SECTION REPORT
FAMILY LAW

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Message from the Chair

Well, I hope all is well with our membership during the heat of the Summer. We have enjoyed our best year ever legislatively, and I encourage you to review all the changes that have been accomplished by our Legislative Committee in conjunction with the Family Law Foundation. Special thanks goes to Steve Bresnen, the legislative lobbyist who carried our water all Session. We look forward to the New Frontiers in Marital Property Course hosted by Randy Wilhite and Patrice Ferguson in beautiful reborn New Orleans at the Omni Hotel October 8 & 9. The program is devoted to cutting edge issues and, like N'Orlens, has a style of its own. The Course is intended to be an intimate sharing experience with terrific presenters in a relaxed, audience-exchange format. Please join us there. New Frontiers is followed in San Antonio with the Ultimate Trial Notebook Course hosted by Joe Indelicato at the Westin Riverwalk Hotel December 3-4. This Course provides nuts and bolts guidance to Family Law Practitioners in an intensive atmosphere designed to provide practical aid for immediate use in day to day work. Please join us for one or both of these helpful seminars. Also there is an excellent course for all of our paralegals on October 14-16 at the South Shore Harbour Resort in League City, just south of Houston. Don't forget that they need to get their continuing education also. This is an excellent chance for all of the section members to show how much we appreciate our staff, while reaping the benefits in our practices. Details are included below in the new Paralegal Column. See you there.

----------Doug Woodburn, Chair

COUNCIL ADMINISTRATIVE ASSISTANT
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Section Wear and Publications

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EDITOR'S NOTE

I am really excited about this issue. We have some fabulous articles addressing premarital agreements, what happens after the abolishment of economic contribution, an update on grounds for termination, and the little known T.R.C.P. 139. I am extremely grateful to my law clerk, Quinn Martindale, who has contributed an article for this report, and who will continue to assist me in summarizing the case law until he graduates in May. I am also looking for questions for our Ask the Editor Column. All questions received will be answered, and the ones that address the most interesting issues will be published in future section reports. In addition to the two courses mentioned by Doug in his Message from the Chair, I would also like you to join us for the 26th Annual TAFLS Trial Institute in Santa Fe over the Valentine's Day Weekend. Jimmy Vaught and I are the course directors, and we will be presenting the Uncivil War of Rhett and Scarlett – Rhett and Scarlett have divorced, Scarlett has finally caught and married Ashley, and now Rhett gives a damn!!!!!!!! Come join us for the final modification trial. You can sign up at TAFLS.org. Once again, we will be furnishing briefs on flash drives on many topical issues. This time the focus will be on children's issues, military retirement issues, and enforcement. Everyone is welcome, you don't need to be board certified. The Section Report has also added a column addressing parlegal issues. I have also included information on an upcoming seminar just for paralegals. Just like us, they need to receive regular, high-quality continuing education.

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In the Law Reviews and Legal Publications

TEXAS ARTICLES

Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 S.M.U. L.R. 367 (2009)

LEAD ARTICLES

Mary Helen Carlson, *United States Perspective on the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 43 Fam. L.Q. 21 (2009)

William Duncan, *The New Hague Child Support Convention: Goals and Outcomes of the Negotiations*, 43 Fam. L.Q. 1 (2009)

Carl Gilmore, *When "Daddy" is Full of Doubt: How to Challenge the Paternity Presumption*, Fam. Advocate, Summer 2009 at 4.

Battle Rankin Robinson, *Integrating an International Convention into State Law: The UIFSA Experience*, 43 Fam. L.Q. 61 (2009)

Marilyn Ray Smith, *Child Support at Home and Abroad: Road to The Hague*, 43 Fam. L.Q. 37 (2009)

ASK THE EDITOR

Dear Editor: Next week I am set for trial, and pursuant to the court's instructions, the other side has filed a sworn inventory and appraisement in which they have listed the husband's IRA as community property, without any portion of it being listed as separate property even though he had $34,000 in it at the time of the parties' marriage. Can I object at the time of trial to the husband trying to put on evidence that any part of his IRA is his separate property? *Exasperated in El Paso*

Dear Exasperated in El Paso: Yes, you can object to the husband putting on this evidence. Because a sworn inventory and appraisement is not a petition or an answer, and because it does not state a cause of action or defense, it is technically not a "pleading." Sworn inventory and appraisements, however, are analogous to pleadings. *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 509 (Tex. App. – Austin 1994, no writ). Like pleadings, inventories may constitute judicial admissions. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App. – El Paso 1985, writ dism'd). A judicial admission establishes the issue in dispute as a matter of law on behalf of the adversary of the one making such admission. *Id.* The party making a judicial admission may not introduce evidence contrary to the admission. *Id.*

If you have a question, please submit via email to the Editor at glslaw@gte.net.

IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Alimony: The Georgia Supreme Court refused to apply the "two-witness" rule to execution of a prenuptial agreement because a prenuptial agreement that sets the amount of alimony to be paid upon divorce is an agreement made in contemplation of divorce, not marriage, and therefore the prenuptial agreement statute does not apply. *Dove v. Dove*, Nos. 285 Ga. 647, ___ S.E. 2d ___, 2009 WL 1649681(Ga. 2009). In a dispute whether the word "salary" included bonuses when calculating alimony, the Connecticut Supreme Court held "salary" ambiguous because on one occasion during the prove-up of the parties' agreement, the ex-wife's counsel used the word "income" when referring to salary. *Isham v. Isham*, 292 Conn. 170, 972 A.2d 228 (2009).

Bankruptcy: A Minnesota trial court erred when it refused to order an ex-husband to pay a joint debt on property awarded to him upon divorce, despite the ex-husband's subsequent bankruptcy, because obligations resulting from divorce proceedings are not dischargeable in bankruptcy. *Fast v. Fast*, 766 N.W.2d 47 (Minn. App. 2009). An Oregon bankruptcy trustee failed to set aside transfers made pursuant to a divorce judgment in which the debtor wife received assets comprising less than 1% of the marital estate because the trustee alleged only constructive rather than actual fraud. *Batlan v. Bledsoe*, 569 F.3d 1106 (9th Cir. 2009).

Child support: A New York appellate court upheld a judgment of civil contempt (and a six-month jail sentence) when the trial court did not believe that the obligor, a fired postal worker, had a back problem that prevented him from working or really had tried to find a job. *Vickery v. Vickery*, 63 App. Div. 3d 1220, 880 N.Y.S.2d 724 (2009). A "change" in an account's "investment value" should not be considered income for child support purposes, but capital gains should, according to *Cupkova-Myers v. Myers*, 63 App. Div. 3d 1268, 880 N.Y.S.2d 736 (2009). A Connecticut court refused to enforce a stipulated family support judgment when the obligee claimed that because the judgment was tantamount to a civil judgment on which she sought execution, she need not prove the amount of any arrearage. *Barber v. Barber*, 114 Conn. App. 164, 968 A.2d 981 (2009).

Modification: A New York court agreed with the father that a mother's proposed move from New York to South Carolina would not be in the child's best interest, noting "that the father has exercised his visitation almost every weekend since the parties' separation and has remained active in the child's life." *Martino v. Ramos*, No. 64 A.D. 657, N.Y.S.2d , 2009 WL 2032366 (N.Y. App. July 14, 2009). In *Perry v. Korman*, 63 App. Div. 3d, 880 N.Y.S.2d 815 (2009), the court reversed a trial court's modification order granting custody to the father, even though the mother had moved six times in eight years, because other evidence favored the child remaining with her mother. A California appellate court mandamused a trial court that allowed a mother to move to Arizona during the pendency of a divorce because the trial court did not consider the child's best interest but only whether the father had proved a change in circumstances. *Keith R. v. Superior Court*, 174 Cal. App. 4th 1047, 96 Cal. Rptr. 3d 298 (2009).

Paternity: An Oregon court upheld an adjudication of paternity of a man who testified that his wife told him she had been artificially inseminated at a fertility clinic when she actually had used "an artificial insemination kit from an Internet vendor" and been inseminated by a private semen donor with the husband's help. *In the Matter of the Marriage of A.C.H. and D.R.H.*, 229 Ore. App. 129, 210 P.3d 929 (2009). In California, a voluntary declaration of paternity signed by both parents has the "same force and effect as a judgment for paternity issued by a court of competent jurisdiction." The appellate court reversed a paternity adjudication in famed father, who "took the child into his own home" and "held him out as his own child," and adjudicated

paternity of the biological father because he and the mother had signed a voluntary declaration of paternity. *Kevin Q. v. Lauren W.*, 174 Cal. App. 4th 1557, 95 Cal. Rptr. 3d 477 (2009).

Property: A husband's beneficial interest in a revocable trust settled on him by his mother is not marital property in Oregon because the beneficial interest amounts to a mere expectancy. *In the Matter of the Marriage of Githens*, 227 Ore. App. 73, 204 P.3d 835 (2009). A New York court properly determined that only 10% of the value of a subsidiary owned by a corporation the husband organized prior to marriage should be included in the marital estate when the increase in the subsidiary's value was largely attributable to the efforts of its employees rather than its owner. *Smith v. Winter*, 883 N.Y.S.2d 412 (App. Div. 2009). An Indiana appellate court reminded the lower courts that a residence titled in a third party's name cannot be considered part of the marital estate without joining the third party in the divorce suit. *Nicevski v. Nicevski*, 909 N.E.2d 446 (Ind. App. 2009).

Settlement: In a pair of divorce cases, the North Dakota Supreme Court found one settlement agreement unconscionable but upheld another one. In *Eberle v. Eberle*, 2009 N.D. 107, 766 N.W.2d 477 (2009), the court held a settlement agreement unconscionable when the wife testified that the was on medication when she signed it, that the husband would not leave the house until she signed, that she did not read the agreement or consult an attorney, and that "no rational person would accept" the agreement. In *Vann v. Vann*, 2009 N.D. 118, 767 N.W.2d 855 (2009), the court upheld a settlement agreement despite the husband's testimony that he did not read the agreement or consult an attorney and that he suffered from alcoholism, depression and anxiety. The court noted that according to the wife, the husband "had not consumed any alcohol for three full days" prior to the date the parties signed the agreement.

UCCJEA: A New York trial court erred when it granted a Kentucky father's motion to dismiss a child custody proceeding for lack of home-state jurisdiction when the Kentucky mother had moved with the children to New York more than six months ago. The children's six-week summer vacation with their father in Kentucky during those six months "did not constitute a change in their residency." *Felty v. Felty*, 882 N.Y.S.2d 504 (App. Div. 2009).

Columns

USING PSYCHOLOGICAL TESTS IN COURT: TELLING TESTS APART
Part II

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

Our last column noted that psychological test results offer, at best, inferences about an examinee but do not, by themselves, define an examinee's psychological makeup. Some psychological tests provide more research-based inferences than others. For example, an MMPI-2 test profile is more likely to convey useful information about examinees' psychological concerns than the House-Tree-Person test that purports to classify emotional problems by qualities of examinees' drawings.

This column identifies three important aspects of tests that distinguish tests that may be useful in court from those with questionable statistical and legal reliabilities. The next column will identify three other

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important aspects. Lawyers should focus their direct and cross examinations of psychological tests around these key aspects.

Response Style. Examinees respond to test questions in a context: as parents in a child custody evaluation, as plaintiffs in an employment discrimination suit, or as criminal defendants. Consequently, these examinees may respond to test questions in ways that favor their cases—trying to look too well-adjusted or trying to exaggerate problems—and thus produce questionable test profiles. Lawyers should note if a particular test is able to gauge an examinee's response style—psychologists will be hard-pressed to rationalize their use of tests that do not measure response style. Also important is the quality of a test's response style measures. For example, response style measures, composed only of transparent questions that attempt to catch the examinee in obvious falsehoods, are almost useless.

Standardization Sample. The essence of a well-constructed psychological test is that the test compares an examinee's score with a larger standardization sample on which the test is based. The examinee's test score becomes meaningful when it is compared to the scores of others in the sample with characteristics similar to those of the examinee. Lawyers should note several aspects of the standardization sample. For example, in a personality test, it may not be enough that the standardization sample included people diagnosed as depressed. Lawyers might also inquire about how those people were diagnosed: by a professional's interview, from a simple questionnaire, or just by people saying they were depression. In addition, the standardization sample's size should be noted: generally, larger sample sizes of a characteristic reflect that characteristic more reliably than smaller sample sizes. The sample's makeup should also be explored. For instance, were only college students or another convenient group used as the standardization sample, or were the sample's demographics broad enough to include the examinee's characteristics? In sum, make sure that the psychologist is not comparing apples to oranges when applying test scores and profiles to your client.

Reliability. Caselaw emphasizes that psychological test reliability differs from legal reliability. *Daubert* notes that legal reliability refers to evidentiary reliability. In contrast, psychological test reliability refers to the extent to which test scores are consistent and free from measurement error.

Measurement of any psychological variable is always subject to some error. But one indication of a test's quality is its ability to produce consistent results with an examinee over time with a minimum amount of error. A common example of reliability may occur in one's bedroom every morning: people watching their weight will not tolerate scales that yield inconsistent readings; scales that produce consistent readings with the same individual characterize reliability.

Lawyers should note a key aspect of psychological test reliability: testing some psychological characteristics is inherently more reliable than testing others. For example, adults' I.Q. scores are generally stable; not much change will occur from one test administration to another over a period of time, even years. I.Q. changes may indicate neurological problems. Consequently, the reliability figures of well-constructed adult intelligence tests are among the highest in psychological testing.

Measures of emotional problems are more variable than measures of intellectual abilities. For example, depressed people will often become less depressed after several months, and, if tested over this period, their depression profiles will change. Consequently, even in a well-constructed personality test like the MMPI-2, depression scales will reflect lower reliability figures than more stable intelligence scores. The reliability figures of depression scales will decrease more as time from the administration of the personality test lengthens. Bottom line? Lawyers' ears should perk up if they hear psychologists making long term predictions of an examinee's emotional condition based only on personality test scores, and especially if the tests which produced those scores were administered even several weeks earlier.

Our next column will identify three other important aspects of well-constructed psychological tests that will help lawyers critique psychological tests more effectively in their cases.

WHAT YOU NEED TO KNOW ABOUT STOCK OPTIONS

by
Christy Adamcik Gammill, CDFA[1]

Stock Options are a benefit given to employees of privately held and publicly traded companies as a form of compensation that goes well beyond a salary and allows the employee to benefit from the success of the company in the future. Start up companies in particular may use stock options to retain more cash by incentivizing the employee to work hard for less of a salary with the goal of them being highly rewarded if it goes public. Along with the upside potential there is risk to be aware of to either party awarded Stock Options in a divorce, especially the non-employee spouse. Understanding the difference in vested and unvested stock options as well as the tax implications of different types of options is imperative before making a decision to keep or acquire them in a Divorce Property Settlement.

Granting Stock Options

The options may be granted to the employee at the employer's discretion and the number of options granted will vary depending on the financial value the company places on the employee or a longer term performance incentive. Each stock option award will have a specific number of shares of stock with a grant or strike price using the value of the stock at or near the grant date, a vesting schedule, and expiration date. These details will be in the Grant Letter. If the employee accepts the terms, he will then execute a Stock Option Agreement. As vesting occurs, the employee may then exercise the vested stock options purchasing shares at the grant price at some point in the future with the goal that the underlying value of the stock is much greater than the strike price thus creating potentially significant profits or wealth for the employee.

In-the-Money and Out-of-the-Money Options

The difference between the grant price and 'exercise' price is called the *In-the-Money* value of the option or what its intrinsic value is before tax. An example of how a stock option grant and vesting schedule with its In-the-Money value is outlined later. If the stock's grant price is more than the value of the stock then it is *Out-of-the-Money* and has no intrinsic value. If the stock option, for whatever reason, is not exercised before its expiration date it will expire worthless. Because it is difficult to predict how much a stock's price will rise or fall in the future, it is human nature to want to hold onto the option until expiration to see how far up it can go, however, as recent times have clearly shown, what goes up may just as quickly go down. Therefore, holding onto an option until expiration is not a wise stock option exercise strategy. A stock option analyzer is a more sophisticated method of modeling options to determine the amount of leverage each batch has and the ideal time to exercise based on risk tolerance and time horizon. A stock that is $10 may go up $2 per share or 20% in price, however if the grant price is $5, the difference in $10 and $12 is 40% ($12-$5 = $7/share and $10-$5 = $5/share; $7/$5 = 40%) in option world.

Qualified and Non-Qualified Stock Options: When a *Non-Qualified Stock Option* is exercised, the difference between the grant and exercise or 'strike' price is taxed at ordinary income. This is the most common type of option. The less prevalent Qualified Stock Option or *Incentive Stock Option "ISO"* has preferential tax treatment if specific holding period requirements are met by IRS rules based on date of issue and date of sale of the stock. If the ISO qualifications are met, then capital gains rates apply to the option, which is advantageous to the employee since in most instances capital gains rates are much lower than ordinary income tax.

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Vested and Unvested Unexercised Stock Option Risk: Unvested or vested and unexercised stock options may be lost in their entirety in the event there is a change in employment status due to termination, retirement or death. The Stock Option Agreement may state that after one of the aforementioned events that the employee has anywhere from zero days until the expiration day to exercise the vested or unvested options. Stock options are rarely transferable to another party except in the case of a beneficiary assignment at death.

Stock options in Divorce: In addition to risk associated with the stock market with a publicly traded company, a soon to be ex-spouse has a myriad of risk factors if awarded stock options in a divorce. Because the stock option is given to the employee as compensation, the company is not interested in allowing the options to be transferred to a former spouse in a divorce. The employee becomes Constructive Trustee of the Stock Options awarded to the non-employee stock in the divorce. As Constructive Trustee, the employee spouse will execute orders to exercise the stock options on behalf of the non-employee spouse and deliver shares or funds (net of taxes) to them within a specified period of time. A specific order should be entered addressing issues related specifically to the property award:

- Methods of communication acceptable to receive instructions to exercise an option
- Timeframe the employee must execute the transaction after receipt of instructions
- Timeframe for delivery of shares or funds
- Unexercised options upon death of employee or non-employee ex-spouse
- Federal Income and Social Security tax of the option

Only a percentage of the unvested option's In-the-Money value will qualify as *community property* in a divorce. If the stock options were acquired during marriage, the separate property interest is determined by using the number of days from the date of divorce until earliest vesting date and the period of time from when the options were granted until they can be exercised.

As with any asset, to analyze all factors involved in the client's situation, stock options and other executive benefits may have more moving parts than meet the eye. Therefore, an evaluation of the client's need for liquidity, personal risk profile, tax bracket, type of options granted, and a stock option analysis are an immense tool to help determine which party is better matched to bear the risk and to be awarded the asset. Bear in mind, the upside potential of stock options is enticing if the factors discussed fall into play appropriately for your client.

XYZ
Executive Stock Option Incentive Plan
August 31, 2009

Stock Price: $57.26

Grant Date	Exercise/ Exp. Date	Options Granted	Vested Quantity	Non-Vested Quantity	Stock Price	Grant Price	Value Per Share	In-the-Money Value	After-tax At 30%*
02/01/1998	01/31/2011	1,440	1,440	-	$57.26	$43.50	$13.76	19,814	$13,583
02/01/1999	01/31/2012	1,324	1,324	-	$57.26	$50.00	$7.26	9,612	$6,589
02/01/2000	01/31/2013	3,229	3,229	-	$57.26	$39.75	$17.51	56,540	$38,758
02/01/2001	01/31/2011	9,154	9,154	-	$57.26	$43.50	$13.76	125,959	$86,345
02/0120/02	01/31/2012	8,364	8,364	-	$57.26	$59.00	$ -	-	$ -
02/01/2003	01/31/2013	11,049	11,049	-	$57.26	$39.75	$17.51	193,468	$132,622
02/01/2004	01/31/2014	7,619	7,619	-	$57.26	$47.25	$10.01	76,266	$52,280
02/01/2005	01/31/20115	6,697	6,697	-	$57.26	$62.00	$ -	-	$ -
								$ 481,660	**$ 330,178**

*Federal Income tax rate of 30% and 1.45% medicare tax are deducted from the In-the Money Value to give After-Tax Value

THE PARALEGAL'S ROLE IN A FAMILY LAW JURY TRIAL AND WHY IT IS WORTH YOUR CLIENT'S MONEY

By
Kay Redburn[2]

A good paralegal helps you solve problems.
A great paralegal helps you avoid them.

Jury trial are strange creatures. The one hard and fast rule is to expect the unexpected. Exhibits that you review, pre-mark and make endless copies of never get offered, much less admitted. Opposing counsel focuses on issues that you feel were unimportant. And your issues were relevant and sound, but the fireworks happened in response to the other side's actions or inactions. Juries are completely unpredictable, and they pick up on the weirdest things. Juries don't care about what the attorneys or clients wear or don't wear. But they have plenty to say about what the attorneys did (and didn't) do. Jamie Cooper, Senior Counsel with Martin, Disiere, Jefferson, & Wisdom, L.L.P.'s Houston office, wrote an article entitled: "Reflections on a First Jury Trial" and says: "They did not like that I took notes. It distracted them. They did not like that I sat to examine witnesses. It seemed that I was uninterested. They wanted me to stand near the jury box. But, when I did stand near the jury box, they did not like that I stood in front of the plaintiff's lawyer when I wrote on the flip chart. It seemed that I was trying to distract him. They did not like that I did not object to aggressive questioning of my witnesses. It made them feel sorry for my witnesses." The bottom line is that you can know your case, you can know the law, you can know courtroom procedures and protocols, but there is no way to know the mind of the jury. Having a second set of eyes, a second point of view, and a second perspective is invaluable during a jury trial. While your mind is on direct and cross examination, laying predicates for the introduction of evidence, making objections and the like, your paralegal can be watching the jury, watching the judge, watching opposing counsel and watching YOU.

For both the pretrial and trial stage, having a checklist of the duties to assign to your paralegal is a great tool in that preparation. The first step in preparing for the Jury Trial is notebook preparation. Depending on the size of the case, one, two or three notebooks may be needed. If it is a large case with lots of witnesses and exhibits, it may be better to have a Trial Notebook, a Witness Notebook and an Exhibit Notebook. The contents of the Trial Notebook is totally dependent upon the likes and dislikes of the attorney. Here it is broken down into two volumes – the first volume is for jury selection, voir dire, pretrial motions, and stipulations, if any. The second volume is for the actual trial itself. The checklist should be started at the beginning of the case, and developed as the case progresses and changes. The checklist is to trial preparation as sheet music is to the orchestra. It tells you where to go with your case and what it will "sound" like along the way.

Tip: If the Court's file is in multiple folders, make a binder for the Judge containing just the live pleadings, pretrial motions, and any relevant documents or pleadings ALREADY in the court's file and ask opposing counsel in open court if he/she would object to giving the notebook to the Judge for reference.

Develop a Pretrial Checklist that follows your individual style for trial preparation. Go over this check list with your paralegal several times in advance of trial to be sure nothing is overlooked or to avoid having to do things like summarize depositions at the last minute. Next is the preparation of a Witness notebook. At the very inception of the case, there are already two witnesses - the client and the attorney (on fees). After submitting the Response to Request for Disclosure, start culling the list of persons with knowledge of relevant facts to those people who have a good chance of being called at trial. Create a master list of witnesses, with their contact information and if they have conflicts with the trial and will need to be called out of order. Have a tab for each witness, put the interview notes in the notebook. Put a copy of the subpoena with the return of ser-

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[2] Kay Redburn is a board certified paralegal—family law working with Brian Webb at the Webb Family Law Firm and can be reached at kay@webbfamilylaw.com.

vice in the notebook (especially for hostile witnesses). Have your client prepare a list of questions or topics about which each witnesses will testify. Lastly, prepare an Exhibit Notebook. If you have more than 10 exhibits, this will be very helpful at counsel table when looking for an exhibit to offer, it will keep them in order to refer to during direct and across. Copies of each exhibit would be in folders numbered to correspond to the Exhibit number. Like a doctor calling to the nurse for his instruments, an attorney should be able to identify the exhibit by the pre-marked number and have his paralegal had it to him quickly and efficiently.

Tip: If you have a multi-day trial (or if during the pendency of the suit there are many hearings with multiple exhibits) after each day's trial, make a notebook containing just the exhibits, one for your exhibits and one for opposing counsel's exhibits.

In conclusion, dozens of things are going on at once in a jury trial. With good pretrial preparation, and with a second set of eyes, hears and hands to help at trial, you have led the jury to water. Hopefully they will drink from the information you have provided.

Texas Advanced Paralegal Seminar
October 14-16, 2009
South Shore Harbour Resort
League City, TX

Chart Your Course- Sharpen Your Mind- TAPS CLE 2009!

The Paralegal Division of the State Bar of Texas is sponsoring the Texas Advanced Paralegal Seminar (TAPS), a three-day seminar featuring 65 speakers in League City, TX on October 14-16, 2009. Fourteen (14) hours of CLE that can be obtained by Texas Paralegals in various areas of law. This seminar has been approved for thirteen (13) hours of CLE by the Texas Board of Legal Specialization (TBLS) for board certified family law paralegals.

Several of the key family law speakers at this seminar are Wendy Burgower, immediate past chair of the Family Law Section, presenting *Choosing and Courting a Jury in a Family Law Case*, Joan Jenkins who serves on the Family Law Foundation is presenting *Legislative Updates in Family Law*, Sallee Smyth (a Houston Family Law Attorney) is presenting *Death by Deadlines (& Other Spooky Appellate Things Every Paralegal Should Know),* and Judge Ken Wise, the Friday keynote luncheon speaker presenting "*ORDER IN THE COURT… OR NOT."*

The Texas Advanced Paralegal Seminar (TAPS) speaker line-up is the brainchild of Jennifer Barnes, a family law paralegal, who works for Peltier, Bosker & Griffin, P.C., in Houston, TX. Jennifer is the Chair of the Speaker TAPS Planning Committee for this event. Family Law paralegals Nan Gibson of Jenkins & Kamin in Houston and Gloria Porter of Gregory Family Law, P.C. in Denton, also serve on the TAPS Planning Committee.
This event is the place to be for all Texas Paralegals. It serves as the best educational event for your money offering advanced continuing legal education as well as networking with paralegal colleagues from across Texas.

To **register** for this event, paralegals should access the online registration at www.txpd.org and choose "**2009 Texas Advanced Paralegal Seminar Registration and Brochure"** on the Home Page. Deadline for early bird registration discount is Monday, September 21 (PD members discount applies).

Articles

THE PRACTITIONER'S GUIDE TO DEALING WITH THE PREMARITAL AGREEMENT CLIENT

By
Eric Beal[4]

As you sit in your office wondering what kind of case the next call will bring, you probably imagine another divorce, maybe a child custody or adoption matter. Most work for family law practitioners involves fairly standard fare. The call that is different is the one asking, "Do you do Prenupts?"[5]

In addition to the distinction of being transactional work rather than litigation, Premarital Agreements are far from "cookie cutter," like some of the other more mundane transactional work often is. Drafting a simple will for a client that just finished a divorce is both reasonably easy and without much risk of conflict. A Premarital Agreement, on the other hand, may involve someone with an incredibly complex personal financial statement and a great risk of conflict.

