.2d at 441. The *Calderon* court then held that "any attempt to supplant the mandatory transfer provision applicable in a SAPCR is void." *Calderon*, 96 S.W.3d at 719. The appellate court further held that the mediated settlement provision did not constitute a waiver of venue because a settlement agreement attempting to change venue contrary to the statutory law of the state cannot constitute a waiver of venue. *Id.* at 720 (citing *Johnson v. U.S. Indust., Inc.*, 469 S.W.2d 652, 654 (Tex. Civ. App.—Eastland 1971, no writ)). If the provision were allowed to contravene the statutory scheme, it would "defeat the legislature's intent that matters affecting the parent-child relationship be heard in the county where the child resides." *Id.* (*citing Leonard*, 654 S.W.2d at 442).

If the trial court enters a judgment based on a mediated settlement agreement, and the trial court did not have jurisdiction to do so, then that portion of the agreed judgment is void. *Seligman-Harris v. Hargis*, 186 S.W.3d 582, 586-87 (Tex. App.—Dallas 2006, no pet.). In *Hargis*, appellant filed suit in Texas although the entire family lived in Germany. *Id.* at 584. The parties entered into a mediated settlement agreement regarding custody, visitation, child support and division of property. *Id.* at 585. The parties agreed to have the decree registered in Germany. *Id.* Based on the agreement, the trial court signed an agreed final decree. *Id.* On appeal, the appellant contended that under the UCCJEA, the trial court did not have jurisdiction over its decree provisions regarding child custody because Texas was not the "home state" of the children. *Id.* The appellate court initially noted that, although the mother agreed to the trial court's jurisdiction, subject-matter jurisdiction cannot be conferred by consent, waiver, or estoppel. *Id.* (*citing Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000)). The appellate court then reiterated that section 152.201(a) of the UCCJEA is the exclusive jurisdictional basis for a Texas court making a child custody determination. The appellate court also noted that the entire agreement would be void "if the contract is entire and indivisible." *Id.* at 587 (*citing In re Kasschau*, 11 S.W.3d 305, 311 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). But the court found that, in this instance, "the effect the trial court's lack of jurisdiction over the child custody has on the underlying settlement agreement is an issue that has not been presented to the trial court" because the Father was unable to raise them. *Id.* Therefore, the court of appeals reversed the provisions of the decree that dealt with the division of property and child support and remanded the case back for further development. *Id.* The child custody claims were dismissed for want of jurisdiction. *Id.*

J. Death of a Party

In *Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237 (Tex. App.—Austin 2007, pet. denied), husband filed for divorce. Subsequently, husband and wife attended mediation and signed a mediated settlement agreement. *Id.* at 239. For more than two years, husband unsuccessfully used various legal maneuvers attempting to rescind the agreement. Wife died on the day before the hearing to enter the final divorce decree was to occur. *Id.* at 239. The independent executor of wife's estate filed a declaratory judgment action concerning the enforceability of the mediated settlement agreement. *Id.* The trial court held that the mediated settlement agreement was enforceable. *Id.* at 239.

On appeal, husband argued that, although he and wife signed a mediated settlement agreement pursuant to section 6.602 of the Family Code, the agreement was unenforceable because wife's death precluded any possibility of incorporating the agreement into a final divorce decree. *Id.* at 241. The court of appeals held that the mediated settlement agreement was enforceable based upon the plain language of the statute and the public policy underlying it as well as the parties' intent as expressed in the language of the agreement. *Id.*

K. Drafting Considerations

1. Include Statutory Language

Make sure that the mediated settlement agreement includes the required statutory language, such as the following language:

THIS MEDIATED SETTLEMENT AGREEMENT IS NOT SUBJECT TO REVOCATION:

The Parties hereto agree that this MSA is binding on the Parties and is not subject to revocation. The Parties understand and agree that more detailed documents in the form of a decree of divorce ("Decree") and transfer documents will be drafted by the Parties' attorneys. Those documents, however, are not a condition precedent to the formation of the agreement being entered into hereby, but rather merely a more formal memorialization of this already enforceable MSA.

EACH PARTY SPECIFICALLY STIPULATES AND AGREES THAT HE OR SHE HAS ENTERED INTO THIS AGREEMENT FREELY AND VOLUNTARILY.

THIS AGREEMENT SHALL BE BINDING ON THE PARTIES AND SHALL NOT BE SUBJECT TO REVOCATION. THE PARTIES SHALL BE ENTITLED TO A JUDGMENT ON THE MEDIATED SETTLEMENT AGREEMENT NOTWITHSTANDING RULE 11, TEXAS RULES OF CIVIL PROCEDURE OR ANY OTHER RULE OF LAW.

2. Include a Full Disclosure Provision

Given the *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.) decision, to include a full disclosure provision is also wise. The provision in *Boyd* stated: "[e]ach party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them." *Id.* at 404. Another example of a full disclosure provision provides: "Each party represents that they have made a full and complete disclosure of all assets and debts of the community and separate estates and that such disclosure is a material part of the consideration for the agreements set out herein."

3. Be Cautious When Including a Residuary Clause

Caution is appropriate when including a residuary clause in a mediated settlement agreement because significant unintended consequences may occur. Two general types of residuary clauses exist. One category is the "possession and/or control" residuary clause, and is generally treated as the more narrow of the two types. The other general category, referred to as the broadly worded clauses, uses language intended to cover a wider range of property. *See Marriage of Smith*, 115 S.W.3d 126, 133 (Tex. App.–Texarkana 2003, pet. denied). Both are ill advised.

a. Possession And/or Control Residuary Clauses

In *Soto v. Soto*, 936 S.W.2d 338 (Tex. App.–El Paso 1996, no pet.), the divorce decree stated that wife was awarded "[a]ll property in [the wife's] possession" and that the husband was awarded "[a]ll real and personal property in [the husband's] possession." *Id.* at 339-340. Several years later, the wife filed suit to partition property allegedly not divided upon divorce. *Id.* at 340. The trial court ruled that, at the time of the entry of divorce, the husband had actual control, access and possession of all real properties. *Id.* at 340, 342. On appeal, the wife argued that because her name was listed on the deeds to the properties, the court of appeals should determine that she was in legal, as opposed to actual, possession of the properties. *Id.* at 342. The court of appeals rejected the wife's "legal possession" argument stating that "'[p]ossession' as used in the context of divorce decrees, means the physical control of the property, or the power of immediate enjoyment and disposition of property." *Id.* at 343.

In *Marriage of Malacara*, 223 S.W.3d 600 (Tex. App.–Amarillo 2007, no pet.), the husband and the wife executed a settlement agreement in which they agreed that the husband "shall own, possess, and enjoy, free from any claim of [the wife], the property listed in Schedule 2 of this agreement . . . ." The property described in Schedule 2 consisted of "[a]ll personal property in [his] possession." *Id.* at 602. The husband's retirement benefits were not expressly mentioned in the agreement. *Id.* at 601. Once the husband retired and began receiving benefits, wife filed suit to partition the community portion of the retirement benefits. *Id.* at 601. The trial court determined that the retirement benefits were not divided in the settlement agreement or the divorce decree and awarded wife a portion. *Id.* at 601-602. The court of appeals rejected husband's argument that the retirement benefits were in his "possession." The appellate court explained that settlement clauses encompassing property within the possession of a spouse do not affect intangible property, that is, property not subject to physical control or immediate enjoyment or disposition. The court further explained that chooses-in-action or contract rights are such property, as is a right to retirement benefits. *Id.* at 602.

b. Broadly Worded Residuary Clauses

In *Marriage of Smith*, 115 S.W.3d 126, 133 (Tex. App.–Texarkana 2003, pet. denied), the husband and the wife entered into a partition agreement. Paragraph 12 stated:

> The parties agree that, except as provided herein, each party shall own, have, and enjoy, independently of any claim or right of the other party, all property of every kind, nature, and description, wheresoever situated, which is now owned or held by him or her, or which may hereafter belong or come to belong to him or her, with full power to him or her to dispose of the same as fully and effectively in all aspects and for all purposes, as if he or she were unmarried.

Id. at 129. The partition agreement made no specific reference to the disposition of the husband's GOSI retirement benefits. *Id.* A few years later, the husband began receiving payments from his GOSI retirement benefits. *Id.* at 129. Years later, the wife filed for divorce. The trial court concluded that the partition agreement did not cover the GOSI retirement benefits and awarded a portion to the wife. *Id.* at 129-130.

The court of appeals noted that the residuary clause was a broadly worded residuary clause. The court further noted that language of the clause clearly indicates that the parties intended that it cover all property not specifically divided by the agreement, regardless of possession or control. *Id.* at 134. Because the agreement does not specifically allocate the GOSI retirement benefits to either the husband or the wife, the court concluded that the residuary clause governed the disposition of the funds. That being so, the funds, having "come to belong" to the husband, still belong to the husband independent of any claim or right of wife. *Id.* at 134. *See Buys v. Buys*, 924 S.W.2d 369, 371-372 (Tex. 1996).

In *Pearson v. Fillingim*, 332 S.W.3d 361 (Tex. 2011), the husband's parents conveyed four deeds for mineral rights to him during the marriage. The husband and the wife subsequently divorced. The divorce decree divided property into two schedules, one for the husband and one for the wife. The decree did not specifically mention the mineral rights that originally belonged to the husband's parents in the division, but it did include residuary clauses in each schedule awarding both parties a "one-half interest in all other property or assets not otherwise disposed of or divided herein." *Id.* at 362. Years later, after the husband discovered that the wife was receiving royalties, he filed a petition to clarify the divorce decree and a declaratory judgment action concerning his separate property mineral interests.

The trial court determined that the deeds were gifts from husband's parents and his separate property, and that the divorce decree did not partition the separate property of the parties. *Id.*

The appellate court held that such residuary clauses, as opposed to the more limited clauses that divide only the property "in possession" of the former spouses, have been held to effectively divide property not explicitly mentioned in the decree. *Id.* The appellate court concluded that because husband did not provide any evidence that the deeds were separate property, the deeds were encompassed in the "estate of the parties" and were divided by the divorce decree's residuary clauses. *Id.* at 364.

4. Arbitration Provisions

A mediator may also serve as an arbitrator if the parties consent. *In re Provine*, 312 S.W.3d 824, 829 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *see In re Cartwright*, 104 S.W.3d 706, 714 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding)(mediator should not act as arbitrator in same or related dispute without express consent of parties).

In *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012), the parties signed a mediated settlement agreement. Subsequently, a dispute arose regarding the meaning of the terms of the mediated settlement agreement. *Id.* at 617-618. After a hearing, the trial court signed a decree which provided for the assignment of a partnership interest to the wife. *Id.* at 618. The Texas Supreme Court determined that the language in the mediated settlement agreement regarding the partnership interest was ambiguous and that the intent of the parties was a question of fact. *Id.* at 622. The Court recognized that the mediated settlement agreement provided that the parties were to return to the mediator in the event of a dispute regarding the language in the agreed final decree or other documents necessary to effectuate the agreement's terms. The mediated settlement agreement further provided that the mediator would arbitrate the dispute and make a final decision on the disputed matter. The Court held that this provision would apply to ambiguities in the mediated settlement agreement itself, making the mediator, rather than the trial court, the appropriate authority to resolve the fact issue. *Id.*

Another recent decision addressing arbitration provisions is *Spradley v. Spradley*, No. 03-13-00745-CV, 2014 WL 1279658 (Tex. App.–Austin March 26, 2014, no pet.)(mem. opinion). In *Spradley*, the husband and the wife, pro se, executed a mediated settlement agreement. The mediated settlement agreement expressly partitioned the community estate and contemplated that the parties would thereafter finalize their divorce and obtain a final judgment in accordance with the mediated settlement agreement. Before this could happen, the wife amended her pleadings and filed a declaratory judgment action challenging the validity and enforceability of the mediated settlement agreement claiming the husband had induced her into the mediated settlement agreement by fraud and duress. The husband sought to compel arbitration relying on two separate provisions within the mediated settlement agreement. One recognized that the mediated settlement agreement was merely an outline of the settlement and the parties' understood the final order would contain additional provisions to implement the general agreement. This provision required arbitration of drafting disputes. The second provision stated that "if any other dispute arises with regard to the interpretation or performance of [the MSA] or any of its provisions" then these will be handled by binding arbitration with the mediator.

The trial court denied husband's motion to compel arbitration and further denied the husband's motion to enter judgment on the mediated settlement agreement. The appellate court held that the first arbitration provision included only drafting disputes; however, the second provision, much broader in scope, contemplated both mediation, and if no settlement, then arbitration of "any other disputes" regarding interpretation or performance.

The appellate court considered whether wife's challenge to the validity and enforceability of the mediated settlement agreement could be considered a dispute regarding interpretation or performance. The appellate court ultimately held that the wife's efforts to avoid the mediated settlement agreement contemplated a dispute regarding the parties' respective performance of the mediated settlement agreement, and thus, her disputes fell within the scope of the second arbitration provision. *Id.*

5. Partition of Future Income and Earnings

Unless a mediated settlement agreement addresses future income and earnings, such pre-decree earnings will be community property. No provision in the Family Code states that a mediated settlement agreement terminates the growth of the community estate. This can cause a substantial problem.

One means of addressing this problem is to promptly obtain a rendition from the trial court (even an oral rendition), that grants the divorce and terminates the period of time in which the community estate will continue to accumulate. Another option is to include in the mediated settlement agreement provisions providing for the partition of future income, retirement rights and assets, and income received from property awarded to a party in the mediated settlement agreement. One should also allocate post-mediated settlement agreement debts.

VII. THE IMPORTANCE OF RENDITION

A. End the Marital Estate.

One reason to promptly obtain a signed decree that divorces the parties is to end the accumulation of the marital estate of the parties. An oral rendition of the divorce that is clear should accomplish the same goal, as should a mediated settlement agreement that contains partition provisions awarding or partitioning subsequently acquired property and earnings. It is to the benefit of the higher income producing spouse to end the marital estate as soon as possible.

The Family Code requires that the court divide the estate of the parties when granting a decree of divorce. *See* Tex. Fam. Code § 7.001 (court "shall" divide estate of parties in divorce decree). It is error for a court to grant a divorce and sever the issue of property division for a later trial and decision. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 324 (Tex. 1998); *Gathe v. Gathe,* 376 S.W.3d 308, 314 (Tex. App.—Houston [14th Dist.] 2012, no pet.). An oral rendition is effective as a judgment if the record unequivocally shows that the judge intended for his or her oral rendition to finally dispose of all claims and parties. *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995); *Woods v. Woods*, 167 S.W.3d 932, 933 (Tex. App.—Amarillo 2005, no pet.); *Keim v. Anderson*, 943 S.W.2d 938, 942-43 (Tex. App.—El Paso 1997, no pet.).

Thus, if the court orally renders judgment which divorces the parties and divides their estate by adopting a settlement agreement of the parties, and the oral rendition unequivocally shows that the court intends to dispose of all claims and issues, then the parties are divorced, and the community estate ends, the day the oral rendition is pronounced.

A potential problem exists. An oral rendition of divorce and property division is final and effective (i.e., its only good) so long as the court does not change its mind before signing a written decree. The court does not lose plenary power over its judgment until thirty days after it signs a written judgment (unless a post-trial motion extending its plenary power is filed). *See* Tex. R. Civ. P. 306a (date written judgment is signed is date for calculating when trial court's plenary power ends); Tex. R. Civ. P. 329b (trial court has plenary power thirty days after judgment is signed unless post-trial motion filed that extends plenary power);*Stallworth v. Stallworth*, 201 S.W.3d 338, 349 (Tex. App.—Dallas 2006, no pet.)(trial court can alter oral rendition at any time while it retains plenary power); *see Cook v. Cook*, 888 S.W.2d 130, 132 (Tex. App.—Corpus Christi 1994, no writ)(accord); *Ex parte Chunn*, 881 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding)(accord).

So long as the court stands by its original rendition, then the oral rendition is good. It divorces the parties and divides their property as of the date of rendition. *See In re Joyner*, 196 S.W.3d 883 (Tex. App.—Texarkana 2006, pet.). However, if the court decides to alter its oral rendition of judgment in its written judgment, then the date of the divorce and property division may become the date of the written judgment. *Cook*, 888 S.W.2d at 131-32; *Ex parte Chunn*, 881 S.W.2d at 915.

VIII. AGREEMENTS IN COLLABORATIVE LAW CASES

A. Participation Agreement Authorizes Binding Agreements

The collaborative law lawyer participation agreement often includes a provision entitled "Agreed Court Orders" that states "[a]greed Orders and signed Collaborative Law Settlement Agreements, whether partial or final, are binding on the Clients and, in the event of termination of the Process, may be the basis of a claim against a client who fails to comply with their terms."

B. Collaborative Family Law Act Authorizes Binding Agreements

Texas law permits collaborative participants to enter into binding agreements as follows:

(a) A settlement agreement under this chapter is enforceable in the same manner as a written settlement agreement under Section 154.071. Civil Practice and Remedies Code.

(b) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative family law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is boldfaced type, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the collaborative attorney of each party.

Tex. Fam. Code § 15.105. This provision appears to allow collaborative participants the same finality with a collaborative settlement agreement as a mediated settlement agreement. (*See* Tex. Fam. Code § 6.602(b)).

C. Agreements

The lawyer Participation Agreement and the collaborative family law act authorize binding, enforceable agreements in a collaborative case. Collaborative participants desire a final, binding agreement that resolves all issues. Controversy arises most often in the context of interim agreements. These interim agreements sometimes create confusion when one party believed a particular agreement was binding and the other believed it was merely an expression of intent or conditioned upon some other event. Collaborative lawyers must talk to their clients and ask questions to determine whether agreements are intended to be binding or conditional. Lawyers then must draft Minutes consistent with the intent of the parties—expressing agreements as “conditional” or “binding” or “mere letters of intent.” As long as the participants discusses the pros ,cons, and ramifications of entering into a binding settlement agreement, the collaborative participants are free to do so.

IX. CONCLUSION

Selecting the proper type of settlement agreement, and drafting that settlement agreement properly are “mission critical” tasks. For purposes of a final settlement of a case, Rule 11 agreements are ill advised, unless one immediately travels to the courthouse and obtains a definitive oral rendition that expressly adopts the Rule 11 agreement as the final judgment of the court on all matters and in all respects. Otherwise, a mediated settlement agreement is, by far, the safest alternative. Informal settlement agreements can, potentially, save the cost of a mediator, but involve a material risk of enforceability problems and cannot be used in matters relating to children.

Throughout this process, one must use caution to avoid making mistakes. Since parties often execute mediated settlement agreements in the evening after a long day of mediation, ambiguities often arise. These ambiguities or errors can have serious consequences. Despite the lateness of the hour, to carefully review the agreement is essential. If an ambiguity arises, or if a problem occurs, making the mediator, who negotiated the agreement, the arbitrator of future disputes is very wise. The mediator/arbitrator knows what the “deal was.” Arbitration provisions in mediated settlement agreements with regard to the final documents are, in the undersigned’s opinion, virtual necessities.

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No Primary? No Problem (at least at temporary orders)!

Ryan H. Segall[1]

Changing conservatorship at temporary orders may be tricky. However, shifting from an even custody split to naming a party primary may not be as difficult as one may think. After all, if neither party is named primary in the original order, how could the statute addressing requirements for changing primary at temporary orders apply in the ensuing modification?

This was the Fort Worth Court of Appeals' rationale when recently presented with this issue.[2] If there is no designation of primary in a final order, the court reasoned, then the statute mandating heightened pleading standards for changing the child's primary residence at temporary orders does not apply.

In *G.P.*, a 2013 final order appointed a mother and father as joint managing conservators but neither party was given the right to designate the primary residence of the child. Instead, the order restricted the child's residence to several contiguous counties.

In the ensuing modification, the grandparents of the child intervened. At the original temporary orders hearing, Mother was given the exclusive right to designate the primary residence of the child. Later, the grandparents filed a motion to modify the temporary orders asking to be appointed temporary managing conservators. The trial court refused to set a hearing on the grandparents' motion, stating that the pleadings had failed to meet allege any of the three requirements set forth by Texas Family Code Sec. 156.006(b).

The Fort Worth Court of Appeals court examined Texas Family Code Sec. 156.006, the statute addressing temporary orders in modification suits. The rule provides three methods for changing the primary residence of the child designated under the final order at temporary orders:

(1) the child's present circumstances significantly impair the child's physical health or emotional development (an affidavit supporting the allegations is required);

(2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or

(3) the child is 12 years of age or older and expressed to the court who is the child's preference to have the exclusive right to designate the primary residence of the child.

The appellate court granted Grandparents' writ of mandamus, holding that 156.006(b)'s requirements for changing the person who has the exclusive right to designate the child's primary residence apply only when that designation has been previously set through a final order. The court reasoned that since there was no "final" designation to change in the original 2013 order, the movants were not required to plead and prove one of the three circumstances described by 156.006(b).

In conclusion, the *G.P.* ruling allows a trial court more discretion when faced with a temporary orders hearing for a custody modification. For conservators whose prior order does not give either party the right to designate primary residence of the child, this lowers the burden for movants. No longer are the parties required to plead or prove one of 156.006(b)'s requirements, including the higher "significant impairment" standard. For better or for worse, this makes things easier for litigants to change a final order at temporary orders.

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[2] See *In re G.P.*, 495 S.W.3d 927, 931 (Tex. App.—Fort Worth 2016, no pet.).

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NOT GETTING MARRIED TODAY: AN OVERVIEW OF COMMON LAW MARRIAGE[1]

By Lisa Hoge[2]

I. INTRODUCTION

Society tends to judge couples that choose to remain unmarried, even if they have sensible reasons for not formalizing their relationship.[3] However, their desire to avoid a formal marriage does not prevent them from becoming - intentionally or not - common-law married in certain states.[4] An estate planning or family law attorney should be aware of the laws regarding common-law marriage and the potential ramifications for a client.

The story of rapper Iggy Azalea illustrates how a person can be unaware of a common-law marriage and need legal advice.[5] Her former boyfriend, Maurice Williams, filed for divorce claiming that the couple was common-law married under Texas law.[6] He claims they lived together for a time and held themselves out as a married couple.[7] She denies these claims and says that Mr. Williams is seeking to turn a six-month relationship into an easy payday.[8]

This article hopes to help attorneys plan a defense for a client like Ms. Azalea by providing an overview of the history of common-law marriage and discussing the current state of the law within the United States.[9] It will also discuss the benefits of marriage, with a particular focus on the financial aspects.[10] Finally, this article will conclude with a discussion of the Social Security Administration's requirements for proving a common-law marriage, emphasizing how they place a burden on both applicants and employees.[11]

II. HISTORICAL OVERVIEW

While the concept of common-law marriage likely dates back much further, informal marriages have existed since at least the sixteenth century.[12] The *Decretum de Reformatione Martrimonni* supports this claim.[13] The Council of Trent passed this decree on November 11, 1563.[14]. It dealt a serious blow to informal marriages in Italy by declaring that a priest and at least two other witnesses were required to be present at a valid marriage ceremony.[15]

The law in England during that same time period was much more liberal about common-law marriages.[16] It allowed a marriage to be formed merely through word of assent.[17] This was known as entering into a marriage contact "per verba de praesenti."[18]

Scotland was even more lax on marriage formalities.[19] Many young English couples eloped across the border in order to escape disapproving parents.[20] In fact, parental consent was not required for

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[1] This article was originally published in Volume 55-3 of the REPTL Reporter.

[2] Ms. Hoge received an honorable mention for this article in the REPTL writing contest. She graduated from Texas Tech School of Law in May 2016, and may be reached at lnhoge@gmail.com.

[3] *See* Bella DePaulo, *Top 8 Reasons Not To Marry*, PSYCHOLOGY TODAY (Nov. 19, 2013), https://www.psychologytoday.com/blog/living-single/201311/top-8-reasons-not-marry.

[4] *See infra* Part III.A.

[5] *See Iggy Azalea Has Never Been Married but Ex Boyfriend Wants a "Divorce"*, SAN DIEGO DIVORCE ATTORNEY BLOG (Nov. 3, 2014), http://www.sandiegodivorceattorneysblog.com/2014/11/iggy-azalea-common-law-marriage.html.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See infra* Parts II-IIIA.

[10] *See infra* Part IV.

[11] *See infra* Parts V.