The first questions one may want to address are these:

1. Should I accept the work?
2. Should I charge for my consultation?
3. How much should I charge for the work?
4. Should I use my standard contract?

In answering these initial questions, the first thing to consider is Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct, which states, "A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence," unless certain exceptions are met.

Certainly, whether to accept a particular matter is a personal issue for any attorney, based upon a number of factors, but any serious family law practitioner who is willing to be diligent in his or her efforts should be able to meet the standard set forth in the terminology section of the rules. There, the rules define "competence" as "possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client." The fact that one is not a "prenupt mill," if any such thing exists, is no reason to turn down the work.

The more proper, practical, sub-questions to ask oneself may be simply, 1) do I have the time necessary, 2) do I have access to the materials I need, and 3) am I willing to take the risk that I may be called upon later to defend my work.

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[4] © 2009, Eric D. Beal, BEAL LAW FIRM, www.DFWDIVORCE.com. Eric Beal practice family law in Tarrant County.

[5] Throughout the article, the terms "Prenupt" and "Premarital Agreement" will be used interchangeably.

Numbers 1) and 3) are again personal matters, but any attorney with access to either Matthew-Bender or West materials, and State Bar of Texas CLE written materials, should have sufficient guidance to accomplish the task.[6]

The next question is whether to charge for the initial consultation. Opinions may vary, but if the consultation will be used to discuss the law and give legal opinions, rather than just a sales pitch, the answer should probably be "yes." Anyone unwilling to compensate an attorney for spending the time necessary to explain the matters discussed in this article, may not be a client worth having anyway.

In calculating how to answer the question, "How much will this cost?," keep in mind that the cost is likely impossible to know until after the initial consultation. One may have a general idea, but Rule 1.04 of the Disciplinary Rules lists seven factors that may be considered when setting a fee, and at least some of those will not be known until you have met with the client, including, "the time and labor required, the novelty and difficulty of the questions involved" and "the time limitations imposed by the client or by the circumstances."[7] Additionally, remember that an "hourly rate" alone probably will not adequately compensate you for the risk that you are incurring in the representation and that things often take far more time than originally thought.

In deciding how to contract with the client, a written agreement is preferable, and one's "standard" contract may not fit the situation. Certainly any warnings that apply, given the facts of the case, should be added to any standard agreement.[8] Additionally, a tax warning[9] and warning of potential uncertainties should be considered.[10]

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[6] Two articles that I have found particularly helpful are *Top Ten Ways to Screw Up a Premarital Agreement*, by Richard R. Orsinger, Scott Downing, and Carson Epes, ADVANCED FAMILY LAW DRAFTING AND ADVOCACY: ART AND FORM 2003 and *Premarital and Marital Property Agreements: "As God is my Witness, I'll never go Hungry Again,"* by Katherine Kinser and Jonathan Bates, 34th Annual Advanced Family Law Course 2008

[7] Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

[8] For Example: WARNING: THIS IS TO CONFIRM THAT YOU HAVE BEEN WARNED THAT THE FOLLOWING ITEMS THAT APPLY TO YOUR SITUATION INCREASE THE RISK OF CHALLENGE AND RISK OF A SUCCESSFUL CHALLENGE IN YOUR CASE: A. RELATIVELY SHORT TIME TO INVESTIGATE AND DRAFT THE AGREEMENT; B. USING WAIVER OF DISCLOSURE RATHER THAN FULL DISCLOSURE; C. NO INCENTIVE OFFERED TO UPHOLD THE AGREEMENT.

[9] For Example: TAX DISCLOSURE AND ACKNOWLEDGMENT:THE CLIENT IS ADVISED TO OBTAIN INDEPENDENT AND COMPETENT TAX ADVICE REGARDING LEGAL MATTERS SINCE LEGAL TRANSACTIONS CAN GIVE RISE TO TAX CONSEQUENCES. THE CLIENT SHOULD HAVE A CERTIFIED PUBLIC ACCOUNTANT OR TAX ATTORNEY DETERMINE IF THE LEGAL WORK THAT IS TO BE PERFORMED UNDER THIS AGREEMENT, HAS OR MAY HAVE TAX IMPLICATIONS OR CONSEQUENCES TO THE CLIENT OR ANY OF THE CLIENT'S INTERESTS. THE UNDERSIGNED LAW FIRM AND ATTORNEY HAVE NOT AGREED TO RENDER ANY TAX ADVICE AND ARE NOT RESPONSIBLE FOR ANY ADVICE REGARDING TAX MATTERS OR PREPARATION OF TAX RETURNS, OR OTHER FILINGS, INCLUDING, BUT NOT LIMITED TO, STATE AND FEDERAL INCOME TAX RETURNS.

[10] For Example: WARNING: THIS IS TO CONFIRM THAT YOU HAVE BEEN ADVISED THAT NO ONE CAN PREDICT THE FUTURE OF THE LAW OR A FUTURE RESULT IN COURT. ADDITIONALLY, PLEASE BE ADVISED THAT THE LAW IS CURRENTLY UNCLEAR ON THE ABILITY AND/OR EXTENT TO WHICH ONE CAN WAIVE THE RIGHT TO INTERIM SPOUSAL SUPPORT, INTERIM ATTORNEYS FEES, AND NECESSARIES. ALSO, THE LAW IS UNCLEAR AS TO WHETHER ERISA (FEDERAL LAW) PREEMPTION PREVENTS ONE FROM WAIVING AN INTEREST TO CERTAIN RETIREMENT BENEFITS.

Having dealt with those initial questions, the next matter to attend to is the initial consultation. Prior to beginning the consultation, the cautious practitioner will have the client sign some type of acknowledgement that a failure to move past the consultation stage, with a written agreement, will result in a cessation of the attorney's obligations.[11]

A suggested agenda for the consultation is as follows:

1. Goals of the Client
2. Basics of the law
3. Warnings to the Client
4. Practical Advice, and
5. Q&A.

As the attorney works through the agenda, he or she will want to be "reading" the client to look for signs of trouble. If it appears that the client is simply looking for a "fuse," i.e., someone to blame if things go wrong, or has unrealistic expectations, e.g., wanting the agreement completed in a couple of days or wanting to limit child support, the attorney may well want to refuse the work or price himself out of the market.
If it appears that the lawyer is to be retained, a description of the anticipated schedule of work, a review of what will be needed from the client, setting the fee, and execution of the contract are the final tasks to accomplish in the first meeting.

In examining the goals of the client, be alert to the possibility that a Premarital Agreement may not be needed to accomplish the client's goals. For example, since many lay people fail to understand that separate property is not converted to community property upon marriage, it is possible that the client only wants to accomplish what the law already provides – the retention of a piece of separate property.
On the other hand, in discussing proof problems with the client, it may be that a Prenupt would be a wise and cost-effective second layer of protection with respect to the property owned prior to marriage.

Texas Family Code §4.001, *et seq.* contains the statutory guidance for Premarital Agreement, and the basics of the law are fairly straightforward.[12] The client should be advised that the Agreement may have con-

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[11] For Example: Until and unless the potential client and the attorney sign a contract for employment, neither the attorney nor [the attorney's law firm] have any obligation to provide services of any kind after the initial office consultation is completed. Should a potential client not retain this office for any reason, he/she is strongly encouraged to seek legal advice from another attorney as soon as practicable. LEGAL RIGHTS CAN BE LOST WITH THE PASSAGE OF TIME; failure to seek legal advice immediately may cause you to lose some or all of your rights. I understand the above statement of office policy and agree to abide by its terms.

[12] See, e.g., Tex. Fam. Code § 4.003 Content
(a) The parties to a premarital agreement may contract with respect to:
(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
(3) the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
(4) the modification or elimination of spousal support;
(5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
(6) the ownership rights in and disposition of the death benefit from a life insurance policy;
(7) the choice of law governing the construction of the agreement; and
(8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
(b) The right of a child to support may not be adversely affected by a premarital agreement.

sequences whether the marriage ends by divorce or death, and that the law favors enforcement of a properly executed Agreement.

That said, a review of the two prongs that may be used to defeat[13] a Prenupt is advisable, as is a discussion and warning of some of the unknowns. For example, no one can predict what changes will occur in the law during the course of the marriage, there is no way to know exactly what facts may give rise to a finding of un-voluntariness, and the law is unclear with respect to the pre-emption of federal retirement law, as well as the potential limitation of the courts power to enter temporary orders for the payment of certain debts.[14]

Lest the client believe that the rights of children of the marriage can be limited by the Agreement, a strong reminder that such is not possible is called for in the initial meeting, as is a discussion of the methods courts have used to provide for the support of children, despite the limitations of separate property.[15]

At some point during the consultation, the "counselor" portion of one's law license calls upon the attorney to discuss the practicalities of life vis-a-vis the proposed agreement. If the client is the monied spouse, a discussion of the possibility that the Agreement may lead to a self-fulfilling prophesy of doom for the marriage may be in order. If the client is the non-monied spouse, a discussion of what life will really look like post-marriage, under the terms of the tendered agreement, if the marriage fails or ends by the death of the monied spouse may be called for. Having this type of discussion may lead to the client choosing not to move forward with the Agreement, but it is this type of frankness that justifies the charging of the consultation fee. If the client decides to proceed, the lawyer needs to explain what the process will be to accomplish the goal. While § 4.001 does not require the use of more than one document, the cautious practitioner will probably want to use three separate documents – the Waiver of Disclosure of Financial Information, the Premarital Agreement, and the Property Agreement Between Spouses.

Given that the grounds for challenging a Prenupt found in § 4.006 of the Family Code leave plenty of room for litigation, it is advisable to conclusively foreclose the one area possible – disclosure. The Code specifically provides that the "fair and reasonable" disclosure called for can be waived, as long as the waiver is voluntary, express, and in writing. The most important word of the section for the practitioner is the word "before." ***The waiver must be executed before the Premarital Agreement***.

The next topic to cover with the client is the timeline. Rarely does a client not want something done sooner, rather than later. That being said, time plays a dual role in the discussion with the client. First, the attorney needs sufficient time to do a competent job. Second, an agreement executed close to the date of mar-

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[13] Tex. Fam. Code § 4.006. Enforcement

(a) A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:

(1) the party did not sign the agreement voluntarily; or

(2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:

(A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses. Tex. Fam. Code § 4.006

[14] *See, e.g.,* *Martin v. Martin*, 287 S.W.3d 260 (Tex. App.—Dallas 2009, pet. filed 08/07/09)("Generally, whether a party executed an agreement voluntarily or as the result of a state of duress or coercion is a question of fact dependent upon all the circumstances and the mental effect on the party claiming involuntary execution.")

[15] See, e.g., Muller v. Muller, 2003 WL 22026413 (Tex. App.—Fort Worth 2003, no pet.) ("In some circumstances, a court may set aside one spouse's separate real property as the homestead of the minor child or children and former spouse for a period of time if that spouse has primary custody and such setting aside would not amount to a divestiture or transfer of the owner's fee title.")

riage, under certain circumstances, may give rise to a claim of "un-voluntariness." At a minimum, the presentation of a proposed agreement to a non-monied fiancé on the eve of trial creates a tougher fact question than one presented weeks or even months earlier.

In answering the question of what will be needed from the client and proposed spouse, it is probably preferable to get at least some disclosure. Notwithstanding the fact that, as discussed above, the disclosure can be waived, the "standard" Agreement lists the significant assets and debts of both parties. Just as when drafting a final decree, a useful phraseology may be, "If you care about it, list it." At a minimum, it will make proof easier in the future, if needed.

The last three questions to cover with the client will likely be:

1. Does my fiancé need an attorney?
2. What if we change our minds? and
3. So now, what's this going to cost?

The answer to the first of these is will probably need to be some version of "yes and no." There is no statutory requirement that both sides be represented, however, once again the question of "voluntariness" arises. It is harder to argue that an agreement is involuntary if it is truly bargained for, however, the mere presence of an attorney on the non-monied spouse's side does not insulate the Agreement from attack.[16] As a matter of self preservation, if the opposing party will not be represented by counsel, the attorney needs to include an acknowledgement by the opposing party that the attorney provided no legal advice.

As for changing of the minds, § 4.005 of the Texas Family Code provides that, "After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties."[17] By the plain language of the statute, therefore, destruction of the document is of no moment, and the client may be well served by a reminder that it is not simply the fiancé's future actions that are at issue – enforcement or avoidance of the Agreement may be sought by heirs of the fiancé.[18]

So how much will it cost? At least one of the factors to consider is the amount of time needed to do the job. The problem, of course, is that no one knows that in advance. Combining (and paraphrasing) the advice given by a speaker heard once at a CLE on Federal Criminal Defense and a U.S. Marine in the middle of the Mojave Desert – estimate the maximum possible time you believe will be needed, then double it and add the "uh-oh" factor – that is the time that will likely be needed. Take that amount of time, convert it to an hourly rate, then add in the aggravation factor and the risk of future complications, and you may have your answer.

Finally, get paid in advance. Premarital agreements have a funny way of never coming to fruition. After an attorney drafts 60-70 pages of agreements, the last "funny" thing he or she needs is lack of payment. Remember, if the client doesn't want to pay a fee upfront, he or she may be the type that doesn't want to pay at the end as well.

Good luck!

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[16] *See, e.g.*, *Martin v. Martin*, 287 S.W.3d at 263, 265 ("Denise contends that Bruce decided the terms of the agreement and that her lawyer did not play a substantial role in the negotiation of its terms. She also argues that the pressure and coercion Bruce placed on her to sign the agreement caused her to sign it when she otherwise would not have done so." . . . "we conclude that Denise produced more than a scintilla of evidence to raise a fact issue precluding judgment as a matter of law on her statutory defense of involuntary execution.")

[17] § 4.005. Amendment or Revocation

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

[18] See, e.g., Williams v. Williams, 569 S.W.2d 867, 869 (Tex. 1978) ("The marriage lasted but 141 days. Shortly after the parties were married, Mr. Williams became ill and died on January 29, 1974. He died testate and his sole devisees were his children, William Wesley Williams, Jr. and Geneva W. Canion, who are the petitioners in this cause.")

TEXAS ABOLISHES ECONOMIC CONSTRIBUTION -- NOW WHAT?

By J. Thomas Oldham[19]

I. Introduction

During marriage, spouses frequently improve property of one character with funds of a different character. The traditional Texas remedy for such contributions was reimbursement, an equitable claim that arises at dissolution of the marriage. When substantial community funds were used to improve separate property, the amount of the community reimbursement claim was sometimes small under traditional Texas reimbursement rules. Due to the perceived unfairness of this result, about a decade ago the Texas Legislature created a new claim at dissolution for certain contributions, "economic contribution." This experiment has ended: 2009 legislation reinstates reimbursement as the sole remedy when a spouse uses funds of one character to improve property of another character.[20] However, the 2009 legislation and other recent legislative changes in this area create ambiguities in the rules that will govern various types of reimbursement claims.

II. The 2009 Statute

A. Summary of the Statute

The 2009 legislation removes economic contribution from the family code and expands the instances when reimbursement arises. The new section 3.402 now lists nine types of contributions that can create a reimbursement claim (including the two examples that were set forth in old section 3.408). Section 3.408 has been deleted. The revised Section 3.402 also includes the provision, previously included in former 3.408, that the benefit of use and enjoyment of the benefited property can be offset against the reimbursement claim.

B. Some Potential Ambiguities

1. Paying a Secured Debt

Perhaps the most common reimbursement claim in Texas divorces arises when spouses use community funds to make payments on a mortgage that one spouse took out before marriage to purchase a house. The traditional approach, before the experiment with economic contribution, was that all community funds allocated to the house payment created a reimbursement claim, which the benefit incurred by the community arising from living in the house could reduce. [21] The reduction could reduce the claim to zero if the community benefits exceeded the community funds spent.[22] Some courts held that the benefit to the community amounted to the sum of the amount allocated to interest, insurance and taxes.[23] In these instances, the net community reimbursement claim was the amount that the community funds reduced the principal balance during the marriage.[24]

The 2009 changes take a different route to arrive at a similar result. The 2009 changes limit a reimbursement claim arising from paying a secured debt to the amount the principal balance of the debt was reduced.[25]

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[19] John Freeman Professor of Law, University of Houston Law School. The author would like to thank Kathryn McClain, a UH law student, for her assistance in connection with this article. This article first appeared in the *Houston Lawyer* Sept./Oct. 2009 issue and is being used with their permission.

[20] *See* Act of June 19, 2009, 81st Leg., R.S., ch. 768 (originally Senate Bill 866).

[21] *See* Hawkins v. Hawkins, 612 S.W.2d 683 (Tex. App.—El Paso 1981, no writ).

[22] *See* Penick v. Penick, 783 S.W.2d 194 (Tex. 1988).

[23] See *Hawkins*, 612 S.W.2d at 683. .

[24] *Id.*

[25] *See* Tex. Fam. Code § 3.402(a)(3).

The new section provides that, when considering a community reimbursement claim relating to a separate property primary or secondary residence, there should be no reduction of the claim for use and enjoyment.[26] So, the presumptive reimbursement claim is now the amount the principal balance was reduced and is not reduced by any offsetting benefit from a "primary or secondary residence."

These undefined terms could create ambiguities. The statute bars offsetting benefit reductions for expenditures relating to "a primary or secondary residence." Could spouses have more than one "primary" or "secondary" residence? If spouses live in a house for a period and then rent it to others, is it a "primary residence?" If a spouse bought a duplex before marriage, and during marriage the spouses live in one unit, how will courts analyze that under the new law? The meaning of "secondary residence" is also unclear. If a spouse owns a vacation home in another location that is primarily rented to tenants, could the property be a secondary residence if the spouses sometimes go there to stay?

2. Capital Improvements

a. The Time to Measure the Claim

Before the 2009 changes, capital improvements created an economic contribution claim based on the amount of funds contributed. The new legislation changes the remedy for such a contribution to reimbursement.[27] The measure of reimbursement is not the amount of funds contributed, but "enhancement."[28]

One basic question confronted when considering a future reimbursement claim for a capital improvement is when to measure the enhancement. For example, adding a swimming pool may have enhanced the value of the property $10,000 in 2000, when the pool was built, but might enhance the property $15,000 in 2010, when the parties divorce. Which figure should be used? The statute does not clarify this. Prior Texas case law has measured enhancement at the time the claim arose. For example, in *Anderson v. Gilliland*,[29] the parties spent $20,237.89 of community funds building a home on the wife's separate property land. The court found that, when the husband died, the house enhanced the value of the property by $54,000; it based the reimbursement award on this amount.[30] This gives the community an inflation adjustment for its prior contribution.

b. The Offsetting Benefit Reduction

Before the advent of economic contribution, enhancement was the measure of reimbursement for a capital improvement, and a community claim for enhancement could be reduced by the value of the benefit the community enjoyed from the property.[31] The new statute generally incorporates the concept of an offsetting benefit reduction,[32] but states that it does not apply to a community "contribution" to a separate property "primary or secondary" residence.[33] This seems to mean that a court should not reduce a a community reimbursement claim for a capital improvement to the family's primary residence for any offsetting benefit. This interpretation of the statute differs from Texas reimbursement law as it existed before the creation of economic contribution.

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[26] Section 3.402(c) provides that there should be no use and enjoyment offset for community "contributions."
[27] *See* Tex. Fam. Code § 3.402(a)(8).
[28] *See Id.* §3.402(d).
[29] 684 S.W.2d 673 (Tex. 1985).
[30] *Id.*
[31] *See Penick*, 783 S.W.2d at 194.
[32] *See* § 3.402(c).
[33] *Id.*

3. Time, Toil and Talent

The contribution of both community funds and community efforts can give rise to a community property reimbursement claim. When the Texas Supreme Court belatedly confirmed this rule, the Court stated that, when community efforts are contributed during marriage to benefit separate property, the community has a reimbursement claim for the value of those efforts over and above those necessary to maintain and preserve the property, unless the community has already received adequate compensation for those efforts.[34]

The 2009 statute includes the provision that had previously been added to section 3.408 to the effect that a reimbursement claim includes "inadequate compensation for the time, toil, talent and effort of a spouse by a business entity under the control … of that spouse."[35] This rule creates a number of ambiguities. Does the reimbursement right now arise for the value of ALL time, toil and talent contributed (with no offset for services needed to maintain the property)? This would change Texas law. For example, in *Lifshutz v. Lifshutz*,[36] the court held that the community was not entitled to reimbursement when no evidence was presented regarding the value of the husband's services needed to manage and preserve his separate estate. Secondly, can a time, toil and talent claim arise in connection with services contributed to anything other than a business (such as, say, stock investments or real estate)? Finally, what if the non-owner contributes services?[37] The statute does not answer any of these questions. The Texas Supreme Court, in *Jensen v. Jensen*, announced the general rule that the community estate should be reimbursed for "the value of the time and effort expended by either or both spouses to enhance the separate estate of either…."[38] Because the new statute generally retains the "offsetting benefit" concept, any time, toil or talent claim should be reduced by any benefits the community received from the separate property involved.

4. Offsets to Separate Property Reimbursement Claims

The notion of an "offsetting benefit reduction" to a reimbursement claim derives from the "family expense doctrine," the idea that it is fair to charge the community with all family living expenses during marriage. Under this doctrine, living expenses avoided due to separate property, e.g. rent, reduce the community property reimbursement claim by the amount the community estate would have spent. There is no analogous rationale for reducing a separate property claim for reimbursement. So, there should be no offsetting benefit reduction for such claims. However, the current statute does not limit the offsetting benefit concept to community property claims.[39] It is unclear how Texas courts will construe this provision regarding separate property reimbursement claims.

Indeed, the current Pattern Jury Charge seems quite confused. PJC 204.9B first asks the jury to determine the amount of the reimbursement claim proved either on behalf of the community estate against a separate estate, or a separate estate against another separate estate (but does not include, for whatever reason, the possibility of a claim by a separate estate against the community estate).[40] Question 2 then asks the jury to determine the amount of the offset against the reimbursement claim due to the benefit received by a party's SEPARATE estate. The answer to question 2 should always be $0 if there are no offsetting benefit reductions for such claims. In addition, for a community property claim the question should be related to what the benefit was to the COMMUNITY estate; this possibility is not set forth as an option.

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[34] *See* Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982).
[35] *See* Tex. Fam. Code § 3.402(a)(2).
[36] 199 S.W.3d 9 (Tex. App. –San Antonio 2006, pet. denied).
[37] *Cf.* Gutierrez v. Gutierrez, 791 S.W.2d 659 (Tex. App. – San Antonio 1990, no writ).
[38] 665 S.W.2d 107, 109 (Tex. 1984).
[39] *See* Tex. Fam. Code § 3.402(c).
[40] *See* Texas Pattern Jury Changes, Family (State Bar of Texas 2008) at page 74.

5. Does the New Statute Set Forth the Exhaustive List of Reimbursement Claims?

Texas Family Code Section 3.408 (deleted by the 2009 legislation) set forth two instances where a reimbursement claim could arise. It stated that "a claim for reimbursement includes (1) payment by one marital estate of the unsecured liabilities of another marital estate; and (2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse."[41] The new section 3.402 now sets forth nine instances where reimbursement claims can arise. Like the previous statute, the statute states that "a claim for reimbursement INCLUDES…." and then lists various instances where a reimbursement claim arises. The language of the 2009 statute does not appear to reflect an intention that this constitutes an exhaustive list. Other situations not listed in the current statute have created common law reimbursement claims.[42]

6. The Meaning of Nominal Value

The new statute does not change section 3.409, which provides that there should be no reimbursement claims for contributions of "nominal value."[43] No Texas cases to date have clarified what this means. One dictionary states that "nominal" means trifling or insignificant.[44]

7. Offsets for Use and Enjoyment

The 2009 statute (new § 3.402) incorporates the portion of old § 3.408 that provided that the "benefits of use and enjoyment of property" can be offset against a claim for reimbursement.[45] One commentator has wondered whether this somewhat different term has a different meaning from the traditionally utilized term "offsetting benefits."[46]

III. Conclusion

The legislature has ended the Texas experiment with economic contribution. After September 1, 2009, the doctrine of reimbursement is now to be applied in all instances. However, the new statute appears to change the manner in which some aspects of Texas reimbursement rules have traditionally been applied, and leaves some other issues not resolved. Some appellate litigation or future legislative cleanup will be needed to resolve these matters.

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[41] *See* Tex. Fam. Code § 3.408(b).
[42] *See* Stewart Gagnon, "The Conflicts between the New Statutory and Common Law Reimbursement," New Frontiers in Marital Property Law (Oct. 2006), ch. 2.3, at 5-6. *Bigelow v. Stephens*, 286 SW3d 619 (Tex. App. – Beaumont 2009, no pet.) holds that the old 3.408 is not an exhaustive list of when a reimbursement claim can arise.
[43] *See* Tex. Fam. Code § 3.409.
[44] *See* Webster's Third International Dictionary (Unabridged) (1986) at 1534.
[45] *See* Tex. Fam. Code § 3.402(c).
[46] *See* Warren Cole et al., "Digging Up Alcatraz," New Frontiers in Marital Property Law (Oct. 2006), ch. 4, at 9.

Grounds for Termination of Parental Rights

by
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INTRODUCTION

The Due Process Clause of the Fourteenth Amendment requires the State to support the "parental unfitness" finding in a termination case by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980). Clear and convincing evidence is defined as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TFC 101.007.[47]

The clear and convincing evidence standard at trial requires a higher standard of factual sufficiency review on appeal. *In re C.H.*, 89 S.W.3d 17 (Tex. 2002).[48] The standard for legal sufficiency review of termination appeals is also higher than in cases with a preponderance burden at trial. *In re J.F.C., A.B.C., and M.B.C.*, 96 S.W.3d 256 (Tex. 2002). While the *type* of evidence that may be considered in applying the various grounds for termination remains the same, the *standard* of evidence necessary to sustain a judgment on appeal may be different for cases decided before these decisions were announced in 2002; older cases should not be cited for discussions of appellate review standards.

The Texas Family Code requires that termination of parental rights be supported by clear and convincing evidence (1) of a statutory termination ground, *and* (2) that termination is in the best interest of the child. TFC 161.001. "Only one predicate finding under 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re A.V. and J.V.*, 113 S.W.3d 355, 362 (Tex. 2003).[49]

The Texas Family Code provides at least 25 statutory grounds for termination of an individual's parental rights. TFC 161.001(1)(A)-(T), 161.002(b), 161.003, 161.005, 161.006, and 161.007. Termination of parental rights is final and irrevocable. In most cases, termination "divests the parent and the child of all legal rights and duties with respect to each other, except that the child may retain the right to inherit from and through the parent." TFC 161.206(b). A court may order post-termination child support for a child in foster care under the managing conservatorship of the Department of Family and Protective Services ("the Department") until the child is adopted or emancipated. TFC 154.001(a-1).