[12] Jennifer Thomas, " *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW 151, 154 (2009).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Scottish Way of Birth and Death*, UNIVERSITY OF GLASGOW, http://www.gla.ac.uk/schools/socialpolitical/research/economicsocialhistory/historymedicine/scottishwayofbirthanddeath/marriage/ (last visited Oct. 19, 2015).

those below twenty-one, and girls as young as twelve could legally marry.[21] The minimum age for boys was fourteen until it jumped to sixteen in 1929.[22]

The United States began enacting marriage laws on a state-by-state basis as early as 1639.[23] In Massachusetts, men were required to present a marriage certificate to the proper authorities for recording.[24] The law was later taken a step further with a requirement that all marriages take place before a magistrate or other authorized person.[25] This essentially abolished the possibility of being common-law married in Massachusetts.[26]

New York took a more liberal approach than Massachusetts. In 1809, a New York court upheld a marriage based on words of assent.[27] This is likely because New York based their laws on the English common law, which had long recognized common-law marriage.[28] They were not the only state to base their approval of common-law marriage on the English common law, as Texas would later use similar reasoning.[29]

Texas actually adopted the English common law after England abolished common-law marriage.[30] However, case law later clarified that Texas had adopted an older United States version of English common law that still recognized common-law marriage.[31] This allowed Texas to justify upholding the tradition of common law marriage.[32]

The United States Supreme Court upheld the continuation of common-law marriage in 1877.[33] They declared that marriage is a common right.[34] The only way a state can abolish common-law marriage is by specifically indicating so through legislation.[35] A later section will discuss the statutes of those states that still allow common-law marriage.[36]

Between 1875 and 1917, many states abolished common-law marriage for a variety of social reasons.[37] Ten more states would follow between 1921 and 1959.[38] Some of these reasons included fear of interracial marriages, concern with fraudulent claims, and a perceived threat to the institution of marriage.[39]

Only four states have abolished common-law marriage since 1959.[40] This seems to indicate that those social concerns became less importance as society changed. Common-law marriage has actually survived two semi-recent attempts to abolish it in Texas.[41] This brings us to a discussion of the current state of common-law marriage in modern-day America.[42]

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Commonwealth v. Munson, 127 Mass. 459, 461 (1879).
[24] *Id.*
[25] *Id.*
[26] *See id.*
[27] Fenton v. Reed, 4 Johns. 52 (N.Y. Ch. 1809).
[28] Cynthia Grant Bowman, xt=facpub" *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 720 (1996).
[29] MICHAEL ARIENS, LONE STAR LAW 157 (2011).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] .edu/supremecourt/text/96/76" Meister v. Moore, 96 U.S. 76 (1877).
[34] *Id.* at 81.
[35] Report/004WashReport0570.htm" In re McLaughlin's Estate, 30 P. 651, 654 (Wash. 1892).
[36] *See infra* Part III.A.
[37] *See* Bowman, *supra* note 26, at 731-32.
[38] *Id.* at 740.
[39] *Id.*
[40] *Id.*
[41] *See* Ariens, *supra* note 27, at 157-58.
[42] *See infra* Part III.A.

III. CURRENT STATE OF THE LAW

A. The Law

There are currently thirteen states with statues regarding common-law marriage.[43] Five of those states will only recognize a common-law marriage if it was entered into prior to a certain date. [44] That date will vary between the states.[45] Because of that severe restriction, those five states (Pennsylvania, Ohio, Indiana, Georgia, and Florida) are considered to have abolished common-law marriage for all practical purposes.[46]

Colorado has taken the opposite approach.[47] Rather than only recognizing common-law marriages entered into before a certain date, Colorado only recognizes common-law marriages entered into after September 1, 2006.[48] Both parties must be at least eighteen at the time of marriage, and no other law may prohibit the marriage.[49] Those requirements apply even if the common-law marriage was entered into outside of Colorado.[50]

Other states besides Colorado have statutes actively allowing common-law marriage.[51] New Hampshire and Texas are good examples of how a typical common-law marriage statute is written.[52] The New Hampshire statute states that "persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married."[53]

The Texas statute requires either a signed declaration of marriage or mutual agreement, co-habitation, and representing oneself as married.[54] The Texas Supreme Court upheld these requirements in 2013.[55]

Utah has a statute nearly identical to the Texas one.[56] The most significant difference is that Utah does not allow a common-law marriage to be formed by signing a declaration of marriage.[57] The other notable difference is that Utah allows a common-law marriage to be established up to one year after the termination of the relationship.[58] Iowa, Kansas, Montana, and South Carolina are the only other states that still actively allow common-law marriage, at least under certain circumstances.[59]

Statutes are not the only way for a state to recognize common-law marriage.[60] Some states have common-law marriage as part of their case law.[61] Rhode Island and Alabama are prime examples of this approach.[62]

The leading case on common-law marriage in Rhode Island is Demelo v. Zompa.[63] This case holds that a couple must have "seriously intended to enter into the husband-wife relationship."[64] Additionally, their conduct must have been "of such a character as to lead to a belief in the community that they

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[43] *Common Law Marriage By State*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 4, 2014), http://www.ncsl.org/research/human-services/common-law-marriage.aspx
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] /leg_dir/olls/2013TitlePrintouts/CRS%20Title%2014%20(2013).pdf" COLO. REV. STAT. ANN. § 14-2-109.5 (West 2015).
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] e.nh.us/rsa/html/xliii/457/457-39.htm" N.H. REV. STAT. ANN. § 457:39 (2015); tate.tx.us/Docs/FA/htm/FA.2.htm" TEX. FAM. CODE ANN. § 2.401 (West 2015).
[53] N.H. REV. STAT. ANN. § 457:39 (2015).
[54] FAM. § 2.401(a)(1)-(2).
[55] e/grigsby-v-reib-et-al" Grigsby v. Reib, 105 Tex. 597 (1913); *See* Ariens, *supra* note 27.
[56] /Title30/Chapter1/30-1-S4.5.html" UTAH CODE ANN. § 30-1-4.5 (West 2015).
[57] *Id.*
[58] *Id.*
[59] *Common Law Marriage By State*, *supra* note 41.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] elo-v-zompa" Demelo v. Zompa, 844 A.2d 174 (R.I. 2004).
[64] *Id.*

were married."[65] These two requirements can be proven by "inference from cohabitation, declarations, reputation among kindred and friends, and other circumstantial evidence."[66]

Alabama law can also be easily summarized.[67] Alabama requires proof of "(1) capacity; (2) present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships; and (3) public recognition of the relationship as a marriage and public assumption of marital duties and cohabitation" in order to show a common-law marriage.[68]

Oklahoma actually has contradictory law regarding common law marriage.[69] They have a statute requiring a formal marriage license, which would seem to bar common-law marriage.[70] However, common-law marriage has been upheld in the Oklahoma courts on more than one occasion.[71] It remains to be seen if and how the state intends to clarify this discrepancy.[72] In the meantime, an Oklahoma lawyer might face confusion arguing a common-law marriage case, which provides an excellent segue into our next topic.[73]

B. How to Argue For Your Client

The best place to start when faced with a common-law law marriage issue is to gather clear and convincing evidence that the couple were or were not common-law married.[74] Courts have been known to recognize many different things as evidence of a common-law marriage.[75] This might include financial documents, use of a common last name, insurance policies, and testimony from third parties.[76]

There are three common ways to repute a common-law marriage.[77] The first is to offer evidence that an element of the common-law marriage statute for the state where the marriage was formed was not met.[78] Alternatively, an attorney could produce proof that one or both of the parties was not legally competent at the time of the marriage.[79] Some possible reasons for incompetence include being insane or underage.[80] Finally, the third possible defense is to allege that one or both parties were already married at the time of the marriage.[81]

Courts have a preference towards marriage and view cohabitation and reputation within the community as particularly persuasive evidence.[82] Because of this preference towards marriage, common-law marriages continue to be recognized even if the couple moves to a state where common-law marriage is abolished.[83] This means that attorneys in all states need to consider whether their client may be common-law married.[84] The attorney also needs to make sure that a client who is common-law married understands the need for formal divorce should the couple ever split.[85] Finally, all attorneys should be aware of what marital benefits their client may be entitled to, which is our next topic of discussion.[86]

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[65] *Id.*
[66] *Id.*
[67] 1917647/gray-v-bush/" Gray v. Bush, 835 So. 2d 192 (Ala. Civ. App. 2001).
[68] *Id.* at 194.
[69] *Common Law Marriage By State*, *supra* note 41.
[70] OKLA. STAT. ANN. TIT. 43, § 43-4 (West 2015).
[71] *Common Law Marriage By State*, *supra* note 41.
[72] *See id.*
[73] *See infra* Part III.B.
[74] David Tracy, *Common Law Marriage in Oklahoma*, DIVORCENET, http://www.divorcenet.com/states/oklahoma/common_law_marriage_in_oklahoma (last visited Oct. 22, 2015).
[75] *Id.*
[76] *Id.*
[77] Adam Kielich, *Do I Need a Divorce for my Common-Law Marriage?*, THE KIELICH LAW FIRM (Jan. 14, 2015), http://kielichlawfirm.com/need-divorce-common-law-marriage/
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] er.com/opinion/2584479/matter-of-benjamin/" In Re Benjamin, 34 N.Y.2d 27 (1974).
[83] *Common Law Marriage*, NATIONAL PARALEGAL COLLEGE, http://nationalparalegal.edu/public_documents/courseware_asp_files/domesticRelations/Marriage/CommonLawMarriage.asp (last visited Oct. 26, 2015).
[84] *See id.*
[85] *Id.*
[86] *See infra* Part IV.

IV. MARITAL BENEFITS

Common-law spouses enjoy the same financial benefits as a traditionally married couple.[87] These include employment benefits, tax exemptions, ability to both claim tax deductions for mortgage interest and children, and eligibility for Social Security benefits.[88]

Employment benefits are an important advantage of being married as many people receive health insurance through their spouse's employer.[89] Employers who offer spousal benefits generally extend this benefit to common-law spouses.[90] Additionally, any children from the relationship can be added to the insurance plan as dependents.[91]

Some insurance companies or employers may require a signed affidavit before adding a common-law spouse to an insurance plan.[92] Others may require evidence of the marriage.[93] Once again, this evidence may include things like a joint tax return, a joint mortgage, or any other paperwork where the couple holds themselves out as a marital unit.[94]

Common-law married couples are also entitled to certain tax benefits.[95] Arguably, the most important of these is the marital exemption from the gift tax.[96] This states that an individual may transfer property to their spouse as a gift and then deduct that amount from their total taxable gifts.[97] The biggest caveat is that the receiving spouse must be a citizen of the United States in order to claim this deduction.[98]

One of the other major tax benefits of marriage is the increased estate tax exemption.[99] If a person dies with an estate valued over a certain amount, their heirs are required to pay taxes at a high rate on the excess amount.[100] However, married couples are allowed a much larger estate before the estate tax kicks in.[101] In 2015, an estate tax was owed on any estate of more than $5.43 million (if single) or 10.86 million (if married).[102] The applicable tax rate was 40%.[103] As you can see, marriage greatly benefited any couple with an estate in the $5-10 million range.[104]

The last major tax benefit of marriage involves deductions for children and for mortgage interest.[105] A hypothetical is helpful to explain the child deduction. An unmarried couple lives together and has two children.[106] One wishes to claim the standard child deduction on his/her taxes, while the other wishes to use the child to claim the Earned Income Tax Credit (EITC) on his/her taxes.[107] Who gets to claim the children?

The answer is that only one parent gets to claim a specific child.[108] So, either one parent claims both children, or each parent claims one child in this scenario.[109] If both parents attempt to claim the

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[87] Katie Adams, *Marriage vs. Common Law: What It Means Financially*, INVESTOPEDIA (Feb. 15, 2010), http://www.investopedia.com/financial-edge/0210/marriage-vs.-common-law-what-it-means-financially.aspx
[88] *Id.*
[89] *See Health Care Benefits: Common Law Marriage: How does common law marriage affect health insurance?*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Mar. 25, 2015), http://www.shrm.org/templatestools/hrqa/pages/howdoescommonlawmarriageaffecthealthinsuranceeligibility.aspx.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Publication 17 (2014)*, INTERNAL REVENUE SERVICE, http://www.irs.gov/publications/p17/ch02.html (last visited Oct. 26, 2015).
[96] aw.cornell.edu/uscode/text/26/2523" I.R.C. § 2523 (West 2015).
[97] *Id.*
[98] *Id.*
[99] *Gift Tax and Estate Tax*, EFILE.COM, http://www.efile.com/tax/estate-gift-tax/ (last visited Oct. 26, 2015).
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *See id.*
[105] *See supra* Part IV.
[106] *Qualifying Child of More Than One Person, AGI and Tiebreaker Rules*, EARNED INCOME TAX CREDIT, http://www.eitc.irs.gov/Tax-Preparer-Toolkit/faqs/tiebreakers (last visited Oct. 27, 2015).
[107] *Id.*
[108] *Id.*

same child, there is a tiebreaker rule that the IRS can apply.[110] Assuming that the child lived with each parent equally throughout the year, the parent with the higher adjusted gross income (AGI) is allowed to claim the child.[111] Needless to say, marriage would solve this messy situation by allowing the couple to file together and jointly benefit from all possible deductions and credits from both children.[112]

We finally come to the mortgage interest deduction.[113] Mortgage interest can be deducted from the homeowner's taxes under certain conditions.[114] As you will see below, there are distinct advantages to being married when it comes to mortgage interest deduction.[115]

> Interest on a mortgage taken out to buy, build or improve your home after October 13, 1987, may be fully deducted only if the total debt from all mortgages, including any grandfathered debt, amounts to $1 million or less for married couples and $500,000 or less for singles or married couples filing separately.[116]
>
> Mortgages taken out after October 13, 1987, for reasons other than to buy, build or improve your home must total $100,000 or less for married couples and $50,000 or less for singles or married couples filing separately. They must also total less than the fair market value of your house minus the value of all grandfathered debt and all post-October 13, 1987, mortgage debt.[117]

Now, it is time to discuss one of the most well-known marital benefits - Social Security.[118] "A married person can collect retirement benefits based on his or her own earning from work, or an amount equal to 50 percent of the other spouse's retired worker benefit - whichever is the higher amount."[119] Two examples are helpful to illustrate that concept.[120]

> Mrs. Williams will get a retirement benefit of $1,200 a month based on her work record. Mr. Williams is entitled to a retirement benefit of $500 a month based on his own work history. He will receive his own $500, plus an additional $100 to bring his total to $600 a month, based on 50 percent of Mrs. Williams' benefit. Total family benefits for the Williams household will be $1,800 a month.[121]
>
> Mrs. Rodriguez is entitled to a retirement benefit of $1,100 a month based on her work history. Her husband will get a benefit of $1,400, which would provide a spousal benefit of $700. Mrs. Rodriguez receives her own benefit of $1,100 a month, because that is the larger of the two amounts. Total family retirement benefits: $2,500 a month.[122]

As you can see, Social Security greatly favors married couples.[123] However, the Social Security Administration wants to be sure that couples are truly legally married, and has enacted regulations to help determine that.[124] This brings us to a discussion of the Social Security Administration's burdensome requirements to prove a common-law marriage.[125]

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Eight Facts about Filing Status*, IRS (Jan. 13, 2011), http://www.irs.gov/uac/Eight-Facts-About-Filing-Status.
[113] *See supra* Part IV.
[114] James E. McWhinney, *Tax Deductions on Mortgage Interest*, INVESTOPEDIA (Feb. 08, 2006), http://www.investopedia.com/articles/pf/06/mortinttaxdeduct.asp.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See supra* Part IV.
[119] *Social Security, Marriage, and Divorce*, NATIONAL ACADEMY OF SOCIAL INSURANCE, https://www.nasi.org/learn/socialsecurity/marriage-divorce (last visited Oct. 27, 2015).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *See id.*
[124] *See infra* Part V.
[125] *See infra* Part V.

V. SOCIAL SECURITY REQUIREMENTS

The Social Security Administration (SSA) makes it easy to prove a traditional ceremonial marriage.[126] A ceremonial marriage may be proven by a "certified copy of the public record of the marriage; [a] certified copy of the religious record of the marriage; or [t]he original marriage certificate.[127] Nearly all couples will be able to produce one of those documents.

If the couple is unable to produce one of those documents, a signed statement from the officiant who performed the wedding or "other evidence of investigative value" may suffice.[128] That type of evidence may include things like photographs, newspaper announcements, or witness statements.[129]

In contrast, a common-law marriage is difficult to prove.[130] Let's begin by looking at just part of the actual regulations.[131]

> Evidence to prove a common-law marriage in the States that recognize such marriages must include: [i]f the husband and wife are living, a statement from each and a statement from a blood relative of each; [i]f either the husband or wife is dead, a statement from the surviving widow or widower and statements from two blood relatives of the decedent; or [i]f both a husband and wife are dead, a statement from a blood relative of the husband and from a blood relative of the wife.[132]

This is obviously a complicated process, but it gets even more involved when you read the specifics in more detail.[133] The regulations go on to state that each spouse must submit a Statement of Marital Relationship and that, if the husband and wife are still living, a blood relative from each side must submit a Statement Regarding Marriage.[134]

The Statement of Marital Relationship form is a four-page document.[135] While most of the form is yes or no questions, the majority of yes responses require further explanation.[136] This form is required of both spouses, despite the fact that their answers will be (nearly) identical.[137]

Meanwhile, there is also the Statement Regarding Marriage.[138] This is required of one blood relative on each side.[139] What makes this form potentially complicated is the whole blood relative issue. There are dozens of reasons why a person might not have blood relatives, and the SSA specifically states that a relationship by marriage or adoption is insufficient.[140] There is no explanation of why a blood relative's testimony is perceived as more reliable than testimony from a non-blood relative or friend.[141]

The SSA did anticipate that a couple might have issues accessing blood relatives and does have an alternative process.[142] If a couple does not have enough blood relatives to fulfill the requirements,

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[126] *Evidence of Ceremonial Marriage*, SOCIAL SECURITY HANDBOOK, https://www.socialsecurity.gov/OP_Home/handbook/handbook.17/handbook-1716.html (last visited Oct. 27, 2015).
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *See Evidence of Common Law Marriage*, SOCIAL SECURITY HANDBOOK, https://www.socialsecurity.gov/OP_Home/handbook/handbook.17/handbook-1717.html (last visited Oct. 27, 2015).
[131] *Id.*
[132] *Id.*
[133] *Development of Common Law (Non Ceremonial) Marriages*, SOCIAL SECURITY PROGRAM OPERATIONS MANUAL SYSTEM (Oct. 13, 2013), https://secure.ssa.gov/poms.nsf/lnx/0200305065.
[134] *Id.*
[135] *Statement of Marital Relationship*, SOCIAL SECURITY ADMINISTRATION (Jul. 2015), http://www.socialsecurity.gov/forms/ssa-754.pdf.
[136] *Id.*
[137] *Development of Common Law (Non Ceremonial) Marriages*, *supra* note 131.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*

they may have another person who knows them well fill out the paperwork.[143] However, they must submit additional paperwork explaining why they were unable to use a blood relative.[144]

The process is further complicated when a couple is unable to obtain a Statement Regarding Marriage from anyone at all.[145] The SSA does provide their employees with instructions on how to handle this situation when both spouses are still living, although it notes that very few circumstances will justify using alternative procedures, and the couple will have to provide documentation about their unique circumstances.[146]

To wrap up this section, the following instructions show exactly what is expected of an employee faced with the task of proving a common-law marriage.[147]

> Develop each form independently of the others. Answer all items on each form fully but concisely and in the person's own words. Clarify all ambiguous answers and reconcile all conflicts. Explain any ambiguous answers on a report of contact form or Report of Contact (RPOC) screen. Get a supplemental statement over the person's signature, as needed. Obtain corroborating evidence (e.g., mortgage or rent receipts, insurance policies, medical records, bank records) to substantiate the fact that the couple considered and held themselves out as husband and wife.[148]

This list does not even include how to handle complex issues such as common-law marriages established outside of the United States.[149] The SSA has provided their employees with separate instructions on how to handle those complex situations, but they are beyond the scope of this article.[150] However, they do help illustrate the challenges that SSA employees face when handling a common-law marriage case.[151]

VI. CONCLUSION

Common-law marriage is a complex issue that can vary greatly from state to state.[152] It is important for couples to understand the benefits they may be entitled to as a common-law married couple.[153] However, some of the benefits may be challenging to receive, and Social Security is by far most difficult.[154]

It is time for the SSA to reevaluate their guidelines. They should begin by allowing non-blood relatives to provide evidence of a common-law marriage.[155] If they are unwilling to take that step, the SSA should at least adequately and publicly explain their rationale behind this policy.

The SSA should also reconsider why both parties are required to fill out the Statement of Marital Relationship form.[156] There seems no benefit to this, as couples will likely fill out their forms together. This greatly reduces the chances that conflicting answers will expose some lie, which is likely the SSA's rationale behind this policy.

In conclusion, a common-law marriage may be right for many couples. However, these couples need to fully understand several things: what it takes to form a common-law marriage, what it takes to end a common-law marriage, and the potential difficulties behind proving such a marriage.[157] It is the job of a good attorney to properly educate these couples and make sure they are prepared for the future in every way possible.

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[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *See supra* Part V.
[152] *See supra* Part III.A.
[153] *See supra* Part IV.
[154] *See supra* Part V.
[155] *See supra* Part V.
[156] *See supra* Part V.
[157] *See supra* Parts III-IV.

The Appeal of Polygamy in the Wake of Obergefell v. Hodges

By Jose Chapa*

Introduction

When the Supreme Court finally legalized same-sex marriage in *Obergefell v. Hodges*,[158] the question of polygamy resurfaced.[159] If states cannot restrict marriage to heterosexuals, can they restrict it to monogamous couples? This article presents the argument against decriminalizing and/or legalizing polygamy because it institutionalizes gender inequality, which harms women, children, and men (particularly younger, lower-status men). Part I describes where and how polygamy is practiced, and I will also include some conflicting narratives describing the polygamous experience and the effects of polygamy on the people who practice it and on society at large. Part II explores the constitutional evolution of polygamy, including *Reynolds v. United States*,[160] *State v. Holm*,[161] and *Brown v. Buhman*,[162] before considering how the holding in *Obergefell* does not necessarily entail a more capacious understanding of marriage itself, and I will use this recent case as a prominent interpretive lens for analyzing a fundamental right to plural marriage claim under a post-*Obergefell* constitutional framework. Part III sets forth various sources, including a literature review concerning feminist and critical race theory discourses on polygamy, to support the thesis that even from a social and policy perspective, decriminalizing and/or regulating polygamy is not a good alternative vehicle. Part IV summarizes the main arguments as to why the legal landscape with respect to polygamy is unlikely to change in the near future because the social forces themselves are not sufficiently strong to inspire this substantial redefinition of marriage.

I. Polygamy: What Is It and What Does It Look Like?

Polygamy is an umbrella term that includes polygyny and polyandry. In the former, which also happens to be the most commonly practiced form of polygamy, a male is allowed to have multiple wives.[163] In the latter, less frequently practiced form of polygamy, a female is allowed to take multiple husbands.[164] Arguably, from a historical perspective, polygamy is more traditional than monogamy. In fact, there are more polygamous societies across the globe than monogamous ones. The practice, however, is currently prohibited throughout the Americas, Europe, Australia, and large parts of Asia, including China and Japan.[165] On the other hand, polygamy remains legal in sub-Saharan Africa, the Middle East, and some parts of Asia.[166] Notwithstanding the criminal sanctions on it, polygamy continues to be practiced illegally in isolated fundamentalist Mormon communities and by some Islamic and African immigrants in both the United States and Canada. Polygamists are on the fringe of society and generally do not enjoy legal protections.

Opponents of polygamy frequently recount the negative impacts that women suffer within an inherently sexist relationship. In fact, to justify criminalizing polygamy, opponents raise the protection of women and children as the single most important objective. While there are "bountiful"[167] and polyvocal narratives within the polygamy discourse, most polygamous relationships in the United States, and in

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[1] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[159] In cases that resolve constitutional issues in favor of expanding rights, dissenters almost reflexively invoke the parade of "horribles" to anchor their opposition, regardless of sincerity of belief and almost always with an element of exaggeration.

[160] *Reynolds v. United States*, 98 U.S. 145 (1879).

[161] *State v. Holm*, 137 P.3d 726 (Utah 2006).

[162] *Brown v. Buhman*, 947 F.Supp. 2d 1170 (D. Utah 2003).

[163] Black's Law Dictionary (2nd Edition 2014).

[164] *Id.*

[165] *Reference re: Section 293 of the Criminal Code of Canada*, 2011 B.C.S.C. 1588.

[166] *Id.*

[167] For an extensive account of positive portrayals of polygamy in Bountiful, British Columbia, Canada's only openly polygamous community, *see* Angela Campbell, *Bountiful Voices*, 47 Osgoode Hall L. J. 183 (2009).

the world for that matter, are polygynous.[168] Historically, these relationships have glorified the male subject at the expense of his female counterpart, and women have been routinely placed in positions of little to no power. Contemporary scholars, however, have attempted to redirect this negative limelight by engaging members in polygamous arrangements who actually have something positive to say about the polygamous experience.[169] Despite these contradictory tales of "good" and "bad" polygamy, the case against polygamy should dominate because the harms of the practice significantly outweigh its benefits.

Further, modern-day practicing polygamists have also offered their own views, and these range from pleasant accounts of how the practice allows for dependence on co-wives, or "sister wives" as they have been euphemistically called, for the communal care of children to frightening and discomforting accounts of jealousy and resentment.[170] Nationwide, up to 100,000 people are estimated to be living in polygamous arrangements.[171]

A. Harms to Women

The Canadian case, *Reference re: Section 293 of the Criminal Code of Canada*,[172] noted that women in polygamous marriages are more likely to die in childbirth and live shorter lives than their monogamous counterparts. Women are also more likely to be the victims of domestic violence, as their husbands abuse them or they abuse one another. Women compete against each other as they vie for their husband's[173] attention. Not only does the abuse immediately affect the victim but it also creates a culture in which conflict is normalized, and all the parties involved must bear witness to the violence. Unsurprisingly, co-wives will not intervene to stop such violence.[174]

Studies have also shown that women in polygamous arrangements are far more likely to suffer from a number of emotional and psychological issues than women in monogamous relationships. According to one expert, the "indoctrinated conformity and lack of personal empowerment for women leads to an underdeveloped sense of self, an inability to understand or exercise choice, and a blurring of personal and collective identity."[175] In fact, women in polygamous marriages are more likely to report "higher levels of somatization, obsession-compulsion, depression, interpersonal sensitivity, hostility, phobia, anxiety, paranoid ideation, psychotism, and GSI-general symptom severity."[176] Further, for women in polygamous relationships, polygamy and life satisfaction are negatively correlated, and self-esteem is strongly related to the order in which they marry.[177]

B. Harms to Children

There has also been evidence that children in polygamous families have lower self-esteem than children from traditional families; the former are more likely to suffer from aggressive and anti-social behavior, conduct disorders, communication difficulties, adjustment problems, poor self-concept, sexual activity, drug abuse, and alcoholism.[178] The children are most significantly impacted by familial distress and disorder, the absence of the father,[179] and financial stress,[180] all of which can take a toll on their

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[168] *Reference re: Section 293 of the Criminal Code of Canada*, 2011 B.C.S.C. 1588, para. 235 (Can.).
[169] *Id.* at para. 236.
[170] In an interview, Marion Munn said that polygamy was "like living with adultery on a daily basis." Kirsten Andersen, *Former "Sister Wife*,*"* LIFE SITE (Feb. 11, 2014, 4:56 PM), https://www.lifesitenews.com/news/former-sister-wife-polygamy-was-like-living-with-adultery-on-a-daily-basis.
[171] *Id.*
[172] *Reference*, *supra* note 11, at para. 8.
[173] NB: not husbands'.
[174] Dena Hassouneh-Phillips, *Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America*, 22 Health Care for Women Int'l 735, 744 (2001).
[175] Nicholas Bala, *Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy*, 25 Can. J. Fam. L. 165, 169 (2009).
[176] Amberly N. Beye, *The More, the Marry-er? The Future of Polygamous Marriage in the Wake of* Obergefell v. Hodges, 47 Seton Hall L. Rev. 197, 215 (2016).
[177] *Id.*
[178] *Id.* at 219.
[179] *Reference* at para. 667 (In a heart-wrenching account, Sarah Hammon speaks of the absence of her father and their lack of a relationship. He did not know her name or who her mother was, leaving the child feeling more like a number than a valuable

emotional and physical wellbeing.[181] Children in these abusive households experience higher levels of depression and anxiety, both of which can precipitate suicidal and homicidal thoughts.[182] Psychology has already given this issue a name: "the lockage phenomenon,"[183] which proposes that for adolescents who experience intense pressure, from either witnessing or enduring abuse, homicide or suicide offers the only means of escape. Moreover, displaced parental aggression finds expression in frustration and anger toward their innocent children, which in turn spurs older siblings to take on parenting roles.[184] Children also suffer because they are often set in perennial rivalry with other children and mothers for the affection and attention of the family patriarch.[185] Further, studies have also shown that children are more likely to be abused and neglected in a home with an unrelated adult than children in a home with two natural parents.[186] This all leads to deep psychological and emotional harms that cannot be undone, as these are profound effects that last a lifetime.

C. Harms to Men

By the same token, polygamy harms men because it promotes marriage by the richest and most powerful males. As higher-status men take more wives, lower-status men are directly impacted because they are left with a smaller pool of women to choose from, and they must compete for fewer brides. In other words, they are excluded from the "marriage market." Instead, they turn to committing crimes of violence. In many polygamous communities, particularly in FLDS,[187] "many adolescent and young men are effectively forced to leave the community to ensure that the 'chosen' men have multiple wives."[188] When these men are expelled from these communities and are forced to integrate into a society in which polygamy is not the norm, the outside world becomes a foreign place in which they do not have the necessary tools—whether it be in terms of education, life skills, or a combination of both—to effectively survive.[189] Polygyny results in large numbers of unmarried men, who ultimately resort to destructive behavior that harms themselves and others as they compete for fewer women and resources.[190] Institutional monogamy, on the other hand, reduces intra-sexual competition, which leads to a more egalitarian distribution of women.[191]

Moreover, polygamy stimulates male lust,[192] and the politics of power are created, negotiated, and stratified according to these sexual dimensions that favor the male subject. Without a restraint on the male libido, polygamy encourages men to take on multiple wives; it deprives men of the essential, organic bond of exclusive marital companionship. Monogamy is not only the best way to ensure paternal certainty and joint parental investment in the children, but it also best ensures that men and women are treated with equal dignity and respect within the domestic sphere; in monogamous unions, husbands

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member of a family. Indeed, the narrative reflects the child's perception of abandonment is directly linked to her sense of social isolation—even within the structure of her own family.).

[180] *Id.* at para. 13 (Polygamy is associated with high fertility rates, and many families have economic needs beyond their means. Resultantly, many receive social assistance.).

[181] Beye at 216.

[182] *Id.*

[183] *Id.* at 217.

[184] *Id.*

[185] John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy Over Polygamy*, 64 Emory L.J. 1675, 1727 (2015).

[186] Jonathan A. Porter, *L'Amour for Four: Polygyny, Polyamory, and the State's Compelling Economic Interest in Normative Monogamy*, 64 Emory L.J. 2093, 2117 (2015).

[187] This is the acronym for the Fundamentalist Church of Jesus Christ of Latter-Day Saints. Although the Mormons of today officially renounced polygamy in 1890 (classic instance of religion bending toward the legal light), and the church has taken it upon itself to excommunicate those who do practice polygamy, fundamentalist Mormon groups continue to believe that plural marriage is an essential—and not just a useful—element of their faith.

[188] Beye at 219.

[189] *Id.*

[190] Porter at 2116.

[191] *Id.*

[192] Porter at 2121 (One study suggested that polygamous men experience higher levels of testosterone than monogamous men, and this phenomenon can be largely attributed to the fact that polygamous men are actively involved in the process of mate-seeking, thus participating in risky, testosterone-fueled behavior.).

and wives are more likely to provide each other with mutual support, protection, and edification throughout their lifetimes, adjusted to each person's needs at different stages of the life cycle.[193]

In sum, polygamy "routinizes patriarchy, deprecates women, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, harms children, and much more."[194] While there are instances of "good" polygamy, there are enough "bad" cases, as the following subsection will illustrate, to make its legalization too risky a prospect to entertain. Where plural marriage thrives in America, these disconcerting issues of imbalanced gender relations already exist, and most are increasingly resistant to egalitarian trends. Because these harms are not just theoretical and the potential for household upheaval in the context of polygamous arrangements is heightened, criminal prohibitions on polygamy are fittingly designed for the typical cases of polygamy—not the exceptional ones.[195] Resultantly, states can justify a strong interest in maintaining the relatively safe societal construct of the monogamous household.[196]

D. Warren Jeffs Gives Polygamy a Bad Name

Polygamy is subversive and abusive toward women, children, and men. It would be incorrect to say that arguments against polygamy rooted in harm are either archaic or unjustified.[197] Admittedly, the horrors of polygamy are most darkly depicted in the disturbing tale of Warren Jeffs, the former leader of the largest polygamist enclave in America. And while some accounts of polygamous arrangements can be clothed in deceptively utopic terms,[198] the harms described in most of these societies paint a different picture. Indeed, the prosecution of Warren Jeffs provides the most illuminating example of the negative consequences associated with polygamy, particularly the relations between the power dynamics that promote the male subject by subordinating the most vulnerable members.

In 2011, Warren Jeffs was convicted for the sexual assault of underage girls.[199] The FBI had placed him on its Ten Most Wanted List for arranging marriages between his followers and underage girls, but Jeffs was also notorious for hiding rape, condoning child abuse, and committing other criminal acts.[200] In a perverse effort to eliminate competition for wives, Warren Jeffs exhorted parent members to expel their young male children, which resulted in the "lost boy" phenomenon.[201] It was revealed during the court proceedings that Jeffs had more than seventy illegal marriages, a third of which were with underage girls.[202] Further, Jeffs kept incriminating records that detailed his heinous activities; during his trial, a tape of his assault on a twelve-year-old girl was played.[203] He was summarily sentenced to life in prison.[204] Even from behind bars, however, Jeffs continues to exert influence over members of his community.[205] The raid on Yearning for Zion, Jeffs's FLDS community in West Texas, will forever live in infamy.

It may be hard to estimate with absolute certainty what impacts legalizing polygamy would have on our country. Jonathan Turley, a nationally acclaimed legal scholar, argues that Jeffs represents the most radical case, and that selectively focusing on these extreme, individual cases to attack polygamy provides little value because doing so does not accurately capture the prevalence of abuse within a wider array of polygamous arrangements for the purposes of harm.[206] Nevertheless, countries in which

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[193] Witte at 1677-78.
[194] *Id.* at 1729.
[195] *Id.* at 1731.
[196] Porter at 2119.
[197] Casey E. Faucon, *Polygamy After Windsor: What's Religion Got to Do With It?*, 9 Harv. L. & Pol'y Rev. 471, 477 (2015).
[198] Angela Campbell, *supra* note 10, presents the "oppositional narrative," in which women claim that polygamy has enhanced their lives because it promotes the communal care of children, allows women to pursue educational opportunities, and fosters self-fulfillment. This is also the competition-cooperation paradigm. Polygamy provides more bodies to support the household.
[199] *Warren Jeffs*, BIOGRAPHY, http://www.biography.com/people/warren-jeffs-20771031.
[200] *Id.*
[201] Brieanne M. Billie, *The "Lost Boys" of Polygamy: Is Emancipation the Answer?*, 12 J. Gender Race & Just. 127, 129 (2008).
[202] BIOGRAPHY, *supra* note 42.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 Emory L.J. 1905, 1919 (2015).

polygamy remains legal may provide powerful templates for envisioning an America with polygamy. Most of these nations are illiberal and highly patriarchal. Could it be said that America is sufficiently post-modern and relatively egalitarian as to be able to smoothly translate from a world of monogamy to one of polygamy without re-institutionalizing patriarchy? Is our aversion to polygamy simply a function of its illegality? If members of polygamous communities were granted the panoply of benefits that the State affords to monogamous couples, would they flourish better?[207] As Steven Macedo, a political theorist at Princeton, accurately put it: "[A] sober assessment of polygamy as lived social form provides strong grounds for not extending equal recognition to plural marriages."[208]

II. The Constitutional Evolution of Polygamy

In an age of expanding sexual rights and marriage equality, it is not hard to imagine why the cause for polygamy has gained some traction. From a constitutional standpoint, however, claims for polygamy have been largely unsuccessful in the Supreme Court. *Reynolds v. United States*[209] was the first landmark case in which the Court ruled unanimously that banning polygamy was constitutional. This late nineteenth-century case tested the limits of religious liberty, and the Court held that the First Amendment allows Congress to outlaw religious practices even if it is prevented from interfering with religious beliefs.[210] Armed with racist terminology and laced with bigotry, the Court delivered an opinion that marked polygamy as an "odious" practice that was "almost exclusively a feature of the life of Asiatic and of African people."[211] As far as the Court was concerned, polygamy "fetter[ed] the people in stationary despotism."[212] For all its Victorian morality, *Reynolds* is still good law.

Recently, the courts in Utah have interpreted their bigamy laws very differently in the span of a decade. In *State v. Holm*,[213] the Utah Supreme Court adopted a broad reading of the bigamy law, as it applied to both legal and religious marriages. The Utah statute at issue in this case used to read: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person."[214] The defendant, Rodney Holm, was convicted for violating the state's bigamy law and for having unlawful sexual conduct with a minor.[215] Holm legally married Suzie Stubbs in 1986, but he later entered into religious marriages with Wendy Holm and Ruth Stubbs, Suzie's 16-year-old sister.[216] According to the Utah Supreme Court, the fact that Holm's subsequent marriages were not legally formalized did not remove them from the scope of the statute.[217] As a result, the court found Holm guilty of violating both the "purports to marry" and "cohabitation" prongs when he engaged in a ceremony and lived together with Ruth Stubbs, as husband and wife.[218] The court also held, more generally, that "religious solemnization"[219]—which requires nothing but speech and expressive conduct—triggers state prosecution.

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[207] *Id.* (Turley notes that polygamous families have been forced largely underground by the threat of prosecution and investigation.).
[208] W.W., *Marriage and Polygamy: Three's Company, Too*, THE ECONOMIST (July 2, 2015).
[209] *Reynolds*, *supra* note 3 (George Reynolds was a resident of Utah and the a devout member of the Mormon Church. He was married to two women at the same time, and he argued that his religion compelled him to marry multiple wives. His conviction rested on a charge of unlawful cohabitation, which was upheld by the Supreme Court. Today, "unlawful cohabitation" is no longer a crime.).
[210] *Reynolds* at 162.
[211] *Id.* at 164.
[212] *Id.* at 166.
[213] *Holm*, *supra* note 4.
[214] Utah Code Ann. § 76-7-101 (West 2010), *invalidated in part by Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).
[215] *Holm* at 730.
[216] *Id.*
[217] *Id.* at 738.
[218] *Id.* at 747.
[219] *Id.* at 737 ("But while a marriage license represents a contract between the State and the individuals entering into matrimony, the license itself is typically of secondary importance to the participants in a wedding ceremony. The crux of marriage in our society, perhaps especially a religious marriage, is not so much the license as the solemnization, viewed in its broadest terms as the steps, whether ritualistic or not, by which two individuals commit themselves to undertake a marital relationship.").

Chief Justice Christine Durham delivered a powerful dissent,[220] claiming that the cohabitation portion of the law was in clear violation of *Lawrence v. Texas*.[221] In *Lawrence*, the Supreme Court held that the constitutional right of privacy guarantees the right of adults to enter into consensual, intimate relationships without state interference; ultimately, *Lawrence* recognized intimacy outside of marriage.[222] Chief Durham further noted that purely religious ceremonies should not fall within the scope of regulation.[223] Interestingly and perhaps incorrectly, the majority found that *Lawrence* was inapplicable because it specifically covered private acts, and it did not protect abuse of our nation's most cherished institution: marriage.[224] Because one of the marriages was to a minor, the issue of actual consent was all the more suspicious.[225] Finally, the Utah Supreme Court held that the statute did not infringe upon Holm's freedom of religion or freedom of association.[226] Because the statute was facially neutral, it applied equally to everyone.[227]

But the polygamous experience begins to paint a different picture in *Brown v. Buhman*,[228] and America's perception of polygamy shifts to a considerably more positive light. To illustrate, it is imperative to look at Kody Brown's polygamous family. Brown has one wife and three "spiritual" wives. The men, women, and children of this family are not so much victims as they are meaningful participants; they defy every stereotype one can fathom about polygamy. *Sister Wives*, Brown's reality show, presents polygamy on a much too familiar plane, with the same banality of a perfectly conservative monogamous marriage, which induces viewers to be "less dogmatic about the morality and constitutionality of numerical limitations."[229] At the very least, the show humanizes polygamists. The show deliberately invites viewers to find common, resonant themes that are shared among all families.[230] By featuring the polygamous lifestyle in a manner that many find relatable, polygamy itself becomes normalized. In fact, Brown's mantra maintains that "love should be multiplied, not divided."[231]

Given this background, it comes as no surprise that the federal court in *Brown* reached the opposite conclusion than Utah's Supreme Court did in *Holm*. In his initial legal battle, Brown was actually successful in challenging Utah's cohabitation provision, even if he could not defeat the bigamy law altogether. In fact, *Brown* followed the dissent's line of reasoning in *Holm* in order to limit the "purports to marry" prong to only people seeking multiple legal marriage licenses, whereas the court in *Holm* held that religious ceremonies were included.[232] Further, Judge Clark Waddoups ruled that the cohabitation clause of Utah's statute was unconstitutional because it could not survive substantive due process analysis.[233] Because Utah could not articulate a compelling governmental reason for criminalizing nonmarital "religious cohabitation" that could satisfy strict scrutiny, the court had to strike down the cohabi-

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[220] *Id.* at 758-79.
[221] *Id.* at 776.
[222] *Id.* at 762.
[223] *Id.*
[224] *Id.* at 742.
[225] *Id.* at 743.
[226] *Id.* at 746.
[227] *Id.* at 745.
[228] *Brown*, *supra* note 5.
[229] Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 Emory L.J. 1977, 2043 (2015).
[230] *Id.*
[231] Interestingly, polygamy can also be conceived as dividing love precisely because it is shared among numerous partners such that no one partner can receive the entirety of one's affection. While there are different types of loves, *eros*—romantic love—threatens to melt away the boundary between ego and object (Freud), as it floods every part of a person, just as it "obliterate[s] the distinction between giving and receiving" (Lewis). Both C.S. Lewis and Sigmund Freud, despite their significant differences in perspective (Christian narrative v. psychoanalysis), provide highly influential formulations of *eros* by engaging similar metaphors of fluidity to describe the union of two as one. *See* Marcia Brennan, THE HEART OF THE HEREAFTER 37, (John Hunt Publishing 2014).
[232] *Brown* at 1210.
[233] *Id.* at 1189.

tation prong of Utah's bigamy law.[234] Although Brown won his case at the district court level, the Tenth Circuit reversed this ruling.[235]

In light of *Brown*'s initial victory in its decriminalization of religious, or informal,[236] polygamy and *Obergefell*'s legalization of same-sex marriage, it is easy to wonder why the prospect of legal polygamy may not seem too dim. Even the holding in *Obergefell* has been criticized by many scholars precisely because it vaguely defines and measures the liberty interest at stake[237] without formulating a sufficiently strong argument for marriage's limitation to two people other than by generously and indiscriminately inserting the adjective "two" in various places throughout the opinion.[238] These are just some of the rhetorical infirmities that may inadvertently slip through the interstices of our constitutional firmament. Justice Kennedy did, however, create a four-part test to determine that the fundamental right to marry applied with equal force to same-sex marriages.[239] The four "principles and traditions" invoked by Justice Kennedy to support his position are (1) individual autonomy, (2) the importance of the two-person union, (3) the rights of childrearing, procreation, and education, and (4) social order.[240]

A. The Future of Polygamy

Framing the pro-polygamy argument around autonomy alone bears considerable purchase. For this reason, the first factor is very likely to work in favor of the right to plural marriage, while the final three may not be as easy to overcome. Polygamy, by definition, conflicts with the second principle. But, if a court were to disregard the adjective "two," then perhaps the analysis might go differently. Indeed, a court may be inclined to uncover a fundamental right to marry altogether, without limiting it to two people. As for the third principle, polygamy presents a very weak case because, although children[241] may suffer from the stigma of having their parents' polygamous arrangement socially disparaged, the risks posed by polygamy on the children's wellbeing are more alarming. There would also be an argument that locking polygamists out of the central institution of marriage exacts its own brand of tyranny, perhaps in the same fashion that it once discriminated against same-sex couples. As for the fourth principle, monogamy is inextricably linked to social order. If, in any way, polygamy can be shown to deliver the same benefits as monogamy, its legalization is more likely to follow. Once polygamy sheds itself of the stereotypes associated with its pernicious harms, its legalization may become a reality.

III. Feminist and Critical Race Theory Discourses on Polygamy

Even if the reasoning behind *Reynolds* might have been misguided and colored by a disdain toward a certain group of people, subsequent decisions regarding polygamy have abandoned this language in favor of more accurately depicting polygamous contexts. Similar rhetoric, however, has threaded the polygamy discourse, particularly in terms of describing the practice as injuring children and subjugating women. Even though *Reynolds* has been incisively criticized for its racist and anachronistic theories, conceptualizing polygamy through a modern lens (such as *Reference*[242]) can help bring polygamy law more in tune with today's shared social values. While the *Reynolds* decision is undeniably tainted by a "dependence on nineteenth century theory that preceded the development of rigorous and objective social science,"[243] the harms of the practice remain. Perhaps our jurisprudential vocabulary should be updated such that it reflects more politically correct language because there are many aspects of the *Reynolds* opinion that are obsolete. In other words, as our jurisprudence related to pri-

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[234] *Id.* at 1190.
[235] *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1203 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016).
[236] In other words, not legal.
[237] Casey E. Faucon, *Decriminalizing Polygamy*, 2016 Utah L. Rev. 709, 761 (2016).
[238] This is essentially Justice Roberts's criticism of Kennedy's opinion.
[239] *Obergefell*, *supra* note 1, at 2589-92.
[240] *Id.*
[241] Naturally, the offspring of polygamous unions would be more numerous.
[242] *Reference*, *supra* note 8.
[243] Maura Irene Strassberg, *Can We Still Criminalize Polygamy: Strict Scrutiny of Polygamy Laws Under State Religious Freedom Restoration Acts After* Hobby Lobby, 2016 U. Ill. L. Rev. 1605, 1610 (2016).

vacy and marriage continues to develop, it is crucial to create bases for prohibiting polygamous marriages that are not entrenched in majoritarian morality nor colored by social animus.[244]

A. Polygamy and Same-Sex Marriage

In terms of analogizing polygamy to same-sex marriage, those efforts may not prove as fruitful as one might imagine. First of all, the polygamy issue is structurally dissimilar to the same-sex marriage issue, even as they both offer challenges to the traditional conception of the heterosexual marriage dyad. Although both require the reimagining of marriage itself, same-sex marriage maintains the dialogical conception of the "limited partnership,"[245] while polygamy does not. Many of those who favor same-sex marriage are quick to reject the polygamist agenda precisely because of its negative connotations. As explained in detail above, polygamy is not a victimless crime. Indeed, it is harmful to the most vulnerable parties, namely, women and children. Some commentators have even argued that this is exactly why polygamy should be legalized, as it allows for all these issues of domestic violence and abuse to come to light. The problem with that argument, however, is that legalizing the oppressive behavior inherent in polygamous arrangements only validates it. Moreover, the harms of polygamy are not only limited to the immediate familial structure but also to society and the institution of marriage at large, and I will consider these arguments in turn.

Inevitably, there is some validity to the statement that "[a]dvocates for a cause usually are concerned only with achieving their objective and could care less about any social reverberations."[246] However, "[m]any scholars [in favor of same-sex marriage] decry the comparison between same-sex relationships and polygamous relationships as too attenuated in practice to support any colorable legal analogy."[247] The truth is that the two are different in both structure and content. Same-sex marriage advocates primarily sought admission into the prevailing heterodyadic regime.[248] By contrast, plural marriage proponents seek to undermine the numerical limitation in favor of marital multiplicity.[249] Moreover, while the desire of LGBT members to marry a person of the same sex is "immutable," the desire of polygamists to marry more than one person is "mutable."[250]

Because of the inherent differences between same-sex marriage issue and the issue of polygamy, the majority's reasoning in *Obergefell* should not immediately provoke the question of "whether States may retain the definition of marriage as a union of two people."[251] Justice Kennedy belabors his point to establish that marriage is fixed between two people. The dissent, however, latches onto the "slippery slope" argument in order to oppose the legalization of same-sex marriage.[252] As the dissent remarks, "from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world."[253] The construction of this leap, however, is misplaced. It would be downright incorrect and ineffective for the Supreme Court to look to the sociocultural realities of other, arguably less developed nations in order to import the fallacious notion that because polygamy works elsewhere, it is likely to work in the United States. Indeed, national laws are shaped by myriad factors, including history, community values, economics, culture, religious orientation, and current predominant legal philosophy, among many others. Put simply, what works in one country does not necessarily work in another. Thus, the Supreme Court's inquiry into "history and tradition" must be geographically limited, as this is what makes most sense.

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[244] Jack B. Harrison, *On Marriage and Polygamy*, 42 Ohio N.U. L. Rev. 89, 146 (2015).
[245] *See generally* Adrienne D. Davis, *Regulating Polygamy, Intimacy, Default Rules, and Bargaining for Equality*, 110 Colum. L. Rev. 1955 (2010).
[246] John O. Hayward, *Plural Marriage: When One Spouse is Not Enough*, 19 U. Pa. J. Const. L. Online 1, 8 (2017).
[247] Faucon, *supra* note 40, at 476.
[248] Davis at 1997.
[249] *Id.*
[250] *See* Edward Stein, *Plural Marriage, Group Marriage and Immutability in* Obergefell v. Hodges *and Beyond*, 84 UMKC L. Rev. 871 (2016).
[251] *Obergefell*, *supra* note 1, at 2621.
[252] Witte, *supra* note 28, at 1728.
[253] *Obergefell* at 2621.

B. Polygamy's Harms and Monogamy's Benefits to Society

While monogamous marriage is neither good for everyone nor always good, Western writers have long argued that, in general and in most cases, monogamy brings essential private goods to the married couple and their children, in addition to vital public goods to society and the state.[254] Polygamy, on the other hand, erodes the institution of marriage in clearly discernible ways. Indeed, polygamy should be avoided not so much because of wickedness and barbarism, but because it fails to deliver the benefits of monogamy. As Jonathan Porter aptly notes, "the argument against [polygamy] is the argument for normative monogamy."[255]

Polygamous societies tend to have higher levels of familial poverty, lower levels of political rights and civil liberties, as compared to states with less polygyny, and increased antisocial behaviors that take the form of violence and crime.[256] The most radical argument contends that polygamy could disintegrate the monogamous model of marriage.[257] There is an inverse relationship between legalizing polygamy and societal wellbeing. If polygamy were legalized, more people would enter into polygamous marriages, and monogamy's benefits would decrease as polygamy's harms would increase.[258]

One of the strongest arguments that states have overlooked in advocating for normative monogamy is one grounded in economics. Monogamy artfully distributes marriage equally along gender lines, reduces the gender gap, and alleviates the incentives for men to commit risky and criminal activities as a means to attract a mate.[259] Monogamy also increases the likelihood of peaceful homes, which provides more security to children.[260] And, perhaps most importantly, monogamy encourages men to channel their efforts from mate-seeking to more productive means, like education and long-term business investments.[261] In short, the aggregate economic benefit of normative monogamy sparks societal prosperity and progress.[262]

C. Polygamy Arguments Across the Spectrum

Admittedly, polygamists continue to practice their lifestyles outside the eyes of the law. Strassberg argues that polygamy is the foundation for "insular and theocratically governed communities" that "shelter criminal abuse of other community members from government observation and sanction."[263] Moreover, she stresses that the marriages of second and third wives are necessarily "relegated to a place of silence and inferiority in public for fear of social stigma or criminal sanctions. Although the Court's purported intent was to protect innocent women, it only exacerbated their tenuous legal positions by pushing their lifestyles and existence into the shadows."[264] Concededly, criminalization may have the effect of forcing families to conceal their status to outsiders. This may nevertheless be preferable to decriminalizing polygamy, which may bring visibility to this community—but it would also conjure up the aforementioned consequences.