The State has a duty to protect the safety and welfare of its children; therefore, the State has the duty to intervene, when necessary, in the parent-child relationship. Although a termination suit can result in loss of a parent's legal relationship with the child, the primary focus of the suit is protecting the best interests of the child, not punishing the parent. Protection of the child is paramount; the "rights of parenthood are accorded only to those fit to accept the accompanying responsibilities." *In re A.V.*, 113 S.W.3d at 361. Although "pa-

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* Ms. Marrero, Mr. Shulman, Mr. Woodruff, and Mr. Hooten are appellate lawyers for the Department of Family and Protective Servs.. This article is a revised and updated version of previous articles. *Grounds for Termination of Parental Rights*, in STATE BAR OF TEXAS FAMILY LAW SECTION REPORT (Fall 2007) and *Grounds for Termination of Parental Rights*, in STATE BAR OF TEXAS FAMILY LAW SECTION REPORT (Fall 2005).

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[47] Short form references to the Texas Family Code are used in this article. Unless otherwise noted, all references are to the Family Code as amended through the 2009 legislative session.

[48] To conserve space, the Blue Book-approved short-form case style "*In re . . .*" is used in place of "*In the Interest of . . .*" throughout this article.

[49] The federal Indian Child Welfare Act (ICWA) preempts state law both with respect to the burden of proof and some substantive requirements. *In re W.D.H.*, 43 S.W.3d 30, 35-37 (Tex. App.–Houston [14th Dist.] 2001, pet. denied). A discussion of the impact of ICWA on termination suits in Texas is beyond the scope of this article.

rental rights are of constitutional magnitude, they are not absolute. Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *In re C.H.*, 89 S.W.3d at 26.

Common to all the grounds for termination of parental rights, including a suit by a petitioner to terminate his or her own rights, is a requirement that the court find the termination to be in the best interest of the child. This article will therefore address first the issue of "best interest" and then consider the various substantive "grounds" that statutorily justify termination of parental rights.

Courts of appeals no longer designate opinions "do not publish." Older unpublished opinions may be cited, but are not binding precedent. TEX. R. APP. P. 47.7. For opinions issued after January 1, 2003, the courts may designate the opinion as a "Memorandum Opinion" if the issues in the case are "settled" as to the facts and the law. TEX. R. APP. P. 47.4. All opinions issued after January 1, 2003, whether or not "published" by a reporter service, may be cited as precedent.[50] An on-point memorandum opinion from the court of appeals with jurisdiction over the particular county should be followed by the trial judge. Therefore, this article includes both regular and memorandum opinions among the annotations below.

Practitioners using this article should carefully review the case law, *including memorandum opinions*, in their respective jurisdictions for variations from the representative cases discussed here. Although the Supreme Court has addressed several issues, there remain substantial disagreements among the courts of appeals on some points.

BEST INTEREST

Termination of parental rights cannot be granted unless it is shown by clear and convincing evidence to be in the child's best interest. TFC 161.001(2).

In 1976, *prior* to the adoption of the "clear and convincing evidence" standard for termination of parental rights, the Texas Supreme Court *reversed and rendered* a termination order in a private case, finding that there was no evidence to support the trial court's finding that termination of the mother's parental rights would be in the best interest of the child. *Holley v. Adams*, 544 S.W.2d 367, 373 (Tex. 1976). The *Holley* factors are still used to evaluate the evidence relating to best interest, which include, but are not limited to, the following:

- the desires of the child;
- the emotional and physical needs of the child now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parenting abilities of the parties seeking custody;
- the programs available to assist these persons;
- the plans for the child by the parties seeking custody;
- the stability of the home or proposed placement; and
- the acts or omissions of the parent and any excuse for same. *Id.* at 372.

Additional statutory factors for determining the best interest of a child when the Department is a party to the suit include a preference for a "prompt and permanent placement of the child in a safe environment" and a list of factors to be considered in determining whether the child's parents are willing and able to provide the child with a safe environment. TFC 263.307.

[50] A flood of appeals in recent years has produced over 900 opinions since June 20, 2002, most of them designated as memorandum opinions. Due to space limitations, many memorandum opinions have been eliminated from this update. A careful lawyer should, however, always check for relevant memorandum opinions from the local Court of Appeals.

Following *Holley* and applying the "clear and convincing" evidence standard, as well as heightened standards of appellate review, several courts of appeals have reversed termination orders on the ground that the evidence of "best interest" was insufficient. In reversing one such appellate ruling, the Texas Supreme Court observed:

> The absence of evidence about some of these (*Holley*) considerations would not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child. Other cases, however, will present more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice to uphold the jury's finding that termination is required.

In re C.H., 89 S.W.3d at 25-26.

The Court also clarified the application of one of the enumerated *Holley* factors, "the plans for the child by the parties seeking custody," by stating:

> Evidence about placement plans and adoption are, of course, relevant to best interest. However, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located. Instead, the inquiry is whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest - even if the agency is unable to identify with precision the child's future home environment. *Id.* at 28.

The court in *In re C.H.* also explicitly ruled that evidence used to prove termination under section 161.001 may also be used to meet the "best interest" prong, stating "[w]hile it is true that proof of acts or omissions under 161.001(1) does not relieve the petitioner from proving the best interest of the child, the same evidence may be probative of both issues". *Id.* On remand, the court of appeals found "that the record contains evidence of specific acts, inaction, and a pattern of conduct that [the father] is incapable of child-rearing and that a reasonable jury could form a firm conviction or belief from all the evidence that termination would be in [the child's] best interest." *Id.*

BEST INTEREST

Generally

In re C.H., 89 S.W.3d 17 (Tex. 2002) (although parental rights are of constitutional dimension, it is also essential courts recognize that parental rights are not absolute and that the emotional and physical interests of children should not be sacrificed to preserve that right; proof of acts or omissions under 161.001(1) also may be probative on the issue of child's best interest; conduct "inimical to the very idea of childrearing" is relevant not only to endangerment, but also to best interest; lack of definitive plans for child's permanent placement is not dispositive; evidence of all *Holley* factors is not required as a "condition precedent" to termination)

Holley v. Adams, 544 S.W.2d 367 (Tex. 1976) (seminal case establishing a non-exhaustive list of factors to consider in determining best interest in a private termination suit)

In re C.C., D.W., Jr., and A.W., 2009 WL 866822 (Tex. App.–Corpus Christi, 2009, pet. filed) (mem. op.) (mother's argument that the best interest finding must have a basis in facts separate and apart from the evidence supporting the statutory termination grounds rejected; "We hold that, particularly when the evidence shows that the parental relationship endangered the child's physical or emotional well-being, evidence of the parental misconduct leading to the removal and subsequent termination should be considered when reviewing the best interest of the child.")

In re J.S., M.N.S.C., and T.S., 2008 WL 2330959 (Tex. App.–Fort Worth 2008, pet. denied) (mem. op.) (Despite fact mother: (1) completed all her services; (2) maintained steady housing and employment; (3) made significant progress according to her therapist; and (4) stated she did not know who harmed her child and of-

fered multiple explanations for the severe injuries, the appellate court held: "In sum, the record demonstrates that although appellant diligently completed her services, the severity of [the child's] injury, TDFPS's uncertainty as to the identity of the person or persons who inflicted the injuries, her denial of the intent and nature of the injuries, her failure to inform TDFPS of her new boyfriend, and the intentional neglect of the children, all demonstrate that it was in [the children's] best interest that appellant's parental rights be terminated.")

In re A.A.T., L.L.T., A.C., and W.L.C., Jr., 162 S.W.3d 856 (Tex. App.–Texarkana 2005, no pet.) (children in filthy and unsafe housing, domestic violence, parents physically abusing children, parents engaging in "sexual play" in front of children, and mother's pattern of becoming romantically involved with pedophiles supports best interest finding)

Taylor v. Tex. Dep't of Protective and Regulatory Servs., 160 S.W.3d 641 (Tex. App.–Austin 2005, pet. denied) (1990 and 1997 drug convictions relevant as to best interest; elapsed time since drug convictions did not render them unfairly prejudicial relative to their probative value; convictions and illegal drug use were from 1980s until two years before trial)

In re J.M. and L.M., 156 S.W.3d 696 (Tex. App.–Dallas 2005, no pet.) (father's belief domestic violence did not have any effect on the children presented an emotional danger now and in future; father's delegation of all responsibility for caring for the children to mother indicated lack of parental abilities; father's failure to meet with the Department's caseworker because work schedule interfered indicated lack of stability in home)

In re A.I.G. and J.A.M., 135 S.W.3d 687 (Tex. App.–San Antonio 2003, no pet.) (although strong presumption exists that child's best interest is served by keeping child with his or her natural parents, that presumption disappears when confronted with evidence to contrary)

In re D.C., A.C., and H.M., 128 S.W.3d 707 (Tex. App.–Fort Worth 2004, no pet.) (parent's inability to provide stable home and remain gainfully employed and failure to successfully complete drug treatment and to comply with her court-ordered family service plan supports finding that termination is in the children's best interest)

In re C.A.J., 122 S.W.3d 888 (Tex. App.–Fort Worth 2003, no pet.) (inability to provide adequate care for the child, lack of parenting skills, poor judgment, drug use, and repeated instances of immoral conduct may be considered when looking at best interest; parent's unstable lifestyle, lack of income, and lack of a home may be considered in determining a parent's inability to provide for a child's emotional and physical needs; a parent's "drug addiction clearly poses an emotional and physical danger to [the child] now and in the future")

In re N.H., B.H., J.H., P.H., E.C., and A.D.C., 122 S.W.3d 391 (Tex. App.–Texarkana 2003, pet. denied) (although mother divorced abusive father after children were removed and completed all required services, evidence mother allowed children to remain in abusive environment for over four years supports finding that termination in best interest of children)

In re D.J., 100 S.W.3d 658 (Tex. App.–Dallas 2003, pet. denied) (*Holley* test focuses on best interest of child, not best interest of parent)

In re J.I.T.P., 99 S.W.3d 841 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (*Holley* factors are not exhaustive; Department does not have to prove all nine factors under *Holley* or all thirteen factors in 263.307 before termination of parental rights can be granted)

In re J.O.C., 47 S.W.3d 108 (Tex. App.–Waco 2001, no pet.) (no one *Holley* factor is controlling; facts of case may mean evidence of one factor is sufficient to support finding that termination in child's best interest)

In re D.T., 34 S.W.3d 625 (Tex. App.–Fort Worth 2000, pet. denied) (despite mother writing bad checks, jumping bond, and leaving other children in another state, totality of evidence insufficient to show best interest where eighteen-month-old child was happy, healthy, and had no special needs; mother planned to move in with her mother and return to school when released from prison; no proof of mother's lack of parenting ability nor of agency's plan for child's future)

Edwards v. Tex. Dep't of Protective and Regulatory Servs., 946 S.W.2d 130 (Tex. App.–El Paso 1997, no writ) (when considering best interest, need for permanence paramount consideration for child's present and future needs; requirement to show termination in the best interest of the child subsumes the reunification issue; a separate consideration of alternatives to termination is not required)

D.O. v. Tex. Dep't of Hum. Servs., 851 S.W.2d 351 (Tex. App.–Dallas 1993, no writ) (*Holley* test focuses on best interest of the child, not best interest of the parent; fact finder may consider the possible consequences of a decision not to terminate and properly determine that the impermanent foster care arrangement that would be mandated if a parent retained any parental rights was not in the child's best interest; fact finder may compare the parent's and the Department's plans for the child and can consider whether the plans and expectations of each party are realistic or weak and ill-defined; in reviewing the parental abilities of a parent, a fact finder can consider the parent's past neglect or inability to meet the physical and emotional needs of her children)

In re S.H.A., 728 S.W.2d 73 (Tex. App.–Dallas 1987, writ ref'd n.r.e.) (best-interest analysis may be based not only on direct evidence, but also on circumstantial evidence, subjective factors, and the totality of the evidence as a whole)

Danger to/Needs of Child Now and in the Future

In re J.A.P., A.K.A.C., D.J.P., and C.C.P., 2009 WL 839953 (Tex. App.–Texarkana 2009, no pet.) (mem. op.) (The factors listed in TFC 263.307, including a "history of abusive or assaultive conduct by the child's family", should be taken into account when determining if termination of parental rights is in the best interest of the children. Evidence of other wrongs or acts is admissible for determining what is in the child's best interest)

In re V.A., V.A., and V.A., 2007 WL 293023 (Tex. App.–Corpus Christi 2007, no pet.) (mem. op.) (fact finder can infer that the "identified risk factors establish[ing] endangerment … in the past … would continue to be present thus endangering the children's well-being in the future if the children are returned" to the parent; fact finder can infer that mother's past inability to appropriately care for her children as established by her mental health issues and her unstable housing, employment, and relationships, is indicative of the quality of care she is capable of providing the children in the future)

In re F.A.R., No. 2005 WL 181719 (Tex. App.–Eastland 2005, no pet.) (mem. op) (continued drug use demonstrates "an inability to provide for [the child's] emotional and physical needs" and "demonstrates an inability to provide a stable environment for" the child)

Williams v. Williams, 150 S.W.3d 436 (Tex. App.–Austin 2004, pet. denied) (parent had history of unstable housing, unstable employment, unstable relationships, mental health issues, and drug usage; fact finder may infer that past conduct endangering the well being of a child may recur in the future if the child is returned to the parent)

In re C.T.E. and D.R.E., 95 S.W.3d 462 (Tex. App.–Houston [1st Dist.] 2002, pet. denied) (although father had been in prison for cocaine possession and convicted of domestic abuse appellate court reversed trial court's finding that termination was in children's best interest; evidence was factually insufficient to support best interest finding because (1) the children had behavioral problems and special needs and there was no evidence that they were adoptable or what the chances were that they would be adopted by the same family; (2) one child had been in nine different foster homes and the other in six different foster homes; and (3) there was evidence one child was sexually abused while in the Department's care)

In re M.D.S., 1 S.W.3d 190 (Tex. App.–Amarillo 1999, no pet.) (current and future incarceration of parents relevant to their ability to meet the child's present and future physical and emotional needs; parent's incarceration at the time of trial "makes [her] future uncertain")

In re D.L.N., 958 S.W.2d 934 (Tex. App.–Waco 1997, pet. denied) (fact finder may infer from past conduct endangering well-being of children that similar conduct will recur if children are returned to parent)

Desires of Child

In re J.M. and L.M., 156 S.W.3d 696 (Tex. App.–Dallas 2005, no pet.) (children too young to express their desires; trial court could consider children had bonded with foster parents and called them "mommy" and "daddy")

In re W.S.M., 107 S.W.3d 772 (Tex. App.–Texarkana 2003, no pet.) (evidence child loves his parents and is bonded with them is an important consideration, but it cannot override or outweigh the overwhelming and undisputed evidence showing that the parents endangered the child)

In re U.P., 105 S.W.3d 222 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (toddler unable to articulate her desire; testimony relevant that child well cared for by, and was bonded with, foster family, and spent minimal time in presence of father and his family)

In re C.N.S., 105 S.W.3d 104 (Tex. App.–Waco 2003, no pet.) (child too young to express desire verbally; appellate court looked to evidence that no emotional bond existed between child and father)

In re M.D.S., 1 S.W.3d 190 (Tex. App.–Amarillo 1999, no pet.) (child just over a year old and thus unable to directly express his desire; fact finder can consider that the child acknowledges his foster mother and father as his parents)

Parental Ability

In re R.L.M., B.M.M., C.M., J.N.M., J.A., T.T., and J.J.R., 2008 WL 4627393 (Tex. App.–Amarillo 2008, no pet.) (mem. op.) (in analyzing best interest, appellate court considered that father had opportunity to foster parental relationship with his children, but opted to engage in criminal activity and other conduct detrimental to that relationship)

In re B.L.H., 2008 WL 864072 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (mem. op.) (Mother placed the child in danger for most of his life through her drug use, beginning while pregnant with the child, causing him to be born with cocaine and Xanax in his blood. She also admitted to using marijuana every day for nine years. Although mother "purports to love B.L.H., her conduct throughout his life, with few exceptions, demonstrates that she does not have the parental ability to care for B.L.H.")

In re S.K.A., M.A., and S.A., 236 S.W.3d 875 (Tex. App.–Texarkana 2007, pet. denied) (best interest sufficient as father had a history of domestic violence, extensive criminal history, and used drugs while in prison despite notice of the termination proceedings; "While it is true that [father] has been incarcerated during a portion of the children's lives, the evidence does not show that either parent has demonstrated parenting skills for the minimal needs of the children.")

Wilson v. State, 116 S.W.3d 923 (Tex. App.–Dallas 2003, no pet.) (fact a parent has poor parenting skills and "was not motivated to learn how to improve those skills" is evidence supporting a finding that termination is in the child's best interest)

Permanence

Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982) (it "is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents"; "there is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current home under the care of his parents or foster parents, especially when such uncertainty is prolonged")

In re M.A.N.M., 75 S.W.3d 73 (Tex. App.–San Antonio 2002, no pet.) (permanence is of paramount importance in considering a child's present and future physical and emotional needs; the government has a compelling interest in establishing a stable, permanent home for a child; failure to support child not sufficiently egregious behavior on its own to warrant finding termination in child's best interest)

Plans of Party Seeking Custody

Anderson v. Tex. Dep't of Family and Protective Servs., 2007 WL 1372429 (Tex. App.–Austin 2007, pet. denied) (mem. op.) (distinguishing *Horvatich* – "the primary reason we reversed the decree [in *Horvatich*] was the Department's failure to present evidence of its future plans for the children. Here, the Department presented evidence of its future plan through testimony by the foster parents and the guardian ad litem that the foster parents are committed to the children and hope to adopt them both."); *see* *Horvatich v. Tex. Dep't of Protective and Regulatory Servs.*, 78 S.W.3d 594 (Tex. App.–Austin 2002, no pet.)

Horvatich v. Tex. Dep't of Protective and Regulatory Servs., 78 S.W.3d 594 (Tex. App.–Austin 2002, no pet.) (opinion of guardian ad litem without supporting facts held insufficient evidence of "best interest"; record lacked sufficient evidence of children's needs or agency's plan for sibling set; court also found scant evidence of reunification efforts); *but see* *Anderson v. Tex. Dep't of Family and Protective Servs.*, 2007 WL 1372429 (Tex. App.–Austin 2007, pet. denied) (mem. op.)

In re A.R.R., 61 S.W.3d 691 (Tex. App.–Fort Worth 2001, pet. denied) (even without plan for adoption, termination in best interest of fifteen-year old whose fragile condition could deteriorate if father returned to her life after ten years)

Programs Available to Party Seeking Custody

In re W.E.C., 110 S.W.3d 231 (Tex. App.–Fort Worth 2003, no pet.) (best interest of the child is "quite often" infused with the statutorily offensive behavior; in other instances, best interest determination must have firm basis in facts apart from offending behavior; fact finder can infer from parent's failure to take the initiative to avail herself of the programs offered to her by the Department that the parent "did not have the ability to motivate herself to seek out available resources needed … now or in the future"; termination should not be used to merely relocate a child to better and more prosperous parents)

In re M.T. and A.A., 2003 WL 22054247 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (mem. op.) (mother's failure to complete therapy is evidence fact finder can consider in determining child was at risk because mother had not completed services recommended by the Department)

Recent Turnaround

In re J.O.A., T.J.A.M., T.J.M., and C.T.M., 283 S.W.3d 336 (Tex. 2009) (court of appeals' finding of legal insufficiency reversed; "While the recent improvements made by [father] are significant, evidence of short-duration, does not conclusively negate the probative value of a long history of drug use and irresponsible choices.")

In re C.C., D.W., Jr., and A.W., 2009 WL 866822 (Tex. App.–Corpus Christi 2009, pet. filed) (mem. op.) (mother's argument that the court should give deference to her evidence of a recent turnaround rejected; "[w]hile we agree that a presumption exists that reunification is in the child's best interest, we disagree that evidence of a recent turnaround will *always* offset other evidence favoring termination.")

Smith v. Tex. Dep't of Protective and Regulatory Servs., 160 S.W.3d 673 (Tex. App.–Austin 2005, no pet.) (in considering best interest, evidence of a recent turnaround by mother does not offset evidence of pattern of past instability and harmful behavior)

In re J.W.M., Jr. and L.P.M., 153 S.W.3d 541 (Tex. App.–Amarillo 2004, pet. denied) (the fact that there were improvements in mother's life during the months just before trial did not mandate the evidence in favor of best interest finding factually insufficient)

In re R.W., 129 S.W.3d 732 (Tex. App.–Fort Worth 2004, pet. denied) (despite father's contention he had stopped drinking, using drugs, and being depressed prior to his involvement with this case, the jury was not required to ignore a long history of dependency and destructive behavior merely because it allegedly abated before trial)

In re M.G.D. and B.L.D., 108 S.W.3d 508 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (while expert testimony may be helpful in termination case, jurors may apply their own experience and common sense to facts to draw conclusions regarding best interest; compliance with family service plan and "recent turnaround" by parent do not necessarily preclude termination; jurors not required to ignore long history of dependency and abusive behavior that abates as trial approaches); *but see* *In re W.C.*, 98 S.W.3d 753 (Tex. App.–Fort Worth 2003, no pet.) and *In re K.C.M.*, 4 S.W.3d 392 (Tex. App.–Houston [1st Dist.] 1999, pet. denied)

In re Uvalle, 102 S.W.3d 337 (Tex. App.–Amarillo 2003, no pet.) (mother's participation in prison treatment and education programs began year after her incarceration and only short time before trial; trier of fact could reasonably infer her participation solely for purposes of trial)

In re W.C., K.A.C., L.C.D., D.J.D., and S.T.D., 98 S.W.3d 753 (Tex. App.–Fort Worth 2003, no pet.) (finding best interest evidence factually insufficient citing, *inter alia*, uncontroverted evidence mother "has done everything the Department required of her")

In re K.C.M., 4 S.W.3d 392 (Tex. App.–Houston [1st Dist.] 1999, pet. denied) (evidence supported contention that "jail turned [mother's] life around" and rendered evidence that termination was in best interest factually insufficient)

Davis v. Travis County Child Welfare Unit, 564 S.W.2d 415 (Tex. App.–Austin 1978, no writ) (fact finder can measure the future conduct of parents by their recent past conduct, but is not required to believe that there has been a lasting change in a parent's attitude since his or her children were taken)

TERMINATION GROUNDS

1. Abandonment

Seven termination grounds are predicated on actual or constructive abandonment of the child. Parental rights may be terminated if the parent has:

- voluntarily left the child alone or in the possession of another not the parent, and expressed an intent not to return; TFC 161.001(1)(A)
- voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; TFC 161.001(1)(B)
- voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; TFC 161.001(1)(C)
- abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; TFC 161.001(1)(G)
- voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; TFC 161.001(1)(H)
- constructively abandoned a child in DFPS' conservatorship or an authorized agency for not less than six months and, despite reasonable efforts made by DFPS or the authorized agency to return the child to the parent, the parent has not regularly visited or maintained significant contact with the child and has demonstrated an inability to provide the child with a safe environment; TFC 161.001(1)(N) or
- voluntarily delivered the child to a designated emergency infant care provider under 262.302 without expressing an intent to return for the child. TFC 161.001(1)(S).

The duration of time required to show abandonment varies among these seven grounds, depending upon evidence of the parent's express or implied intent to abandon the child. There is no minimum time requirement for the clearest forms of abandonment; *i.e.*, when the parent demonstrates, by words or by actions, a clear intent to abandon the child. 161.001(1)(A), (G), and (S). There is a six-month requirement where the parent's intent to abandon the child is less clear. 161.001(1)(C) and (N). Evidence that would support an abandonment ground may also serve as proof of a non-abandonment termination ground. For example, evidence supported constructive abandonment and failure to comply with a court order [161.001(1) (N) and (O)], but these grounds were not pled; however, the same evidence was cited to support termination under the pled termination grounds, [161.001(1) (D) and (E)]. *See* *In re J.O.C.*, 47 S.W.3d 108, 112 (Tex. App.–Waco 2001, no pet.).

VOLUNTARY OR CONSTRUCTIVE ABANDONMENT

Holick v. Smith, 685 S.W.2d 18 (Tex. 1985) (termination under (C) ground reversed; mother left her children with adoptive parents to find a job in another city because she could not support them; (C) required mother only to make arrangements for adequate support of children, not to personally support them)

In re D.M.F., 283 S.W.3d 124 (Tex. App.–Fort Worth 2009, pet. filed) ((H) applies to "alleged father" but panel majority held that it was "improper to look to or consider the conduct of an alleged father before paternity has been established or acknowledged by the father"; dissent would consider circumstantial evidence of actual knowledge by the alleged father to find legally and factually sufficient evidence)

Gonzalez v. Tex. Dep't of Family and Protective Servs., 2008 WL 2309208 (Tex. App.–Austin 2008, no pet.) (mem. op.) (Evidence sufficient to support termination under (N) because: (1) The Department presented father with family service plans designed to reunify him with the children. "Reasonable efforts to reunite parent and child can be satisfied through the preparation and administration of service plans." (2) Father had minimal contact with the children for over five years and the children had very little attachment to him. After being deported, father contacted a friend several times by telephone. He did not make the same effort to communicate with his children. Father did not maintain significant contact with the children. (3) "While imprisonment of a parent, standing alone, should not constitute abandonment of a child as a matter of law, neither should it preclude a finding of abandonment." (4) Evidence father continued his involvement in criminal activity, had not supported his children in over two years, had speculative housing plans, was unemployed, and had a questionable ability to stay in the U.S. supports the finding that father did not demonstrate an ability to provide a safe environment for the children.)

In re R.M., 180 S.W.3d 874 (Tex. App.–Texarkana 2005, no pet.) (evidence legally insufficient to prove father failed to provide adequate support of child under (B) and (C); although father did not personally deliver child to the Mosleys and did not initiate the arrangement whereby the Mosleys would care for the child, he was aware of the arrangement at all times and agreed to the arrangement; "it should not be significant whether a parent physically delivers their child to someone who will care for the child" – "the controlling issue should be whether the parent was aware of, consented to, and participated in the arrangement for the child's support")

In re S.S.G., 153 S.W.3d 479 (Tex. App.–Amarillo 2004, pet. denied) (reversed and rendered termination under (A) because no direct evidence that each parent expressed "intent not to return"; under (A) any evidence of events occurring before the birth of the child cannot be considered)

In re K.W., 138 S.W.3d 420 (Tex. App.–Fort Worth 2004, pet. denied) (reversed and rendered on (N); father, incarcerated in New York, became aware of child's whereabouts and abusive situation, corresponded regularly with the Department's caseworker to inquire about child's condition, expressed desire to become more involved in child's life, requested that child be placed with father's aunt, a licensed foster parent in New York, sent several letters to the court expressing his concerns and desires, and sent caseworker letter addressed to his son; even though father in prison, established ability to provide child with safe environment by having the child live with aunt, an appropriate placement)

In re J.J.O., 131 S.W.3d 618 (Tex. App.–Fort Worth 2004, no pet.) (visiting only twelve times in nine-month period although weekly visits were scheduled, failure to maintain stable employment and housing, drug use, and failure to comply with service plan supports termination under (N))

In re D.S.A., E.E.A., and O.J.A., 113 S.W.3d 567 (Tex. App.–Amarillo 2003, no pet.) (evidence supported termination of parental rights under subsection (N); father voluntarily committed acts causing incarceration; although father professed desire to be part of children's lives, "the jury could reasonably believe that [his] actions when he was not subject to a restricted regimen within the confines of prison walls spoke more convincingly of his abandonment of his children")

In re K.M.B., 91 S.W.3d 18 (Tex. App.–Fort Worth 2002, no pet.) (proof that Department prepared several service plans designed to help mother reunite with child is ample evidence Department made reasonable efforts to return child under subsection (N); father voluntarily leaving mother during pregnancy, failing to provide support even when working, seeing child only three times during six years, and failing to work with Department to obtain visitation after child's removal from mother evidence to support termination under (C) ground)

In re D.T., 34 S.W.3d 625 (Tex. App.–Fort Worth 2000, pet. denied) (finding that parent has not attempted to regularly visit or maintain significant contact to support constructive abandonment not warranted when incarcerated mother's repeated requests for visits with infant were denied)

In re B.T., 954 S.W.2d 44 (Tex. App.–San Antonio 1997, pet. denied) (termination under (C) affirmed; although imprisonment alone does not constitute intentional abandonment of a child, imprisonment does not excuse failure to contact or support the child both before and after the father's incarceration)

2. Endangerment

The two endangerment grounds are the most commonly pled grounds in termination suits. These grounds typically are pled together and are often referred to as "the (D) and (E) grounds". Termination of parental rights may be granted if a parent has:

- knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child; or
- engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child.