Some unanswered questions that have been raised by our jurisprudential corpus on polygamy reveal thornier issues. For instance, can we enforce equality to the point of denying autonomy? Should we constitutionally recognize cultural or religious practices that invariably discriminate against women? There is a clear interplay between religion and gender equality. One feminist has coined the phrase "the paradox of multicultural vulnerability"[265] to shed light on the fact that women are harmed by the very patriarchal elements in their own religious and cultural communities.[266] This theory exemplifies the dissonance that some women may encounter as they try to live their lives, either according to religion

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[254] Witte at 1677.
[255] Porter, *supra* note 29, at 2113.
[256] Hayward at 10.
[257] Strassberg, *supra* note 86, at 1632.
[258] *Id.*
[259] Porter at 2138.
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] Maura Strassberg, *The Crime of Polygamy*, 12 Temp. Pol. & Civ. Rts L. Rev. 353, 369-75 (2003).
[264] Faucon, *supra* note 40, at 487.
[265] Ayelet Schachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001).
[266] Beverley Baines, CONSTITUTING EQUALITY 153, (Susan H. Williams ed., Cambridge University Press 2009).

or other values. This all affects feminist thought, and the arguments permeate the whole spectrum. With religious freedom as their standard, religious feminists have no interest in claiming sex equality, while secular feminists privilege sex equality over religious freedom.[267] By contrast, intersectional feminists seek a balance between the two.[268]

Ironically, pluralist, multiculturalist, and counterculturalist arguments in favor of polygamy are typically associated with liberal political correctness, rather than with sexism and theological oppression. The truth is that "[n]ot all religious women seek to exercise their agency in a way that corresponds with a normative feminist politics of emancipation."[269] In promoting their own cultural practices, they do not necessarily seek to send signals of submission to men; rather, they are using venues to express diversity, assert personal choice, and craft unique social identities.[270] Vicki Jackson, a constitutional scholar, sets up this binary between feminist theory and constitutional theory by embracing the contradictory stances of rapprochement and disengagement.[271] Jackson advocates that a "good theory in this universe of feminist epistemologies is one that grows out of and is recursively refined by its interactions with facts, experiences, and interpretations of those experiences from the perspectives of women."[272] Admittedly, storytelling has the power to inform the law, and feminist scholars and critical race theorists alike have robustly explored this connection.[273] As Carol Smart interestingly put it, "[T]he law exercises power . . . in its ability to disqualify other knowledges and experiences."[274]

Although our legal codes are based on a rationalist philosophical inheritance of dualism, polygamy lies beyond the rational, and thus beyond this rationalist model of subjectivity. In effect, many of the arguments that are offered by proponents of polygamy seem to be about preserving the rights of the privileged, consolidated male subject as an autonomous entity, and this sense of consolidated and gendered subjective privilege is only enhanced and heightened by the multiplicity of female others surrounding him. Thus, the gender binary, favoring the masculine subject, that supports the polygamist proposition parallels and reinforces the dualistic logic concerning the rights, privileges, and freedoms of the autonomous (male) subject that underpins Enlightenment thought in general.[275]As Adrienne Davis relatedly responds:

> An international lens exposes the ways that polygamy is part of the pantheon of feminist conflicts over women as volitional subjects. Postcolonial and other feminists have called for more complex accounts of women's subjectivity, as beings who make "choices" under cultural, economic, and other constraints. An ongoing question for feminism is whether it leaves room for women who are committed to religious faith, cultural autonomy, antiracism, class solidarity, etc.[276]

In fact, many other contemporary writers have fervently argued in favor of polygamy, and they have examined past judicial decisions to decipher themes of colonialism, racism, and politics, to disentangle the threads of the Mormon Question. Martha Ertman, one such legal scholar, suggests that the ban on polygamy is rooted in a legacy of colonialism and racism, and that the discourse surrounding polygamy thinly veils a continued intolerance for sociocultural difference.[277] She introduces the concept of the "blackening" of Mormons; in so doing, Ertman imports the stereotypes and feelings of animosity and condescension that white supremacists felt towards African Americans during the Civil War era

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[267] *Id.* at 150.
[268] *Id.*
[269] Suzanne Lenon, *Intervening in the Context of White Settler Colonialism: West Coast LEAF, Gender Equality and the Polygamy Reference* (December 28, 2016). Oñati Socio-Legal Series, Vol. 6, No. 6, 2016. Available at SSRN: http://ssrn.com/abstract=2891019.
[270] Baines at 147.
[271] Vicki Jackson, CONSTITUTING EQUALITY 315, (Susan H. Williams ed., Cambridge University Press 2009).
[272] *Id.* at 318.
[273] *See* Katharine T. Bartlett, *Feminist Legal* Methods, 103 Harv. L. Rev. 829 (1990).
[274] Lenon at 1342.
[275] Witte, *supra* note 28, at 1718-24. I would also like to thank Marcia Brennan, Associate Professor of Art History at Rice University, for this insight.
[276] Adrienne D. Davis, *Regulating Polygamy, Intimacy, Default Rules, and Bargaining for Equality*, 110 Colum. L. Rev. 1955, 2038-39 (2010).
[277] Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 Colum. J. Gender & L. 287, 290 (2010).

(antebellum period and Reconstruction).[278] Ertman urges readers to rethink the ways an American ban on polygamy is not so much an attempt to promote gender equality and to protect minors as it is a political and religious agenda designed to "prevent the traitorous establishment of a separatist theocracy in Utah."[279] Even as Ertman purports to unmask hidden and suspicious legislative intentions, the current effects of polygamy, as expounded upon in this paper, acutely damage the lives of many women and children.

Moreover, Ertman draws on the work of Edward Said on Orientalism to express the multiple ways Mormon polygamists were always portrayed as either Blacks/Asians in cartoons.[280] By injecting this "us/them" dialectic, Ertman unwittingly alludes to Lacan's theory of "Othering."[281] The one doing the "othering" creates boundaries by projecting difference onto the "othered" subject, thus validating "our" existence and actions by vilifying "their" existence and actions.[282] In a similar vein, Pascale Fournier,[283] another legal professor, draws on Said's work to illuminate the differences between Eastern and Western thought.[284] Our own ethnocentric comparisons, defined by Brenda Cossman as "the geopolitical location of the author [which] becomes the unstated norm against which the exotic 'other' is viewed,"[285] preserves biases that obstinately deny differences within our own Western culture. The law operates in a highly charged atmosphere when it attempts to shape substantive equality within a religious framework—both because inclusion of certain behavior works at the exclusion of other—and it is thus met with firm resistance by groups wishing to privilege equality over conformity to religious principles vis-à-vis groups wishing to assert, affirm, and express their own individuality as part of a greater cultural schema. "Since the inception of early American constitutional and philosophical development, religion and law have been, theoretically, running on different (if not parallel) tracks."[286] The two—however—intersect, overlap, and clash in ways that make it impossible for the law to please everybody. Alas, this is one of the limits of the law.

Ertman also engages Sir Henry Maine's observation that progressive societies shift from status to contract in order to accomplish equality.[287] This tension between status and contract is viewed against the backdrop of white supremacy.[288] Because contract represents choice and equality, Ertman and Maine force readers to reconsider polygamy in light of these terms. In the same vein, Gordon writes that "[f]reedom of contract contained the power to participate in domestic relations, not to restructure them at will. The marriage contract was drafted by the state and triggered by the consent of the parties but not constructed by their idiosyncrasies."[289] Is the United States embracing paternalism at the expense of, as John Stuart Mill put it, interfering with Mormon women's choice, thus imposing a greater tyranny than the structure of polygamy itself?[290] Conversely, and borrowing from Maine's language, wouldn't the legalization of polygamy represent a regression from individualism toward larger units—take the family, for example—thus minimizing the issue of consent? As Gordon piercingly pointed out,

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[278] *Id.* at 312.
[279] *Id.* at 288.
[280] *Id.* at 290.
[281] *Id.*
[282] *Id.*
[283] Furthermore, Fournier deconstructs the East/West binary in the hope of "[a]llowing for the existence of hybridity, [in which] this methodological difference reverses the relation between the West and the East and facilitates the emergence of another story, one which creates a space where . . . men and women might be able to negotiate their claims outside the recognition/non-recognition binary." Other feminists have argued for a "joint governance" model, which is an institutional approach that ties the mechanisms for reducing sanctioned in-group rights violations to the very same accommodation structure that enhances the jurisdictional autonomy of minority religious groups. This model, of course, would fail *ab initio* in the United States because it is premised on the idea of shared jurisdiction between the state and the minority group.
[284] Pascale Fournier, CONSTITUTING EQUALITY 158, (Susan H. Williams ed., Cambridge University Press 2009).
[285] Brenda Cossman, *Returning the Gaze? Comparative Law, Feminist Legal Studies and the Postcolonial Project*, 1997 Utah L. Rev. 525, 525 (1997).
[286] Faucon, *supra* note 40, at 478.
[287] Ertman at 335.
[288] *Id.* at 336.
[289] Sarah Barringer Gordon, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 173-74 (University of North Carolina Press 2002).
[290] Ertman at 338.

"Lax exit (divorce) from marriage, when paired with the presumption of forced entry, appeared as a coherent whole, two sides of a corrupt coin."[291]

The Bountiful community in Canada provides a golden opportunity for understanding and analyzing polygamy. As Suzanne Lenon, an Associate Professor at the University of Lethbridge in Alberta, Canada, theorizes, "the very articulation of gender equality as a key trope in popular and public policy debates over polygamy . . . is deeply *conditioned* by the racial hierarchies underpinning the history and application of anti-polygamy laws, and particularly by the idea that gender *in*equality 'is a measure of the backwardness and incivility of *other* cultures.'"[292] In truth, the arguments and policies surrounding the history of both Canadian and American legislation are not dissimilar. Fournier further proclaims that "the West codifies and discursively produces knowledge about the East through the paradigm of colonial/imperial structures."[293] Viewed through this lens, Lenon and Ertman's arguments can be productively brought to bear in order to enhance the claim that the Western model of monogamy and civility may just as well be a self-fulfilling prophecy that discredits and denies its own subscription to hypocritical tendencies that promulgate a "white settler" agenda.

Furthermore, these viewpoints turn the gaze, as it were, away from the inherently harmful aspects of polygamy and toward the sociopolitical structures that allow monogamy to thrive. In this manner, the substantive inequality that women face in polygamous structures is effaced, while the religious liberty of the practitioners is sustained. Polygamy and gender equality will always be in tension with each other, even in the context of polyandry, because all polygamist practices"violate the security of the person by infringing on personal autonomy and bodily integrity."[294] Indeed, legalizing polygamy can have the unintended effect of creating a safe space for men to exploit women.

In the balancing of comparative harms, our democratic system recognizes that arguments concerning the welfare of women and children outweigh those that deny the polygamist his (or her) opportunity to enter into a plural marriage, and perhaps taking it even further, of preventing him (or her) from providing service to God and access to his (or her) own exaltation. The law has never been understood to privilege religion over an individual's desire to access multiple marriages. In fact, the law has recognized, time and again, that its own force and power is greater than that of any religious argument that may be formulated. Indeed, in *Employment Division v. Smith*, Scalia referenced *Reynolds* when he quoted that "[t]o permit [religious conduct in question] would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself."[295] Gordon herself insisted that "religious liberty was designed to protect individual citizens against attempts to 'control the[ir] mental operations, and enforce an outward conformity to a prescribed standard' rather than to excuse attempts to redefine legal or political structures in light of religious belief."[296]

The challengers to *Reference*, among other pro-polygamists, have indefatigably argued that there are already criminal sanctions for those harms that are said to arise out of polygamy, including statutory rape, child abuse, and domestic violence. In other words, a blanket prohibition on polygamy is virtually unnecessary to address these harms. Clearly, this misses the point. Polygamy is not just a proxy for these social ills; "the polygamy provision [actually] 'targets the problems holistically instead of in a piecemeal fashion' as it 'captures the institutional framework that creates the circumstances in which such other crimes may occur.'"[297] Moreover, Strassberg also argues that there is already an effective alternative on the books to decriminalizing polygamy—that of prohibiting legal recognition of more than

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[291] Gordon at 173.
[292] Lenon at 1332.
[293] Fournier at 166.
[294] Lenon at 1338.
[295] Indeed, it was cited by Justice Scalia in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) ("[W]e rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. 'Laws,' we said, 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."' (quoting *Reynolds*, 98 U.S. at 166-67)).
[296] Gordon at 227.
[297] Lenon at 1339.

one marriage. My fear is that if polygamy is decriminalized, the next logical move would be to fight for its recognition. If the marriage equality movement has taught us anything, it is that—much to Scalia's chagrin—decriminalization often leads to legalization. Is polygamy insufficiently harmful to women, children, and society, such that it should not be criminalized? Or, is polygamy simply too harmful to be recognized? The answer to the first question, I hope, is "no" for most people. And the answer to the second question is "yes."

Does access to a shared husband (or wife) present polygamy as a step forward toward progress or a step backward along the civil rights movement? The court in *Holm* found that *Reynolds* was "nothing more than a hollow relic of bygone days of fear, prejudice, and Victorian morality."[298] Though American society has embraced a more liberal campaign with respect to human rights, the issue of polygamy continues to be jarring to most people. One day, Americans may come to accept polygamy; or perhaps they never will. Nevertheless, those dissenting opinions that have made their mark by arguing in favor of polygamy may at one point, as Justice Douglas ruefully put it, "salvage for tomorrow the principle that was sacrificed or forgotten today."[299]

Furthermore, Faucon argues that the "larger political danger in failing to legally recognize and regulate polygamy is the current and future impact that this would have on the value of diversity in America, which is now expanding to include sexual orientation and alternative relationship structures, or 'intimate pluralism,' as part of that cultural and social diversity."[300] Polygamy can be dually interpreted as the most progressive and post-modern reform and the most traditional practice. Although the concept of recognizing the autonomous choice of consenting adults to structure their intimate association in the manner they find most appropriate is an attractive liberal idea, it myopically ignores all of the compromising evidence against polygamy. Admittedly, there are compelling stories about women who thrive in polygamous contexts. Nevertheless, polygamy seems to exact a price on volition, particularly on women, precisely because it simultaneously objectifies and subjects them to positions where their voices are just one in the multitude, and the male figure is more likely to prevail, thus garroting equality and resurrecting patriarchy. Shame is horizontal, and the unwritten laws that are themselves societal norms and expectations within repressive communities become vessels for emotional exploitation. Indeed, even the conditions underpinning and enabling consent are themselves not uniformly possible within polygamous societies or arrangements. While informed consent is not an unattainable goal, it is impossible to guarantee the lack of coercion or the possibility of agency, as there may be lingering and unresolved issues stemming from an unconsciousness about the oppression inherent in the practice, or the community pressure to only tell a "happy" story.[301]

Some women assert that "half a good man is better than none at all,"[302] but such a view unjustly dismisses the more widely held notions of the female population. Although some women may just as well prefer to be subjected to a system of patriarchy, luckily, most women do not fall under this category. Again, equality has the unavoidable effect of essentializing[303] women, but despite this, democracy and equality are irrevocably intertwined. Further, essentialist claims that dyadicism is "good" and polyfidelity is "bad" naturalize dyadic marriage as a static institution with an intrinsic set of "idealized" traits.[304] Indeed, these elementary premises "traffic in monolithic visions of all women as idealized feminist subjects."[305] As it continues to take form, the current social, legal, and political climate can only support dyadicisim, whether it is heterodyadic or homodyadic marriage, as the unspoken intimacy form against which all other forms are measured and evaluated. The law never promised to make everyone happy with its rules. Even within the LGBT community, critics opposed *Obergefell* for consigning them to an institution from which not all its members sought recognition; in fact, the opposite was true for some

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[298] *Holm*, *supra* note 4, at 741.
[299] Henry W. Ehrmann, COMPARATIVE LEGAL CULTURES 119, (Joseph LaPalombara ed., Prentice-Hall, Inc. 1976).
[300] Faucon, *supra* note 40, at 473.
[301] Campbell, *supra* note 10, at 193.
[302] Faucon at 475.
[303] *See generally* Diana Fuss, *Essentially Speaking: Feminism, Nature, and Difference* 1-2 (1989) (asserting that "essentialism is essential to social constructionism, a point that powerfully throws into question the stability and impermeability of the essentialist/constructionist binarism).
[304] Davis, *supra* note 88, at 2037.
[305] *Id.* at 2041.

LGBT members. By being excluded from the institution of marriage, many LGBT members resisted the societal norm that was being virtually thrust upon them by the weighty demands of a heteronormative society. In other words, they remained—to a certain extent—voluntary outsiders.

Obergefell stands for the proposition that society is becoming increasingly tolerant of people's different choices in family formation. But, as Hayward notes, even in a post-*Obergefell* world, "plural marriage has the potential to disrupt both heterosexual and same-sex marriage by destroying the exclusivity of the marriage bond."[306] Are we socially programmed to think of monogamy as the ideal? What is marriage actually for? As Maggie Gallagher prefaces, "[i]n every complex society governed by law, marriage exists as a public legal act and not merely a private romantic declaration or religious rite."[307] Gallagher argues that traditional marriage must be deconstructed if unbounded autonomy is to prevail.[308] The tradition of marriage, deeply rooted in Judeo-Christian culture, involves reciprocal vows of lifelong monogamy that are, of course, not universal.[309] As Gallagher elegantly put it, "Marriage is the way in which every society attempts to channel the erotic energies of men and women into a relatively narrow but highly fruitful channel . . . [and] of isolating and preferring certain types of unions over others."[310] The law of marriage helps to create a bundle of heightened expectations, both of which deter either spouse from transgressing the very moral and social boundaries they set out for each other when they said, "I do." As Gordon eloquently put it, polygamy explodes the fiction of perfect unity, "replacing [marriage] with multiplicity and tumbling the intricate structure built on the fantasy."[311]

Historically, polygamy "challenged both the Christian concept of marital unity and the related common-law concept of coverture, which defined married women's legal status."[312] Today, polygamy continues to challenge the Christian concept but instead of challenging coverture—another relic of the past—it challenges equality. In this manner, the prohibition against polygamy is both pre-Christian in origin and post-Christian in operation.[313] Evidently, polygamy cannot exist coextensively in either world. There is no breathing space for polygamy because its imperfect design cannot be socially engineered to match the arresting architecture of equality.

IV. Conclusion

The center of gravity of legal development lies not in legislation, but in society itself.[314] Indeed, shifting attitudes and behaviors shape our legal system. Changes in the law are invariably slower than changes in society. To alter the legal rules will require a complete reorientation of society's perception of monogamy, which until now, has been seamlessly woven into the social and moral fabric of America. When emotions run high and the climate is sufficiently charged to catalyze change, the law invariably cedes in the name of these greater, almost always romanticized, ideals. As Henry Ehrmann points out, "[t]o bring about changes in the law it is generally necessary that social and political pressures be built up, and even after this appears to have been done the pressures can be deflected or arrested unless they are strong and specific enough."[315] Currently, only 16% of the American public believes plural marriage is acceptable, and the individuals who practice polygamy mostly live in small towns in Arizona, Colorado, and Utah.[316] Despite the sensationalization of polygamy,[317] many Americans are actually unaware of Mormonism's origins and history, continue to disapprove of the Mormon faith, and generally distrust Mormons.[318] Consequently, polygamy has failed to feature proudly on the mantle of American civil rights liberties.

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[306] Hayward, *supra* note 89, at 2.
[307] Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 774 (2002).
[308] *Id.* at 779.
[309] *Id.* at 781.
[310] *Id.*
[311] Gordon, *supra* note 132, at 167.
[312] *Id.* at 66.
[313] Witte, *supra* note 28, at 1735.
[314] Henry W. Ehrmann, COMPARATIVE LEGAL CULTURES 2, (Joseph LaPalombara ed., Prentice-Hall, Inc. 1976).
[315] *Id.* at 4.
[316] Hayward at 10.
[317] Polygamy features in television programs, academic journals, politics (two presidential candidates), and the hit Broadway musical. *See* infra note 15.
[318] Jack B. Harrison, *supra* note 87, at 94-5.

As Gordon keenly observed: "The staying power of antipolygamy jurisprudence is remarkable, for many nineteenth-century cases were buried under the weight of twentieth-century rights doctrines that constantly eschew the nineteenth-century Court's restrictive interpretation of civil rights."[319] Thus, contemporary family law has the Herculean task of preserving monogamy by delimiting the tangled and intimate relations to no more than two adults. How can polygamous families share in the blithe experiences promised by marriage and parenthood when their very lives are blighted by indignity? How can democracy seek to effectively govern both the hearth and the heart in these intricately complicated, multifaceted, and asymmetrical relationships? How can the individuals experimenting with those polygamous contexts balance the relations between ardor and order? Answering these questions, which are at the crux of the polygamy agenda, deserves nothing less than the democratic process.[320]

In an age of expanding sexual rights and marriage equality, *Obergefell* has understandably galvanized the appeal of polygamy. Nevertheless, criminalizing polygamy will remain a feature of American law until its harms are shown to subside or once the American social imagination expands to include it as an acceptable alternative lifestyle. Despite the nation's changing attitude toward the government's regulation of personal and private affairs and an "apparent laissez faire attitude toward family structure,"[321] polygamy continues to be a subject that easily unsettles many Americans. The incentives and benefits of marriage should be limited to the monogamous couple because legalizing plural marriage would only adversely impact society; our government has invested far too much in cultivating an ethos of egalitarian democracy. The time is simply not ripe, as the cultural and legal pilgrimage for polygamy has yet to garner perceptible social momentum.

[319] Gordon at 130.
[320] Some readers may note the irony of this argument, as it was also one that was made by same-sex marriage opponents.
[321] Faucon, *supra* note 40, at 480.

Guest Editors this month includes Sallee S. Smyth *(S.S.S.)*, Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.),* and Jessica H. Janicek (*J.H.J.*)

DIVORCE
JURISDICTION AND PROCEDURE

WIFE FAILED TO INTRODUCE EVIDENCE TO SUPPORT DEFAULT DIVORCE DECREE.

¶17-3-01. *In re Marriage of Lucio*, No. 14-15-00951-CV, 2017 WL 1540799 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (mem. op.) (04-27-17).

Facts: Wife obtained a default divorce decree when Husband failed to file a timely answer. Husband appealed the decree, asserting that the evidence was legally insufficient to support the property division.

Holding: Reversed and Remanded

Opinion: A petition for divorce may not be taken as confessed if the respondent does not file an answer. Wife was required to put on evidence to support her claims. However, there was no evidence regarding the value of any community property or the community property as a whole. The only evidence was Wife's assertion that the division in her proposed decree was fair, just, and right.

Editor's comment: *This is a refresher case… you have to prove up the entire case, all of it, at a default prove-up, and do it on the record. There's a difference between an uncontested prove-up and a default prove-up. M.M.O.*

TRIAL COURT LACKED JURISDICTION TO MAINTAIN DIVORCE PROCEEDING BECAUSE WIFE HAD NOT MET RESIDENCY REQUIREMENT AT THE TIME HER PLEADING WAS FILED.

¶17-3-02. *In re Paul*, No. 10-16-00359-CV, 2017 WL 1749805 (Tex. App.—Waco 2017, orig. proceeding) (mem. op.) (05-03-17).

Facts: Wife filed a petition for divorce asserting she and Husband had a common-law marriage and that she had met the 90-day residency requirement. In temporary orders, the trial court ordered Husband to pay Wife $425,000 in interim attorney's fees. Husband filed a petition for writ of mandamus, which the appellate court—finding Wife had not met the residency requirement—granted. That same day, the trial court held a hearing on Wife's residency. Wife testified that she had signed a lease agreement for an apartment in Texas 90 days before that hearing. The trial court again awarded Wife the $425,000 in interim attorney's fees plus an additional $331,000 in interim fees. Husband again petitioned for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A suit for divorce may not be maintained if neither the petitioner nor the respondent have been a resident of the county in which the suit is filed for the preceding 90-day period. This requirement is jurisdictional and may not be waived. It is not enough that the ninety days will pass during the pendency of the proceeding. If the requirement is not met at the time the original petition is filed, the petitioner must file an amended petition when the requirement is met to allow the suit to proceed.

Here, Husband lived in Oklahoma and had no intent to move to Texas. At the hearing on Wife's residency, she testified that she had signed a lease agreement to live in Texas 90 days prior to that hearing but six months after her live pleading was filed. Wife filed no amended petition after that hearing. No evidence in the record showed that Wife might have lived in Texas before she signed the apartment lease.

Editor's comment: *I felt it necessary to comment on this case because I see this issue come up all the time. For example, a divorce is filed and into the divorce proceeding, it is discovered that you filed in the wrong county. Many attorneys believe that the problem can be corrected by the fact that 90 days has passed since the filing. This case is a reminder that that is not the law, and that the 90 day requirement is actually jurisdictional and therefore cannot be waived. J.H.J.*

Editor's comment: *What I think is interesting about this case is that the Waco court holds an amended pleading excuses failure of jurisdiction at the outset of a case. How many things could this apply to? I'm thinking a UCCJEA pleading where the child hasn't lived in Texas for 6 months. This case stands for the proposition that you can file early, dance around and keep it pending until you cross the date, then amend your pleading and you are ok. I don't agree with it, but here's some authority. M.M.O.*

PROPERTY DIVISION REMANDED BECAUSE NO EVIDENCE TO SUPPORT IT IN DEFAULT DIVORCE DECREE.