TFC 161.001(1)(D) and (E).

The (D) ground focuses, by its terms, on the child's conditions or surroundings and the parent's knowing involvement with that placement. The (E) ground focuses on a parent's conduct or the conduct of persons with whom the parent placed the child. Some courts have interpreted these sections to require different types of proof, while others draw little distinction between the two grounds, reasoning that a parent's "conduct" creates the conditions or surroundings that place the child at risk.

Endangerment is more than a threat of theoretical injury or possible ill effects of a "less-than-ideal" family environment, but actual injury to the child is not required. *See Tex. Dep't of Human Servs. v. Boyd*, below, 727 S.W.2d at 533. The Supreme Court has defined "endanger" as to expose to loss or injury or to jeopardize. *Id.* The endangering conduct does not have to be directed at the child, nor does the child have to actually suffer injury. *Id.* "Conduct of a parent or another person in the home can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection (D). For example, an environment which routinely subjects a child to the probability that he will be left alone because his parents or caregivers are incarcerated endangers both the physical and emotional well-being of a child." *Castaneda v. Tex. Dep't of Protective and Regulatory Servs.*, 148 S.W.3d 509, 522 (Tex. App.–El Paso 2004, pet. denied).

Conduct of the parent both before and after the child's birth "is relevant to the determination of whether the conduct endangers the child's physical or emotional well-being." *In re S.P.*, 168 S.W.3d 197, 204 (Tex. App.–Dallas 2005, no pet.). Where the parent "had used heroin, cocaine, methaphetamines, and marijuana from the age of twelve until the time of trial," gave birth to one child with cocaine and marijuana in his body, continued to smoke around the child in spite of his health problems, and failed to complete drug rehabilitation programs, the evidence supported termination under (D) and (E). *In re K.G.M.*, 171 S.W.3d 502, 504 (Tex. App.–Waco 2005, no pet.).

ENDANGERMENT

In re J.O.A., T.J.A.M., T.J.M., and C.T.M., 283 S.W.3d 336 (Tex. 2009) ("endangering conduct may include the parent's actions before the child's birth, while the parent had custody of older children, including evidence of drug use")

In re J.O.A., T.J.A.M., T.J.M., and C.T.M., 283 S.W.3d 336 (Tex. 2009) (court of appeals' finding of legal insufficiency reversed; "While the recent improvements made by [father] are significant, evidence of short-duration, does not conclusively negate the probative value of a long history of drug use and irresponsible choices.")

Tex. Dep't of Human Servs. v. Boyd, 727 S.W.2d 531 (Tex. 1987) (an actual or concrete threat is not necessary to establish endangerment; danger can be inferred from parental misconduct)

In re K.C.B., 280 S.W.3d 888 (Tex. App.–Amarillo 2009, pet. denied) (evidence that mother admittedly violated safety plan on almost a daily basis constituted endangering conduct under (D) and (E); trial court was also entitled to disbelieve mother's contention that she did not know about methamphetamine drug lab at family residence)

In re J.P., 2008 WL 283295 (Tex. App.–Fort Worth 2008, no pet.) (mem. op.) (Mother had a history of mental illness. After the birth of her son, she displayed bizarre behavior and reported a history of schizoaffective, bipolar, and obsessive compulsive disorder. Mother was hospitalized for twenty-nine days in a state hospital after making the following remark at her psychological evaluation: "What do I have to do to get some help around here, slit my wrists." Although the appeals court found the evidence legally sufficient, it concluded that the evidence was factually insufficient to support termination under (D) and (E))

In re S.M.L., 171 S.W.3d 472 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (parent need not know for certain that child is in an endangering environment, awareness of the potential for danger and disregarding that risk is sufficient; parent who repeatedly commits criminal acts subjecting the parent to the possibility of incarceration can negatively impact child's living environment and emotional well-being; parent's failure to maintain contact with child after learning she is in agency's custody is "evidence of endangerment")

In re C.J.F., 134 S.W.3d 343 (Tex. App.–Amarillo 2003, pet. denied) (abuse or neglect supports finding of endangerment even against child not yet born at time of conduct)

In re D.M., B.W., and J.C.W., 58 S.W.3d 801 (Tex. App.–Fort Worth 2001, no pet.) (to determine whether termination is necessary because of endangerment, courts may look to parental conduct both before and after the child's birth)

In re M.J.M.L., 31 S.W.3d 347 (Tex. App.–San Antonio 2000, pet. denied) (conduct involves not only acts, but also omissions or failures to act)

161.001(1)(D)

Generally

In re M.C., D.C., and C.W.J., 917 S.W.2d 268 (Tex. 1996) (unsanitary conditions can be considered conditions or surroundings which endanger the well-being of a child under (D))

In re Stevenson, 27 S.W.3d 195 (Tex. App.–San Antonio 2000, pet. denied) (error not to give jury instruction that father must have knowledge of paternity prior to committing conduct prescribed under (D) which requires a parent's *knowing* conduct; (E) requires only *conduct*)

Williams v. Tex. Dep't of Human Servs., 788 S.W.2d 922 (Tex. App.–Houston [1st Dist.] 1990, no writ) ((D) refers only to the suitability of the child's living conditions)

Allowing Child to Remain in Dangerous Place

In re J.P.B., 180 S.W.3d 570 (Tex. 2005) (witness credibility issues that depend on witness appearance and demeanor cannot be weighed by the appellate court; evidence legally sufficient to support termination under (D) where father reacted appropriately to child's symptoms of abuse by taking child to the hospital for treatment, but failed to ameliorate the underlying cause)

In re V.S.R.K., 2009 WL 736751 (Tex. App.–Fort Worth 2009, no pet.) (mem. op.) (although parent need not have certain knowledge an actual injury is occurring, there must be evidence the parent was at least aware of the potential for danger to the child and disregarded it; the case was reversed and remanded as the record was devoid of evidence that father, who had been incarcerated for most of the child's life, was aware that mother's home was a dangerous environment)

Lopez v. Tex. Dep't of Protective and Family Servs., 2008 WL 4367588 (Tex. App.–Houston [1st Dist.] 2008, pet. denied) (mem. op.) (evidence legally insufficient under (D) because there was nothing to show that father was aware mother posed a risk to the child before the injury occurred; past abuse could not have been inferred from child's other medical problems)

In re S.K. and S.K., 198 S.W.3d 899 (Tex. App.–Dallas 2006, pet. denied) (termination of parents' rights under (D) upheld where mother and father lacked "insight" into the children's delays and still had limited parenting skills and did not understand the children's developmental needs after completing parenting classes and counseling; evidence was undisputed that the children were regularly dirty and covered with lice and that father saw the children in such a condition but allowed them to remain with the mother)

In re M.J.F., 2006 WL 2522200 (Tex. App.–Texarkana 2006, no pet.) (mem. op.) (mother's conduct under (D) supported where she used drugs around the child and permitted the child to stay with his father after father had been abusive to her; father's conduct under (D) supported where father allowed the child to remain with his mother with knowledge of her drug use, and allowed the child to remain in his home with knowledge of his wife's physical abuse of other children in his home and knowledge of the violence and emotional turmoil in his home)

Castaneda v. Tex. Dep't of Protective and Regulatory Servs., 148 S.W.3d 509 (Tex. App.–El Paso 2004, pet. denied) (leaving child with father knowing he was "too rough" with baby, and refusing to separate in an effort to regain custody of her son supported termination)

In re M.N.G., 147 S.W.3d 521 (Tex. App.–Fort Worth 2004, pet. denied) (mother consistently endangered her children by exposing them to abusive partners)

In re M.S., E.S., D.S., S.S., and N.S., 140 S.W.3d 430 (Tex. App.–Beaumont 2004, no pet.) (failing to remove children from a home in which they were being physically abused, neglected, and where illegal drug use occurred supports termination)

Environment/Living Conditions

In re D.H. and C.H., 2006 WL 3095252 (Tex. App.–Waco 2006, no pet.) (mem. op.) (evidence char-acterizing home as "hazardous" with specific examples and testimony addressing home's condition throughout case being progressively worse sufficient to affirm finding that parents allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being)

In re W.R.E., 167 S.W.3d 636 (Tex. App.–Dallas 2005, pet. denied) (father's poor hygiene and unsanitary living conditions after child was born and removed from hospital supports finding of endangering conduct)

In re P.E.W. II, K.M.W., and D.L.W., 105 S.W.3d 771 (Tex. App.–Amarillo 2003, no pet.) (exposure to continually unsanitary living conditions, continued uncleanliness, and failure to attend to child's medical needs indicia of endangerment; child "need not develop or succumb to a malady" before endangerment arises)

161.001(1)(E)

Generally

In re K.J.R. and T.R.B., 2008 WL 2877807 (Tex. App.–Eastland 2008, no pet.) (mem. op.) (Failing to follow a service plan requiring an agreement to not engage in illegal activity is sufficient to show conduct that endangered the well-being of a child. The evidence was legally and factually sufficient to support termination under (E))

In re J.W., 152 S.W.3d 200 (Tex. App.–Dallas 2004, pet. denied) (parent need not know of child's existence to terminate under (E))

In re J.T.G., H.N.M., M.D.M., and B.M.L., 121 S.W.3d 117 (Tex. App.–Fort Worth 2003, no pet.) (physical and emotional abuse of child, domestic violence, drug use during pregnancy and after births of children, and attempt to commit suicide support termination)

In re N.K. and D.T.K., 99 S.W.3d 295 (Tex. App.–Texarkana 2003, no pet.) ((E) does not require parent to personally commit direct physical or emotional abuse of child before child endangered)

Domestic Violence

In re T.L.S. and R.L.P., 170 S.W.3d 164 (Tex. App.–Waco 2005, no pet.) (man's non-parent status and not being the biological father did not stop him from committing family violence in the past; trial court entitled to infer that abuse will likely continue as neither he nor the mother testified that they would not have future contact with each other)

Phillips v. Tex. Dep't of Protective and Regulatory Servs., 149 S.W.3d 814 (Tex. App.–Eastland 2004, no pet.) (drug use while children in house and not ending relationship with abusive husband supports termination under (D) and (E))

In re N.H., B.H., J.H., P.H., E.C., and A.D.C., 122 S.W.3d 391 (Tex. App.–Texarkana 2003, pet. denied) (mother divorced abusive father after children were removed and completed all services required by the Department, including attending battered women's group; evidence mother knew of father's abusive behavior and allowed children to remain in abusive environment for over four years supported termination)

In re C.L.C. and C.R.D., 119 S.W.3d 382 (Tex. App.–Tyler 2003, no pet.) (abusive or violent conduct by parent or other resident of child's home can produce an environment that endangers the physical or emotional well-being of a child; probability that child will be left alone because parents jailed again endangers both physical and emotional well-being of child; scienter not required for parent's acts under (E))

Drug Use

In re J.A.W., J.A.W., J.E.W., and J.A.W., 2009 WL 579287 (Tex. App.–Fort Worth 2009, no pet.) (mem. op.) (a parent's failure to remain drug free while under the Department's supervision supports a finding of endangering conduct under (E) even if there is "no direct evidence" the parent's drug use "actually injured" the child)

In re C.R., 263 S.W.3d 368 (Tex. App.–Dallas 2008, no pet.) (On appeal, mother challenged the sufficiency of the evidence supporting termination and argued the trial court erred in admitting a drug test. The trial court admitted the drug tests only for the purpose of establishing the Department's and mother's state of mind. The record did not establish that the trial court relied on the test results to establish that mother failed the test or was using drugs. Mother's failure to take seven of nine requested drug tests allowed trial court to infer the results would be positive.)

In re M.L.M., 2007 WL 79339 (Tex. App.–Amarillo 2007, no pet.) (mem. op.) (trial court could draw adverse inferences from mother's invocation of her right against self-incrimination when asked questions regarding her drug use)

Cervantes-Peterson v. Tex. Dep't of Family and Protective Servs., 221 S.W.3d 244 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (finding of endangering conduct affirmed where mother admitted to cocaine use during pregnancy and that she had a serious, recurring problem with drugs; mother's cocaine use was part of a course of conduct over multiple pregnancies)

In re R.W., 129 S.W.3d 732 (Tex. App.–Fort Worth 2004, pet. denied) (evidence demonstrated that father struggled with substance abuse so excessive that he required medical assistance; despite father's testimony that he no longer used drugs, the jury was not required to ignore his long history of substance abuse and destructive behavior)

In re J.T.G., H.N.M., M.D.M., and B.M.L., 121 S.W.3d 117 (Tex. App.–Fort Worth 2003, no pet.) (fact finder reasonably can infer parent's failure to take a drug screen indicates the parent was avoiding testing because parent was using drugs)

Robinson v. Tex. Dep't of Protective and Regulatory Servs., 89 S.W.3d 679 (Tex. App.–Houston [1st Dist.] 2002, no pet.) (court may consider narcotics use and its effects on a parent's life and ability to parent as contributing to a course of endangering conduct)

In re W.A.B., 979 S.W.2d 804 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (use of drugs during pregnancy is conduct that endangers the physical and emotional well-being of the unborn child; court is not required to speculate as to the harm suffered by the child when its mother ingests drugs during pregnancy)

Edwards v. Tex. Dep't of Protective and Regulatory Servs., 946 S.W.2d 130 (Tex. App–El Paso 1997, no writ) (mother's drug-related endangerment of a child by using drugs during pregnancy imputed to other parent)

Emotional Endangerment

Carpenter v. Tex. Dep't of Family and Protective Servs., 2008 WL 5423223 (Tex. App.–Austin 2008, no pet.) (mem. op.) (courts are not limited to consideration of a child's physical injuries when determining whether a parent engaged in an endangering course of conduct; termination of parental rights may be based solely on emotional endangerment)

Environment

In re M.J.F., 2006 WL 2522200 (Tex. App.–Texarkana 2006, no pet.) (mem. op.) (mother's conduct under (E) supported where she used drugs in the child's presence and during her pregnancy, drove while intoxicated with the child in the car, and drove the child around without a properly adjusted car seat; father's conduct under (E) supported where father allowed mother to care for the child with knowledge of her drug use, and allowed his wife to care for the child with knowledge of his wife's violent tendencies)

Inability to Parent/Failure to Protect

In re R.F. and L.C., 115 S.W.3d 804 (Tex. App.–Dallas 2003, no pet.) (mother had been a child abuse victim and suffered from bipolar disorder; "[w]hile some of her behavior might be predictable given her circumstances, the question is not *why* [she] engaged in the conduct she did, but whether the conduct presented a danger to her children")

In re Uvalle, 102 S.W.3d 337 (Tex. App.–Amarillo 2003, no pet.) (mother's reliance on her mother to care for children on occasion "placed them at risk" because of evidence that maternal grandmother had history of drug abuse and had her parental rights terminated on two occasions)

In re J.I.T.P., 99 S.W.3d 841 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (a parent's mental state may be considered in determining whether a child is endangered if that mental state allows the parent to engage in conduct that jeopardizes the child's physical or emotional well-being)

In re R.G. and M.M., 61 S.W.3d 661 (Tex. App.–Waco 2001, no pet.) (knowledge actual offense occurred not necessary for endangerment where father aware of daughter's claims of sexual abuse, but took no protective action)

In re J.O.C., 47 S.W.3d 108 (Tex. App.–Waco 2001, no pet.) (failure to learn to care for child with feeding difficulties, propensity to stop breathing, and susceptibility to infection presents great risk of physical harm to medically fragile child)

In re C.D., 664 S.W.2d 851 (Tex. Civ. App.–Fort Worth 1984, no writ) (a parent's mental condition and suicide attempts are factors to consider in determining whether the parent has engaged in endangering conduct)

Imprisonment/Criminal Conduct

Tex. Dep't of Human Servs. v. Boyd, 727 S.W.2d 531 (Tex. 1987) (while incarceration, standing alone, will not prove endangerment, it is a factor for consideration on the issue of endangerment)

In re V.S.R.K., 2009 WL 736751 (Tex. App.–Fort Worth 2009, no pet.) (mem. op.) (termination of father's parental rights reversed and remanded because the Department failed to show how the child was endangered as the "direct result" of father's conduct; father had two prior convictions for evading arrest, one for which he was incarcerated at trial, and had been incarcerated for most of the child's life)

In re D.T., 34 S.W.3d 625 (Tex. App.–Fort Worth 2000, pet. denied) (placement of healthy, clean baby in foster care when mother arrested insufficient for termination under (D), no proof child exposed to bad environment; writing bad checks and prison term of less than two years required for (Q) ground insufficient for endangerment under (E) without evidence of additional endangering conduct)

In re M.D.S., 1 S.W.3d 190 (Tex. App.–Amarillo 1999, no pet.) (imprisonment, standing alone, does not constitute engaging in conduct that endangers the emotional or physical well-being of the child; however, it is a factor for consideration by the trial court on the issue of endangerment; if the evidence, including the imprisonment, shows a course of conduct that has the effect of endangering the physical or emotional well-being of the child, a finding under (E) is supportable)

In re J.N.R., 982 S.W.2d 137 (Tex. App.–Houston [1st Dist.] 1998) (knowing one's parental rights are at stake and continuing criminal behavior that results in incarceration is conduct that constitutes endangerment)

Allred v. Harris County Child Welfare Unit, 615 S.W.2d 803 (Tex. Civ. App.–Houston [1st Dist.] 1980, writ ref'd n.r.e.) (intentional criminal activity which exposes a parent to incarceration is relevant evidence tending to establish a course of conduct which endangers a child's emotional or physical well-being)

Neglect

In re M.C., D.C., and C.W., 917 S.W.2d 268 (Tex. 1996) ("neglect can be just as dangerous to the well-being of a child as direct physical abuse"; leaving pre-school children alone unattended by highway in car with engine running, exposing them to extremely unsanitary conditions, and failing to obtain necessary medical care supported termination based on neglect; physical abuse not required)

In re W.J.H., 111 S.W.3d 707 (Tex. App.–Fort Worth 2003, pet. denied) (neglect can be as dangerous to child's emotional and physical health as intentional abuse; actions or inactions that endanger other parent or another child can sufficiently support termination, even to unborn child)

Physical/Sexual Abuse

In re J.A.J., 225 S.W.3d 621 (Tex. App.–Houston [14th Dist.] 2006, rev'd in part) ("we are not prepared to hold that a bruise on the buttocks or back of the legs is, by itself, proof of unreasonable or excessive force")

In re S.F., M.F., and C.F., 141 S.W.3d 774 (Tex. App.–Texarkana 2004, no pet.) (parent who commits sexual abuse of child's sibling endangers the physical and emotional well-being of child; not required that child be aware of the sexual abuse or that abuse occurred in parent's home or where child lived)

In re A.B., R.B., T.B., C.R., and D.M., 125 S.W.3d 769 (Tex. App.–Texarkana 2003, pet. denied) (mother unwilling or unable to ensure emotional well-being of the children because of her denial that two older children sexually abused their younger siblings; failure to participate in counseling and refusal to take children to counseling contributed to continued exposure to sexual abuse and children's hesitancy to report future sexual abuse)

In re D.P., 96 S.W.3d 333 (Tex. App.–Amarillo 2001, no pet.) (endangerment finding not warranted in absence of evidence of how or when injuries occurred, or who caused injuries in different stages of healing)

In re King, 15 S.W.3d 272 (Tex. App.–Texarkana 2000, pet. denied) (conviction for aggravated sexual assault of one child is conduct court could infer will endanger other children in home)

3. Failure to Support

Failure to support the child is a required element in some of the abandonment grounds discussed above and may help support a finding under the endangerment "conditions and surroundings" ground. Failure to support may be relevant to the issue of best interest, showing a lack of parental interest in, and responsibility for the child. Failure to support the child also is a separate termination ground. To establish this ground the petitioner must prove that a parent has:

- failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition. TFC 161.001(1)(F).

FAILURE TO SUPPORT

Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976) (one-year period required in (F) means a continuous twelve-month period for both failure to support and ability to pay)

In re N.A.F., 282 S.W.3d 113 (Tex. App.–Waco 2009, no pet.) ("While it is true that a child-support order contains an implied finding that the obligor was able to pay the ordered support, 'that support order only contains an implied finding as of the time the order is entered; it cannot predict the future.' Thus, a child-support order is no evidence of [a parent's] ability to pay support for the twelve consecutive months required by [F].")

In re K.A.H., 195 S.W.3d 840 (Tex. App.–Dallas 2006, no pet.) (evidence factually sufficient to uphold trial court's finding of father's conduct under (F); father's defenses that he was young, under no order to pay support, and that he didn't know where the child was were rejected; "father cites us to no authority, and we have found none, excusing the failure to support one's child for reasons of youth or the absence of a court order to pay")

Williams v. Williams, 150 S.W.3d 436 (Tex. App.–Austin 2004, pet. denied) (testimony at default hearing that parrots statutory language without specificity and merely makes conclusory statement of conduct under (F) legally insufficient to prove ground)

In re M.A.N.M., 75 S.W.3d 73 (Tex. App.–San Antonio 2002, no pet.) (even without firm evidence of father's earnings during 12-month period, evidence he worked sporadically, spent significant money on drugs, and was able to earn money sufficient to show ability to pay)

Phillips v. Tex. Dep't of Protective and Regulatory Servs., 25 S.W.3d 348 (Tex. App.–Austin 2000, no pet.) (ability to pay satisfied by father's admission he could have earned enough money to contribute to child's support but did not)

R.W. v. Tex. Dep't of Protective and Regulatory Servs., 944 S.W.2d 437 (Tex. App.–Houston [14th Dist.] 1997, no pet.) (father who received the child into his home and held out the child to be his own subject to termination for failure to support child during time period preceding resolution of paternity suit)

4. Failure to Comply with Court Order

There are two termination grounds based on a parent's failure to comply with a court order. Termination may be ordered if the parent has:

- contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261. 161.001(1)(I).
- failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary man-

> aging conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child. TFC 161.001(1)(O).

The subchapter referenced in the (I) ground permits a court to order a parent: (1) to allow access to the child's home for purposes of investigation [TFC 261.303(b)]; (2) to provide medical or mental health records or submit to an examination [TFC 261.305]; or (3) not to remove the child from the state pending completion of the investigation [TFC 261.306]. Given the limited scope of this ground, it is seldom used.

To qualify as an order that will support termination of parental rights under the (O) ground for failure of the parent to comply, the order must have "specifically established the actions necessary for the parent to obtain the return of a child" and the child must have been in the custody of the Department for not less than nine months. Disobedience of an order that does not specify "actions necessary for the parent to obtain the return of a child" may be grounds for contempt, but not for termination. Prior orders that establish the actions required of the parent to obtain return of the child may be marked and offered into evidence, but must be redacted to delete any extraneous fact-findings. *In re M.S., E.S., D.S., S.S., and N.S.*, 115 S.W.3d 534, 538 (Tex. 2003) (admitting the orders as evidence that the parent failed to comply was not in itself inappropriate, but the trial judge's factual findings that his order had, in fact, been violated, should have been redacted, so that the jury could draw its own conclusions).

FAILURE TO COMPLY WITH COURT ORDER

In re J.F.C., A.B.C., and M.B.C., 96 S.W.3d 256 (Tex. 2002) (evidence supported conduct under (O) as a matter of law where parents completed some services, however, they testified that they had consciously decided not to comply with many of the requirements imposed by the trial court's order; the parents' "sporadic" incidents of compliance with the court orders did not alter the undisputed fact that they violated many material provisions of the trial court's order)

In re D.M.F., 283 S.W.3d 124 (Tex. App.–Fort Worth 2009, pet. filed) (evidence against father insufficient under (O) because no specific order was introduced into evidence and child not removed due to abuse or neglect by father) (*but see S.N. infra.*)

In re C.M.C., C.E.C., and G.L.C., 273 S.W.3d 862 (Tex. App.–Houston [14th] 2009, no pet.) (court rejected mother's financial excuses for failure to comply with court-ordered services under (O), noting that statute does not make provision for excuses)

In re J.S.G. and J.A.G., 2009 WL 1311986 (Tex. App.–Houston [14th Dist.] 2009, no pet.) (mem. op.) ((O) requires the evidence establish the children were removed as a result of abuse or neglect "specific to them" by the parent being terminated under (O))

In re S.N., S.M.N., and D.A.N., 287 S.W.3d 183 (Tex. App.–Houston [14th Dist.] 2009, no pet.) (Appellate court rejected father's argument that the language, "as a result of the child's removal from *the parent* under Chapter 262 for the abuse or neglect of the child" in (O) means that the parent who failed to comply with the court order must be the same parent whose acts or omissions caused the child to be removed and placed into the Department's care. (O) "does not require that the parent who failed to comply with a court order be the same parent whose abuse or neglect of the child warranted the child's removal. Had the legislature intended such a requirement, it could have easily provided that conservatorship be 'as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child *by the parent*.' It did not do so, and we presume it did not do so for a purpose.") (*But see Silva*, *infra*)

Tex. Dep't of Family and Protective Servs. v. Silva, 2009 WL 276782 (Tex. App.–Houston [1st Dist.] 2009, no pet.) (mem. op.) (appellate court upheld the granting of father's directed verdict as to termination of his parental rights under (O); removal of the child was from mother; there was no evidence Department had removed the child from Silva under Chapter 262 based on neglect or abuse of child by Silva, which is a required element under (O)) (*But see S.N.*, *supra*)

In re B.L.R.P., 269 S.W.3d 707 (Tex. App.–Amarillo 2008, no pet.) (for Department to prevail under (O) there must be a written order for services establishing actions necessary to obtain return of child)

In re T.N.F., H.R.F., H.R.F., and H.R.F., 205 S.W.3d 625 (Tex. App.–Waco 2006, pet denied) (termination under (O) ground upheld where father testified that distance, time constraints, and employment issues excused his failure to complete court-ordered services; "[The parent] presents no authority for his novel excuse argument, and the statute itself does not make a provision for excuses")

In re D.L.H., 2005 WL 2989329 (Tex. App.–San Antonio, 2005, no pet.) (mem. op.) (parents' arguments that substantial compliance was sufficient to avoid termination under (O) rejected; "neither party has provided, and we have not found, any legal authority for their premise that 'substantial compliance' somehow renders undisputed evidence of a failure to comply somehow insufficient to support a trial court's finding")

In re M.C.M., C.M.M., J.L.M., and L.S.M., 57 S.W.3d 27 (Tex. App.–Houston [1st Dist.] 2001, pet. denied) (parents not held in contempt for violating court's orders; parental rights were terminated under (O), so conduct not subject to criminal contemnor protections)

In re Verbois, 10 S.W.3d 825 (Tex. App.–Waco 2000, orig. proceeding) (mandamus denied where evidence did not show parents were forced to choose between protecting parental rights through compliance with court-ordered service plan or exercising constitutional protection against self-incrimination)

5. Truancy/Runaway

Rights may be terminated under 161.001(1)(J) where a parent has been the major cause of:

- the child's failure to be enrolled in school as required by the Education Code, or
- the child's absence from the home without the consent of the parents or guardian for a substantial length of time or without the intent to return. TFC 161.001(1)(J).

This is a rarely used ground, although evidence of the child's chronic failure to attend school may be used to support a finding under the endangerment grounds or to show that termination would be in the child's best interest. One opinion, in a footnote, notes that where a child was enrolled in school, this ground does not apply, even if excessive absences caused the child to fail all her subjects. *Smith v. Tex. Dep't of Protective and Regulatory Servs.*, 160 S.W.3d 673, fn. 2 (Tex. App.–Austin 2003, no pet.). The second part of this ground appears to permit termination for parental kidnapping, but no reported case has discussed this ground.

6. Voluntary Relinquishment and Termination on Petition of Parent

Voluntary relinquishment of parental rights is undoubtedly the most commonly used termination ground in private termination cases. Relinquishment is also frequently used in cases involving the Department. This ground is met if a parent has:

- executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter. TFC 161.001(1)(K).

  Detailed formal requirements for an affidavit of relinquishment are set out in the Family Code at TFC 161.103. There are some notable differences between relinquishments in a private setting and those in which the Department is involved. Note while an affidavit of relinquishment may be revocable in a private case, TFC 161.103(e) provides the relinquishment in an affidavit that designates the Department or a licensed child-placing agency as managing conservator is irrevocable.

Issues of misrepresentation, fraud, duress, coercion, and overreaching have become more common in direct appeals and petitions for equitable bills of review attacking termination orders based upon relinquishments. Relinquishments in cases involving the Department are particularly vulnerable to such challenges, es-

pecially when the parent who relinquishes parental rights is unrepresented and/or unsophisticated. Practical and ethical concerns arise when a caseworker or an attorney representing the Department explains the meaning of the affidavit of relinquishment to an adverse party; therefore, best practice dictates that parents be encouraged to obtain *independent* legal advice before signing an affidavit.

The court may order termination on petition of the parent, if termination is in the best interest of the child. TFC 161.005(a). If the petition seeks appointment of the Department as managing conservator, the Department shall be given service of citation. TFC 102.009(a)(10) and 161.005(b). The court shall notify the Department if the court appoints the Department as the managing conservator of the child. TFC 161.005(b).

VOLUNTARY RELINQUISHMENT AND TERMINATION WHEN PARENT IS PETITIONER

In re L.M.I. and J.A.I., 119 S.W.3d 707 (Tex. 2003) (*cert. denied, sub. nom. Duenas v. Montegut*, 541 U.S. 1043 (2004)) (parents waived: (1) alleged father's issue whether signature on affidavit procured in violation of due process rights; (2) alleged father's claim affidavit did not comply with statute; (3) mother's issue whether custodial parents made unenforceable promises fraudulently inducing signing affidavit; and (4) mother's issue whether police detective and others improperly acted as adoption intermediaries)

Brown v. McLennan County Children's Protective Servs., 627 S.W.2d 390 (Tex. 1982) (Legislature expressly provided that an affidavit to the Department or to an authorized adoption agency is irrevocable; Legislature intended to make irrevocable affidavits of relinquishment sufficient evidence on which a trial court can make a finding that termination is in the best interest of the children)

Vallejo v. Tex. Dep't of Family and Protective Servs., 280 S.W.3d 917 (Tex. App.–Austin 2009, no pet.) (father's argument that the trial court erred in terminating his parental rights under (D), (E), and (K) when he executed a voluntary relinquishment of parental rights rejected; the statute does not provide that an affidavit of voluntary relinquishment ends the trial court's inquiry into other bases for termination and an affidavit of voluntary relinquishment neither automatically concludes a termination proceeding nor automatically terminates parental rights)

In re R.B., J.B., S.B., T.B., A.B., and J.B., 225 S.W.3d 798 (Tex. App.–Fort Worth 2007 no pet.) (while appellants may have been under considerable pressure to make a decision, they were represented by counsel, were aware of the documents they were signing, and understood the consequences; fact that appellants may have been faced with potential criminal charges or the removal of their unaffected children does not prove the affidavits of relinquishment were wrongfully procured)

In re M.Y.W. and C.C.W., 2006 WL 3360482 (Tex. App.–Houston [14th Dist.] 2006, pet. denied) (mem. op.) (appellant filed a bill of review fifteen months after termination judgment attempting to set aside termination of her parental rights based on her affidavit of relinquishment; bill of review barred by the six month limitation period in TFC 161.211)

In re E.S.S., 131 S.W.3d 632 (Tex. App.–Fort Worth 2004 no pet.) (trial court erred in rendering judgment on the ground that appellant voluntarily relinquished his parental rights without a properly executed affidavit of relinquishment tendered to the court and offered as evidence; there is no statutory provision that an oral relinquishment will suffice to comply with the strict requirements of TFC 161.103 and the court found no common law authority allowing acceptance of an oral relinquishment in lieu of a signed affidavit)

Mosley v. Dallas County Child Protective Servs., 110 S.W.3d 658 (Tex. App.–Dallas 2003 pet. denied) (equitable bill of review correctly dismissed where mother failed to establish prima facie right to judgment on retrial)

Jones v. Tex. Dep't of Protective and Regulatory Servs., 85 S.W.3d 483 (Tex. App.–Austin 2002, pet. denied) (appellate court reversed trial court's denial of bill of review where department breached duty, based on prior relationship with the mother as former foster child, to tell "whole truth" to her, and such failure amounted to prima facie proof that relinquishment was involuntary)

In re D.R.L.M., 84 S.W.3d 281 (Tex. App.–Fort Worth 2002, pet. denied) (court's failure to follow mother's wishes regarding appointment of specific family as child's conservator does not make affidavit of relinquishment involuntary where relinquishment not conditioned on mother's statement)

Lumbis v. Tex. Dep't of Protective and Regulatory Servs., 65 S.W.3d 844 (Tex. App.–Austin 2002, pet. denied) (no improper inducement where mother was represented and understood agreement to try to arrange

open adoption was unenforceable; the fact that she was emotionally upset when she signed the affidavit of relinquishment does not make it involuntary)

Queen v. Goeddertz, 48 S.W.3d 928 (Tex. App.–Beaumont 2001, no pet.) (unenforceable promise of visitation makes relinquishment involuntary)

In re V.R.W., 41 S.W.3d 183 (Tex. App.–Houston [14th Dist.] 2001, no pet.) (reversible error to refuse to grant mother's timely request for jury trial if material issue of fact exists concerning intent of parties in signing affidavit of relinquishment)

In re M.A.W. and M.A.W., 31 S.W.3d 372 (Tex. App.–Corpus Christi 2000, no pet.) (mother's subsequent change of heart does not invalidate relinquishment voluntary when executed)

Vela v. Marywood, 17 S.W.3d 750 (Tex. App.–Austin 2000, pet. denied) (child-placing agency's breach of special duty owed to pregnant mother; failure to notify that open adoption agreement is unenforceable justified finding relinquishment procured by misrepresentation, fraud, or overreaching, and was not voluntarily signed)

Petition for termination by parent

Duenas v. Duenas, 2007 WL 2012871 (Tex. App.–Corpus Christi 2007, no pet.) (mem. op.) (Trial court did not err in refusing to accept father's voluntary relinquishment of his own parental rights. A trial court may only order termination of parental rights on the parent's petition if it is in the child's best interest under TFC 161.005. "However, no parent may blithely walk away from his or her parental responsibilities." To reverse the trial court's ruling would be "condoning [father's] abandonment of his personal responsibility to support his biological offspring and opening the door for other angry and disappointed parents to do the same.")

7. Parent's Bad Acts Directed Towards Another Child

Most termination grounds focus on a parent's acts or omissions that directly harm or endanger the child that is the subject of the termination suit. However, two termination grounds base termination on a prior bad act by the parent with respect to any child.

Parental rights can be terminated if the parent has been found criminally responsible for the death or serious injury of a child under one of the following Penal Code sections, or has been adjudicated under Title 3 (Juvenile Justice Code) (*see A.N.*, below) for conduct that caused the death or serious injury of a child that would constitute a violation of the following Penal Code sections:

- 19.02 (murder);
- 19.03 (capital murder);
- 19.04 (manslaughter)
- 21.11 (indecency with a child);
- 22.01 (assault);
- 22.011 (sexual assault);
- 22.02 (aggravated assault);
- 22.021 (aggravated sexual assault);
- 22.04 (injury to a child, elderly individual, or disabled individual);
- 22.041 (abandoning or endangering child);
- 25.02 (prohibited sexual conduct);
- 43.25 (sexual performance by a child); and
- 43.26 (possession or promotion of child pornography). TFC 161.001(1)(L).

Parental rights also can be terminated for culpable conduct towards another child if the parent has:

- had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) (the two endangerment grounds) or substantially equivalent provisions of the law of another state. TFC 161.001(1)(M).

The conviction or adjudication required under (L) may be for acts or omissions directed at any child, whether or not that child is related to the parent or to the child who is the subject of the termination suit. This ground can be used when the child who is the subject of the suit was the victim of the crime; however, such cases also can be handled under the endangerment grounds of (D) and (E). Although termination under (L) occurs most commonly for acts committed against a child, this ground also is used where a parent has injured a child by omission, *i.e.*, where the parent has failed to protect the child from serious injuries inflicted by the other parent. *See, e.g.*, *Segovia*, below.

The Amarillo Court of Appeals has held that unless death or serious injury is an element of the offense, proof of criminal adjudication for one of the crimes listed in (L) is not, in and of itself, sufficient to support termination under that ground. *See Vidaurri v. Ensey*, below. In *Vidaurri*, the court opined that the "premise that serious injury must automatically be inferred from the mere commission of indecency with a child fails to survive reasonable analysis". *Id.* at 146. *But see In re L.S.R.*, 92 S.W.3d 529 (Tex. 2002) (Texas Supreme Court denied the parents' petitions for review, but specifically "disavow[ed] any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury").

Termination under (M) may be proved by the admission of a copy of the judgment terminating the parent's rights under (D) and/or (E) or substantially equivalent provisions of the law of another State. It is not necessary that the State prove up the previous termination case again. *See In re J.M.M.*, below.

PARENT'S BAD ACTS DIRECTED TOWARDS ANOTHER CHILD

In re A.N. and S.N., 2009 WL 2403538 (Tex. App.–Eastland 2009, no pet. h.) (mem. op.) (proof of mother's conviction for intoxication manslaughter [Penal Code 49.08] was legally insufficient to support termination under 161.001(1)(L) because that section of the Penal Code is not listed in the termination statute; reference to "Title 3" in 161.001(1)(L) refers to the Juvenile Justice Code, not the Penal Code)

In re E.S.C. and L.M.M., 2006 WL 1148144 (Tex. App.–Houston [14th Dist.] 2006, no pet.) (mem. op.) (although E.S.C. and L.M.M. were not involved in family shoplifting ring that included other children, the "law does not require the State to wait until each child in a family is personally victimized before it may terminate a parent's rights"; evidence sufficient under (E)) *see also* *In re S.P.*, 168 S.W.3d 197 (Tex. App.–Dallas 2005, no pet.) (mother's argument that endangerment finding can be supported only by evidence of conduct toward child to whom parental rights are to be terminated rejected)

In re Castillo, 101 S.W.3d 174 (Tex. App.–Amarillo 2003, pet. denied) (evidence of father's conviction for murder of one of his children supports termination under subsection (L))

In re J.M.M., B.R.M., and W.T.M., 80 S.W.3d 232 (Tex. App.–Fort Worth 2002, pet. denied) (appellant's rights to another child previously terminated based on findings she violated (D) and (E); Department need not re-establish that parent's conduct with respect to other child was in violation of (D) or (E), need only admit into evidence prior termination order terminating under those grounds)

In re A.R.R., 61 S.W.3d 691 (Tex. App.–Fort Worth 2001, pet. denied) (father's testimony that he made a mistake in sexually assaulting his child, coupled with caseworker testimony that type of sexual abuse committed causes a child to sustain serious emotional injury, sufficient to prove that criminal conduct caused serious injury under (L))

Vidaurri v. Ensey, 58 S.W.3d 142 (Tex. App.–Amarillo 2001, no pet.) (father's deferred adjudication for indecency with child insufficient to prove father caused serious injury to child) *see also* *In re L.S.R.*, 60 S.W.3d 376 (Tex. App.–Fort Worth 2001, pet. denied) (evidence legally insufficient to support termination under (L) ground where the only evidence presented was the father's deferred adjudication conviction for indecency with a child and that he had been treated for pedophilia; there was no testimony that the victim suffered death or serious injury; "where death or serious injury is not an element of the offense, the conviction or deferred adjudication is not by itself sufficient evidence to support termination under 161.001(1)(L)(iv)") *but see* *In re L.S.R.*, 92 S.W.3d 529 (Tex. 2002) ("we deny the petitions for review, but disavow any suggestion that molestation of a four-year-old, or indecency with a child, generally, does not cause serious injury")

In re J.M.S., 43 S.W.3d 60 (Tex. App.–Houston [1st Dist.] 2001, no pet.) ((L) and (M) grounds are constitutional even though no causal connection to activities toward child subject of present suit)

Segovia v. Tex. Dep't of Protective and Regulatory Servs., 979 S.W.2d 785 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (father's criminal conviction for injury to another child by omission supported termination under (L) even if facts insufficient to prove other endangerment grounds)

Lucas v. Tex. Dep't of Protective and Regulatory Servs., 949 S.W.2d 500 (Tex. App.–Waco 1997, pet. denied) (father's conviction for aggravated sexual assault of seven-year-old daughter and diagnosis of pedophilia supports termination of parental rights to his other children based on endangerment)

Avery v. State, 963 S.W.2d 550 (Tex. App.–Houston [1st Dist.] 1997, no pet.) (involuntary termination of rights to another child seventeen years earlier not too remote to support termination)

Director of Dallas County Child Protective Servs. v. Bowling, 833 S.W.2d 730 (Tex. App.–Dallas 1992, no writ) (termination under (D) and (E) ground proper for violent or negligent conduct directed at the other parent or other children even where the behavior was not committed in the child's presence)

8. Drug and Alcohol Use

Rights may be terminated if the parent has:

- used a controlled substance as defined by Chapter 481 of the Health and Safety Code *in a manner that endangered the health or safety of the child*, and:
  (i) failed to complete a court-ordered substance abuse treatment program; or
  (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance. TFC 161.001(1)(P) (emphasis added).

Note that the definition of a controlled substance under Chapter 481 of the Health and Safety Code explicitly *excludes* alcohol, tobacco, prescribed drugs, and over-the-counter medications, and that the parent's use of a controlled substance must endanger the child under the (P) ground.

Parental rights also can be terminated if the parent has:

- been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by TFC 261.001. TFC 161.001(1)(R).

A child "born addicted" is defined as a child who is born to a mother who during the pregnancy used a controlled substance as defined by Chapter 481 of the Health and Safety Code, other than a controlled substance legally obtained by prescription, or alcohol; and:

1) experienced observable withdrawal from the alcohol or controlled substance;
2) exhibited observable harmful effects in the child's physical appearance or functioning; or
3) exhibited the demonstrable presence of alcohol or a controlled substance in the child's bodily fluids. TFC 261.001(7).

The (R) ground is broader than the (P) ground in three ways: (1) it applies to alcohol as well as other illegal drugs; (2) it does not require separate proof, beyond the fact of the child's being born addicted, that the drug or alcohol use endangered the child, and (3) the mere "demonstrable presence" of drugs or alcohol makes the child "born addicted" under (R).

CHILD ENDANGERED BY DRUG USE OR BORN ADDICTED

In re B.L.H., 2008 WL 864072 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (mem. op.) (Mother placed the child in danger for most of his life through her drug use, beginning while pregnant with the child, causing him to be born with cocaine and Xanax in his blood. She also admitted to using marijuana everyday for nine years. Although mother "purports to love B.L.H., her conduct throughout his life, with few exceptions, demonstrates that she does not have the parental ability to care for B.L.H.")

In re M.J. and A.M., 2006 WL 3438058 (Tex. App.–Beaumont 2006, no pet.) (mem. op.) (evidence legally and factually sufficient to support finding of conduct under (P) and (R) where mother completed court-ordered substance abuse program and was reunited with her children; however, she began using cocaine during subsequent pregnancy, causing that child to be born addicted to cocaine; trial court could infer endangering course of conduct as mother admitted to using drugs at the beginning and end of her pregnancy and to staying away from her children and prostituting herself after her relapse)

In re T.N.J., 2005 WL 3115913 (Tex. App.–San Antonio 2005, no pet.) (mem. op.) (father's argument that his parental rights could only be terminated for behavior relating to controlled substance abuse under (P) ground rejected; 161.001(1) contains no restrictions as to what findings are required in a particular case, and trial court was permitted to rely on drug addiction as conduct under (E) to support termination)

In re U.P., 105 S.W.3d 222 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (termination affirmed under (D) and (E); parents' rights could have been terminated under (R) because mother used drugs during pregnancy and father provided her with drugs after learning of her pregnancy)

In re H.R., 87 S.W.3d 691 (Tex. App.–San Antonio 2002, no pet.) (fact that child was born addicted to drugs supported logical inference that mother's drug use while pregnant exposed child to injury; affirmed under (P) as well as (D), (N), and (O))

9. Imprisonment

Under TFC 161.001(1)(Q), a parent's parental rights may be terminated if a parent has:

- knowingly engaged in criminal conduct that has resulted in the parent's:
  (i) conviction of an offense; and
  (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition. TFC 161.001(1)(Q).

Until 2003, the courts of appeals were split as to whether (Q) should be applied prospectively or retrospectively. In July of 2003, the Texas Supreme Court ruled that (Q) was to be applied prospectively. *See In re A.V.*, below.

IMPRISONMENT

In re H.R.M., 209 S.W.3d 105 (Tex. 2006) (appellate court must give due deference to jury's finding and not supplant the jury's judgment with its own; father's testimony regarding parole was inherently speculative; jury could disregard father's testimony in light of evidence of his multiple convictions and prior revocation)

In re A.V. and J.V., 113 S.W.3d 355 (Tex. 2003) ((Q) "aims to remedy the conditions of abused and neglected children, not to enhance the punishment of the parent"; (Q) applied prospectively from date petition filed; prospective reading "allows the State to act in anticipation of a parent's abandonment of the child and not just in response to it")

Lewis v. Tex. Dep't of Family and Protective Servs., 2008 WL 3877687 (Tex. App.–Austin 2008, no pet.) (mem. op.) (The "care" contemplated by (Q) encompasses arranging care for the child by another. Father's proposed caretaker was his mother, who was unemployed, had little money, and had a daughter with a learning disability and a granddaughter with health issues who lived with her. The appellate court found the jury could find the evidence sufficient that Lewis was unable to care for the child.)

Smith v. Tex. Dep't of Family and Protective Servs., 2008 WL 2465795 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (mem. op.) ((1) In a footnote, the court stated it used the date that the Department amended its petition to include (Q) as the starting point of the prospective two-year period of (Q), not the date of the Department's original petition. (2) father's argument that it is the Department's burden to show that it asked him for the names of relatives who could care for the children rejected; "Requiring DFPS to prove that it had affirmatively asked [father] for the names of persons who could care for the children while he was incarcerated would not be reasonable." (3) father's argument that (Q) requires a showing that he knew he was the children's father before he committed the criminal conduct that resulted in his inability to care for the children rejected; "Subsection (Q) cannot be reasonably read to require a showing that the parent knew he was the child's parent at the time he engaged in the criminal conduct.")

Hampton v. Tex. Dep't of Protective and Regulatory Servs., 138 S.W.3d 564 (Tex. App.–El Paso 2004, no pet.) (merely naming relatives without showing of willingness, capacity, and competence not sufficient to meet parent's burden to produce some evidence of how parent has arranged for care during incarceration)

In re Caballero, 53 S.W.3d 391 (Tex. App.–Amarillo 2001, pet. denied) (after the petitioner establishes that a parent's knowing criminal conduct has resulted in his/her incarceration for more than two years, the incarcerated parent must produce evidence showing how (s)he would provide care for the child during the parent's period of incarceration; if the parent meets this burden, the burden shifts back to the petitioner to show that the proposed arrangement would not satisfy the parent's duty to the child)

10. Murder of the Other Parent of the Child

Parental rights may be terminated if the parent has been convicted of:

- (i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code.
- (ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i); or
- (iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i). TFC 161.001(1)(T).

The underlined language was added by Senate Bill 1838, 81st Leg., Reg. Ses., effective September 1, 2009.

See In re B.R., 950 S.W.2d 113 (Tex. App.–El Paso 1997, no writ) (father's shotgun slaying of child's mother constitutes endangerment and there is no need to prove adverse effect on child); *see also In re E.M.N.*, 221 S.W.3d 815 (Tex. App.–Fort Worth April 5, 2007, no pet.) (mem. op.) (mother's rights terminated under (T) for murdering child's father).

11. Failure of Alleged Father to Claim Paternity or Register with Paternity Registry

Federal constitutional protections that apply to parents do not prohibit states from treating alleged fathers differently from fathers who have "come forward to participate in the rearing of the child." In *Lehr v. Robertson*, the Supreme Court upheld a New York rule that allowed adoption of a man's biological child by his former girlfriend and her husband without notice to or participation by the father, who had failed to sign up with the state's paternity registry, in spite of the fact that the putative father had filed a paternity petition before the adoption was finalized. The 80th Texas Legislature, effective September 1, 2007 moved Texas closer to the New York approach in dealing with alleged fathers who fail to register with the paternity registry.

Termination on Default.

An alleged father's rights may be terminated under TFC 161.002 if:

* he has been served with citation *and* has failed to respond by timely filing an admission of paternity or a counterclaim for paternity under Chapter 160 [TFC 161.002 (b)(1)];

Paternity Registry Provisions.

An alleged father's rights may be terminated if:

* the child is over one year of age at the time the petition is filed, the alleged father has not registered with the paternity registry and cannot be identified and/or located despite the exercise of due diligence by the petitioner [TFC 161.002(b)(2); or
* the child is under one year of age at the time the petition for termination or for adoption is filed and the alleged father has not registered with the paternity registry [TFC 161.002(b)(3)]; or

* he has registered with the paternity registry but he cannot be served at the address provided or at any other address known by the petitioner, despite the petitioner's due diligence [TFC 161.002(b)(4)].

Effective for termination decrees rendered on or after January 1, 2008, *there is no requirement of personal service or citation by publication on an alleged father who has not registered with the paternity registry under Chapter 160*. TFC 161.002(c-1). Instead of a return of service, the petitioner is required to file with the court "a certificate of the results of a search of the paternity registry under Chapter 160 from the bureau of vital statistics indicating that no man has registered the intent to claim paternity." TFC 161.002(e).

If the alleged father has registered with the paternity registry, and the petitioner is unable to effect personal service at the address provided to the registry and at any other address known to the petitioner, the alleged father's rights may be terminated without the necessity of citation by publication. TFC 161.002(d). In that circumstance, the court cannot render a termination order "unless the court, after reviewing the petitioner's sworn affidavit describing the petitioner's effort to obtain personal service of citation on the alleged father and considering any evidence submitted by the attorney ad litem for the alleged father, has found that the petitioner exercised due diligence in attempting to obtain service on the alleged father. The order shall contain specific findings regarding the exercise of due diligence of the petitioner." TFC 161.002(f).

Right to Court-Appointed Attorney.

An alleged father who is personally served is *not* entitled to a court-appointed attorney until and unless the court adjudicates him to be the father of the child. There is no right to court-appointed attorney for the parentage trial. An alleged father's rights cannot be terminated under section TFC 161.002 if he timely appears and seeks to establish paternity. *See Salinas v. Tex. Dep't of Protective and Regulatory Servs.*, 2004 WL 1896890 (Tex. App.–Austin 2004, no pet.) (mem. op.) (father waited almost a full year after the Department took custody of the child to assert his paternity; father did not timely file an assertion of paternity or a counterclaim for paternity). If an alleged father timely appears and seeks to establish paternity, the court should proceed to adjudicate parentage under Chapter 160. If the man is adjudicated not to be the father, then he is not a parent and no termination is necessary. *See* TFC 101.024 (definition of "parent"). If he is adjudicated to be the father, his rights cannot be terminated under Section 161.002 and he is entitled to a court-appointed and county-paid attorney if he appears in opposition and establishes indigence. TFC 107.013(a)(1).

An alleged father who either fails to register with the paternity registry or cannot be personally served "at the address provided to the registry and at any other address for the alleged father known by the petitioner" is required to have a court-appointed attorney for the parental termination hearing. TFC 107.013(a)(3) and (4). The attorney ad litem for the absent father is entitled to present evidence at the hearing on due diligence if the alleged father registered but then could not be served. TFC 161.002(f). Note, however, that "due diligence" is no longer required in searching for a putative father who failed to register, so the role of the appointed attorney may simply be to protect against fraud on the court - for example, where the alleged father, although failing to register, has established an actual relationship with the child that would be entitled to constitutional protection under *Caban v. Mohammed*, 441 U.S. 380 (1979).

Since the paternity registry was first established effective September 1, 1997, and the Bureau of Vital Statistics (BVS) cannot accept "registration" by a father that is attempted more than 30 days after the birth of the child (father must register before the birth or by the 31st day after the birth) under TFC 160.402(a)(2), the "paternity registry" process cannot be used to terminate the rights of an alleged father if the child was born prior to August 2, 1997.

TERMINATION OF ALLEGED FATHER'S RIGHTS

Lehr v. Robertson, 463 U.S. 248 (1983) (upholding the constitutionality of New York's paternity registry; notice of adoption to alleged father who fails to register not constitutionally required)

In re V.S.R.K., 2009 WL 736751 (Tex. App.–Fort Worth 2009, no pet.) (mem. op.) (there are no formalities which must be observed for an admission of paternity under 161.002; the court concluded that father had admitted his paternity for purposes of 161.002(b)(1) as he filed a general denial and request for counsel in which he stated "I am the parent of the child named above [V.S.R.K.].")