¶17-3-03. *Beam v. Beam*, No. 07-15-00250-CV, 2017 WL 1953225 (Tex. App.—Amarillo 2017, no pet. h.) (mem. op.) (05-10-17).

Facts: Though duly served, Husband failed to answer Wife's divorce petition, and Husband did not appear at the final hearing. At the final hearing, Wife testified as to her domicile and residence, that the marriage had become insupportable, that there were no children of the marriage and none were expected, and that she had prepared a divorce decree setting forth what she believed to be a just and right division of the estate. The trial court signed the decree. Subsequently, Husband filed a restricted appeal, asserting error apparent on the face of the record because no evidence supported the property division.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Even when a respondent fails to file an answer to a petition for divorce, the petitioner is required to prove the petition's allegations at the final hearing. Here, Wife entered no evidence of the extent or value of the marital estate or debts and no evidence regarding the character of the marital property.

Editor's comment: *I feel it's necessary to comment on this case, which is similar to Lucio above, because it is a case that I briefed and argued on appeal as my client was defaulted. I cannot stress how important it is as a litigator that you prepare a default in the same way that you would prepare for final trial. If you intend to default someone, no matter how long it has been since they were supposed to file an answer, you must present sufficient evidence to support your case. If you are trying to prove a just and right division, it is not enough to simply ask the client if he or she thinks the order is a just and right division. Bring an inventory, bring supporting documents, bring evidence that would support your argument that the division is just and right. Otherwise, it is very likely to be overturned on appeal and cost your client a significant amount in attorney's fees. J.H.J.*

Editor's comment: *Another default case… sometimes these come in pairs (see Lucio above). M.M.O.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT ABUSED ITS DISCRETION BY REMOVING ARBITRATOR AND APPOINTING NEW ARBITRATOR CONTRARY TO PARTIES' ARBITRATION AGREEMENT.

¶17-3-04. ***In re M.W.M.,*** ___ S.W.3d ___, No. 05-16-00797-CV, 2017 WL 1245422 (Tex. App.—Dallas 2017, orig. proceeding) (04-05-17).

Facts: The parties' final divorce decree including an agreement to mediate and, if necessary, arbitrate future disputes regarding child custody. After Mother was arrested for assaulting her new husband, Father sought an emergency hearing before the named arbitrator. Subsequently, the arbitrator signed an "Arbitration Order" temporarily suspending Mother's rights to visitation and possession. More than two years later, Mother filed a motion in the trial court to remove the arbitrator. The court found that the arbitrator had exceeded his authority, removed him as arbitrator, and appointed a new arbitrator. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The Family Code's arbitration provisions operate alongside the arbitration regime in the Texas General Arbitration Act ("TGAA"). Once parties have consented to arbitrate, they are bound by their agreement except insofar as the agreement is subject to review under the TGAA or other controlling law. Under the TGAA, a court is authorized to appoint an arbitrator if a party requests an appointment *and* (1) the agreement does not specify a method of appointment; (2) the agreed method fails or cannot be followed; or (3) an appointed arbitrator fails or is unable to act and a successor has not been appointed by the parties.

Here, the parties' agreement appointed a specific arbitrator, and he was not unable to act as arbitrator. Thus, the provisions for appointment by the court pursuant to the TGAA did not apply. Whether the arbitrator exceeded his authority was not relevant to whether the court had authority to appoint a new arbitrator.

★★★TEXAS SUPREME COURT★★★

MSA UNAMBIGUOUSLY DIVIDED ALL FUTURE EARNINGS; WHETHER HUSBAND'S SUBSEQUENT BONUS MAY HAVE BEEN PARTIALLY COMMUNITY PROPERTY IRRELEVANT TO ENFORCEMENT OF MSA.

¶17-3-05. ***Loya v. Loya,*** ___ S.W.3d ___, No. 15-0763, 2017 WL 1968033 (Tex. 2017) (05-12-17).

Facts: During their divorce proceedings, Husband and Wife signed an MSA that provided in part that all future income and earnings from each party would be partitioned to the person who earned it. When the decree was being drafted, the parties disputed the language that reflected this part of the agreement. Wife argued that the MSA awarded Husband future earnings "arising for services after" the MSA was signed. Husband argued that he was awarded all future earnings after the MSA was signed "period." The parties attended arbitration, and a decree was entered consistent with Husband's interpretation. Nearly a year later, Husband earned a bonus of $4.5 million. Wife filed a petition for post-divorce division of property, arguing that the bonus was community property that had not been divided by the MSA.

The trial court granted Husband a motion for summary judgment. Wife appealed, and the appellate court reversed. Husband sought review from the Texas Supreme Court

Holding: Trial Court Affirmed; Court of Appeals Reversed

Opinion: Whether the bonus was community or separate property was not relevant to the interpretation of the MSA. The MSA provided that all future income after the signing of the MSA would belong to the party who earned that income. Thus, the bonus Husband received nearly a year after the parties signed the MSA was Husband's property pursuant to the MSA, regardless of whether the bonus was for work performed during the marriage. The Texas Supreme Court quoted the dissent in the appellate decision, who stated that even if Husband's employer "considered work [Husband] performed before [the MSA was signed] in awarding the [subsequent] bonus, none of the bonus came into existence until" well after the MSA was signed.

Editor's comment: *This is a very important and must read case. This case is also a lesson about how to use residuary clauses. When drafting a decree, if your intent is to divide everything, at the time of the mediation and after, a residuary clause will do just that. For example, awarding a party "all sums of cash in that party's possession." Having an undivided asset clause will not do any good here, because the settlement agreement clearly awards that party all sums of cash without question to timeframe. If you have a concern about undisclosed assets, the most cautious thing you can do, and the safest for your client, is to only specifically divide the assets and values in existence at the time of the agreement. Had this settlement agreement specifically divided only the sum of cash in husband's possession, at the time the settlement agreement was signed, the court may have been able to find the bonus, which was earned during marriage but not awarded until later, a community property asset. J.H.J.*

Editor's comment: *The most interesting part of this opinion is, "Whether the portion of a purely discretionary bonus based on services performed during the marriage constitutes community property is an important issue, but one we need not reach in this case." J.V.*

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

EVIDENCE SUPPORTED AWARD OF SPOUSAL MAINTENANCE WHILE WIFE PURSUED MASTER'S DEGREE IN NURSING.

¶17-3-06. *Alfayoumi v. Alzoubi*, No. 13-15-00094-CV, 2017 WL 929482 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (03-09-17).

Facts: After a bench trial in their divorce proceeding, the trial court awarded Wife spousal maintenance. Husband appealed.

Holding: Affirmed

Opinion: When the parties separated, Wife resumed the pursuit of her career in the medical profession by returning to college for a master's degree in nursing. Thus, the trial court could have found that Wife overcame the presumption against spousal support by showing diligence in developing necessary skills to provide for her own minimum reasonable needs.

Wife put her career on hold when the parties married and was a homemaker throughout the parties' 14-year marriage. Although Wife finished her bachelor's degree before having children, she never

obtained a nursing license. The trial court could have found that the 14-year-old degree was insufficient by itself to allow Wife to apply her skills in a meaningful way.

Although Wife received about $250,000 in gold in the divorce, the law did not require her to spend down long-term assets or liquidate all available assets to meet her short-term needs: the costs of tuition and living expenses while in school.

Finally, Wife testified that she suffered significant depressive episodes that required counseling and that she was once committed to a psychiatric facility. The trial court could have considered the potential on-going cost of mental health counseling in determining Wife's minimum reasonable needs while pursuing her master's degree.

Editor's comment: *TFC 8.051 states that maintenance can be awarded "only if the spouse seeking maintenance will lack sufficient property, including the spouse's separate property . . . to provide for the spouse's minimum reasonable needs." The court rejected the argument that the ex-wife should have to liquidate any of the $250,000 in gold awarded to her in the divorce to meet her minimum reasonable needs. It relied on Amos v. Amos, 79 S.W.3d 747 (Tex. App.—Corpus Christi 2002, no pet.), where the court said the ex-wife's assets were "negligible," and on Trueheart v. Trueheart, No. 14-02-01256-CV, 2003 WL 22176626 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet.) (mem.op.), where the ex-wife received assets worth $290,000 but almost half of them were illiquid so should not be considered for maintenance, which is supposed to be short-term in nature. If $250,000 in gold should not be touched to provide for an ex-spouse's minimum reasonable need, is not TFC 8.051 robbed of any meaning? J.V.*

WIFE NOT ENTITLED TO SPOUSAL MAINTENANCE: WIFE'S TESTIMONY ALONE MAY HAVE BEEN SUFFICIENT TO ESTABLISH DISABILITY, BUT WIFE FAILED TO PROVIDE ANY EVIDENCE THAT HER "DISABILITY" PRECLUDED HER FROM OBTAINING GAINFUL EMPLOYMENT.

¶17-3-07. ***Roberts v. Roberts***, ___ S.W.3d ___, No. 04-16-00170-CV, 2017 WL 1902591 (Tex. App.—San Antonio 2017, no pet. h.) (05-10-17).

Facts: In a prior appeal, the appellate court remanded the property division because the trial court mischaracterized $32,000 as Wife's separate property, which had more than a de minimus effect on the just and right division of the marital estate. On remand, the trial court changed its original ruling of a 60/40 division but declined to affix a percentage to the "new" division and determined that the original final decree "continues to be just." The trial court found that the final decree would remain the same, which included an award of indefinite spousal maintenance to Wife. Husband appealed, challenging the spousal maintenance and the property division.

Holding: Reversed and Remanded in Part; Affirmed as Modified in Part

Opinion: While testimony of the party seeking spousal maintenance alone may support a finding of disability, this testimony must still be sufficient and probative to establish a disability exists *and* that the disability prevents that party from obtaining gainful employment. Here, Wife testified as to a number of ailments from which she suffered. However, Wife did not testify that any single condition or that her collective "disability" precluded her from obtaining gainful employment. Thus, the appellate court modified the decree to omit the award for spousal maintenance, as it was not supported by the evidence.

After the property division was previously remanded due to the trial court's mischaracterization of separate property, the trial court failed to reallocate the erroneously awarded balance or in any other way change the property division to account for the error. The trial court, in finding the division "continues to be just" implicitly awarded Wife the separate property in the guise of community property. Accordingly, the appellate court again remanded the decree for a just and right division.

Editor's comment: *This case is a good example of making sure you meet all elements of the test as laid out in the family code in order to get relief. Here, the court indicates that there may have been evidence that the wife's disability precluded her from earning income, but that evidence was not presented to the court, so wife could not meet her necessary burden. This is no different than a protective order case where a party puts on significant evidence of family violence, but no evidence that family violence is likely to occur in the future. You cannot succeed in getting relief without meeting all the elements, so make sure that you carefully present evidence to meet each prong of the statute. J.H.J.*

Editor's comment: *The opinion states that the appellant gave the same testimony about her disability after remand that she gave in the original trial. If that is correct, then why did the court remand for a reconsideration of maintenance after finding the characterization error? If the appellant did not testify that her disability precluded her from obtaining gainful employment in the first trial, should the court not have reversed and rendered on that issue in the first appeal? J.V.*

Editor's comment: *Spousal maintenance based on a spouse's disability has two elements. You must prove the disability AND you must prove that the disability prevents the spouse from getting a job. Disability alone is not enough. M.M.O.*

DIVORCE
PROPERTY DIVISION

HUSBAND'S TEN-YEARS' EXPERIENCE IN CATTLE AUCTION BUSINESS SUFFICIENT TO INVOKE THE PERSONAL-OWNER RULE SO HE COULD TESTIFY AS TO HIS BUSINESS'S VALUE.

¶17-3-08. ***Banker v. Banker*****,** ___ S.W.3d ___, No. 13-15-00385-CV, 2017 WL 1228899 (Tex. App.—Corpus Christi 2017, no pet. h.) (03-02-17).

Facts: During the marriage, the parties purchased two businesses. Husband ran a livestock auction house, and Wife ran an insurance agency. In their divorce decree, each party was awarded the business he or she operated. At trial, Husband did not have an expert valuation of his company. Rather, Husband testified that his estimated value was based on his personal knowledge from a lifetime of experience and education in the livestock auction market. The trial court granted the divorce on the ground of Husband's adultery and found that Wife was entitled to 55% of the community estate. Wife appealed, arguing that the trial court erred in valuing and distributing certain assets.

Holding: Reversed and Remanded in Part; Affirmed on Condition of Remittitur in Part; Affirmed in Part

Opinion: Although Wife noted some inconsistencies in Husband's testimony, he demonstrated a minimum basis of personal knowledge adequate to invoke the personal-owner rule, allowing him to testify as to the value of his company. Further, contrary to Wife's complaint, Husband was not required to use the magic words "fair market value."

No evidence supported the value assigned by the trial court as to the bank accounts awarded to Wife. However, evidence supported a lesser amount. Because the trial court found that Wife was entitled to a 55% share of the marital estate, the appellate court suggested Husband voluntarily remit the cash which was erroneously credited to him within 15 days of the appellate court's judgment. Such action would cure any reversible error.

Wife complained that the decree failed to award six community property horses. Husband contended that residuary clauses in the property division awarded the horses to him because they were in his possession. The final decree awarded Wife "any other livestock" in her possession, but did not in-

clude that phrase in the property awarded to Husband. The decree did not otherwise refer to the six horses, so that issue was remanded to the trial court for valuation and division.

Editor's comment: *This is the first time I can remember ever seeing "remittitur" used as a device to otherwise correct error in a property division on appeal. In my experience, a $10K valuation error in an overall $2 million++ estate would be considered "de minimis" and would not result in reversible error on a division of property. Here, however the COA finds the error reversible but offers the H an inexpensive way out of a complete property division reversal. I'm guessing payment of $4,914 versus the fees and expenses involved in a complete new trial makes for an easy decision on H's part. S.S.S.*

Editor's comment: *My only comment on this case is simply that it's not required that an expert be hired to testify to the value of the business. We have many clients who cannot afford experts or their businesses may have value, but not value enough to pay thousands of dollars to an expert. There is still a way to get the value testimony into evidence. J.H.J.*

Editor's comment: *This is one of the rare cases where a trial court granted a divorce based on adultery. Although it did not need to, perhaps the trial court wanted to buttress its 55/45 property division in favor of the other spouse. J.V.*

Editor's comment: *Two things stand out to me about this case. First, the Corpus Christi Court terms the concept that a party can offer evidence about the value of their assets as the "personal-owner rule". I don't think I've ever heard it called that before. Second, they permit a remittitur to avoid reversible error. I've never seen that before either. M.M.O.*

SEPARATE-PROPERTY RECITAL IN GENERAL WARRANTY DEED CREATED PRESUMPTION OF SEPARATE PROPERTY.

¶17-3-09. *Cardanas v. Cardanas*, No. 13-16-00064-CV, 2017 WL 1089683 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (03-23-17).

Facts: During their marriage, Husband took out a loan against his separate property and had Wife use the funds to purchase a house. The general warranty deed listed Wife as grantee and as "a married woman dealing with her sole and separate property." During the divorce proceedings, Wife asserted that the house was separate property because Husband gifted it to her during the marriage. Husband claimed he never intended the house to be a gift. The trial court agreed with Wife. Husband appealed, contesting various aspects of the property division, including the characterization of the house and the valuation of a camper trailer.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A separate property recital in a written instrument negates the community property presumption and creates in its place a rebuttable presumption of separate property. Here, the general warranty deed listed Wife as the grantee dealing with "her sole and separate property." This recital created a presumption of separate property that Husband failed to rebut.

Because Wife's unsworn inventory was not admitted as evidence, its valuations, including that of the camper trailer, was not evidence that could be relied upon by the trial court. All admitted evidence of value of the trailer was significantly less than the value assigned by the trial court in its findings. Thus, Husband was correct that no evidence supported the trial court's valuation of the trailer.

Editor's comment: *De minimis? The wife testified that the husband had received bids for the camper trailer of $12,000, such that the error alleged amounted to $4,000. J.V.*

THIRD-PARTY DEFENDANTS IN DIVORCE NOT ENTITLED TO ATTORNEY'S FEES AS PART OF JUST-AND-RIGHT DIVISION OF COMMUNITY ESTATE.

¶17-3-10. ***Brown v. Wokocha*, ___ S.W.3d ___, No. 01-15-00759-CV, 2017 WL 1326076 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.)** (04-11-17).

Facts: In an amended counter-petition for divorce, Husband added claims for fraudulent transfer, IIED, and civil conspiracy and added Wife's three adult daughters from a previous marriage and Wife's business entities as co-respondents. Subsequently, the trial court granted the daughters a summary judgment, and the remaining issues were tried to the bench. After a final decree was entered, Wife appealed. Among other complaints regarding the property division, Wife argued that the trial court erred in failing to award attorney's fees to the attorney who represented her daughters and business entities.

Holding: Affirmed

Opinion: Without findings of fact and conclusions of law establishing the values attributed to the community estate or reimbursement claims, the appellate court had no way to determine whether the trial court abused its discretion in dividing the community estate. Additionally, even if the trial court erred in mischaracterizing Wife's separate property, Wife failed to show that such error had more than a de minimus effect on the just and right division.

Wife cited no authority to support her assertion that third-party defendants in a divorce action are entitled to an attorney's fee award as part of the just and right division of the marital estate.

Editor's comment: *This case demonstrates the critical importance of seeking and obtaining FFCL when the final decree itself does not include values. There are appellate decisions wherein the COA is still able to consider property issues on the merits when the decree includes enough information on value to permit review, however when a decree is silent as to values of the property divided and there are no FFCL, the already difficult job of securing a reversal of a property division will rapidly become "impossible" in the words of the COA. S.S.S.*

Editor's comment: *This case finds that third-party defendants aren't entitled to an attorneys fee award in a divorce case. I think this holding may have some ramifications. M.M.O.*

FIDUCIARY DUTY EXISTED BETWEEN HUSBAND AND WIFE DESPITE LACK OF COMMUNITY PROPERTY.

¶17-3-11. *Hughes v. Hughes*, No. 13-15-00496-CV, 2017 WL 1455088 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (04-20-17).

Facts: Husband, 86-years old, and Wife, 57-years old, had both been married twice before. Before they wed each other, they signed a prenuptial agreement, which they ratified after the marriage. They agreed that no community property would be created during the marriage, and that if any property was jointly obtained, each spouse would own an undivided interest in the jointly acquired asset in an amount equal to the percentage of his or her respective contribution.

Subsequently, Husband attempted to conduct estate planning, but he and Wife disagreed about the character of certain assets. Husband filed for a declaratory judgment to interpret the prenuptial agreement. Shortly after, both parties filed for divorce, and the declaratory action and divorce proceeding were consolidated and tried to a jury.

Evidence showed that, during the marriage, Wife regularly transferred large sums from Husband's separate accounts into her own. At trial, Husband's expert testified about his tracing of the parties' purchases during the marriage. The jury made findings regarding each parties' interest in certain disputed

assets and found that Wife committed fraud and breached her fiduciary duty to Husband, for which Husband was entitled to damages.

Wife appealed the judgment, arguing that the evidence did not support the verdict because assets found to be Husband's separate property were, Wife contended, gifts to her. Wife additionally argued that the evidence was legally insufficient to support the jury's finding that she and Husband owed each other a fiduciary duty because no community property was created during the marriage.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: Wife failed to establish that any of the disputed assets were gifts. Additionally, of all the assets disputed on appeal by Wife, only a diamond necklace could be traced to a purchase from an account which the jury found to be her separate property. Thus, the trial court erred in granting Husband a directed verdict with regard to the necklace.

Recognizing that a fiduciary duty exists between spouses with regard to their community estate, the appellate court chose not "to read those cases so narrowly as to foreclose that spouses do not owe other fiduciary duties to one another by virtue of the marital relationship." Accordingly, despite the lack of any community property, the evidence was legally sufficient to support the jury's finding that Wife breached her fiduciary duty to Husband.

Editor's comment: *This case is a good reminder that fiduciary duties in relationships exist whether or not there is a community estate. I have had a significant amount of cases with premarital agreements where parties argue that there is no fiduciary relationship, and there can be no fraud, because there is no community estate. Clearly in this case, wife committed fraud against husband by breaching her fiduciary duty to him as a wife, regardless of the fact that the money she was transferring and spending was his separate property. J.H.J.*

ACCEPTANCE-OF-BENEFITS DOCTRINE DID NOT BAR WIFE'S APPEAL BECAUSE HUSBAND FAILED TO SHOW HE WAS PREJUDICED BY HER ACCEPTANCE.

¶17-3-12. ***In re Marriage of Stegall*****,** ___ S.W.3d ___, No. 07-15-00392-CV, 2017 WL 3364875 (Tex. App.—Amarillo 2017, no pet. h.) (05-12-17).

Facts: When Husband and Wife married, Husband had approximately $140,000 in cash, several motor vehicles and trailers, over 100 head of cattle and calves, hay, forage, saddles and tack, 30 head of horses, a residence, and two other pieces of real property. During the marriage, Husband traded cattle—as he had down his whole life—but did not keep good records. Wife worked sporadically. In the divorce decree, the trial court confirmed the cattle and related inventory as Husband's separate property. Wife appealed, arguing that Husband failed to present clear and convincing evidence sufficient to overcome the community-property presumption.

In reply, Husband asserted that Wife was estopped from appealing the property division because she had accepted its benefits by cashing a tax return check and by having Husband's 401(k) funds transferred to her own 401(k) account. Additionally, Husband argued that by applying the inception-of-title rule and the minimum-sum-balance presumption, the trial court had sufficient evidence to support its finding that the cattle and related inventory was Husband's separate property.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Citing *Kramer v. Kastleman*, 508 S.W.3d 211 (Tex. 2017), the court noted that the acceptance-of-benefits doctrine is an estoppel-based doctrine, and that Husband, as appellee, had the burden to establish that Wife's acceptance of the benefits unfairly prejudiced him. While the court did not hold that Wife's acceptance was based on economic necessity, it did hold that Husband failed to

show that the benefits could not be replaced by Wife if she were to succeed on appeal but receive a less favorable property division on remand.

Because Husband made no effort to identify or segregate the cattle he brought into the marriage from the calves born during the marriage, Husband failed to overcome the community-property presumption. Additionally, the court noted that "it is doubtful that the minimum-sum-balance presumption can be applied to cattle since cattle, unlike cash, is not fungible."

HUSBAND AND WIFE OBTAINING LOAN FINANCED BY HUSBAND'S SEPARATE PROPERTY AND USE OF WIFE'S NAME OF DEED OF SALE OF THE PROPERTY DID NOT AFFECT SEPARATE CHARACTER OF THE PROPERTY.

¶17-3-13. *Haynes v. Haynes*, No. 04-15-00107-CV, 2017 WL 2350970 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (05-31-17).

Facts: In a post-nuptial agreement, Husband and Wife agreed that in the event of a divorce, there would be no community property, neither party would be entitled to reimbursement, and each spouse would indemnify the other if one party's separate property debt was paid by separate funds of the other party.

Husband owned a home before marriage. A few years into the marriage, he refinanced the home, and both Husband and Wife signed the loan documents as borrowers. The check for the proceeds was made payable to both Husband and Wife and was initially deposited into a joint checking account. Subsequently, the funds were used to pay one of Husband's pre-marriage debts. A few years later, Husband sold the house to his family's company. Husband and Wife were both listed as grantors. The sale proceeds were deposited in the parties' joint account and were subsequently used to pay another of Husband's pre-marriage debts.

During the divorce proceedings, Wife asserted that the parties were tenants-in-common of the house and that she was entitled to reimbursement for her separate-property share of the proceeds that were used to pay Husband's separate debts. The trial court signed an order granting Wife the requested reimbursement. Husband appealed, arguing the house remained separate property, and Wife was not entitled to reimbursement.

Holding: Affirmed in Part; Reversed in Part

Opinion: Character of property does not change because both parties sign a note, or because the names of both parties are on the deed of trust. Further, no evidence was presented that Husband executed a deed or made an oral gift of the property to Wife. Thus, while the community estate may have had a claim for reimbursement, which claims were precluded by the post-nuptial agreement, it had no right, title, or interest to the land.

DIVORCE
RETIREMENT BENEFITS

WIFE FAILED TO SHOW THAT DIVORCE DECREE DID NOT FULLY ACCOUNT FOR HUSBAND'S RETIREMENT BENEFITS.

¶17-3-14. *King v. King*, No. 05-16-00467-CV, 2017 WL 930029 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (03-09-17).

Facts: Wife filed a petition for post-divorce division of property, alleging the decree failed to divide Husband's total retirement benefits. Husband's retirement account ("TMRS") had two parts: his individual contribution and his employer's matching contribution. The employer's matching contribution was kept in a separate account until Husband retired. Wife asserted that the decree only divided Husband's contributions, not the matching contributions. After Wife presented her evidence, Husband moved for judgment, which the trial court granted. Wife appealed.