In re G.A.G., III, 2007 WL 3355463 (Tex. App.–San Antonio 2007, no pet.) (mem. op.) (under TFC 161.002(b)(1), no formalities have to be observed for admission of paternity to be effective; assertions of fact, not pleaded in the alternative, in live pleadings of party regarded as formal judicial admissions and have conclusive effect)

In re J.W.T., 872 S.W.2d 189 (Tex. 1994) (alleged biological father has state constitutional right to establish paternity over objection of presumed father and mother); *see also* TFC 160.607 (four-year statute of limitations where child has presumed father); TFC 160.608 (presumed paternity may be protected by equitable estoppel provision)

In re Unnamed Baby McLean, 725 S.W.2d 696 (Tex. 1987) (protecting rights of alleged biological fathers under Texas Equal Rights Amendment; "father who steps forward, willing and able to shoulder responsibilities of raising a child, should not be required to meet a higher burden of proof [than the mother] solely because he is male")

Toliver v. Tex. Dep't of Family and Protective Servs., 217 S.W.3d 85 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (termination of alleged father's rights under 161.002(b)(1) reversed where father failed to file an answer or counterclaim for paternity after being served; however, he appeared at trial and admitted his paternity and requested that his parental rights not be terminated; father's appearance at trial before his rights were terminated and subsequent admission of paternity "triggered his right" to require the Department to prove conduct under 161.001)

In re E.A.W.S., 2006 WL 3525367 (Tex. App.–Fort Worth 2006, pet. denied) (mem. op.) (both default judgment and termination of alleged father's parental rights under TFC 161.002(b)(1) were inappropriate as alleged father forwarded a signed, notarized, and witnessed document to the trial court, which even though it was a purported voluntary relinquishment, met the requirements of both an answer and an admission of paternity)

In re K.W., 138 S.W.3d 420 (Tex. App.–Fort Worth 2004, pet. denied) (alleged father's letters to Department and court sufficient admissions of paternity to prevent termination under 161.002(b)(1))

Phillips v. Tex. Dep't of Protective and Regulatory Servs., 25 S.W.3d 348 (Tex. App.–Austin 2000, no pet.) (alleged biological father cannot simultaneously acknowledge paternity and claim protection against termination because paternity has not been adjudicated)

12. Inability to Care for Child Due To Mental or Emotional Illness

The trial court may order termination of parental rights in a suit filed by the Department if the court finds that:

* the parent has a mental or emotional illness or a mental deficiency that renders the parent unable to provide for the physical, emotional and mental needs of the child;
* in all reasonable probability, proved by clear and convincing evidence, the illness or deficiency will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child;
* the Department has been the temporary or sole managing conservator of the child for six months preceding the date of the termination hearing;
* the Department has made reasonable efforts to return the child to the parent; and
* termination is in the best interest of the child. TFC 161.003.

Immediately after the filing of a suit under this section, the court must appoint an attorney ad litem for the parent and the ad litem must represent the parent for the duration of the suit. TFC 161.003(b) and (d). A

hearing on the termination may not be held earlier than 180 days after the date on which the suit was filed. TFC 161.003(c). This ground has been used to terminate a parent's parental rights where the parent has a persistent mental disability. The mental disability can be the result of either the parent's mental illness or mental retardation. Section 161.003 does not require culpable conduct. The emphasis is on the best interest of the child; however, the statute does require that the Department use reasonable efforts to return the child to the parent.

INABILITY TO CARE FOR CHILD DUE TO MENTAL OR EMOTIONAL ILLNESS

Liu v. Dep't of Family and Protective Servs., 273 S.W.3d 785 (Tex. App.–Houston [1st] 2008, no pet.) (evidence sufficient to support finding mother's mental illness would continue to render her unable to provide for child's needs through the child's eighteenth birthday under TFC 161.003(a)(1)-(2) and sufficient to support determination that Department made reasonable efforts to return child to mother under 161.003(a)(4))

In re C.J. and C.M.J., 2008 WL 4447687 (Tex. App.–Houston [14th] 2008, no pet.) (mem. op.) (TFC 161.003 requires only that the Department have TMC or PMC of the children for six months preceding the termination hearing)

In re B.G.S., 2007 WL 1341401 (Tex. App.–San Antonio 2007, pet. denied) (mem. op.) (mother's refusal to control her bipolar disorder with medication sufficient to support termination under TFC 161.003(a))

In re D.R., C.D., Jr., Q.R., E.R., and Y.R., 2007 WL 174351 (Tex. App.–Fort Worth 2007, no pet.) (mem. op.) (parental rights properly may be terminated under either TFC 161.001 or TFC 161.003 in cases in which a parent's mental illness or deficiency is relevant)

In re S.G.S., S.A.S., and S.L.L., 130 S.W.3d 223 (Tex. App.–Beaumont 2004, no pet.) (noncompliance with Americans with Disabilities Act may not be pled as affirmative defense to termination suit under (D) and (E), even though the mother was mildly mentally retarded; parents were permitted to present evidence and argument to jury on ADA)

In re B.L.M. and J.L.M., Jr., 114 S.W.3d 641 (Tex. App.–Fort Worth 2003, no pet.) (161.003 requires "all reasonable probability", not scientific certainty or beyond a reasonable doubt, that a parent's mental illness will continue until the children turn 18; testimony of paranoid schizophrenic parent that he did not intend to take medication for his disease sufficient to establish that he will continue to be unable to care for the children)

In re J.I.T.P., 99 S.W.3d 841 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (mother's mental state found to endanger child where mother had suicidal ideations and long history of noncompliance with medication schedule; relationship with husband violent; foster parents wanted to adopt child; case affirmed under endangerment grounds, mental health grounds not pled)

In re E.L.T., 93 S.W.3d 372 (Tex. App.–Houston [14th Dist.] 2002, no pet.) (unlike in a criminal trial, parent not required to be competent before parental rights terminated; parent's mental illness may serve as basis for involuntary termination under TFC 161.003)

Salas v. Tex. Dep't of Protective and Regulatory Servs., 71 S.W.3d 783 (Tex. App.–El Paso 2002, no pet.) (requires reasonable probability, not scientific certainty, that parent's mental illness will continue until children 18; dual diagnosis of mental retardation and mental illness, inability to protect children from physical and sexual abuse, and anticipated discharge from mental health facility at least one to three years in future sufficient)

13. Paternity Resulting from Criminal Act

Parental rights may be terminated if:

* the parent has been convicted of an offense committed under Texas Penal Code 22.011, 22.021 or 25.02 (*i.e.*, sexual assault, aggravated sexual assault, or prohibited sexual contact);
* the victim became pregnant as a direct result of the commission of the offense; and
* termination is in the best interest of the child. TFC 161.007.

Note that this ground applies not to a possible parent-child relationship between the sex offender and the victim (as in the case of incest), but between the offender and the child born of the pregnancy caused by the sexual offense. Restated, this ground authorizes termination of parental rights between a rapist and a child

conceived as a result of the rape. Termination under section 161.007 is not frequently pled or tried because of problems of proof, *i.e.*, consent issues and "he-said/she-said" problems.

As of this writing, the authors could find only one case affirming termination under this ground. *See In re A.J.B.*, 2003 WL 21403480 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (mem. op.). In *A.J.B.*, the appellant father pled guilty to sexual assault and the criminal judgment was admitted into evidence at the termination trial. The appellant complained on appeal that there were no pleadings on which to base termination on sexual assault. He also complained that the evidence was legally and factually insufficient to show he had committed a sexual assault that resulted in a pregnancy. The court noted that the criminal judgment reflected that the sexual assault had occurred some nine months before the child's birth and that the victim's age was 16. The court held that the issue was tried by consent where the father acknowledged he pled guilty to the sexual assault. Genetic testing confirmed paternity. The court found that this was legally and factually sufficient proof that a sexual assault resulted in the birth of the child. The court also found that termination would be in the child's best interest where the child's conception was a result of the rape of a sixteen-year-old mother by the forty-one-year-old appellant, the mother was appellant's third cousin, and appellant was on parole when he committed the assault. The best interest finding was also supported because the appellant father would never be able to support the child financially or emotionally because he had been sentenced to twenty-one years in prison. In addition, the father was $18,000.00 in arrears in child support from another child and had never offered to support the child.

14. Res Judicata

The court may terminate the parent-child relationship after rendition of an order that previously denied termination if:

* a subsequent petition is filed;
* circumstances of the child, parent, managing conservator, or other party affected by the prior order have materially and substantially changed;
* the parent committed an act listed under 161.001 before the date the order denying termination was rendered; and
* termination is in the best interest of the child. TFC 161.004(a).

In a hearing under subsection (a), the court may consider evidence presented at the previous hearing denying termination to the same parent [TFC 161.004(b)]. Section 161.004 means that the issue of termination can be revisited, notwithstanding a prior "final order" denying termination, if circumstances have *materially* changed since the first order. For example, if one or more of the grounds under 161.001 were clearly established in the first trial, but termination was denied based on "best interest," a subsequent termination order can be entered based on the same conduct at issue in the first trial plus any new evidence going to best interest.

Note that the *Slatton* case discussed below was decided prior to the enactment of section 161.004, which "was passed in response to the concern created by the holding in *Slatton*," as explained by the Waco Court in *In re T.V.*, below.

Legislation passed in 2009 will require the department, at each placement review: for a child for whom the department has been named managing conservator in a final order that does not include termination of parental rights, describe the efforts of the department to find a permanent placement for the child, including efforts to:

(A) work with the caregiver with whom the child is placed to determine whether that caregiver is willing to become a permanent placement for the child;

(B) locate a relative or other suitable individual to serve as permanent managing conservator of the child; and

(C) evaluate any change in a parent's circumstances to determine whether:

(i) the child can be returned to the parent; or
(ii) parental rights should be terminated.

(D) If the goal of the department's permanency plan for a child is to find another planned, permanent living arrangement, the placement review report must document a compelling reason why adoption, permanent managing conservatorship with a relative or other suitable individual, or returning the child to a parent are not in the child's best interest. TFC 263.502(c)(7) and (d), added by Senate Bill No. 939, 81st Leg., Reg. Ses., effective September 1, 2009.

These new provisions will push the department to reopen cases and proceed either to file for termination or work toward reunification or placement of the child outside the foster care system by modifying the PMC order to place the child with a caretaker other than the department.

RES JUDICATA

Thompson v. Tex. Dep't of Family and Protective Servs., 176 S.W.3d 121 (Tex. App.–Houston [1st Dist.] 2004, pet. denied) (evidence sufficient to prove circumstances materially and substantially changed since original petition was denied under 161.004(a)(2); mother's circumstances changed because her parental rights were terminated due to failure to follow the service plan, child's circumstances changed because progress in foster care readied him for more permanent placement, and father's circumstances changed because application for parole was rejected and because he failed to comply with service plan ordered by court in order denying the Department's original termination petition)

In re M.G.H., 2003 WL 22327209 (Tex. App.–Amarillo 2003, no pet.) (mem. op.) (despite the fact that the word "final" appeared in the title of the order, order was not final based on its contents; res judicata is affirmative defense under TRCP 94 and the parents waived it as they failed to plead or present it; the Department's failure to file a new petition after the trial court's initial denial of termination vitiated by parents' appearance and participation at trial which had the same force and effect as being served; parents' argument that evidence was erroneously admitted at the subsequent jury trial not preserved because they failed to produce the record of the initial bench trial or make a bill of exceptions)

In re C.T.E. and D.R.E., 95 S.W.3d 462 (Tex. App.–Houston [1st Dist.] 2002, pet. denied) (trial court properly admitted evidence of father's conduct that occurred prior to previous termination proceeding in which trial court did not terminate parental rights)

In re K.S., 76 S.W.3d 36 (Tex. App.–Amarillo 2002, no pet.) (res judicata defense rejected; prior suit involved different children of mother by prior marriage; collateral estoppel rejected; best interest factual determination unique to individual child; possibility that father sexually abused other children relevant)

In re T.V., 27 S.W.3d 622 (Tex. App.–Waco 2000, no pet.) (TFC 161.004 "was passed in response to the concern created by holding" in *Slatton v. Brazoria County Protective Servs. Unit*, 804 S.W.2d 550 (Tex. App.–Texarkana 1991, no writ); upholding trial court's use of evidence presented at *both* trials to support termination and best interest; TFC 161.004, instructive, not controlling, because no prior final appealable order denying termination)

15. Retroactive Application of New Grounds

There is some question as to whether the *actions* of the parent whose rights are being terminated must always have occurred after the effective date of the legislation. Although restrictions on "*ex post facto*" laws apply only to criminal statutes, Texas has a separate constitutional provision prohibiting "retroactive laws". TEX. CONST. art. I, 16. From the perspective of the child, most new termination grounds are "remedial" and do not involve substantive or vested rights in that they permit termination for behavior of the parent that is clearly harmful to the child. Nonetheless, to avoid a possible constitutional challenge, practitioners should avoid the retroactive application of new grounds to conduct occurring prior to the effective date of a new or amended ground. Bills adding new or modified termination grounds contain detailed information regarding effective dates, which can be located by reviewing the session laws, or online at http://www.capitol.state.tx.us/.

RETROACTIVITY

In re A.V. and J.V., 113 S.W.3d 355 (Tex. 2003) (retroactive application of (Q) permissible to terminate the rights of parent whose pre-1997 criminal conviction and imprisonment predated 1997 enactment of (Q))

In re E.M.N., 221 S.W.3d 815 (Tex. App.–Fort Worth 2007, no pet.) (mother's rights were not violated by retroactive application of (T) despite her conviction and imprisonment before its enactment; the underlying purpose of subsection (T) is not to add additional punishment to mother for murdering the child's father, but to safeguard public welfare and advance public interest by facilitating termination when one parent murders the other, an act previously used to support terminations under (E))

In re Tex. Dep't of Protective and Regulatory Servs., 71 S.W.3d 446 (Tex. App.–Fort Worth 2002, orig. proceeding) (retroactive application of amended statute permitting continuance pending resolution of criminal suit under TFC 161.2011, which is procedural or remedial in nature, does not involve substantive or vested right; retroactive application permissible)

In re A.R.R., 61 S.W.3d 691 (Tex. App.–Fort Worth 2001, pet. denied) (no valid ex post facto claim under (L) where sexual assault of child illegal when committed and earlier version of (L) provided for termination of rights for parent criminally responsible for death or serious injury of a child; nor under (Q) where two-year time from date petition filed did not extend before statute effective)

In re R.A.T., R.L.T., P.R.T., and B.T., 938 S.W.2d 783 (Tex. App.–Eastland 1997, writ denied) (allowing jury to consider conduct of parent that predated the effective date of (N) ground violated constitutional prohibition on retroactivity)

Sims v. The Adoption Alliance, 922 S.W.2d 213 (Tex. App.–San Antonio 1996, writ denied) (imposing 48-hour waiting period after birth for signing of voluntary relinquishment to a document signed before statute's effective date did not violate the prohibition against "retroactive" laws)

16. Alternatives to Termination

Courts may deny termination, but nonetheless grant permanent managing conservatorship to the Department or to an individual other than the parent. TFC 161.205; 263.404. PMC can be awarded to the Department only if the court finds that appointment of a parent as managing conservator would "significantly impair the child's physical health or emotional development; and it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator." TFC 263.404(a). An award of PMC to the Department without the termination of parental rights may relegate a young child to long-term foster care, and should only be done after considering the age and specific needs of the child. TFC 263.404(b). Nevertheless, the trial court has the authority and duty to consider not only termination of parental rights, but whether a preponderance of the evidence shows the appointment of a parent as managing conservator would "significantly impair the child's physical health or emotional well-being." The "clear and convincing" standard of proof does not apply to the determination of managing conservatorship. Thus, an opinion reversing a termination decree does not automatically vacate the order granting the department PMC of the child unless raised. *See* *In re J.A.J.*, 243 S.W.3d 611 (Tex. 2007).

The 81st Texas Legislature recognized long-term foster care is an undesirable outcome, and, effective June 19, 2009, established a priority list of options for permanency goals. PMC to the department is now defined as "another planned, permanent living arrangement for the child." Senate Bill No. 939, effective June 19, 2009, added the following section to Chapter 263, Family Code:

Sec. 263.3026. PERMANENCY GOALS; LIMITATION. (a) The department's permanency plan for a child may include as a goal:

(1) the reunification of the child with a parent or other individual from whom the child was removed;

(2) the termination of parental rights and adoption of the child by a relative or other suitable individual;

(3) the award of permanent managing conservatorship of the child to a relative or other suitable individual; or

(4) another planned, permanent living arrangement for the child.

(b) If the goal of the department's permanency plan for a child is to find another planned, permanent living arrangement for the child, the department shall document that there is a compelling reason why the other permanency goals identified in Subsection (a) are not in the child's best interest.

T.R.C.P. 139, The "Dracula" Rule

By Quinn Martindale[51]

In 2005, the Waco Court of Appeals reallocated trial court costs after a partially successful appeal. *Bryant v. Lucent Technologies*, 175 S.W. 3d 845, 852 (Tex. App.—Waco 2005, pet. denied). The trial court had assessed all trial court costs against the unsuccessful plaintiff. *Id*. The plaintiff appealed four issues, only one of which the Waco Court of Appeals sustained. *Id* at 852. Neither side asked for trial court costs to be adjusted in its brief. *Id.* In its initial opinion, which it subsequently vacated on rehearing, the Court of Appeals made no mention of trial costs, but its judgment assessed all costs "in this court and the court below" against the appellee. Opinion (07/06/05), *Bryant v. Lucent Technologies*, 175 S.W.3d. at 852 (10-03-00330-CV). The defendant filed a motion for rehearing in which it noted, "as currently phrased, an argument could be made that this Court awarded costs incurred at the trial court level to [plaintiff]." Appellee's Motion for Rehearing, *Bryant v. Lucent Technologies*, 175 S.W.3d (10-03-00330-CV). The Waco Court, citing T.R.C.P. 139, still awarded the appellant appellate costs but changed the allocation of trial costs: ordering the partially successful plaintiff to pay 75% and the defendant to pay 25%. *Bryant v. Lucent Technologies*, 175 S.W.3d at 849-852. Why did an appellate court reallocate trial costs? The answer lies in a 150+ year old rule that courts tried to bury almost a century ago – Texas Rule of Civil Procedure 139.

T.R.C.P. 139 states:

> When a case is appealed, if the judgment of the higher court be against the appellant, but for less amount than the original judgment, such party shall recover the costs of the higher court but shall be adjudged to pay the costs of the court below; if the judgment be against him for the same or a greater amount than in the court below, the adverse party shall recover the costs of both courts. If the judgment of the court above be in favor of the party appealing and for more than the original judgment, such party shall recover the costs of both courts; if the judgment be in his favor, but for the same or a less amount than in the court below, he shall recover the costs of the court below, and pay the costs of

In 1940, the rules committee adopted T.R.C.P. 139 unchanged from civil statute 2065. Civil statute 2065 can be traced back to at least 1856. In 1856, the Texas Supreme Court heard an appeal stemming from a suit to recover an account. *Foreman v. Gregory*, 17 Tex. 193 (1856). The plaintiff recovered thirty-nine dollars in the magistrate court, and the defendant brought the case before the district court by certiorari. *Id*. at 193. The district court, trying the case *de novo*, also found for the plaintiff but only awarded nineteen dollars and twenty-five cents. It assessed the costs of both courts against the plaintiff. *Id*. As there were no intermediate courts of appeal at that time, the plaintiff appealed directly to the Supreme Court, which held that the district court erred in its allocation of costs, stating that the allocation of costs "is regulated by statute, art. 716 (Hart. Dig.), and is too plain to require comment." *Id* at 194. Under art. 716 (the direct predecessor of T.R.C.P. 34), it held that the plaintiff should have recovered the costs of the magistrate court while the defendant should have recovered the costs of the district court. Thirty-five years later, the Texas Supreme Court made clear that this statute (which had become Art. 1432) regulated "the matter of costs in appeals from the justices' court to the district court." *Galveston v. Wiemers*, 74 Tex. 564 565 (Tex. 1889). The intent was to prevent the *de novo* retrying of cases merely to delay a judgment. *Id.* This well-intentioned rule, however, became a potential monster as the judicial system changed around it.

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The Legislature created the Courts of Appeals in 1891. After the advent of intermediate appellate courts, courts had to deal with a statute that seemed, on its face, to apply to the intermediate courts but had not been intended to do so. Early cases recognized that the statute was not intended to apply to the new intermediate courts. *See First Nat. Bank v. Rush*, 249 S.W. 183 (Tex. Com. App. 1923) ("We know of no statute in this state regulating the matter of taxing costs of appeal except the provisions under the head of practice in the county and district courts. R. S. arts. 2046, 2047. It is doubtful whether these articles have application to appeals in the Court of Civil Appeals and Supreme Court"); *Maxwell's Unknown Heirs v. Bolding*, 57 S.W.2d 874 (Tex. Civ. App.—Waco 1933) ("Art. 2065 was enacted for the purpose of prescribing the rule to be followed in assessing the costs in the county court where a case has been removed thereto by appeal or certiorari from the justice court, and does not have reference to the assessment of costs by the Court of Civil Appeals .... We therefore hold that said art. 2065 does not control in the matter here under consideration. "). These cases should have defanged rule 139.

Yet modern courts, including the Texas Supreme Court, have resurrected it, seeking to reallocate trial and appellate court costs using T.R.C.P. 139. *Alberts v. Wilson Enterprises*, 701 S.W.2d 248 (Tex. 1985) (memo op.). Recently, the San Antonio Court of Appeals addressed trial court costs. *See Price Construction v. Castillo* 147 S.W. 3d 431 (Tex. App.—San Antonio 2004, pet. denied). In that case, the trial court assessed the plaintiff's attorney ad litem fee against the defendant after a jury found for the plaintiffs. *Id* at 441. The appellate court reversed and rendered judgment for the defendant, and cited rule 139 for the proposition that the party that prevails on appeal does not have to pay trial costs. *Id*. at 440 ("as the prevailing party on appeal, Price is not required to pay the trial court costs, which include the $55,298 ad litem fee.") *citing* TRCP 131 and 139.

In a Houston case, the appellate court reversed and remanded on appeal, and awarded trial court costs to the prevailing party on appeal after trial court costs had been assessed against them. *Wilson & Wilson Tax Services, Inc. v Mohammed*, 131 S.W. 3d 231 243 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Our judgment is in favor of appellants. Under Civil Procedure Rule 139, appellants shall recover the costs of the trial court from appellees. Tex. R. Civ. P. 139") The El Paso court has also recently endorsed this approach. "A court of appeals may also be required to assess trial court costs in its judgment, but this depends on how the appellate judgment impacts the trial court's judgment. Rule 139 of the rules of civil procedure provides specific guidance for assessing appellate and trial court costs." *Newton v Calhoun*, 203 S.W. 3d 382, 385 (Tex. App.—El Paso 2006, no pet.). Using T.R.C.P. 139 as the method for determining costs becomes problematic, however, because it seems to conflict with T.R.A.P. 43.4, which provides an alternative formulation for the allocation of court costs. *See id.* at 385("In a civil case, the court of appeal's judgment should award to the prevailing party the appellate costs--including preparation costs for the clerk's record and the reporter's record--that were incurred by that party. But the court of appeals may tax costs otherwise as required by law or for good cause.")

The Dallas and Texarkana Courts have both tried to reconcile these two provisions by reading the "costs" in the last sentence as applying both to trial and appellate costs. *See Recognition Communication, Inc. v. American Auto. Ass'n, Inc.*, 154 S.W.3d 878, 894 (Tex. App.—Dallas 2005, pet. denied) ("When we read the plain language of both rule of civil procedure 139 and rule of appellate procedure 43.4, we conclude these rules can be harmonized to give effect to both.") *citing Burke v. Union Pacific Resources Co.*, 138 S.W.3d 46, 75 (Tex. App.—Texarkana 2004, pet. denied). Such a reading leaves Rule 139 as the default rule, which an appellate court can deviate from with "good cause." Where does this leave the modern practitioner?

Simply put, the situation is entirely unclear. The modern case law directly conflicts with old precedent without ever directly addressing it. Despite two cases directly stating that the predecessors of T.R.C.P. 139 applied only to appeals from justice to county court, modern courts have still reallocated trial court costs based on the rule. Until courts place T.R.C.P. 139 into its historical context, it will continue to lie in wait to bite unaware practitioners.

Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Christopher Nickelson (*C.N.)*, Jeremy C. Martin (*J.C.M.)*

DIVORCE
Grounds and Procedure

★★★★★ Texas Supreme Court ★★★★★

A NEW CITATION IS NOT REQUIRED FOR SERVICE OF AN AMENDED PETITION REQUESTING A MORE ONEROUS JUDGMENT.

¶09-5-01. ***In re E.A.***, 287 S.W.3d 1 (Tex. 2009) (6/5/09).

Facts: Father and mother divorced. Final decree appointed them JMC, gave mother the exclusive right to determine children's primary residence and granted father visitation. Five months after the divorce, father filed a petition to modify the parent-child relationship, seeking to gain the right to determine children's primary residence. Father's petition did not contain an affidavit alleging special circumstances. Mother received service of process, but did not make any appearance. Three months later, father amended his petition to allege drug use, request SMC and a credit on child support. Father attached a supporting affidavit to the amended petition but not a certificate of service. Father claimed he sent mother the amended petition via certified mail, but that the post office returned it as undelivered after three attempts. The amended petition, transmittal letter, return receipt and court order reflect the same street address and city but three different zip codes. Trial court granted default judgment granting father exclusive right to determine residence, granting no visitation rights to mother and ordering mother to pay child support. Mother moved to set aside the default judgment and for new trial, arguing that there was no service of the amended petition. Trial court denied both motions, which the appeals court affirmed. Appeals court ruled that T.R.C.P. 21(a) eliminated the requirement for a new citation for service of a more onerous amended petition, and that mother had constructive notice of the amended petition. Mother appealed, claiming that a new citation was required for the amended petition, and that she did not have constructive of the amended petition.

Held: Reversed and remanded to trial court.

Opinion: In *Weaver v. Hartford Accident and Indemnity Co.*, 570 .W. 2d 367, 370 (Tex. 1978), Court held that a new citation of service is needed when the plaintiff seeks a more onerous judgment by amended petition against a non-responsive party. In 1990, Court amended T.R.C.P. 21(a) to allow service by a number of methods, including certified mail, for "[e]very notice required by [T.R.C.P.], and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules." The question of whether the amendments to T.R.C.P 21(a) eliminated the *Weaver* requirements is an issue of first impression. The T.R.C.P. do not require plaintiff to serve a non-answering defendant with a new citation for a more onerous amended petition. While some service is required to support a default judgment, service under T.R.C.P Rule 21(a) is sufficient. Therefore, father was not required to obtain a new citation.

T.R.C.P. 21(a) only creates a presumption of service from a mailing. It is not evidence, and can be rebutted when the defendant introduces evidence that the documents were not received. A certificate of service is prima facie evidence of service, but father's amended petition did not include a certificate. Therefore, father has not made a prima facie case supporting service. Furthermore, the record is insufficient to establish constructive notice because there is no evidence that mother was ever served with the amended petition. Since a default judgment requires evidence that a non-answering party was served with a more onerous amended petition there is no such evidence in the record, the default judgment is overturned.

Concurrence (J. Brister). Although the Court was correct to set aside the default judgment, it erred in eliminating *Weaver*'s requirement of a new citation for an amended petition asking for a more onerous judgment. This requirement has been well established for 150 years. The requirement protects unsophisticated defendants who might be misled by the lack of a citation into thinking that there are no penalties for ignoring the amended petition. It also prevents sophisticated litigants from adding on to their petitions after default occurs. The Court did not intend to eliminate the *Weaver* requirement in 1991, and no legal scholarship thought it had done so. The Court should not have eliminated the requirement of a new citation for a more onerous amended petition.