Holding: Affirmed

Opinion: Wife had the burden to establish that community property existed and was not divided or considered by the court when rendering the final decree. The decree was based on the MSA, which purported to be a "full and complete resolution of this case" effecting "a just and right division of the marital assets. …" The decree awarded Husband his TMRS account, except for $32,000, which was awarded to Wife. At the hearing on her petition for post-divorce division, Wife testified that she assumed that the decree divided Husband's entire retirement benefits. She could not have assumed such if she did not also think the decree disposed of the matching funds.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

DIVORCE COURT DID NOT HAVE EXCLUSIVE JURISDICTION TO HEAR WIFE'S BREACH OF CONTRACT BASED ON HUSBAND'S FAILURE TO COMPLY WITH DECREE; HUSBAND OWED WIFE FIDUCIARY DUTY BECAUSE SHE WAS ASSIGNEE OF HIS INTEREST.

¶17-3-15. *Ishee v. Ishee*, No. 09-15-00197-CV, 2017 WL 2293150 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.) (05-25-17).

Facts: In their divorce decree, Wife was assigned a percentage of Husband's percentage interest in a closely held business. Subsequently, Wife filed a petition in a Civil Court for breach of contract and breach of fiduciary duty, asserting that Husband never paid her the money to which she was entitled under the decree. A jury found Husband breached his fiduciary duty and awarded Wife a judgment for $361,040 in actual and punitive damages. Husband appealed.

Holding: Reversed and Remanded in Part; Affirmed in Part; Affirmed as Reformed in Part

Opinion: Husband argued that the Family Court that rendered the divorce had exclusive jurisdiction over the decree and that the Civil Court lacked jurisdiction over the dispute. Texas district courts possession jurisdiction over all actions, proceedings, and remedies, except in cases where exclusive, ap-

pellate, or original jurisdiction is conferred. Tex. Fam. Code § 9.001 provides that a court that rendered a divorce *may* enforce the decree. Thus, the Civil Court had jurisdiction over the contract dispute.

Husband argued that the evidence was insufficient to support the finding that he breached a fiduciary duty. It appeared that the Family Court intended to divide the marital estate in accord with the requirements of the Tex. Bus. Orgs. Code, which did not create a fiduciary duty between Husband and Wife. However, Tex. Fam. Code § 9.001(b) provides "[t]he subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner." Thus, the decree created a fiduciary relationship between Husband and Wife with respect to the percentage interest assigned to Wife of Husband's percentage interest in the closely held business. Further, there was evidence that Husband did not distribute Wife's rightful percentage to the distributions.

Husband argued that the evidence was insufficient to support the $111,520 judgment. The bulk of the jury's award consisted of income received by Husband in return for services provided. Thus, the award was excessive because Wife was not entitled to half of all benefits Husband received without regard to whether such benefits were allocated to him on the basis of his ownership interest.

SAPCR
PROCEDURE AND JURISDICTION

COUNTY COURT LACKED JURISDICTION TO ENTER FINAL ORDER TERMINATING PARENTS' RIGHTS BECAUSE ANOTHER COURT HAD CONTINUING, EXCLUSIVE JURISDICTION OVER THE CHILDREN.

¶17-3-16. ***In re J.I.M.***, ___ S.W.3d ___, No. 06-16-00080-CV, 2017 WL 929545 (Tex. App.—Texarkana 2017, no pet. h.) (03-09-17).

Facts: In 2010, a district court entered a judgment establishing parentage of Child. In 2015, TDFPS filed a petition in a county court pursuant to Tex. Fam. Code Ch. 262. The petition indicated that TDFPS did not believe that another court had continuing exclusive jurisdiction; however, the affidavit attached to the petition averred "The Court records reflect that the children have lived their lives in [a different] County, Texas and each has been the subject of a suit affecting the parent-child relationship in Texas." The OAG filed an Answer specifically informing the county court of the district court's order. Additionally, the district court's order was admitted as an exhibit at trial. Nevertheless, the county court signed a final order terminating Mother's and Father's parental rights to Child. Mother appealed.

Holding: Judgment Vacated; Case Dismissed

Opinion: Tex. Fam. Code Ch. 262 required the county court to transfer the case to the court of continuing exclusive jurisdiction, if one existed. A district court acquired continuing, exclusive jurisdiction in 2010, but the county court failed to transfer the case. The county court lacked jurisdiction to enter a final order, so its judgement was void.

Editor's comment: *I just have to point out that this case is a great example of why jurisdictional issues can be so dangerous. Here you have an order from 2010 that everyone seemed to ignore, and despite the fact that the court entered a termination, no matter how long it had been since that order was entered, that order was void on its face. While jurisdictional issues can be tricky, it's important to make very sure that you have established subject matter jurisdiction, as that cannot be waived. J.H.J.*

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ORDER GRANTING GRANDMOTHER POSSESSION OVER MOTHER'S OBJECTION REVERSED FOR FAILURE TO INCLUDE TEX. FAM. CODE § 154.433 FINDINGS.

¶17-3-17. *In re J.R.W.*, No. 05-15-01479-CV, 2017 WL 1075610 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (03-21-17).

Facts: Mother and Father had one Child. Father initiated a SAPCR, seeking joint managing conservatorship with Mother. Mother filed a general denial. Paternal Grandmother intervened seeking possession. Mother challenged Grandmother's standing, but the trial court overruled Mother's objections. Mother and Grandmother both asserted that Father had committed family violence and suffered from drug addiction and mental illness. After a final trial, the court appointed Mother and Grandmother as joint managing conservators. Mother appealed, challenging Grandmother's standing.

Holding: Reversed and Remanded

Opinion: The appellate court found Grandmother had standing under Tex. Fam. Code § 153.433 because (1) neither parent's parental rights had been terminated; (2) Grandmother introduced sufficient evidence that denial of her possession or access would significantly impair the child's physical health or emotional well-being; and (3) Father did not have actual or court-ordered possession or access to the Child.

However, Tex. Fam. Code § 153.433 requires an order granting possession or access to a grandparent over a parent's objections to state with specificity that the statute's requirements were satisfied. Here, even if the evidence would support an implied finding that the statute's requirements were met, the order failed to state such with specificity.

SPERM-DONOR FATHER HAD STANDING TO SEEK POSSESSION OF CHILD DUE TO MOTHERS' SUBSEQUENT AGREEMENT TO GIVE FATHER LIMITED POSSESSION.

¶17-3-18. ***In re B.N.L.-B.***, ___ S.W.3d ___, No. 05-16-00025-CV, 2017 WL 1908623 (Tex. App.—Dallas 2017, no pet. h.) (05-10-17).

Facts: First Mother and Second Mother were in a committed relationship and wanted to have a Child. Father agreed to be a sperm donor, and the parties signed a donor agreement providing that Father would not be a parent to the Child, that the Mothers would be the Child's parents, and that the Mothers would not seek child support from Father. Additionally, the agreement provided that if Father sought any legal relationship with the Child, he would indemnify the Mothers for all costs of defending the action. First Mother was impregnated, and the Child was born in 2002. Second Mother adopted the Child in 2003.

For a while, Father was allowed limited possession of the Child by informal agreement. Father filed a suit in Virginia, where the Child was then living, to put the possession agreement in writing.

Subsequently, the Mothers and the Child moved to Texas, but the Mothers separated and refused to allow Father to exercise his visitation. Father registered the Virginia order in Texas and filed a motion for clarification and modification, which the trial court granted over the Mothers' objections.

Some years later, First Mother filed a SAPCR asking to be named sole managing conservator and an order for Second Mother to pay child support. Second Mother filed a similar suit. Father filed a petition in intervention asking to be named joint managing conservator with the Mothers and, in the alternative, asked for a standard possession order. Second Mother challenged Father's standing to intervene. The Mothers reached a settlement agreement with each other that the Mothers would be joint managing conservators and that, if the trial court granted Father possession, the Mothers would alternate from which Mother's time Father's possession would be taken. After the trial court denied Second Mother's plea to the jurisdiction and held that Father had standing, the Mothers reached a settlement agreement

with Father giving him periodic possession of the Child. The trial court signed a final order that incorporated the agreement and required Father to pay the Mothers' attorney's fees.

About five years later, Father filed another motion to modify. Second Mother filed another plea to the jurisdiction plus a breach of contract action, asserting Father breached the donor agreement. The trial court denied Second Mother's motions, granted Father's requests in part, and ordered Second Mother to pay Father's attorney's Fees. Second Mother appealed, arguing the trial court erred in denying her plea to the jurisdiction, denying her breach of contract claim, and failing to order Father to pay her attorney's fees. Mother argued that Father lacked standing to seek conservatorship under the original order registered in Texas and, thus, the first Texas order was void. Therefore, Mother argued that Father did not have standing in the subsequent actions as a person affected by a prior order. Father argued that he was not required to pay attorney's fees pursuant to the donor agreement because the subsequent agreements and agreed orders constituted a novation of the donor agreement.

Holding: Affirmed

Opinion: The appellate court opted not to address the parties' issues regarding the initial intervention because, regardless of whether Father had standing to bring that petition in intervention, the Mothers had standing as parents of the child to bring their SAPCR concerning conservatorship and possession of the Child. The final order in that SAPCR was an agreed order, and, thus, the trial court had authority to enter that order because it was entered pursuant to an agreed parenting plan. Further, because that order was an agreed order giving Father possession of the Child, he had standing to file a petition in intervention in the subsequent SAPCR as a person affected by the prior order.

Contrary to Second Mother's contention, *Troxel* did not preclude Father from seeking possession of the Child in the modification suit because there is no parental presumption in modification proceedings.

A party asserting the defense of novation in response to a breach of contract claim must establish (1) a previous, valid obligation, (2) a mutual agreement of the parties to the acceptance of a new contract, (3) the extinguishment of the old contract, and (4) the validity of the new contract. Here, the agreed possession order constituted a novation of the donor agreement, so Second Mother could not prevail on a breach of contract claim, and Father was not required to pay her attorney's fees pursuant to the obsolete donor agreement.

Editor's comment: *(Caveat: I represent the party who prevailed in this proceeding.) The important part of this case is that the person who had a right of possession under a prior order (that was an agreed order between the parties) had standing to sue for modification of that order, notwithstanding a Donor Agreement that predated the prior order that restricted the rights of the parties. M.M.O.*

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

ARBITRATOR'S AWARD SHOULD HAVE BEEN CORRECTED BY TRIAL COURT BY REMOVING PORTION THAT EXCEEDED ARBITRATOR'S AUTHORITY.

¶17-3-19. ***In re S.M.H.***, ___ S.W.3d ___, No. 14-16-00566-CV, 2017 WL 1366801 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (04-13-17).

Facts: Mother and Father's divorce decree incorporated an agreement incident to divorce. The parties later disputed terms relating to Father's support obligation. Mother filed a petition to clarify and enforce Father's obligations. Father filed a counter-petition asking to modify the long-distance provisions for visitation because he intended to move to another city. The parties agreed to submit their dispute to arbi-

tration. The agreement provided that each party would submit a proposal regarding child support, and the arbitrator would select one without making any changes to the proposal selected. The parties further agreed that the arbitrator, after meeting with the children, would submit a proposal for possession. The arbitrator accepted Mother's proposal and signed an award that provided for both support and possession. Finding the arbitrator exceeded her authority, the trial court vacated the arbitrator's award and held a trial on the merits. After the trial court signed a final judgment, Mother appealed, arguing that the trial court should have confirmed the support portion of the arbitrator's award. Father responded, arguing that the appeal was untimely because, he argued, Mother's notice of appeal should have been filed within 20 days.

Holding: Reversed and Remanded

Opinion: Mother had a right under the Texas Arbitration Act ("TAA") to bring an interlocutory appeal, but she was not required to do so. Mother's failure to bring an interlocutory appeal did not mean that her appeal from the final judgment had to be treated as accelerated. Accordingly, Mother was not required to file her notice of appeal within 20 days, and her notice filed 30 days after the judgment was timely.

Upon review of the arbitrator's award, the court held that the portion of the arbitrator's award that exceeded her authority was clearly severable from the portion that was within her authority. Thus, the award should have been corrected by the trial court to remove the portion relating to possession and to retain the portion relating to support.

SAPCR
TEMPORARY ORDERS

GRANDMOTHER NOT ENTITLED TO TEMPORARY ORDERS FOR VISITATION BECAUSE SHE FAILED TO OVERCOME PRESUMPTION MOTHER WOULD ACT IN CHILD'S BEST INTEREST.

¶17-3-20. *In re S.S.*, No. 03-17-00116-CV, 2017 WL 1228888 (Tex. App.—Austin 2017, orig. proceeding) (mem. op.) (03-28-17).

Facts: Mother and Father were married and living together at the time of Father's death by car accident. Mother and the Child's paternal family did not get along well. Paternal Grandmother filed a petition seeking joint conservatorship with the right to determine the Child's primary residence or, in the alternative, a visitation order. Mother sought to dismiss Grandmother's petition, asserting Grandmother had not shown that the Child would be significantly impaired if Grandmother did not have access to the Child. Grandmother's affidavit asserted that she had an extremely close relationship with the Child, that she had been the Child's primary caretaker for a month or two, and that since Father's death, Grandmother had only been allowed to see the Child twice. At the hearing, Grandmother expressed concerns that Mother was inattentive and angry. Mother testified that during a visit with herself, the Child, and Grandmother, Grandmother spent all but 15 minutes watching and taking notes. Mother contested Grandmother's alleged involvement with the Child, stating that Grandmother was an important part, but not a consistent part, of the Child's life. Further, Mother testified that she had just lost her husband and was open to the Child having more of a relationship with Grandmother in the future. The trial court denied Mother's motion to dismiss and granted Grandmother Saturday visitation on the second and fourth Saturday of each month. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Although a close question, the trial court did not abuse its discretion in finding Grandmother's affidavit met the bare minimum of allegations necessary under Tex. Fam. Code § 153.432 ("allegation that denial of possession or access to the child…would significantly impair the child's physical health or emotional well-being"). Further, Mother did not adequately raise the issue of Tex. Fam. Code § 102.004 standing before the trial court, and the appellate court opined that it would "not hold that the trial court abused its discretion in refusing Mother's vague oral motion to dismiss Grandmother's conservatorship claim."

However, even taking Grandmother's allegations as true, the evidence did not satisfy the "hefty statutory burden" to overcome the presumption that Mother would act in the Child's best interest.

TEX. FAM. CODE CH. 156 DOES NOT APPLY TO THE MODIFICATION OF TEMPORARY ORDERS IN ORIGINAL CUSTODY PROCEEDINGS.

¶17-3-21. ***In re McPeak***, ___ S.W.3d ___, No. 14-17-00104-CV, 2017 WL 1366672 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (04-13-17).

Facts: Mother, pro se, and Father, represented by an attorney, signed agreed temporary orders during the divorce proceedings, which provided for conservatorship, possession of and access to, and support for the Children. After Mother hired an attorney, she moved to modify the temporary orders. The trial court declined to consider Mother's motion because she did not file an affidavit that complied with Tex. Fam. Code § 156.102. The court further declined to confer with the 13-year-old Child in chambers. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A motion to modify temporary orders in an original custody dispute is not governed by Chapter 156 of the Texas Family Code. Thus, when Mother sought to modify the temporary orders, she was not required to file an affidavit that complied with § 156.102. Mother was only required to establish that the modification was necessary for the safety and welfare of the children. *See* Tex. Fam. Code § 105.001(a).

Additionally, pursuant to Tex. Fam. Code § 153.009(a) the trial court was required to confer with the 13-year-old Child in chambers on Mother's request.

Editor's comment: *Although Dallas addressed and resolved this same issue in a 2014 memorandum opinion, In re Casanova, 2014 WL 6486127 (Tex. App.—Dallas 2014) (mem. op.), I am glad to see that the Houston 14th has now given us a reported opinion, which cites Casanova, upon which to rely. G.L.S.*

Editor's comment: *It is often the case that when a party seeks to modify temporary orders in the midst of a SAPCR, the defending party will challenge on the basis that there is no material and substantial change, a standard required by Chapter 156. This case seems to clearly define the modification standard for TO's as "necessary for the safety and welfare of the child." It might also be worthy to consider whether local rules in any county attempt to establish standards different from the TFC and/or require the filing of affidavits before approval of hearing to modify TO's is granted. If such rules exist, are they authorized? S.S.S.*

Editor's comment: *As a reminder, there is no requirement that you prove a material and substantial change in circumstances to modify temporary orders. And, if you plead that a material and substantial change has occurred in your pleadings, your judge may hold you to that, as that is your assertion in your pleadings. Sometimes it is easier to simply look at the statute and track and follow the language of the statute in your pleadings. J.H.J.*

Editor's comment: *This case is a reminder that the standard for temporary order is safety and welfare, not change circumstances. Don't confuse the two. M.M.O.*

SAPCR
PARENTAGE

OBERGEFELL DID NOT CONFER STANDING UPON WIFE TO MAINTAIN A PARENTAGE CLAIM AS TO CHILD BORN TO OTHER-SPOUSE DURING SAME-SEX MARRIAGE.

¶17-3-22. *In re A.E.*, No. 09-16-00019-CV, 2017 WL 1535101 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.) (04-27-17).

Facts: Two women were married in Connecticut in 2011. One of the women, "Mother," got impregnated through assisted reproduction, but before the Child was born, the couple separated. Subsequently, the other spouse, "Wife," filed petition for divorce and a SAPCR with respect to the Child. Mother filed a motion to dismiss, alleging Wife lacked standing to file a SAPCR. After a hearing, the trial court granted the motion to dismiss and severed the SAPCR from the divorce. Wife appealed, arguing that after *Obergefell*, the Texas statutes regarding parentage should be read gender-neutrally because the fundamental right to marry encompasses the unified whole of rights that inherently emanate from the marital relationship.

Holding: Affirmed

Opinion: When construing statutes, the courts must give effect to the Legislature's intent and not look to extraneous matters. Wife did not meet any of the statutory definitions of "parent." She had not given birth to the Child, and she was not a man. Further, when construing the statutes regarding artificial reproduction, the substitution of the word "spouse" for the words "husband" and "wife" would amount to legislating from the bench.

Editor's comment: *I have a short comment to this, and it is simply that this is why the statues have to match the current law. Here you have a case that has turned on the wording of the statute, which is in conflict with what the United States Supreme Court has said. Obviously that is something that's going to have to be fixed in the legislature. J.H.J.*

Comment re above editor's comment: *I disagree with Jessica, Obergefell did not address the above issue—parentage does not equate to marriage—but I do agree that the Texas legislature and Family Law Foundation need to specifically look at this issue. I suspect that once more of the appellate courts start weighing in on this issue, there may be a split among the intermediate courts, such as the one addressing the meaning of "care, custody, and control" when determining whether a party has standing. G.L.S.*

Editor's comment: *The court observed that "Wife" neither adopted the child nor initiated proceedings to adopt. In this case, the couple split up before the child was born, but the case raises an abundance-of-caution point: In female same-sex marriages, the woman who did not bear the child should adopt the child so that she will be considered a parent. Likewise, in male same-sex marriages, the nonbiological father should adopt the biological father's child, and if neither man is the biological father, both should adopt. J.V.*

SAPCR
CONSERVATORSHIP

NON-PARENT CONSERVATORS FAILED TO REBUT PARENTAL PRESUMPTION THAT MOTHER SHOULD HAVE BEEN APPOINTED SOLE MANAGING CONSERVATOR.

¶17-3-23. *R.H, v. D.A.*, No. 03-16-00442-CV, 2017 WL 875317 (Tex. App.—Austin 2017, no pet. h.) (mem. op.) (03-02-17).

Facts: Mother and Father took the Child to the ER for a clavicle injury. The Father had reported that the Child fell off the bed while he was changing the Child's diaper. After an examination, the doctor said Father's story could not be true. When Mother discovered Father lied, they broke up. TDFPS sought conservatorship of the Child and initially removed the Child and placed him with Father's Aunt and Uncle. After a trial, the court did not terminate Mother's parental rights but appointed Aunt and Uncle as the Child's managing conservators. Mother appealed, arguing that Aunt and Uncle failed to overcome the parental presumption. Because no party appealed the court's decision not to terminate Mother's parental rights, the only question before the court was the propriety of the trial court's decision with respect to conservatorship.

Holding: Reversed and Remanded

Opinion: Aunt and Uncle's evidence was merely speculative. The TDFPS supervisor conclusorily asserted that Mother failed to tend to the Child's injury immediately without providing any basis for a finding that Mother was aware of the Child's injury and failed to act or, even if so, whether significant harm would likely occur if Mother were appointed sole managing conservator. Aunt and Uncle additionally relied on an unsubstantiated report of conduct unrelated to Mother's care of the Child, which could not support an inference that Mother would probably cause significant harm to the Child. Further, although Mother was unemployed at the beginning of the case, at trial, she had been employed for four months, was maintaining a two-bedroom apartment, and providing for the needs of the Child. Finally, TDFPS was satisfied that Mother had sufficiently demonstrated her ability to parent the Child.

SAPCR
POSSESSION

TRIAL COURT FAILED TO STATE SPECIFIC REASONS FOR VARIANCE FROM STANDARD VISITATION ORDER DESPITE MOTHER'S TIMELY REQUEST FOR FINDINGS.

¶17-3-24. *In re Rangel*, No. 04-17-00060-CV, 2017 WL 1161173 (Tex. App.—San Antonio 2017, orig. proceeding) (mem. op.) (03-29-17).

Facts: Temporary orders restricted Mother's access to the Child. Subsequently, after a five-day hearing, the trial court rendered additional temporary orders further restricting Mother's access, requiring her possession with the Child be supervised and revoking most of her rights and duties with respect to the Child. Mother filed a petition for writ of mandamus, arguing the trial court erred in imposing extreme restrictions without providing a means to remove the restrictions, depriving Mother her fundamental rights to parent the Child, and failing to include findings pursuant to the Tex. Fam. Code.

Holding: Writ of Mandamus Conditionally Granted in Part; Denied in Part

Opinion: The trial court's additional orders failed to include Tex. Fam. Code § 153.258 mandatory findings despite Mother's timely request.

Editor's comment: *The court denied the part of the mandamus petition that claimed the court abused its discretion by "imposing extreme conditions" but "without providing a means for Relator to remove those restrictions." J.V.*

Editor's comment: *The San Antonio court now finds that when a temporary order is rendered which deviates from the SPO, the party has the right to request FOF. Most people think that FOF are only for final orders. But if a party wishes to seek relief from temporary orders by mandamus, they can ask for FOF and the trial court will have to file them. I suspect that other COAs will decide this same issue differently. M.M.O.*

TRIAL COURT FAILED TO SPECIFY AND EXPRESSLY STATE IN THE ORDER THE TIMES AND CONDITION FOR MOTHER'S POSSESSION OF OR ACCESS TO THE CHILD.

¶17-3-25. ***In re J.Y.,*** ___ S.W.3d ___, No. 06-16-00084-CV, 2017 WL 1534013 (Tex. App.—Texarkana 2017, no pet. h.) (04-28-17).

Facts: After a bench trial concerning TDFPS's petition to terminate the parents' parental rights to her Children, the trial court entered an order naming TDFPS permanent managing conservator and the parents possessory conservators. The court conditioned Mother's visitation upon the Children's counselor's approval. Mother appealed, arguing in part that the trial court erred in restricting her access to the Children.

Holding: Reversed and Remanded

Opinion: Complete denial of parental access amounts to near-termination of parental rights and should be reserved for situations rising nearly to the level that would call for termination. When a court appoints a parent as a possessory conservator, it is reasonable to conclude that unrestricted possession would endanger the physical or emotional welfare of the child, while restricted access would not. Here, the effect of the trial court's order was such that TDFPS and the Children's counselor had absolute discretion over Mother's visitation. The trial court could not make an order denying Mother's access unless it decided that the Children's best interests warranted such an order. However, by appointing Mother possessory conservator, it implicitly found that complete denial was unwarranted.

SAPCR
CHILD SUPPORT

EVIDENCE SUPPORTED FINDING THAT CHILD WITH ASPERGER'S SYMPTOMS WAS CAPABLE OF SELF-SUPPORT.

¶17-3-26. *In re J.S.*, No. 05-16-00138-CV, 2017 WL 894541 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (03-06-17).

Facts: When Mother and Father divorced, they were named joint managing conservators of their Children. While the divorce was pending, the older Child ("Son") was diagnosed with "multiple symptoms

consistent with Asperger's." A little over a year after the divorce, Mother filed a petition to modify conservatorship and child support. In its final order, the trial court found that Son did not require substantial care and personal supervision. The trial court did not modify Father's child support obligation but extended Father's medical support obligation for Son until Son turned twenty-one. Mother appealed, complaining the trial court erred in finding the Son did not qualify for extended child support under Tex. Fam. Code § 154.302(a).

Holding: Affirmed

Opinion: Although Mother testified that Son needed significant assistance with his disabilities, two of Son's teachers testified that Son performed well in school, had friends, and participated in class discussions. Father testified that he had never seen Son talking to himself or pacing in circles, as described by Mother. Son expressed an interest in pursuing a career in engineering. The court-ordered forensic custody evaluator testified that while Son likely would need assistance reminding him to attend to his hygiene, he would do well in a small group and in structured situations.

MOTHER FAILED TO PRESENT ANY EVIDENCE TO SUPPORT FINDING OF FATHER'S AVAILABLE NET RESOURCES.

¶17-3-27. ***Reagins v. Walker*****,** ___ S.W.3d ___, No. 14-15-00764-CV, 2017 WL 924498 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (03-07-17).

Facts: Mother and Father each filed a motion to modify child support. At trial, neither Father nor his attorney appeared. Mother testified that she had not been provided any information regarding Father's salary. She conducted internet searches to discover that:

- Father was a petroleum engineer with three degrees, at least one of which was a master's degree;
- Father worked for GE and began working there 2011;
- Father travelled overseas to work; and
- a petroleum engineer might make between $127,000 and $130,000 a year.

Based on this testimony, the trial court found that Father's available net resources were $127,000 per year and set his child support accordingly. Father appealed, challenging the trial court's calculations.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A respondent's failure to appear at trial after filing an answer does not relieve the petitioner of the burden to offer evidence and prove her case. Here, Mother admitted to having no personal knowledge of Father's employment. Rather, she merely speculated regarding Father's position and salary and supported her speculations with general internet research. Mother did not testify as to the type of searches she conducted, what search engines she used, or what websites she visited. Mother failed to establish that Father was currently employed, that he was employed as a petroleum engineer, that he earned any particular salary, or whether he was employed part-time, full-time, or on a contractual basis.

Editor's comment: *Again, it's very important that you provide evidence to the judge if you intend to default someone. While mother made conclusory opinions here, she did not provide sufficient evidence for the court to support its ruling in terms of father's available income. Had she provided some evidence, the default may have withstood appeal. J.H.J.*

Editor's comment: *The court stated: "The defect in this testimony is not the fact that it was based on internet research," citing Baskett v. Baskett, No. 03-16-00563-CV, 2016 WL 7664349 (Tex. App.—Austin Jan. 5, 2016, no pet.) (mem. op.), where a plaintiff's evidence was held sufficient after "she con-*

ducted extensive online research regarding replacement values and offered numerous exhibits detailing how she arrived at her valuations." The court's opinion might be read as a primer on how to get into evidence what you find on the web. The court rejected Mother's testimony, in part, because she did not "offer any specifics regarding the types of searches she conducted 'on the Internet,' what search engines she may have used, or what websites she visited to obtain the information provided." So can a witness testify to Internet-acquired information if it is appropriately sourced? Should discovery requests include identification of web pages visited or relied upon by a party or witness who bases his or her testimony on them? J.V.

EVIDENCE SUPPORTED ABOVE-GUIDELINE ORDER FOR CHILD SUPPORT.

¶17-3-28. *In re V.J.A.O.*, No. 05-15-01534-CV, 2017 WL 930025 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (03-09-17).

Facts: Mother and Father met in France and had a Child, who was born in France. Shortly after the Child's birth, Father returned to Texas. Subsequently, Mother and the Child moved to Texas to live with Father. A few years later, the couple separated and shared custody of the Child. The trial court named the parents joint managing conservators, gave Mother the exclusive right to designate the Child's primary residence, and ordered Father to pay $5000 a month in child support. Father appealed and, among other complaints, argued that the trial court erred in awarding Mother above-guideline support. Father contended that the trial court erred in applying Below-Guideline Factors (Tex. Fam. Code § 154.123(b)) instead of Above-Guideline Factors (Tex. Fam. Code § 154.126(a)). Additionally, Father complained the evidence was insufficient to support the amount of child support awarded. Father's arguments focused on whether a French-immersion private school was a "proven need" of the Child.

Holding: Modified in Part; Affirmed in Part

Opinion: Although the trial court listed in its findings a number of factors that correlated to the Below-Threshold Factors, each of the factors was also subsumed within the three headings of Above-Threshold Factors: the needs of the Child; the resources of the parties; and the circumstances of the parties.

Needs of the Child

(1) the age and needs of the child;
(10) the identified special, extraordinary bilingual educational and cultural expenses of the child;
(12) the nationality, cultural and educational considerations related to this child's education and her best interests taking into consideration the circumstances of the parties.

Resources of the Parties

(2) the ability of [Father] and [Mother] to contribute to the child's needs;
(3) the financial resources available to [Father] for the support of the child;
(5) the amount and type of [Father's] resources, his earnings, earning capacity, the kind and nature of his assets and the revenues and value available to him from his real, personal and financial assets;
(6) the child care expenses and needs incurred and necessitated to allow each party to retain and continue their gainful employment;
(8) the other direct and indirect financial benefits [Father] has access to by virtue of his employment and investments;
(9) the provision by the parties to the child of health insurance and payment of the child's past uninsured medical expenses;
(11) the positive cash flow enjoyed by [Father] by virtue of his real, personal property and assets as well as his businesses and investments;

Circumstances of the Parties

(4) the amount of each parent's possession of and access to the child;
(7) the actual physical custody exercised by [Mother], her role as managing conservator;

While not every child living here but born outside of the United States requires private schooling with cultural immersion, Father should have anticipated this unique need for this Child. Father impregnated Mother in France and acquiesced in the Mother and Child's move from France to Texas, which required Mother to alter her career path. Further, the trial court heard a significant amount of evidence regarding the Child's background and her cultural and linguistic needs. Additionally, there was ample evidence supporting the Child's proven needs from both parents in terms of her living and personal expenses.

Editor's comment: *(Caveat: I represent the party who did not prevail in this proceeding, and we are preparing PFR.) IMO this case is wrong, but I'm prejudiced. This case extends the standards for determining proven needs for an above-threshold, above-guideline case to the point that there is zero standard. Under this case, what is the difference between a "need" versus an opportunity, luxury, want, or preference? Nothing. Anything is a need now, just because one parent says so. M.M.O.*

¶17-3-29. *In re T.W.G.*, No. 05-16-00213-CV, 2017 WL 1427695 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (04-19-17).

Facts: Mother and Father married and had two Children. After 16 years of marriage, Father left Mother and moved in with his girlfriend, with whom he later had a child. After the separation, Father did not pay any child support for his first two Children until Mother filed an application for support with the Attorney General's Office. Father regularly traveled with his girlfriend and gave her $1000 a month for the support of their child. Father's girlfriend was a dentist who earned $200,000 a year.

About 7 years after the separation, Father filed for divorce, and Mother filed a counter-petition seeking child support for her adult disabled Child. That Child had a condition called agenesis of the corpus callosum, which Wife explained meant that the fibers that should connect the right side of the brain to the left side of the brain did not develop. The condition had existed since the Child's birth. The Child lived with Mother, had never attended college, and was not employed. Mother asserted that he would need support for the rest of his life. The Child received adult care, SSI benefits, and SNAP benefits.

Father appealed the final decree of divorce, which awarded Mother adult disabled child support.

Holding: Affirmed as Modfied

Majority Opinion: (J. Francis, J. Lang-Miers) The evidence supported the trial court's findings that:

(1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support; and
(2) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child.

Dissenting Opinion: (J. Whitehill) Mother's evidence was conclusory at best. Mother did not link the Child's lack of education and employment to his disability. The majority presumed the Child received SSI benefits and SNAP benefits because Mother's handwritten list of expenses noted "SSI 733.00" and "SNAP 180.00." There was no testimony that the Child was actually receiving those benefits. Additionally, while Mother testified that the Child received adult care, she did not testify as to what that care entailed or whether it was required.

SAPCR
CHILD SUPPORT ENFORCEMENT

TRIAL COURT PERMITTED TO CONSIDER DIRECT PAYMENTS TO MOTHER WHEN CALCULATING CHILD-SUPPORT ARREARAGE.

¶17-3-30. *Bruce v. Bruce*, No. 03-16-00581-CV, 2017 WL 2333298 (Tex. App.—Austin 2017, no pet. h.) (mem. op.) (05-26-17).

Facts: Father filed a petition seeking reimbursement for overpayment of child support. Mother filed a counter-petition, asserting that Father had not made payments through the child-support registry, as ordered in the final decree, and asked the trial court to enter a judgment for enforcement and for arrearages. The trial court entered a judgment for arrearages but offset the award based on direct payments made by Father to Mother. Mother appealed, arguing the court erred in considering the direct payments and in failing to award her attorney's fees.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Relying on *Ochsner v. Ochsner*, __ S.W.3d __, No. 14-0638, 2016 WL 3537255 (Tex. 2016), the appellate court held that the trial court had discretion to consider direct payments either to the other parent or to a third party in directing whether an arrearage exists, even when the final decree requires payment of child support through a child-support registry. Additionally, the court held that *Ochsner* did not require "regular and periodic payments" and that the trial court was entitled to consider Father's five unequal payments over a period of 13 months when determining Father's arrearage.

However, even after factoring in the direct payments, Father still owed Mother approximately $4,000 arrearage. Thus, pursuant to Tex. Fam. Code § 157.167, Mother was entitled to attorney's fees for her child-support enforcement action, and the trial court erred in ordering that each party would be responsible for his or her own fees.

Editor's comment: *Even though the Texas Supreme Court in Ochsner specifically stated that the decision in that case—where the father paid more than, and was not attempting to reduce, the amount he owed—should be confined to the facts presented, should not be read to encourage obligors to make direct payments, bypassing the registry, and, at a minimum, complicating enforcement proceedings, this court of appeals appears to be widening the door, which is exactly what the dissenting opinions were concerned would happen. G.L.S.*

Editor's comment: *When Oschner was released, many of us speculated that this case would be utilized as an example as to why the payment of additional expenses for the children could be argued to be additional child support or would go towards an arrearage. That particular case was very fact specific, but here is a case that uses the ruling to increase the power of the Oschner ruling. While I still think both of these cases are very fact specific, I also believe we are going to see a significant increase in reliance on these cases in child support matters. J.H.J.*

Editor's comment: *The Austin court relies on the Ochsner opinion out of SCOTX (which I think we are all still stunned about) and exercises its discretion to give a father credit for direct payments made in addition to regular child support. M.M.O.*

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HUSBAND FOUND IN CONTEMPT AND CONFINED FOR FAILING TO PRODUCE PROOF OF LIFE-INSURANCE POLICY TO SECURE CHILD SUPPORT PURSUANT TO DIVORCE DECREE.

¶17-3-31. ***In re Richardson*****,** ___ S.W.3d ___, No. 08-16-00310-CV, 2017 WL 2302607 (Tex. App.—El Paso 2017, no pet. h.) (05-26-17).

Facts: The parties' divorce decree ordered Husband to obtain a life-insurance policy through his employer, with Wife as the named beneficiary, which was to remain in effect until the youngest Child turned 18 and awarded Wife a reimbursement claim and attorney's fees. A couple years later, Wife filed a motion for enforcement of the decree. After a hearing, the trial court held Husband in civil contempt for 9 separate violations and ordered him confined until he purged himself of contempt pursuant to the contempt order. Husband filed a petition for writ of habeas corpus, in which he raised 21 issues to support his claim that the contempt order was void.

Holding: Writ of Habeas Corpus Denied

Opinion: A person may not be imprisoned for a debt. Thus, the portions of the contempt order imprisoning Husband for his failure to pay the money judgment for the reimbursement award and attorney's fees (which were not for the enforcement of child support) were void.

However, the provision of the decree requiring Husband to obtain a life-insurance policy was unambiguous and enforceable by civil contempt. Further, contrary to Husband's contention that the court found him in contempt for failing to do something which was not previously ordered, he had not been found in contempt for a failure to produce proof of unemployment. That provision was merely an additional means by which he could purge himself of contempt because doing so would excuse his failure to get a life-insurance policy.

SAPCR
ENFORCEMENT OF POSSESSION

CONTEMPT ORDER VOID BECAUSE MOTHER NOT ADMONISHED OF HER RIGHT TO COUNSEL.

¶17-3-32. ***In re Rivas-Luna*****,** ___ S.W.3d ___, No. 08-16-00312-CV, 2017 WL 2351347 (Tex. App.—El Paso 2017, orig. proceeding) (05-31-17).

Facts: The parties' divorce decree named them joint managing conservators. Father filed a petition for enforcement, alleging Mother denied his access to the Children on 25 occasions. In an amended petition, Father asked that Mother be jailed for 18 months and placed on community supervision for 2 years following her release. Mother attended the enforcement hearing without counsel. The court asked Mother if she would be representing herself. She replied that she couldn't afford an attorney and aimed to do the best she could. The court admonished her that she would not be treated differently than a lawyer would be. Mother indicated she understood. Subsequently, the court signed an order finding Mother in contempt, ordered her confined for 30 days but suspended the sentence. Mother was placed on community supervision until she paid attorney's fees awarded to Father in the contempt order. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Pursuant to Tex. Fam. Code § 157.163, if there is a possibility of incarceration, a court *shall* inform a pro se respondent of the right to be represented by an attorney. The subsequent suspension

of the commitment order did not relieve the court of the duty to inform Mother she was entitled to counsel. Further, because the contempt order was void, Father was required to return any attorney's fees received from Mother pursuant to the void order.

SAPCR
TERMINATION OF PARENTAL RIGHTS

WITHOUT CONTROVERTING AFFIDAVIT, CHAPTER 262 TRIAL COURT AUTHORIZED TO TRANSFER CASE TO ITSELF ON MOTION ASSERTING GROUNDS FOR MANDATORY TRANSFER EXISTED.

(Withdrawn: ~~Termination orders void—Chapter 262 did not grant jurisdiction to enter final orders when another court had continuing, exclusive jurisdiction.)~~

¶17-3-33. ***In re D.W.***, ___ S.W.3d ___, No. 06-16-00076-CV, 2017 WL 1833497 (Tex. App.—Texarkana 2017, no pet. h.) (03-31-17) (on reh'g).

Facts: TDPFS filed a petition for protection of the Children and for termination of the parents' parental rights. The court appointed Father as sole managing conservator, ordered Mother to pay child support, and dismissed TDFPS as a party.

Four years later, TDFPS filed another petition for protection of the Children and for termination of the parents' parental rights, but in a different county than the prior case. TDFPS asserted the court had jurisdiction under Chapter 262. After temporary orders were entered, the Chapter 262 court set the case for final trial. Father argued that another court had continuing, exclusive jurisdiction. On a motion from TDFPS, the Chapter 262 court initiated a transfer to itself from the court of continuing, exclusive jurisdiction. The case was transferred, and the Chapter 262 court terminated the parent's parental rights. The parents appealed.

Holding: Affirmed (Withdrawn: ~~Trial court's order vacated, case dismissed~~)

Opinion: Although the record did not reflect mandatory grounds for transfer, after TDFPS filed a motion asserting that grounds existed for mandatory transfer, the parents failed to file any controverting affidavit to contest that assertion. Thus, pursuant to the Tex. Fam. Code, the trial court was required to transfer the case without a hearing. Thus, the trial court properly transferred the suit to itself and acquired jurisdiction to enter final orders. Further, the appellate court held that the evidence was sufficient to support the termination order.

(Withdrawn: ~~A court with Chapter 262 emergency jurisdiction shall transfer the case to a court with continuing, exclusive jurisdiction, unless grounds exist for a mandatory transfer. Without such grounds, the court did not have jurisdiction to initiate a transfer or enter final orders.~~)

MOTHER'S APPARENT INDIFFERENCE REGARDING BETTERING HER AND HER CHILDREN'S LIVES SUPPORTED TERMINATION.

¶17-3-34. ***In re M.L.R.-U.***, ___ S.W.3d ___, No. 06-16-00088-CV, 2017 WL 1089808 (Tex. App.—Texarkana 2017, no pet. h.) (03-23-17).

Facts: TDFPS became involved with Mother and her three Children after a report of neglectful supervision. Mother and the Children were living in a small house with two other adults and three other Children, where there was no electricity, one sofa, and no beds. The Children were removed and placed

with foster parents. After Mother's parental rights were terminated, she appealed, generally asserting that the evidence did not support termination.

Holding: Affirmed

Opinion: Although the trial court based the termination of Mother's parental rights on four statutory grounds, only one ground need be affirmed to support the termination order. Here, sufficient evidence established that Mother failed to comply with her court-ordered safety plan.

Further, the evidence supported a finding that termination was in the Children's best interest. Mother had a history of being unable to properly care for the Children's emotional, physical, and financial needs. She had little support from other people. Mother made no effort to improve the Children's living conditions. She did not maintain employment. She failed to fully comply with her service plan. When she visited the Children, she seemed more interested in her cell phone than in the Children. When it was suggested that she seek government assistance, Mother refused. She failed to acknowledge one of the Children's birthdays.

FATHER'S CHOICE TO LEAVE CHILDREN IN EXCLUSIVE CARE OF NEGLIGENT MOTHER AND FATHER'S PERSISTENT DENIAL OF EVER USING DRUGS OR ALCOHOL DESPITE EVIDENCE TO CONTRARY SUPPORTED TERMINATION OF FATHER'S PARENTAL RIGHTS.

¶17-3-35. ***In re S.C.F.***, ___ S.W.3d ___, No. 01-16-00788-CV, 2017 WL 1177589 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (03-30-17).

Facts: Mother had three Children with another man and then had two Children with Father. Mother's parental rights to all five Children were terminated, and the first father voluntarily relinquished his rights. Subsequently, Mother returned to Mexico for in-patient treatment for schizophrenia. Father sought custody of all five Children because the Children wished to remain together. TDFPS placed the Children with foster parents during the pendency of the suit. Initially, TDFPS sought reunification with Father, but after he tested positive for drugs, TDFPS amended its petition to seek termination of Father's parental rights. After a bench trial, the trial court terminated Father's parental rights, and he appealed, arguing the evidence was insufficient to support the judgment.

Holding: Affirmed

Majority Opinion: (J. Bland, C.J. Radack) Father never really lived with the Children before TDFPS obtained custody of them. Father had a protective order prohibiting his contact with Mother for years before TDFPS became involved. Father did not complete any services imposed by TDFPS until after it was clear that the Children would not be returned to Mother. The Children were adamant that they did not want to return to Father. The oldest Child had initially stated that she would be okay living with Father, but later admitted she had only said that because Father promised her a cell phone and a laptop. The younger Child never wavered in her wish not to live with Father. The Children remembered Father drinking alcohol and physically fighting with Mother. The Children reported that Father smelled of alcohol during visits. The Children and others observed signs that Father had consumed alcohol at times. The Children's foster placement was stable, safe, and drug-free. Father had left the Children with a neglectful mother and called on TDFPS to care for them rather than doing so himself. Father had no explanation for failing to visit the Children for the first year they were in TDFPS's custody or for failing to engage in family services until after Mother's rights had been terminated.

Father tested positive for cocaine and marijuana during the pendency of the suit but denied ever using drugs. Father's blamed his landlord for his positive test for marijuana, asserting a contact high, but also stated that he might use his landlord for child care in the future.

Dissenting Opinion: (J. Jennings) When undergoing a legal sufficiency review in a termination proceeding, the appellate court must determine whether the evidence, viewed in the light most favorable to the finding, is such that the fact finder could reasonably have formed a firm belief or conviction about the truth of the matter on which TDFPS bore the burden of proof. However, that does not mean that the appellate court must disregard all evidence that does not support the finding. Under this heightened standard, the court must also be mindful of any undisputed evidence contrary to the finding and consider that in its analysis.

Here, the oldest Child initially said she did not mind going with Father. Thus, her subsequent testimony was contradictory at best. Additionally, there was no evidence of the next two oldest Children's desires. Additionally, a caseworker testified that the Children had bonded with the Father, and that the visits (once every other week) were going well. There was little to no evidence of the Children's current and future emotional and physical needs. While there was evidence that the Children were in therapy, there was no evidence of the frequency or purpose of the therapy, or whether Father intended to continue the therapy. There was no evidence that Children had medical problems.

There was no evidence that Father was addicted to narcotics, had a history of narcotics use, or was ever convicted of a crime involving narcotics. Further Father testified that the Children had never seen him use drugs and that he had never used drugs. There was little evidence regarding domestic violence. There was no evidence that Father displayed violent tendencies, was aggressive, had anger issues, or had ever harmed a child. There was no evidence of any recent domestic violence. With respect to the alleged violence between Father and Mother, they were no longer in a relationship together, Mother had returned to Mexico to receive treatment for her schizophrenia, and Mother's parental rights had been terminated.

Although the Children testified that Father drank too much and smelled like alcohol on occasion, Father testified that he never drank alcohol because he was allergic to it.

Further, Father had done everything required of him to satisfy his safety plan and improve his parenting abilities. There was no evidence that Father would require assistance if the Children were returned to him. Father wanted to care for his Children, with whom he had bonded and visited regularly. There was no evidence that the Children would not be safe and in a drug-free environment if placed with Father.

Thus, the dissent opined that the majority failed to conduct a proper factual sufficiency review of the evidence and did not properly consider all of the evidence before it in a neutral light.

EVIDENCE SUPPORTED TERMINATION ON THE GROUNDS THAT FATHER ENDANGERED THE CHILD AND FAILED TO COMPLY WITH COURT ORDERS.

¶17-3-36. ***In re J.M.T.***, ___ S.W.3d ___, No. 01-16-00940-CV, 2017 WL 1281428 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (04-06-17).

Facts: After a bench trial, the trial court terminated Father's parental rights based on three predicate grounds. Father appealed, arguing the evidence was insufficient to support termination.

Holding: Affirmed

Majority Opinion: (J. Jennings, J. Higley) The evidence supported the findings that Father endangered the Child and failed to comply with court orders and that termination was in the Child's best interest.

Concurring Opinion: (J. Massengale) Because Father conceded the sufficiency of the evidence to support termination based on the trial court's finding that he endangered the Child by use of a controlled substance, the appellate court should not have addressed the sufficiency of the evidence to support the finding that Father failed to comply with court orders.

OKLAHOMA ORDER ADJUDICATING PARENTAGE AND ORDERING CHILD SUPPORT WAS NOT A CHILD CUSTODY DETERMINATION UNDER UCCJEA; ICPC DOES NOT APPLY TO PARENT PLACEMENTS.

¶17-3-37. ***In re C.R.-A.A.***, ___ S.W.3d ___, No. 04-16-00782-CV, 2017 WL 2260115 (Tex. App.—San Antonio 2017, no pet. h.) (05-24-17).

Facts: Mother and Father never married and did not live together. Mother lived in Texas, and Father lived in Oklahoma. While Mother was pregnant, an Oklahoma court rendered an order adjudicating Father as the Child's father and ordering Father to pay child support. Subsequently, the Child was born in Texas and continued to live there through the filing of the underlying proceeding.

TDFPS sought to terminate the parents' parental rights if the Child could not be safely reunified with either parent. The Child was removed, and TDFPS was appointed temporary managing conservator. After a few temporary hearings, Father filed a cross-petition and a "Motion to Place Child." Father referenced the Oklahoma order and asserted that pursuant to the Interstate Compact on the Placement of Children ("ICPC") the Child should be placed with him as the "fit, non-offending parent." Subsequently, Father filed an amended motion asserting that based on the prior Oklahoma order, that state had continuing, exclusive jurisdiction pursuant to the UCCJEA. Father asserted that Texas was the more appropriate forum and asked the Texas court to contact the Oklahoma court as required by the UCCJEA. TDFPS agreed with Father's positions on the ICPC and UCCJEA. After a non-evidentiary hearing, the associate judge held that "under both the UCCJEA Federal Statute and the ICPC Federal Statute…the Court is required to place the child with the non-offending parent, unless it can be established that parent is unfit to care for the child." The associate judge then held an evidentiary hearing on whether Father was an unfit parent. At the hearing's conclusion, the associate judge placed the Child with Father and found that Oklahoma had continuing exclusive jurisdiction. Mother requested a de novo hearing, after which, the district judge adopted the associate judge's decision. Mother appealed, arguing that the Oklahoma order was not a child custody determination and Oklahoma had not acquired continuing, exclusive jurisdiction. Additionally, Mother argued that the trial court erred in placing the Child with Father without conducting a social study pursuant to the ICPC.

Holding: Reversed and Remanded

Opinion: The prior Oklahoma order only addressed paternity and child support. It did not address legal custody, physical custody, or visitation. Thus, it was not a child custody determination, and Oklahoma had not acquired continuing, exclusive jurisdiction. Because the Child had lived in Texas since birth and was three years old at the time of filing, Texas was the Child's home state pursuant to the UCCJEA, and the trial court erred in determining Oklahoma had jurisdiction over the custody matter.

Before addressing Mother's second issue, the court of appeals first questioned whether the ICPC was applicable in this case. Pursuant to the plain language of the ICPC, it did not apply to placements with biological parents. The regulation upon which Mother and TDFPS relied—which purported to extend the ICPC to parents under certain conditions—directly contradicted the plain language of the statute and, thus, was invalid under Texas law. Therefore, because the Child was to be potentially placed with Father, the ICPC did not apply.

MOTHER'S FAILURE TO NOTICE CHILD'S NUMEROUS INJURIES OF VARYING AGES SUPPORTED TERMINATION.

¶17-3-38. ***In re L.M.M.***, ___ S.W.3d ___, No. 01-16-00961-CV, 2017 WL 1953348 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (05-11-17).

Facts: Mother moved a number of times. She lived with her mother for a while, on her own with the Child for a while, and with her boyfriend and his large family for a while. Mother left the Child with vari-

ous caregivers throughout the Child's life. During the first 5 months of the Child's life, Mother noticed no injuries on the Child or any sign that he had, in any way, been harmed. In the next few months:

- Mother took the Child to the hospital because she noticed a bulge on the Child's head. She was advised to follow up with the PCP if the swelling did not go down. The swelling went down the next day, and Mother did not follow up.
- Mother noticed a rash on the Child's penis. A doctor prescribed medication.
- Mother noticed faint red marks on the Child's hands and feet. She followed up with the doctor and believed he was having an allergic reaction to the medication.
- Mother noticed a bump on his forehead, which she attributed to a bug bite and did not seek medical attention.