Editor's Comment: *This is a big shift in default judgment practice. Prior to this decision you could always undo the more onerous requests for relief that a plaintiff added to his or her petition once he or she realized the defendant had defaulted. Now the grounds for setting aside a default based on lack of notice are shrinking. Net effect on the practice of law: attorneys must be more knowledgeable about, and proficient at, the equitable Craddock standard for setting aside default judgments. C.N.*

Editor's Comment: *The danger of "raising the stakes" in an amended petition is especially relevant in family law cases where factual allegations can result in termination of parental rights. Not requiring service by citation of a petition that has been amended to request involuntary termination of parental rights arguably has constitutional repercussions. J.C.M.*

Editor's Comment*: The Court got this one way wrong. As Justice Brister says in the concurrence, the law for 150 years has been that you can only get default judgment on the petition served by citation on the defendant. If you want relief that wasn't in that petition, then amend and serve with a new citation. This new ruling sends out an engraved invitation for litigants to manipulate the system. Ding let the game-playing begin! M.M.O.*

Editor's Comment: *The Court holds that an amended petition may be served under Rule 21a. But the conditions for effective service are onerous. As a practical matter, a lawyer who does not receive a signed green card must have the opposing party personally served with amended pleadings. J.V.*

TRIAL COURT DID NOT ERR BY ALLOWING MOTHER TO USE PLEADINGS IN A SAPCR WITH THE CAUSE NUMBER OF A SEVERED DIVORCE CASE.

¶09-5-02. ***In Re. S.M.V.***, 287 S.W.3d 435 (Tex. App.—Dallas 2009, no pet. h.) (6/10/09)

Facts: Husband and mother married on 6/17/03. Husband filed for divorce on 4/8/05. During the divorce proceeding, mother alleged husband was not biological father of mother's child born on 10/22/02. Biological father filed a petition to intervene in the divorce. On 8/24/06, trial court severed SAPCR from divorce. On 11/10/06, biological father filed an "Original Counterpetition in [SAPCR]" in which he requested orders for conservatorship, visitation and support of child. On 11/29/06, husband filed an "Original Counter-Petition in [SAPCR]" requesting to be appointed SMC and that mother and biological father be appointed possessory conservators and ordered to pay child support. Divorce and SAPCR were tried concurrently to a jury in 5/07. At trial, outside the presence of the jury, husband asked that mother's pleadings in the SAPCR be struck because they had the divorce cause number on the pleadings, not the cause number for the SAPCR. Trial court overruled the objection. Trial court ruled on 7/30/07 after receiving the jury findings. Trial court issued an order that appointed husband, biological father and mother JMC, and changed child's name from husband's to father's. Husband appealed, arguing that the trial court erred by allowing mother to put on evidence in the SAPCR proceedings when she had no filings.

Held: Affirmed.

Opinion: T.R.C.P. 71 requires trial courts to treat wrongly designated pleadings as properly designated if justice requires. Husband argued that the "entire lack of a pleading" was distinct from wrongly designated pleading, and that T.R.C.P. 71 did not apply not to a severed case involving a third party. Although the Court found no case law on the applicability of T.R.C.P. 71 to severed cases, the plain language of the rule say that is applies "[when] a party has mistakenly designated any plea or pleading." The Texas Supreme Court has said that decisions should be based on substance rather than technicalities. Trial court, by allowing the incorrectly numbered pleading to be filed in the SAPCR case looked to the substance of the case instead of basing its decision on a narrow procedural issue. Since husband was a party to the divorce case where the pleading was wrongly filed, he had actual notice of the pleading and was not confused or misled. Therefore, trial court did not err by allowing mother to put on evidence.

TRIAL COURT ERRED BY ENTERING THREE FINAL JUDGMENTS

¶09-5-03. ***Lavender v. Lavender***, ___ S.W.3d ___, 2009 WL 1748970 (Tex. App.—Texarkana 2009, no pet. h.) (6/25/09)

Facts: In the divorce decree, Trial Court awarded Wife the home, a boat, a truck, and a camper as part of her share of community property. It ordered Wife to pay all debts on the communal property she received and indemnified Husband from all obligations. Wife moved out of the home and ceased making payments on the home and the truck. Husband paid $800 to keep the home from going into foreclosure, as well as the utility bills, back taxes on the home and the truck payments. Wife allowed the secured creditor to repossess the truck. The secured creditor then sought a deficiency judgment of $7,059.71 from Husband. Husband sued Wife for his expenses in discharging debts Wife failed to pay as ordered. Trial Court held hearing on 7/31/08 and entered three separate judgments on 12/19/08. It ordered Wife to pay Husband $9,429.69 to hold him harmless and indemnify him for all debts resulting from the foreclosure of the truck. This judgment stated that "all relief not expressly granted herein is hereby denied." Its second judgment held that Wife had abandoned the home and that it was no longer her homestead. It granted Husband an interest-bearing judgment of $9,429.69 secured by a lien on the home. Trial Court ordered the sale of the home with any excess over the judgments payable to Husband. This judgment stated that "all relief requested in this case and not expressly granted is denied", and added "this judgment finally disposes of all parties and claims and is appealable. The third judgment mirrored the second judgment, but added that Husband's lien was against all of Wife's real property in Harrison County. It contained no statement of finality. Wife appealed.

Held: Reversed and Remanded.

Opinion: Beside a few exceptions, there can only be one final judgment in a case. In circumstances where there appears to be more than one final judgment, court try to determine which one is the final one. They may either look at the timing of the judgments or whether the judgments purport to be final in a 'Mother Hubbard' clause. Since these judgments were all entered on the same day, and two contain a variation of the Mother Hubbard clause, the appeals court has no basis to determine which judgment was intended to be final. There is little case law on how to deal with simultaneous judgments, but one court has held that the correct step is to read the judgments together as one final judgment. This situation does not lend itself to blending the judgment because the judgments partly overlap. Abating the matter to Trial Court to enter the correct judgment is unsatisfactory because the original judge has retired, and the record contains insufficient evidence to determine the original intent. Therefore, the case is reversed and remanded.

Editor's Comment: *Rule 301 mandates that there be "only one final judgment" in any cause "except where otherwise specially provided by law." Since the rules "specially provide" that a trial court may dispose of parties or claims through many different procedures (i.e., summary judgment, separate trials, etc.), rather than a conventional trial on the merits, you usually wind up with a number of orders that constitute the trial court's judgment. Usually all prior orders are deemed "merged" into the last order that disposes of the remaining parties or claims. However, a problem arises when a trial court enters orders that address the same*

subject matter but don't reference one another. In addition, difficult problems arise when, as here, the trial court enters a number of orders covering the same or related subject matter on the same day. Remember this case for such problems. C.N.

Editor's Comment: *The "one final judgment" rule is alive and well. M.M.O.*

TRIAL COURT ERRED IN AWARDING CUSTODY OF CHILDREN WITHOUT JURISDICTION WHEN CHILDREN HAD NOT BEEN ABANDONED.

¶09-5-04. ***In re Lay Wah***, ___ S.W.3d ___, 2009 WL 2152565 (Tex. App.—Dallas 2009, no pet. h.) (7/21/09)

Facts: Father is a U.S. citizen born in Taiwan. Mother is not a U.S. citizen, and was born in Singapore. They were residents of Beijing when they married in Las Vegas in 1997. Children were born in Singapore in 1999 and 2001. Family moved to Plano, TX in 06/01, and bought a home there. In 01/04, family moved to Shanghai following father's promotion. On 03/10/08, father resigned from his job and brought the children to the U.S. without mother's knowledge or consent. Father and children moved to Plano on 03/24/08. Father filed for divorce on 04/29/08 based on insupportability. He also sought a division of the parties' community estate and orders for conservatorship, possession and support of the children. The petition alternatively requested that the court use its temporary emergency jurisdiction under the UCCJEA. Mother filed a special appearance with a plea to the jurisdiction, requesting that trial court dismiss the petition for want of jurisdiction. At the hearing, mother orally requested that trial court award her immediate custody of the children and their belongings, as well as order husband to return mother's green card, social security card and jewelry. On 05/01/08, trial court dismissed the divorce petition and declined to exercise emergency jurisdiction. After dismissing the case, trial court awarded custody of children and their belongings to mother, and ordered father to give mother her green card, social security card and jewelry. Husband appealed and petitioned for a writ of mandamus.

Held: Judgment vacated in part and affirmed in part. Mandamus dismissed.

Opinion: T.F.C. §6.301 requires that either the petitioner or the respondent have been domiciled in the state for 6 months and resided in the count for 90 days. Although these requirements are not jurisdictional, they are required to maintain an action for divorce. Although family owned the house in Plano from 06/01 to the present, they maintained no connection to Texas while living in Shanghai. Therefore, trial court did not abuse its discretion ruling that father could not bring his divorce action. Father argued even though he did not meet the residency requirements, trial court was still the appropriate forum under the UCCJEA because China is not a viable forum. Because trial court found that it was in the best interests of children to dismiss the custody proceeding and father did not attack the trial court's order on that basis, the dismissal must be affirmed.

Trial court has temporary emergency jurisdiction when children are present in the state and have been abandoned or are subject to mistreatment or abuse. This exercise of jurisdiction is reserved for extraordinary circumstances. Nothing in the record justified trial court's exercise of temporary emergency jurisdiction. When mother requested custody of children at the hearing, there was no evidence children had been abandoned or were in an emergency situation. Accordingly, court of appeals vacated the custody order and the order requiring father to give mother her green card, social security card and her jewelry.

FATHER COULD NOT REQUEST AN EXTENSION TO FILE A MOTION FOR NEW TRIAL UNDER T.R.C.P. 306A WHEN HE RECEIVED NOTICE OF THE JUDGMENT LESS THAN TWENTY DAYS AFTER TRIAL COURT SIGNED THE ORDER.

¶09-5-05. ***In re Rhodes,*** S.W.3d , No. 02-09-043-CV (Tex. App.—Fort Worth 2009, orig. proceeding) (7/27/09)

Facts: On 05/15/07, mother filed a petition to adjudicate parentage. Father denied parentage, and trial court ordered genetic testing. On 06/04/08, trial court entered agreed temporary orders. Trial court set trial for 12/04/08. On 12/03/08, trial court signed an agreed order allowing father's attorney to withdraw from the case. Father did not appear for trial on 12/04/08. Father filed a request for a T.R.C.P. 306a(4) extension to file a motion for new trial. Attached to the request was an affidavit in which father stated he had not learned on the 12/04/08 final judgment until 12/18/08. Father filed a motion for new trial on 01/23/09 which trial court granted on 02/03/09, 61 days after the 12/04/08 order. On 02/17/09, trial court made a docket entry noting that it granted the motion for new trial and that father had not received notice of the 12/04/08 judgment until 12/26/08. Mother petitioned for mandamus.

Held: Mandamus granted.

Opinion: If a party adversely affected by a judgment does not receive notice or have actual knowledge of the judgment within twenty days, the post-judgment time table begins when the party receives notice as long as the party 1) follows the requirements of T.R.C.P 306a(5); and (2) proves that it received notice of the judgment between twenty and ninety-one days after the judgment was signed. Father's affidavit states that he contacted the court on 12/18/08 and was told that the order had been signed but that it had not yet been mailed to him. He asked the court to mail it to him immediately, and received it shortly after Christmas Day. Although father contends he did not have knowledge of the order until he received it and became aware of its contents, T.R.C.P. 306a only requires notice of the order. Therefore, father's affidavit conclusively establishes that he acquired actual knowledge of the judgment on 12/18/08, less than 20 days after the judgment was signed. He thus cannot utilize T.R.C.P. 306a, and trial court abused its discretion by granting the motion for new trial after its plenary power had expired.

Editor's Comment: *Object lesson for everyone: once you learn a judgment has been signed, don't wait on the mail. Get a copy as soon as possible. Rule 306a only provides relief if twenty days pass and you receive no notice of judgment. If, on day nineteen, you find out about a judgment, get moving. C.N.*

SINCE HUSBAND NOT SERVED WITH MORE ONEROUS PETITION, ERROR ON FACE OF THE RECORD.

¶09-5-06. ***Cox v. Cox***, ___ S.W.3d ___, 03-08-00650-CV (Tex. App. -- Austin 2009, no pet. h.) (8/28/09)

Facts: Husband and Wife married in 1983 and separated in 2007. On 02/01/08, Wife filed for divorce. On 04/17/08, Husband, Wife, Wife's attorney signed a Rule 11 agreement that purported to be binding and irrevocable. The agreement also stated that the hearing scheduled for 04/21/08 "shall be passed." Trial court entered temporary orders that were attached to the Rule 11 agreement. On 07/23/08, the day of the default-judgment hearing, Wife filed 1st amended original petition that contained a certificate of service. Husband did not appear at the hearing. Trial court entered final decree of divorce that included provisions not listed in the written settlement agreement. On 09/11/08, Husband filed a motion for new trial arguing he had not received notice. On 09/26/08, Husband filed motion to extend post-judgment deadlines. Trial court denied both motions on 10/22/08, finding that Husband received constructive notice. Husband filed a notice of restricted appeal.

Held: Reversed and remanded.

Opinion: Since there are substantive differences between the written settlement agreement and the final decree, the hearing where trial court entered the final decree constituted the decision-making event. Although Wife cites cases holding that a party participates in the decision-making event when they signed or approved of the final decree even if they were not present at the decision making event, those cases are distinguishable because there were substantial changes between the rule 11 agreement and the final decree. Husband therefore meets the non-participation requirement of a restricted appeal. Copies of every pleading filed must be served on all parties not less than three days before a hearing. Wife did not file her 1st amended petition until the morning of the 07/23/08 hearing. Since Wife did not provide proof of the method or date of service, the court of appeals presumes Husband was served on the day the pleading was filed. Furthermore, the address on the certificate of service was the address of the marital residence, not Husband's last known address. Therefore, Husband not served with 1st amended petition. A default judgment cannot stand if the defendant was not served under rule 21(a) with a more onerous amended petition. Because a permanent injunction is more onerous than a temporary injunction, the final decree was more onerous despite the fact that the injunctive relief sought in the final order was virtually identical to the injunctive relief in the temporary orders. Furthermore, the written settlement agreement did not provide constructive notice that the final decree would contain the same injunctions. Since Husband was not served with the more onerous amended petition, there is error on the face of the record and the default judgment cannot stand.

DIVORCE
Division of Property

HUSBAND WHO FAILED TO GIVE CREDIBLE EVIDENCE CONCERNING PROPERTY DIVISION AT TRIAL CANNOT COMPLAIN OF TRIAL COURT'S DIVISION ON APPEAL.

¶09-5-07. ***Palacios v. Palacios***, ___ S.W.3d ___, 2009 WL 1653453 (Tex. App.—Amarillo 2009, no pet. h.) (6/10/09)

Facts: Husband and wife divorced. Trial court divided four major property items: two pieces of realty in Mexico, a residence and an empty lot. Trial court found that neither party offered credible evidence as to the value of the properties. Husband appealed, claiming that trial court abused its discretion in dividing the property.

Held: Affirmed.

Opinion: Appellants cannot raise issues that they helped create. Given the poor quality of evidence introduced by husband and wife, both effectively invited error in trial court's division of the property. Therefore, husband cannot raise the issue on appeal.

Editor's Comment: *The doctrine of invited error has no place here. The trial court specifically admitted that it had insufficient evidence upon which to base the property division complained of on appeal. Regardless whose "fault" it was in failing to marshal sufficient evidence, the trial court abused its discretion in ordering a property division in the absence of evidence to support that division. Neither the trial nor appellate court recognized that the trial court had the option to refuse to rule until the parties had proffered sufficient evidence to support a ruling. J.C.M.*

Editor's Comment: *The doctrine of invited error lies behind the Court's opinion in this case. Simply stated, you can't complain about something you helped cause. Here, the opinion notes that both parties "wanted to play lowball/highball," undervaluing the property to be awarded to them and overvaluing the property to be awarded to their spouse. Neither party presented credible evidence as to property values, so they both helped cause the resulting property division – good or bad. Since husband took a risk in his trial strategy by not producing credible evidence, he is stuck with the trial court's property division and precluded from challenging it on appeal. M.M.O.*

Editor's Comment: *The parties "were not open and truthful" with the trial court. Both "wanted to play low ball/high ball" with respect to the community estate. When asked about the value of a residence in Mexico, the husband replied, "I have no idea." It must have been a tough record for an appeal. J.V.*

BENEFITS FROM THE TEMPORARY DISABILITY RETIRED LIST ARE NOT RETIREMENT PAY.

¶09-5-08. ***Thomas v. Piorkowski***, 286 S.W.3d 662 (Tex. App.— Corpus Christi 2009, no pet. h.) (6/11/09)

Facts: Husband and wife divorced 12/3/04. Final decree awarded half of husband's "disposable retired pay" to wife. On 5/5/06, US Navy placed husband on Temporary Disability Retired List (TDRL) which entitled him to receive temporary retirement benefits. On 9/27/06, wife filed a motion to clarify requesting that she be awarded a share of husband's TRDL benefits. Husband argued that TDRL benefits were based on his disability and therefore were disability pay. Trial court held a hearing in 3/07, in which it awarded half of the TDLR pay to wife in a clarification order. Trial court held husband in contempt for not making payments. Husband appealed.

Held: Reversed and remanded.

Opinion: The Uniformed Services Former Spouses' Protection Act makes military retirement pay divisible upon divorce, but excludes disability pay. Husband had not served long enough to be entitled to retirement pay, but only received the pay because of his disability. Therefore, the entirety of the gross pay is not divisible upon divorce, and the trial court erred in awarding a portion to Wife, holding Husband in contempt and holding Wife was entitled to a retroactive arrearage.

Editor's Comment: *This case is reminiscent of Hagen v. Hagen, 282 S.W.3d 899 (Tex. 2009), where the Texas Supreme Court observed that a divorce decree awarded a portion of the husband's military retirement pay to the wife if, as and when received. Said the Court: "As discussed previously, such military retirement pay did not include VA disability benefits." J.V.*

DIVORCE
Post-Decree Enforcement

WIFE CANNOT RECOVER NON-REFUNDABLE RETAINER PAID TO HUSBAND'S LAWYER

¶09-5-09. ***In re C.H.C.***, ___ S.W.3d ___, 2009 WL 1887128 (Tex. App.—Dallas 2009, no pet. h.) (7/2/09)

Facts: Wife obtained a judgment of over $400,000 against former Husband. She subpoenaed Husband's attorney and discovered Husband paid attorney a $15,000 retainer of which $12,798.50 remained. Trial court issued an *ex parte* turnover order instructing Husband's attorney to turn the funds over. Husband filed a motion to dissolve the order. The fee agreement stated that the retainer was non-refundable and required a minimum fee of $15,000. Wife's attorney testified that, based on his experience, the retainer was, in reality, an advance payment of fees. Husband's new wife testified that she had paid the retainer from her separate property and that Husband had no possession or control of funds. Husband's attorney testified that he deposited the retainer in his operating account, not his trust account. Trial court vacated the order. It held that David had never possessed the funds used to pay the retainer which was a requirement for the turnover statute, Civil Practice and Remedies Code §31.002.

Held: Affirmed.

Opinion: Although trial court may order a judgment debtor to turn over property that cannot be readily attached under §31.002, that statute only applies to property within the debtor's possession or under his control. There was sufficient evidence to support the court's finding that Husband never controlled the funds.

Editor's Comment: *Critical to the court's decision was whether the retainer was paid in advance to secure the lawyer's services and to compensate the lawyer for other, lost opportunities for employment. If a retainer meets these requirements, it is a "true retainer" and is earned upon receipt. "If a fee is not paid to secure the lawyer's availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer." This lawyer's fee agreement recited, among other things, "that one purpose of the retainer was to compensate [the lawyer] for lost opportunities." J.V.*

SAPCR
Conservatorship

TRIAL COURT ABUSED ITS DISCRETION WHEN IT AWARDED MOTHER SMC WITHOUT EVIDENCE OF A MATERIAL CHANGE IN CIRCUMSTANCES.

¶09-5-10. ***In re A.B.P.*** ___ S.W.3d ___, 2009 WL 1677819 (Tex. App.—Dallas 2009, no pet. h.) (6/17/09)

Facts: Mother and father divorced in 2005 and became J.M.C. with mother having the exclusive right to designate child's residence. Trial court ordered father to pay $1000 per month in child support, maintain health insurance for A.B.P. through his employer, and notify mother of any change of employment. In 2006, father filed a petition to reduce child support. In 01/07, trial court ordered a reduction to $600 per month but also found that father had not maintained coverage for child and awarded $1,120 to mother to cover costs of premiums. In 4/07, father filed a petition seeking the exclusive right to designate child's residence, to receive child support from the mother. Father alleged mother had a history of family violence and asked trial court to order mother to complete a battering prevention program. In 5/07, mother filed a counter-petition seeking sanctions against father for failing to notify mother of his change of employment and that he had enrolled child in his new employer's health insurance plan. In the counter-petition, mother generally pleaded a material and substantial change in circumstances. In 6/07, father filed an amended petition seeking to be appointed SMC and to receive child support from mother. Trial court issued an order granting mother the right to designate three weeks of possession during the summer first, appointing mother SMC, and father possessory conservator. It increased father's child support obligation to $1,380 per month. It also sanctioned father and ordered him to pay $11,040 for violating the notice requirement of the divorce decree as well as attorney's fees. Father appealed.

Held: Reversed in part, affirmed in part.

Opinion: TFC §156.101 empowers trial court to modify conservatorship when it is in the child's best interest and there has been a substantial and material change in circumstances. Trial court did not include a finding that the circumstances had changed. Although mother alleged a material and substantial change in circumstances, she still had to prove the allegation by a preponderance of the evidence. Mother produced no evidence of a material change of circumstances and testified that there had been no significant change in anybody's circumstances since the prior order. Although there was testimony that mother and father continued to have problems getting along, there was no evidence that this difficulty was new or different since trial court entered the prior order. There was, in fact, no evidence of the conditions when trial court entered the prior order as compared to the circumstances at the time of the hearing. Therefore, the evidence is legally insufficient to support the change of conservatorship. Father did not preserve his other issues for appeal.

Editor's Comment: *It's a sad thing that the parties continued to fight with each other such that the more recent fights were nothing new. The child, who was two years old at the time of the 2005 divorce, is the biggest loser in this case: Regardless how blameworthy either parent might be, the fact is that the child's parents*

can't agree on what's best for him. Perhaps the legislature should consider failure to change circumstances for the better as a ground for modification. J.V.

THE EVIDENCE MUST SUPPORT THE LOGICAL INFERENCE THAT SOME SPECIFIC, IDENTIFIABLE BEHAVIOR OR CONDUCT OF THE PARENT WILL PROBABLY HARM THE CHILD

¶09-5-11. ***In re B.B.M.,*** ___ S.W.3d ___, 2009 1801035 (Tex. App. – Dallas 2009, no pet. h.) (6/24/09)

Facts: Shawn and Samantha are the biological parents of B.B.M. Samantha learned she was pregnant at about 5 months. When Shawn learned of the pregnancy, he called Samantha at her new boy friend's house to speak with her and an argument ensued. After which, Samantha immediately considered placing the unborn baby up for adoption. The mother of her boyfriend told her about a couple in Idaho, the Hesses, who wanted to adopt a child. Samantha called LDS, the adoption agency the Hesses were using and spoke with Sidwell, one of the caseworkers. Samantha met with Kidwell and told her Shawn was the father and indicated that Shawn new about the pregnancy, but she did not know where he was. Samantha did provide Shawn's date of birth and SSN. After this meeting, Samantha asked for a new caseworker. She next met with Larsen, who also asked about the paternity of the baby. She stated she was fairly certain Shawn was the father, but her boyfriend could also be the father. She told Larsen that Shawn was either living in Dallas or going to school in Florida. After being asked several times, Samantha finally admitted that Shawn lived in Granbury and gave Larsen the phone number for Shawn's mother, Sandra.

Shortly before the baby was both, Sandra received a call from Samantha's family telling him Samantha was bout to give birth. Shawn realized given the timing, he might be the father. The next day, Larsen called Sandra and told her Samantha was planning on putting the baby up for adoption. Sandra told Larsen Shawn would not allow the baby to be adopted if he was the father. Sandra also spoke with the social worker at the hospital and told her Shawn would not agree to the adoption. The social worker called Larsen and also informed him that Shawn was not agreeing to the adoption. Samantha and her boyfriend both testified that Shawn called them and said he didn't want to be on the birth certificate and agreed to the adoption. Shawn testified that he had told them he was supportive of the adoption plan.

The baby was born on July 2, 2005, and Samantha asked that no information be given out about her or the baby except to certain named individuals. Shawn was not one of those. The Hesses were present at the birth. They were told Shawn was possibly the father and that he had been calling the hospital and was concerned about what was happening. The Hesses signed a "Contract and Acknowledgement of Legal Risk in Placement" that they understood there was a risk the birth parents would not relinquish or terminate their rights to the baby and the child could be removed from their home. Samantha signed an affidavit relinquishing her rights, but Shawn was not contacted after the birth. Larsen told them things had been worked out with Shawn, and the Hesses took the baby home to Idaho.

On July 28, 2005, Shawn filed his notice to claim paternity of the baby with the paternity registry. Larsen did not send a written request to the registry inquiring about potential paternity claims until 09/07/05. Subsequently, Shawn called Samantha telling her the adoption was illegal. He testified that the months following the birth, he had contacted several lawyers, wrote a letter to the governor's office, and contacted the FBI and father's rights group in an attempt to assert his rights. Larsen then sent Shawn an affidavit to sign relinquishing his rights, which he refused to do. LDS then filed suit to terminate Shawn's rights. A paternity test showed Shawn to be the biological father. The Hesses intervened in the suit. A jury refused to terminate Shawn's rights, awarded managing conservatorship to the Hesses. Shawn appealed.

Held: Affirmed in part, reversed in part, and remanded.

Opinion: The strong presumption that the best interest of a child is served by appointing a natural parent as managing conservator is deeply embedded in Texas law. To overcome this presumption, a nonparent must

prove by a preponderance of the evidence that appointment of the parent as managing conservator would significantly impair the child's physical health or emotional development. The evidence cannot merely raise a suspicion or speculation of possible harm. Instead, the evidence must support the logical inference that some specific, identifiable behavior or conduct of the parent will probably harm the child. Evidence that a nonparent would be a better custodian of the child is wholly inadequate to meet this burden.

The evidence relied upon by the Hesses to support the jury's verdict primarily relates to the potential impairment of the child's emotional development resulting from his removal from the Hesses' home. This focus on potential harm caused by the child's removal is misplaced. The proper focus of the court's inquiry is solely upon whether the placement of the child with the natural parent would significantly impair the child's physical health or emotional development.