None of the medical professionals suspected any abuse or mistreatment of the Child. When the Child was 7 months old, he woke up from a nap crying. At the subsequent trial, Mother testified that the Child had not been feeling well and had been spitting up and losing weight. She attributed his symptoms to his transition from breast milk to formula. Mother soothed the Child, and the two of them napped together. When Mother woke, her boyfriend was holding the Child. Mother went to go take a shower. Within minutes, Mother's boyfriend came in to the bathroom, asserting something was wrong with the Child, who was not moving and was barely breathing. Mother took the Child to the emergency room. Tests revealed the Child suffered from (1) several brain hemorrhages of varying ages and fresh blood on the brain; (2) at least 20 broken bones of varying ages throughout the Child's body; (3) multiple fractures in the hands and feet; and (4) broken blood vessels at the pinky. An investigation was unable to determine who caused the Child's injuries.

TDFPS removed the Child from Mother's care and placed him with Mother's brother and his wife, who wanted to adopt the Child and were able to care for his numerous physical ailments cause by his injuries. Although Mother completed her assigned services, she did not seem to fully appreciate the extent of the Child's physical needs.

After a bench trial, the trial court terminated Mother's parental rights on abandonment and endangerment grounds. Mother appealed.

Holding: Affirmed

Opinion: Mother argued that there was insufficient evidence that she *knowingly* allowed the Child to remain in a harmful environment. Mother reasoned that if the hospital and doctors did not identify the injuries, she could not have known. The Texas Supreme Court has expressly rejected this argument, holding that a medical provider's failure to identify abuse does not establish that a parent does not know of it.

Mother additionally argued that TDFPS offered no evidence that she knew the Child had been harmed or had the potential to be harmed. However, a child's unexplained, non-accidental fractures of various ages support a reasonable inference that the child's caregivers knew of the injuries and their cause and supports termination. Further, there was evidence that Mother had lied to investigators by claiming she was not pregnant with her boyfriend's child at the time of trial. The court could have found Mother not to be credible.

TEX. FAM. CODE VESTED REFERRING TRIAL COURT IN DE NOVO HEARING WITH AUTHORITY TO CONSIDER RECORD OF HEARING BEFORE ASSOCIATE JUDGE.

¶17-3-39. ***In re R.S.-T.,*** ___ S.W.3d ___, No. 04-16-00724-CV, 2017 WL 2124484 (Tex. App.—San Antonio 2017, no pet. h.) (05-17-17).

Facts: TDFPS sought to terminate the parents' parental rights. An associate judge heard several days of testimony from multiple witnesses, as well as legal arguments from the attorneys. Subsequently, a de novo hearing was held before the district court judge. At the de novo hearing, the parties agreed that the statement of facts was accurate and that they did not object to the trial court's consideration of the

statement of facts. The trial court explained, pursuant to standard protocol, testimony contained within the statement of facts would not be repeated during the de novo hearing. The trial court then instructed the parties to each submit a letter, identifying by line and page, the portions of the statement of facts that the parties wanted the trial court to read. Subsequently, the trial court heard additional testimony and argument from counsel. At the hearing's conclusion, the court terminated both parents' parental rights. In addition to challenges to the sufficiency of the evidence, Father argued that the trial court's de novo review "cut off" earlier proceedings and prevented consideration of testimony heard before the associate judge.

Holding: Affirmed

Opinion: Generally, when a matter is heard de novo, the trial court is limited to the evidence presented during the de novo hearing. However, Tex. Fam. Code § 201.015(c) permits the referring court to consider the record from the hearing before the associate judge. Here, prior to any testimony or argument by counsel, the statement of facts from the hearing before the associate judge was admitted in its entirety without objection.

MISCELLANOUS

FATHER FAILED TO SHOW CONFLICT OF INTEREST THAT WOULD REQUIRE REMOVAL OF AMICUS ATTORNEY.

¶17-3-40. *In re Burrows*, No. 06-17-00014-CV, 2017 WL 1031454 (Tex. App.—Texarkana 2017, orig. proceeding) (mem. op.) (03-17-17).

Facts: During the divorce proceeding, the Parties reached a Rule 11 Agreement appointing the Amicus attorney to represent the Child's interests. Father later asked the trial court to remove the Amicus, arguing that a conflict was created because the Amicus was the godmother of Mother's attorney's child; the Amicus and Mother's attorney had shared a case in the past; and the Amicus and Mother's attorney had travelled together in the past. Father argued that those facts created an untenable conflict of interest where the Amicus would be predisposed to argue in favor of Mother. The trial court denied Father's requested relief, and he filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: In a case involving the best interest of the child, the trial court has discretion to appoint or remove an amicus attorney. Nothing in the record established a conflict of interest that would impose a ministerial duty to remove the Amicus. Thus, the trial court acted within its discretion in choosing not to do so.

TRIAL COURT ERRED IN RENDERING JUDGMENT AGAINST HUSBAND AND WIFE JOINTLY AND SEVERALLY IN CONTRACT DISPUTE DESPITE FINDING WIFE HAD NOT ENTERED INTO CONTRACT.

¶17-3-41. ***Infiesimama v. Alemu*****,** ___ S.W.3d ___, No. 01-15-00829-CV, 2017 WL 1173885 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (03-30-17).

Facts: Husband and Wife purchased a house during their marriage. Wife subsequently signed a waiver that waived any interest she had in the property. A few years later, Husband and Wife decided to sell

the house. Buyers and Husband signed a sales contract that included a default provision, providing that if Husband defaulted, Buyers were entitled to either specific performance or termination of the contract and a return of their earnest money. When Buyers had the house appraised, the appraised value was much lower than the originally agreed sales price. Buyers' lender refused to lend funds unless the contract price was reduced. The sales contract was modified to reflect a lower price, and Husband appeared at closing and signed the necessary paperwork.

Subsequently, Husband and Wife refused to turn over the title to Buyers. Husband asserted that his signature on the modified sales contract was a forgery and that although he signed the closing paperwork as "attorney in fact" for Wife, he never had power of attorney.

Buyers sued Husband for breach of contract and sued Husband and Wife for specific performance. Husband and Wife filed a counter-claim asserting the lawsuit was frivolous.

After a bench trial, the trial court held that Husband breached the contract and that there was no evidence that Wife entered a contract with Buyers. The trial court granted the request for specific performance and ordered that the Buyers recover costs, their earnest money, and attorney's fees from both Husband and Wife. Husband and Wife appealed, arguing in part that the trial court erred in rendering judgment against Husband and Wife jointly and severally, despite its finding that Wife had not entered a contract.

Holding: Affirmed as Modified

Opinion: Buyers sought specific performance against Husband and Wife, but only alleged breach of contract against Husband. Specific performance is an available method of relief for a breach of contract claim, it is not a separate cause of action. To be entitled to specific performance against Wife, Buyers would have had to plead and prove that Wife breached the contract. They did not do so, and the trial court erred to the extent it rendered judgment against Wife.

EVIDENCE INSUFFICIENT TO ESTABLISH CRIMINAL CONTEMPT BECAUSE UNCLEAR WHETHER HUSBAND VIOLATED TEMPORARY ORDERS, FINAL DECREE, OR BOTH.

¶17-3-42. *In re Decker*, No. 06-17-00035-CV, 2017 WL 1290854 (Tex. App.—Texarkana 2017, orig. proceeding) (mem. op.) (04-06-17).

Facts: The divorce decree awarded Wife funds from Husband's retirement account. At some point before the divorce, evidence showed that the funds in the account exceeded $100,000. Three months after the divorce, pursuant to a QDRO, the funds were rolled over into Wife's account, but the balance was just under $7,000. Wife filed for enforcement by contempt. At the contempt hearing, Husband pleaded his Fifth Amendment right not to testify in response to every question posed to him. The court found Husband in civil and criminal contempt.

Holding: Writ Granted in Part; Denied in Part

Opinion: There was evidence that the funds were removed, transferred, or otherwise withdrawn from the retirement account at some point, but it was unclear whether the funds were removed before or after the divorce was rendered. Without a more precise time of the withdrawal(s), there was no evidence regarding whether Husband violated the temporary orders, the final decree, or both. Therefore, the trial court's criminal contempt findings that Husband violated the temporary orders and the divorce decree were without evidentiary support, rendering the criminal-contempt aspect of the orders void because they deprived Husband of liberty without due process of law.

STATE COURT LACKED AUTHORITY TO INTERFERE WITH FEDERAL STATUTES, RULES, AND REGULATIONS REGARDING INCOME TAX DEDUCTION.

¶17-3-43. *In re A.M.*, No. 04-16-00335-CV, 2017 WL 1337648 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (04-12-17).

Facts: Mother filed a suit to adjudicate the parentage of the Child. Father filed a counter-petition, seeking managing conservatorship and the right to determine the Child's primary residence. After an order was entered, Father appealed, arguing in part that the trial court abused its discretion by granting Mother the right to claim the dependency exemption for the Child every year for income tax purposes.

Holding: Affirmed as Modified

Opinion: Federal income tax exemptions are preempted by the federal government and must be decided according to applicable federal statutes, rules, and regulations. State courts have no power to interfere. Under federal regulations, the parent with the higher AGI is entitled to the deduction, and there was no evidence regarding the parties' AGIs.

MOTHER-HUBBARD CLAUSE IN PLAINLY INTERLOCUTORY ORDER DID NOT CONSTITUTE FINAL ORDER; TEX. R. CIV. P. 199.5 ONLY PERMITS SUSPENSION OF DEPOSITION BASED ON ACTIONS DURING DEPOSITION.

¶17-3-44. ***Wilson v. S&N, LLP***, ___ S.W.3d ___, No. 05-15-01448-CV, 2017 WL 1360204 (Tex. App.—Dallas 2017, no pet. h.) (04-13-17).

Facts: Shamoun & Norman ("S&N") represented Father in his divorce proceedings but withdrew from the case and was succeeded by Goranson Bain ("GB"). S&N filed a petition in intervention in the divorce seeking unpaid fees from Father. Subsequently, S&N nonsuited the case and refiled in a civil district court. Father filed an answer and a motion to transfer the case back to the family court. The civil court denied the motion to transfer, holding:

> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that [Father's] Motion to Transfer is hereby DENIED, in its entirety.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all relief requested in this case and not expressly granted herein is DENIED.

A few months later, S&N served a deposition notice on Father. GB responded with a request that S&N suspend the deposition, and if S&N would not stipulate to a suspension, GB would suspend the deposition immediately after Father was sworn in. GB asserted that the Denial of Transfer Order constituted a final judgment, and the civil court had lost plenary power over the case a month prior. S&N did not agree to the suspension, and GB suspended the deposition immediately after Father was sworn in. S&N filed a motion to compel and for sanctions, which the civil court heard and granted. The court found that GB was liable for abusing the discovery process and the noncompliance was not justified. GB appealed.

Holding: Affirmed

Opinion: A judgment issued without a conventional trial is final only if it either actually disposes of all claims and parties, or it states with unmistakable clarity that it is a final judgment. A mother-hubbard clause in a plainly interlocutory order is inapt for determining finality where there has not been a trial. Here, the Denial of Transfer Order lacked any clear indication that the trial court intended the order to

completely dispose of the entire case. The only issue considered in the hearing was the motion to transfer. The claim for unpaid attorney's fees was still unaddressed. Thus, the order was not final, and the trial court's power had not expired.

Tex. R. Civ. P. 199.5 permits the suspension of a deposition based on events that happen *during* a deposition. Thus, GB could not rely on Rule 199.5 to unilaterally suspend the deposition based on its belief that the civil court lacked plenary power. GB could have filed a motion to quash before the deposition, but it opted not to do so. Rather, GB chose to appear at the date and time of the deposition only to immediately suspend the deposition, causing S&N to incur travel expenses and preparation costs.

Further, unlike sanctions pursuant to Tex. R. Civ. P. 13 or Tex. Civ. Prac. & Rem. Code Chs. 9 and 10, sanctions pursuant to Tex. R. Civ. P. 215.2(b) do not necessarily require a finding of bad faith, unless a trial court imposes death penalty sanctions. That does not mean an extreme monetary sanction would not need to be supported by a bad faith finding, but here, GB did not allege that the $1,837.50 sanction was so sever as to require reversal on that basis.

Finally, there was a direct relationship between the improper conduct and the sanction, because the sanction order set out line item amounts for the specific costs incurred by S&N for GB's failure to quash the deposition.

ORDER FINDING HUSBAND IN CONTEMPT FOR FAILING TO ABIDE BY DIVORCE DECREE VOID BECAUSE HUSBAND DID NOT APPEAR AT CONTEMPT HEARING.

¶17-3-45. *In re Loepky*, No. 11-16-00322-CV, 2017 WL 1497383 (Tex. App.—Eastland 2017, orig. proceeding) (mem. op.) (04-20-17).

Facts: In the divorce decree, Husband was ordered to sell the marital residence and use the proceeds to buy a new home for Wife. When Husband failed to do so, Wife filed a petition for enforcement by contempt. Husband was served but failed to appear. The hearing was conducted in his absence. The trial court held Husband in contempt and ordered Husband be confined for a period not to exceed 18 months or until he posted a cash bond for the value of the marital residence. Husband filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: A trial court may not hold a person in contempt of court in absentia, regardless of whether the sanction imposed is coercive or punitive. The court should have issued a capias or writ of attachment.

Editor's comment: *A contempt hearing requires that the bad-actor be there in person. If the bad-actor fails to appear or isn't served, all that can happen is the issuance of a capias. You can't hold a contempt hearing without the person there. M.M.O.*

MOTHER FAILED TO PROVE SHE COULD NOT AFFORD TO PAY FEE FOR REPORTER'S RECORD.

¶17-3-46. *In re J.S.*, No. 05-17-00341-CV, 2017 WL 1455406 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (04-20-17).

Facts: Mother, pro se, filed an affidavit of indigency after she was named possessory conservator with only supervised access to her Children. Mother then sought a copy of the reporter's record, but the court reporter filed a challenge to Mother's affidavit of indigency. The trial court sustained the challenge, and Mother appealed.

Holding: Affirmed

Opinion: After the court reporter filed a motion challenging the affidavit of indigence, Mother bore the burden to show she could not afford to pay for the reporter's record. Mother's monthly income exceeded her monthly expenses by $300, and nothing in the record showed the cost of the record.

AGREEMENT BETWEEN FORMER SPOUSES CANNOT BE A "POST-NUPTIAL AGREEMENT," SO WIFE'S POST-DIVORCE PROMISE TO PAY HUSBAND WAS NOT ENFORCEABLE WITHOUT CONSIDERATION.

¶17-3-47. *McClain v. McClain*, No. 13-15-00449-CV, 2017 WL 8539081 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (04-20-17).

Facts: The final divorce decree awarded a home to Wife as her sole and separate property. A few weeks after the divorce, Wife signed an affidavit purporting to give Husband 50% of net the sale proceeds of the home. The home was never sold. It had been listed for sale once with an asking price of $400,000, but no offers were received. Four years after the divorce, Husband field for "a declaratory judgment for Two Hundred Fifty Thousand dollars" and attorney's fees. Wife filed a general denial and pleaded several affirmative defenses, including lack of consideration. Wife testified that Husband had threatened to kill her if she did not sign the affidavit giving him half the net proceeds.

Husband appealed the trial court's dismissal of his claims. Husband asserted that the affidavit was a post-nuptial agreement for which no consideration was necessary, and Wife had breached that agreement.

Holding: Affirmed

Opinion: A post-nuptial agreement only applies to "spouses." Thus, the agreement between Husband and Wife after the divorce could not have been a post-nuptial agreement, and consideration was required.

Further, despite Husband's assertion that his consideration was his agreement not to litigate, Wife testified that Husband made no promises in return for her signature on the affidavit.

TRIAL COURT ABUSED DISCRETION BY REQUIRING HUSBAND TO PREPAY APPELLATE ATTORNEY'S FEES BY DEPOSITING FUNDS INTO THE COURT REGISTRY.

¶17-3-48. *In re Christensen*, No. 01-16-00893-CV, 2017 WL 1485574 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding) (mem. op.) (04-25-17).

Facts: After Husband appealed the property division of the divorce decree, Wife moved for temporary orders pending the appeal. The trial court ordered Husband to post a sufficient bond while the appeal was pending to secure his compliance with the decree and ordered Husband to prepay Wife's appellate attorney's fees by depositing $5000 in the court's registry. Husband filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Any award of appellate attorney's fees should be conditioned on an unsuccessful appeal, and an unconditional award is improper. Further, regardless of whether an appellant has the ability to prepay attorney's fees, an order that fees be prepaid into the court registry while an appeal is pending is improper.

Editor's comment: *A significant amount of cases have dealt with this issue and the pre-payment of appellate fees. The problem is that pre-payment looks like a punishment mechanism, and appellate fees cannot be used to punish. Make sure that in an order on temporary orders pending appeal, the order specifies that attorney's fees are awarded and conditional only on an unsuccessful appeal, and that they are paid in a step up form in an amount that is supported by the record. J.H.J.*

TRIAL COURT'S JUDGMENT FINAL AND ENFORCEABLE DESPITE LACK OF MOTHER-HUBBARD CLAUSE BECAUSE IT ADDRESSED ALL CONTESTED ISSUES BETWEEN THE PARTIES.

¶17-3-49. ***Bergenholtz v. Eskenazi*****,** ___ S.W.3d ___, No. 08-15-00144-CV, 2017 WL 1684729 (Tex. App.—El Paso 2017, no pet. h.) (05-03-17).

Facts: Husband and Wife signed an AID dividing their marital estate, which provided that Husband would pay money to Wife in installment payments. Subsequently, disputes arose, and the parties entered a settlement agreement. The trial court granted Wife's motion to reduce the agreement to judgment. When Husband failed to comply, the trial court granted Wife's request for the appointment of a receiver for turnover relief.

Husband challenged the receivership order, arguing;

- Wife's motion to declare him a vexatious litigant triggered a stay pursuant to Tex. Civ. Prac. & Rem. Code 11.052, and thus, the trial court's receivership order entered during the stay was void;
- the agreement was unenforceable because Wife failed to raise a claim for breach of contract; and
- the judgment was unenforceable because it was not a final judgment because it lacked a Mother-Hubbard clause.

Additionally, in supplemental briefs, Husband argued that:

- the receivership order was void because the appointed receiver was representing him in the appeal, which created a conflict under Chapter 64 of the Tex. Civ. Prac. & Rem. Code; and
- Wife allegedly non-suited all claims against him.

Holding: Affirmed

Opinion: This case was transferred to El Paso from Dallas.

Husband failed to raise at trial any complaint regarding a stay. Further, he and Wife both sought affirmative relief during the pendency of the stay.

Settlement agreements are governed by contract law. A trial court cannot render a consent judgment based on a Rule 11 agreement if a party revokes consent before judgment is rendered. At trial, Husband argued that the trial court lacked jurisdiction to render orders based on pending appeals and a bill of review, but he did not withdraw his consent to the settlement agreement before judgment was rendered.

Although the judgment did not contain a Mother Hubbard clause, it clearly addressed all the contested issues between the parties. Thus, the final judgment was final and enforceable.

The Dallas appellate court has previously held that Tex. Civ. Prac. & Rem. Chapter 64 does not apply in a post-judgment turnover proceeding. Further, even if it did, the appointment of a receiver is only void is a person is disqualified under § 64.021—if the person is not a Texas citizen and qualified voter.

Finally, the record did not support Husband's contention that Wife nonsuited all of her claims against him.

★★★TEXAS SUPREME COURT ★★★

SUCCESSOR JUDGE WHO REPLACED PREDECESSOR JUDGE AFTER PREDECESSOR JUDGE LOST AN ELECTION COULD NOT ENTER FINDINGS OF FACT (OR RULE ON ANY UNDISPOSED MOTIONS) FOR TRIAL OVER WHICH SUCCESSOR JUDGE DID NOT PRESIDE.

¶17-3-50. ***Ad Villarai, et al. v. Pak*, ___ S.W.3d ___, No. 16-0373, 2017 WL 1968035 (Tex. 2017)** (05-15-17).

Facts: Predecessor Judge presided over the trial but failed to issue findings of fact before leaving the bench. Defendant timely filed a notice of past-due findings on the last day Predecessor Judge was the presiding judge of that court. Soon after taking the bench, Successor Judge issued findings of fact, and Defendant appealed.

Holding: Reversed and Remanded

Opinion: Successor Judge—who had replaced Predecessor Judge after an election—had no authority to issue findings. While Texas Rule of Civil Procedure 18 gives some authority to successor judges when the predecessor judge dies, resigns, or becomes disabled, Rule 18 does not apply when a predecessor judge has been replaced through an election. Accordingly, the Court held Successor Judge had no authority to issue findings, the findings were void, and Defendant was not required to raise the specific issue to the trial court to preserve it for appeal.

Additionally, contrary to the court of appeals decision, because Predecessor Judge's term expired during the period prescribed for filing the requested findings, he was permitted to file the findings even after his term expired.

Editor's comment: *Newly elected judge. M.M.O.*

FATHER'S ATTORNEYS ENTTILED TO IMMUNITY FROM SUIT BY MOTHER FOR CONDUCT DURING SAPCR BECAUSE ACTIONS FELL WITHIN SCOPE OF REPRESENTATION.

¶17-3-51. *Diaz v. Monnig*, No. 04-15-00670-CV, 2017 WL 2351095 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (05-31-17).

Facts: In a Mexican divorce decree, Father was awarded custody and possession of the Child. Subsequently, a Mexican court awarded custody to Mother. Mother and the Child moved to San Antonio. Father filed a petition for enforcement under the Hague Convention on the Civil Aspects of International Child Abduction. Father alleged in the Texas court that he was entitled to custody and that Mother had no rights to the Child. The divorce decree and other documents were translated and entered into evidence. After an ex parte emergency hearing, the trial court granted Father a warrant to take physical custody of the Child. Father, with the Child, and Mother were ordered to appear at a hearing on Father's petition. The morning of the hearing, Father's attorneys, at Father's direction via voicemail, announced the intent to nonsuit. It was later discovered that Father had left the country with the Child. Mother filed a motion for sanctions and a motion to set aside the nonsuit, both of which were denied. Mother filed suit against Father's Attorneys alleging interference with possessory right of child, abuse of process, negligent/fraudulent misrepresentation, and civil conspiracy. Father's Attorneys filed hybrid no-evidence and traditional motions for summary judgment, which were granted. Mother appealed, arguing in part that the Father's Attorneys were not entitled to the attorney immunity defense.

Holding: Affirmed

Opinion: Attorney immunity is an affirmative defense, and to prevail, the Attorneys were required to establish their alleged conduct was within the scope of their legal representation of Father. The purpose of attorney immunity is to ensure loyal, faithful, and aggressive advocacy. Even wrongful or fraudulent conduct may fall within the scope of client representation. This is not to say attorneys are not otherwise answerable for any misconduct. Other mechanisms, such as sanctions, contempt, and attorney disciplinary proceedings are in place to discourage and remedy wrongful conduct.

MOTHER TOOK NOTHING ON BREACH OF CONTRACT CLAIM BECAUSE PHRASE "TAKE CARE OF LIKE [FAMILY]" TOO INDEFINITE AS A MATTER OF LAW TO DEFINE FATHER'S OBLIGATIONS.

Editor's comment: *This case is interesting to me because it appears that the court is saying that an attorney can assist in a crime or commit fraud, yet they are still immune under the immunity provisions. While I understand that there are other avenues to punish attorneys, this certainly seems to fly in the face of that if these particular lawyers assisted their client in committing a crime or in violating a court order. J.H.J.*

¶17-3-52. ***Shipley v. Vasquez*****,** ___ S.W.3d ___, No. 04-16-00295-CV, 2017 WL 2351352 (Tex. App.—San Antonio 2017, no pet. h.) (05-31-17).

Facts: Father (the president of Shipley Do-Nut Flour & Supply, Co.) and Mother had a long, on-again-off-again relationship but never married. The couple broke up after Mother became pregnant, got back together after her miscarriage, and broke up again when she had the Child. Shortly after the Child was born, Mother was imprisoned for ten years after pleading no contest to intoxication manslaughter. During that period, Mother's parents raised the Child. When Mother was released from prison, Father had married and had two children with his wife. Father told Mother that she should move out of her parents' house and get a home for the Child and herself. Mother told Father she could not afford the home she picked out, but he told her to get the house and to make sure the Child was "taken care of like a Shipley would be taken care of." Father helped Mother pay the down payment on her home and delivered furniture and household items when she moved in. Father also agreed to above-guideline child support. About a year later, Mother arranged for the Child to meet Father for the first time. The meeting did not go well, and the Child ran off crying. Litigation commenced soon after. Subsequently, Father and his company sued Mother seeking injunctive relief for unauthorized use of Father's name. Mother replied with a counterclaim, in which she alleged that Father breached the agreement to "take care of" the Child "like a Shipley" and that Father breached his fiduciary duty to Mother. A jury found Father breached his oral agreement and awarded Mother damages. It further found that Father breached his fiduciary duty but awarded no damages. Father appealed, arguing that the oral agreement was too indefinite to be enforceable.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. Although not all terms in a parties' agreement are essential, the terms "take care of" and "like a Shipley" in this agreement were vitally important elements of the bargain. There was no evidence, direct or circumstantial, that made those two terms reasonable, definite, and certain.

Editor's comment: *I have to thank my associate's husband, Nate Hearn, for this one—for all you Pulp Fiction aficionados and all you guys that can quote the lines from every movie that they have ever seen go to* https://www.youtube.com/watch?v=O9LbKWL7GRA *G.L.S.*

Time - Phrase
00:13:22 - Well, he's going out of town, Florida...
00:13:24 - and he asked me if I'd take care of her while he's gone.
00:13:27 - Take care of her? (holds up finger showing gun to head) - No, man. Just take her out. You know, show her a good time. Make sure she don't get lonely.