Samantha's testimony regarding past incidents between her and Shawn is greatly outweighed by the evidence showing that awarding managing conservatorship to Shawn poses no threat to his son's physical or emotional well-being. The evidence shows that Shawn has struggled to assert his right to be a father to his son and that he is capable of forming a loving and supportive bond with his child. To deny him this parental right, in favor of a nonparent, based solely on testimony of alleged incidents that took place in one past relationship, which the record before us reveals was characterized by inappropriate behavior on both sides, would both shock the conscience and be manifestly unjust.

Editor's Comment: *This is the one time in history that a potential father actually files with the Paternity Registry to protect his parental rights. The fact, alone, that the adoption agency did not check for filings with the Paternity Registry should be enough to set aside the adoption. Then, applying the larger-than-life Troxel standard, father gets the child back. Sounds like the right result here. This father got a really bad deal and probably spent a ton of money on attorneys in making things right. Good for him that he kept after them and didn't just give up. I'm sure there was a civil suit out there too. M.M.O.*

TRIAL COURT ABUSED ITS DISCRETION BY APPOINTING ATTORNEY AD LITEM AND ORDERING SOCIAL STUDY IN UNCONTESTED DIVORCE AND SAPCR INVOLVING INDIGENT PARENT.

¶09-5-12. ***In re Villanueva,*** ___ S.W.3d ___, 2009 WL 2060093 (Tex. App.—Texarkana 2009, orig. proceeding) (7/17/09)

Facts: Mother, pro se, filed both a divorce action and a SAPCR, attaching an affidavit of inability to pay costs. On 02/23/09, trial court entered an order sua sponte appointing attorney ad litem and compelling home study. The order assessed the parties an advance fee of $750 for the appointing ad litem, as well as an unspecified reasonable fee for the social study. Father filed a waiver of service. Attorney ad litem filed an answer on behalf of the children on 03/04/09. Mother objected to trial court's order on 03/18/09. Trial court overruled mother's objection to the social study and abated mother's objection to the appointment of the attorney ad litem. Mother petitioned for a writ of mandamus.

Held: Mandamus granted.

Opinion: A petition in a suit to dissolve a marriage involving minor children must include a SAPCR. A SAPCR must include a parenting plan approved by trial court as in the best interests of children. Trial court has discretionary authority to appoint an attorney ad litem, but it must consider the ability of parties to pay and balance the child's interests against the costs to the parties. Trial court cannot require an appointed attorney ad litem to serve without reasonable compensation. Since no one contested mother's affidavit, she is indigent as a matter of law. Therefore, trial court could only come to the conclusion that mother was unable to pay the costs of the attorney ad litem and the social study. Therefore, ordering her to pay the costs effectively denied mother a forum in which to dissolve her marriage and resolve custody issues.

TFC §156.102 APPLIES WHEN MOTHER FILED PETITION WITHIN A YEAR OF DIVORCE EVEN IF HEARING HAPPENS MORE THAN A YEAR LATER.

¶09-5-13. ***In re S.A.E.***, ___ S.W.3d ___, 2009 WL 2060087 (Tex. App.—Texarkana 2009, no pet. h.) (7/17/09)

Facts: Father and mother divorced 07/25/06. Trial court appointed them JMC of children and gave father the exclusive right to determine children's primary residence, limited to South Carolina. Eastburn was stationed in Georgia on active military duty. Father and mother agreed to modify the terms of possession to accommodate Eastburn's schedule, and mother regularly drove the children between South Carolina and Georgia. Mother learned that Texas trial court would lose jurisdiction if she did not return to Texas within six months of the divorce decree being signed. Father learned mother intended to take children to Texas and filed an emergency motion to prevent the move. Parents met at a police station in Georgia to determine who had a legal right to possession at that time. During the meeting, mother left secretly with the children and drove to Texas. On 01/23/27, mother filed a petition to modify the parent-child relationship. Trial court entered temporary possession orders on 06/09/07 and held a hearing on 08/29/07. Trial court asked both sides to brief on whether TFC §156.101 or §156.102 governed the dispute but did not rule on the issue. On 08/20/08, trial court modified the order by awarding mother the exclusive right to determine the children's primary residence. No one requested findings of fact and conclusions of law. Husband appealed.

Held: Affirmed.

Opinion: Under TFC §156.101, trial court may modify an order in a suit affecting the parent-child relationship if it would be in the best interest of the child, and the circumstances of the parent or child have substantially changed. Under TFC §156.102 when modification is based on an application filed within a year of the last order, trial court may modify the order if child's present's environment may endanger the child's physical health or emotional development. Mother argued that TFC §156.102 did not apply because the trial court heard the matter outside of the 1 year timeframe. Because trial court entered a temporary order on 07/09/07, it is clear that mother presented the petition to trial court within one year of the divorce. Therefore, TFC §156.102's requirements apply.

Editor's Comment: *The lesson here is that if you can't get your section 156.102 modification (requiring affidavit and evidence that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development) heard within a year of the last modification order, you should amend your modification action to fall under 156.101's less demanding standard (requiring evidence that requested modification is in the best interest of the child and the circumstances of the child or parents have materially and substantially changed since the date of the last modification order). J.C.M.*

'POSSESSION AGREEMENT' BETWEEN UNMARRIED COUPLE DID NOT GRANT NON-PARENT EX-SAME SEX PARTNER STANDING TO SUE FOR CONSERVATORSHIP.

¶ 09-5-14. ***In re M.K.S.-V,*** ___S.W.3d __, 2009 WL 2437076 (Tex. App.—Dallas) (08/11/09)

Facts: Mother and same sex partner met in 1997 and started living together in 1998. After counseling, the two decided to have a child together. In 2003, mother became pregnant with child through artificial insemination. Mother gave birth to child on 5/21/04. Mother and same sex partner co-parented until 08/03/05 when mother and child moved out. Mother agreed child could visit same sex partner pursuant to an agreement. The agreement provided for child to visit same sex partner overnight once a week, alternate Sunday afternoons, alternate weekends beginning on Friday afternoons during the school years, Thursday afternoons "at time" during the summer, and some holidays. On 08/25/07, mother terminated the visitation because same sex partner accessed child's school records against mother's "directive." Same sex partner filed suit in 09/07, seeking to be appointed JMC or to adopt child. Same sex partner claimed standing under TFC §

102.003(a)(9), as a person who had actual care, control, and possession of child for at least six months ending not more than ninety days preceding the date of filing of the petition. She also asserted she was a "parent by estoppel" and could sue for adoption under TFC § 102.005(3). Mother specially excepted to same sex partner's claims and challenged same sex partner's standing. At an evidentiary hearing, trial court found that same sex partner to not have standing to pursue her conservatorship claim but did have standing to seek adoption under TFC § 102.005(5) ("substantial past contact … sufficient to warrant standing."), not under TFC § 102.005(3). Trial court ordered same sex partner to amend her petition to only assert adoption. Same sex partner did so, and mother moved to dismiss. After a hearing on that motion, trial court dismissed "all claims." Same sex partner appealed.

Held: Affirmed.

Opinion: Standing cannot be conferred by waiver or estoppel. Establishing "actual care, control, and possession" requires a party to demonstrate more than temporary or occasional possession and more than the control implicit in having care and possession of the child. The six month requirement means that the child principally resided with the party seeking conservatorship. Same sex partner argued that the weekly overnight visitation satisfied the standing requirement of TFC § 102.003(a)(9) as it was a fixed place of abode that child occupied consistently and in a permanent fashion. This only goes to the six month requirement, not the actual care and control requirement. To show control, the non-parent has to show that she exercised the same decisions-making authority as a parent under TFC § 151.001 and 153.073. Since same sex partner lacked the rights a parent conservator normally enjoys, such as the right to make decisions concerning child's health education and welfare, same sex partner was unable to establish standing. Although earlier cases dealing with TFC § 102.003(a)(9) did not discuss the "actual care, control and possession requirements", the petitioner's in those cases had substantial involvement in raising children.

Editor's Comment: *Dallas, I think you got it wrong. Here, the COA adopted the standard set forth in In re K.K.C., No. 09-09-00131-CV, 2009 WL 2045331 (Tex. App. – Beaumont July 16, 2009, no pet. h.)* for showing "control." *From now on, at a standing hearing, there should be evidence that goes through the laundry list of parental rights and show the parent's acquiescence to the nonparent on those decisions. The problem is that the KKC case talks about the nonparent having a right to make those decisions, which only comes from a court order because the parent can always revoke the authority given to the nonparent. Circular… and unattainable. This case essentially guts the ability of a non-parent from ever being able to gain standing no matter the how significant of a relationship the non-parent had with the child. This is a case that is begging for an answer from the Texas Supreme Court as to what exactly is meant by the term "control" under TFC § 102.003(9). G.L.S.*

CHAPTER 153 DOES NOT APPLY TO MODIFICATION ACTIONS.

¶ 09-5-15. ***In re S.E.K.***, ___ S.W.3d ___, 2009 WL 2648263 (Tex. App. – Dallas 2009, no pet. h.) (08/28/09).

Facts: Mother and Father divorced in 1996. In divorce decree and in agreed order in modification suit in 1999, Mother and Father appointed joint managing conservators of their 4 children. In 2005, Father filed motion to enforce his visitation rights arguing Mother alienating the children from him. Father later filed a motion to modify custody alleging Mother over-medicating the children and seeking inappropriate mental health treatment for them. Mother filed petition to terminate Father's parental rights, alleging that in 2005 the oldest 3 children made outcries of sexual abuse by Father. Mother eventually dismissed the petition for termination and filed a counter-petition for modification. In Nov. 2006, Father found not guilty in a criminal trial of the sexual assault charges involving the oldest 3 children.

The case was tried in October 2007. At that time, the oldest 2 children were over 18 and S.E.K. and H .A.K. were 16 and 14 years-old respectively. Both Father and Mother testified at trial. Several experts, both re-

tained and court appointed, testified about the mental health of the children and their parents at various times; about the allegations of sexual abuse by Father; and about the allegations of parental alienation by Mother. On April 7, 2008, the trial court signed an order removing the parties as joint managing conservators and appointing Mother sole managing conservator of S.E.K., and Father as sole managing conservator of H,A.K. The order gave the parents only supervised visitation over their respective non-custody child.

Held: Affirmed.

Opinion: Mother argued the trial court erred by not entering a finding of fact as she requested about the allegations of sexual abuse by Father under family code § 153.004(b). She also complains that the trial court did not make a record of its interview with H.A.K. under family code § 153.009(f). Since this is a modification case, Chap. 153 and the domestic violence presumption doesn't apply. Therefore, trial court didn't err by failing to make the requested finding of fact under family code § 153.004(b) in the context of a chapter 156 modification proceeding. Similarly, family code § 153.009(f)-which governs the making of a record of a court's in-chambers interview of a child concerning the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence-does not expressly apply to a chapter 156 modification proceeding.

Editor's Comment: *This case holds that the provisions for interviewing a child in chambers under § 153.009, specifically requiring the making of a record of the interview, do not apply to a suit for modification under Chapter 156. But, the new statute 153.006(b), effective 09-01-09, specifically incorporates 153.009 into its provisions. So, I'm not sure where the Dallas Court was headed with this opinion, unless it was just a results-based ruling. M.M.O.*

SAPCR
Child Support

INTEREST ON ANNUITY PAYMENTS ARE PART OF NET RESOURCES.

¶09-5-16. ***In re A.A.G.***, ___ S.W.3d ___, 10-07-00347-CV (Tex. App.—Dallas 2009, no pet. h.) (7/1/09)

Facts: Trial court excluded monies received monthly from an annuity created from the proceeds of a personal injury settlement by creating a distinction between an annuity and a settlement annuity for purposes of determining net resources under TFC §154.062. The AG appealed, arguing that the term "annuity" should include the full amount of every payment under the annuity agreement.

Held: Reversed and Remanded.

Opinion: TFC §154.062(b)(5) defines resources to include "all other income actually being received, including … annuities." TFC §154.062(c), however, excludes "return of principal" from the definition of resources. Since the payouts are composed of both interest payments and the original principle, trial court must decide what portion of each payment represents a return of principle and what portion represents interests earned. Completely excluding the annuity payments was error.

TRIAL COURT ABUSED ITS DISCRETION BY ORDERING PSYCHIATRIC TREATMENT FOR FATHER WITHOUT MAKING IT A CONDITION OF POSSESSION OF OR ACCESS TO CHILD.

¶09-5-17. ***In re Marriage of Swim***, ___ S.W.3d ___, 2009 WL 1940877 (Tex. App.—Amarillo 2009, no pet. h.) (7/7/09)

Facts: Father and mother married 09/06/05. They had child on 5/22/06. On 4/17/07, father filed for divorce. Mother filed answer and counter-petition. Both sought appointment as JMC, but only mother sought designation as the conservator with right to designate child's primary residence. Evidence at trial showed that father had suffered from bipolar disorder and drug abuse since he was a teenager. Father had a history of starting and terminating treatment. At the time of marriage, father was not taking medication or attending counseling. In 12/05, father relapsed and used methamphetamine twice. Father restarted therapy and medication but did not take his medication consistently. On 05/29/08, trial court divorce decree appointing father and mother JMC and giving mother the right to establish the child's primary residence. The decree required father to continue taking his medication, going to counseling, and attending AA meetings. Father appealed.

Held: Reversed and Remanded.

Opinion: Although trial court had discretion to require father to continue treatment as a condition of possession and access, it could not simply issue stand-alone orders to father. Because complying with the orders was not a requirement for father to maintain his parental rights, the orders were not related in any matter to the child. They were, therefore, an abuse of trial court's discretion.

Editor's Comment: *Here, the court order failed to provide any link between the father's access to the child and the requirement of continued medication and counseling. The father argued that the requirements provided in the decree violated his rights as an "incapacitated person" under the Texas Probate Code. The Amarillo Court agreed. Another argument that father could have made here is that the court's order requiring him to take medications violates his constitutional rights. Under Washington v. Harper, 494 U.S. 210 (1990), a person has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs. In order for the government to require someone to take medication against their will, there has to be a finding, by clear and convincing evidence, that the person is a danger to himself or others and the treatment is in the patient's best interest. See Tex. Health & Safety Code §574.106(a-1). So, although a judge can enter orders affecting the child based on the parent's decision to take or not take medication, the court cannot order the parent to take the medication outside of an involuntary suit under the Texas Health and Safety Code. M.M.O.*

SECTION 154.066 DOES NOT REQUIRE COURT TO CONSIDER WHETHER OBLIGOR'S 'VOLUNTARY UNEMPLOYMENT' WAS FOR THE PRIMARY PURPOSE OF AVOIDING CHILD SUPPORT

¶09-5-18. ***Iliff v. Iliff***, 2009 WL 2195559 (Tex. App. – Austin 2009, no pet. h.) (memo op.) (07/29/09).

Facts: Throughout most of the marriage, Father worked in the chemical industry and was the "primary bread winner" of the family, earning between $90,000 to $100,000 per year. He held a bachelor's degree and a masters degree of business administration, and he had worked for 20 years in the chemical industry as a technical specialist, a chemical specialist, and ultimately an account manager. In 2005, his company was sold to Air Products and Chemicals, Inc. Later that year, Father began hearing voices and saying that "people were watching us, that people were intercepting faxes from our home." He began to be more verbally abusive to mother and the children. Without explanation, on January 1, 2006, Father quit his job with Air Products. The job paid $102,000 per year.

Mother testified that, after he quit his job, Father's behavior became erratic and irrational. He began talking about people listening to his telephone conversations, intercepting his faxes, and spying on him through the

skylights. Mother testified that Father bought a .357 Magnum pistol because he thought that people were spying on him. Mother averred that Father's drinking became excessive and that she found empty tequila bottles in the closet. Also, Father bought another gun and was sleeping excessively, did not bathe or change his clothes regularly, and was not brushing his teeth or "doing general hygiene." There were occasions when she left the children at home with Father to go to home health care appointments for her job and that, when she returned home, she would find him asleep in a locked office downstairs.

Mother also testified that, one day in May 2006, the family was attending one of her daughter's dance lessons and that she and Father got into an argument about his treatment of their son. That evening Father became very ill, as if he had a stomach virus, and he was sick all night. The next day, Mother came home to find him hallucinating downstairs and saying that there was a man in a black hat. Mother took him to the hospital, and he was admitted to the intensive care unit where he stayed for five days. Mother testified that the hospital had to restrain Father because of his paranoid behavior and that they administered anti-psychotic medication to calm him down.

Mother filed for divorce on June 28, 2006.

With regard to his ability to work, Father testified that he was not disabled and that no doctor had told him that he could not work. He further testified that, after quitting his job, he tried to start his own tractor business and that he received about $1,287 in 2006 and about $1,200 in 2007. He also testified that he received about $1,200 "in the past two years" from business management consulting. Based on his proven income shortly before the divorce, the trial court determined that Father's gross monthly earning potential was $5,000.00 and that his net available resources were $3,662.09 per month. Accordingly, the trial court awarded child support of $1,098.63, plus $196.56 health insurance reimbursement, per month for three children.

Held: Affirmed.

Opinion: Family code § 154.066 applies to this case. It allows a trial court to apply the child support percentage guidelines based upon earning potential if the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment. A parent with the ability to find gainful employment cannot evade his support obligation by voluntarily remaining unemployed or underemployed. The evidence in the record supports the trial court's finding that James was intentionally unemployed or underemployed and that his earning potential was no less than $5,000 per month. James testified that he was not disabled and that he voluntarily quit his job in January 2006, which paid over $100,000 per year. We conclude there was no abuse of discretion in the trial court's decision to apply the percentage guidelines based on James's earning potential.

The Court specifically rejected Father's argument that the trial court was required to find that his voluntary unemployment was for the primary purpose of avoiding child support before setting child support based upon his earning potential as opposed to his actual income. In support of this argument, James relies on the holdings of our sister courts of appeals in *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) and *In re P.J.H.*, 25 S.W.3d 402, 405-06 (Tex. App.—Fort Worth 2000, no pet.). But this Court has declined to adopt the reasoning of our sister courts. In *Hollifield v. Hollifield,* finding that unemployment was but one of myriad factors a court could consider when exercising its broad discretion to determine child support obligations, this Court held that "[s]ection 154.066 does not require the court to consider whether the obligor's 'voluntary unemployment' was for the primary purpose of avoiding child support." 925 S.W.2d at 156. This Court's holding in *Hollifield* is consistent with the plain language of section 154.066, and we decline to revisit that holding here.

Editor's Comment: *The holding in this case not only conflicts with the Houston 1st, the Fort Worth, and the Dallas Courts of Appeals (see below In re J.G.L.). I also don't think this opinion meets the criteria for a memorandum opinion and should not have been categorized as such since it establishes a new rule of law or*

alters or modifies an existing rule. TRAP 47.4(a). That being said, the opinion nonetheless has precedential value. TRAP 47 comment. G.L.S.

FATHER ON ACTIVE MILITARY DUTY WAS NOT ENTITLED TO RELIEF FROM DEFAULT JUDGMENT UNDER SERVICEMEMBERS' CIVIL RELIEF ACT WHEN HE DID NOT DEMONSTRATE THAT HIS SERVICE AFFECTED HIS ABILITY TO PRESENT A DEFENSE.

¶09-5-19. ***In re K.B.***, ___ S.W.3d ___, 2009 WL 2179976 (Tex. App.—San Antonio 2009, no pet. h.) (7/29/09)

Facts: On 10/31/06, father was served while in uniform and on active duty in Fort McPherson, Georgia with a divorce petition and notice that a hearing on temporary orders had been set for 10/24/06. Father did not respond to the petition, so trial court rendered default judgment on 12/18/06. Father deployed to Iraq from 02/2007 to 05/2007. Father appealed the default judgment, alleging it violated the Servicemembers Civil Relief Act.

Held: Affirmed.

Opinion: The Servicemembers Civil Relief Act prevents a trial court from rendering default judgment against active duty members of the armed forces without following its requirements. Since trial court did not appoint counsel to represent father, it did not follow the requirements of the Servicemembers Civil Relief Act. Father, however, must demonstrate that he is entitled to relief under the act by showing that his military service affected his ability to make a defense and that he actually had a meritorious defense. Since father demonstrated neither prong, he is not entitled to relief under the act.

VOLINTARY RELINQUISHMENT UNDER T.F.C. 157.008 CAN OCCUR EVEN WHEN MOTHER REMAINS DOMICILED WITH CHILDREN.

¶09-5-20. ***In re W.J.B.***, ___ S.W.3d ___, 2009 WL 2617476 (Tex. App. -- Beaumont 2009, no pet. h.) (8/27/09)

Facts: Mother and father divorced in 2003. Trial court entered an agreed order establishing a parenting plan giving mother the majority of possession time as well as the right to designate children's primary residence. The parenting plan also provides that the father will visit the kids whenever possible as long as he notifies the mother in advance. Trial court also entered a child support order requiring father to pay $798.72 per month to mother. Father paid child support until 07/01/05 when he stopped until 11/07. In 07/05, father purchased a home in Montgomery County while still living in another state. Mother and children moved into the house. Father moved into house form 08/05 until 07/07. Mother and children remained in home until 10/07 when they moved to a new home purchased by mother. Mother testified she expected to pay rent in the Montgomery County house but did not because father did not pay child support. Father testified that he took care of the children as a full-time parent, and paid for the utilities as well as a number of expenses on behalf of the children. Father introduced a summary of expenses showing that his monthly support contributions exceeded his child support obligations. Father further testified that he thought they were trying to live as a family again. Mother filed a motion requesting the trial court reduce the child support arrearage to a cumulative judgment and hold father in contempt for not paying child support. Trial court denied both motions. Mother appealed/

Held: Affirmed.

Opinion: Although courts of appeal do not have jurisdiction to hear an appeal from a trial court's judgment not holding someone in contempt, they do have jurisdiction to hear appeals from decisions to grant or deny a monetary judgment for a child support arrearage. Since mother did not request findings of fact or conclusions

of law, trial court is presumed to have made all the necessary findings. Mother failed to challenge the implied finding that father provided actual support equal or greater than his unpaid child support obligations. Mother did challenge trial court's implied finding that she relinquished actual possession and control of children to father. There is legally sufficient evidence to support trial court's implied finding since the parenting plan did not give father the type of control and possession he exercised when he and mother lived together. Despite the fact that mother was domiciled with children, trial court could reasonably find that mother relinquished possession. The legislature intended the statutory offset provision to prevent child support obligors from having to pay their obligations twice. Since courts should construe remedial statutes broadly, the statutory offset provision should not be construed to require that the possessory parent give up all rights of possession and control.

Dissent (J. Kreger): The majority should have interpreted mother's appeal to include a challenge to the implied finding that father had provided actual support. Furthermore, since missed child support payments constitute a final judgment, father was required to introduce evidence of an offset for each individual month for which mother sought arrearage. Father's payment of the mortgage and homeowner's association fees did not constitute actual support since he would have had to pay those anyway, regardless of whether mother and children lived in the house. Additionally, those payments fall under father's common law duty to support his children. The payment of children's expenses that mother would have paid is not a valid offset against a child support obligation. Since father did not present any evidence of actual support paid, court of appeals should have found trial court abused its discretion.

Editor's Comment: *Here the Beaumont Court appears to apply a different standard for the actual control and possession of a child necessary to meet the statutory requirements necessary for voluntary relinquishment in the context of child support, than the standard we have seen applied recently in multiple cases interpreting the requisite control for standing for a non-parent to bring a suit affecting the parent-child relationship under 102.002(b)(9). See e.g. In re M.K.S.-V., __ S.W.3d ___, 2009 WL 2437076 (Tex. App. – Dallas August 8, 2009, pet. filed) (see above); In re K.K.C., __ S.W. __ 3d, 2009 WL 2045331 (Tex. App. – Beaumont July 16, 2009, no pet. h.). How is it that a mother can, while residing in the home, relinquish control over the child to the father, yet a nonparent living in the home is deemed to have no control under the same set of circumstances while performing the same actions toward the child as the father in W.J.B.? This case cries out for attention from the Texas Supreme Court. We need one definition of the term "control" that will be applied evenly to all persons similarly situated, no matter which code provisions is in question. M.M.O.*

MOTHER FAILED TO PROVE FATHER INTENTIONALLY UNDEREMPLOYED.

¶09-5-21. ***In re J.G.L.,*** ___ S.W.3d ___, 2009 WL 2648401 (Tex. App. – Dallas 2009, no pet. h.) (08/28/09).

Facts: Trial court found Father's monthly net resources were $4,779.90 in 2006, and $3,393.40 in 2007. Trial court further found Father obligated to support 2 children, one before the court and another from a previous marriage. Divorce decree shows family code guidelines direct child support payments of $593.77/month based upon Father's 2007 monthly net resources. Trial court, however, found that "testimony shows that the obligor [Father] was voluntarily underemployed during 2007" and set child support payments at $825/month.

Held: Affirmed final decree of divorce as modified.

Opinion: To begin the voluntary underemployment analysis, trial court contemplates obligor's proof of current wages. Once obligor's wages are established, burden shifts to obligee to demonstrate obligor's intent to decrease income for purpose of reducing child support payments. Evidence of intent, such as circumstances of obligor's education, economic adversities, business reversals, business background, and earning potential, gives rise to an inference of voluntary underemployment. These factors, however, are not exhaustive.
Father's employer stated that by agreement Father set his own schedule and did not work every day. Employer further testified that he assigned Father's projects, and Father received a 40% commission from the profits.

Employer told trial court that Father earned $62,730 in 2005, $76,900 in 2006, & $54,300 in 2007. When asked about the earnings decline between 2006 and 2007, Employer indicated that he reduced Father's workload based on Father's emotional state and that his business decreased overall because of adverse economic conditions. Employer testified Father did not ask for a reduction of his workload, and that he subsequently asked Employer to increase it. Father told trial court that in 2007 his income decreased more than the income of the business overall because Employer would assign more work in the downturn to those employees with lower commission percentages. There is no evidence to the contrary.

Mother had the burden at trial to present evidence of underemployment as a specific basis for departing from child support guidelines applied to Father's 2007 income. Such evidence must be of a "substantive and probative character" giving rise to an inference of intentional underemployment. She did not meet this burden. Therefore, final decree of divorce modified in part by substituting $593.77 for $825 as the amount of Father's monthly CS obligation.

Editor's Comment: *Dallas now joins the Houston 1st and Fort Worth Courts of Appeal in holding that the obligee must show that the obligor's intent to decrease income was for the purpose of reducing child support payments. This is in direct conflict with the Austin Court of Appeals (see Iliff v. Iliff above). G.L.S.*

Editor's Comment: *Given current economic conditions, in our practices we are likely to be on one side or the other of a situation in which the child support obligor loses their job or suffers a decrease in income. Naturally, the obligor is going to want to reduce their child support payments accordingly. It is also likely the obligee is going to be unhappy that there is less money coming in. Although the obligee might be unhappy and might be used to higher child support payments, in this economy, decreased income for many is a reality, and, as this opinion illustrates, does not form the basis for a claim of intentional underemployment. The moral of this case – you have to show some intent to prevail on a claim of intentional underemployment. M.M.O.*

AG DID NOT HAVE AUTHORITY TO RELEASE HUSBAND'S CHILD SUPPORT OBLIGATION WHEN MOTHER HAD NOT ASSIGNED RIGHTS TO AG.

¶09-5-22. ***In re J.P.***, ___ S.W.3d ___, 2009 WL 2751043 (Tex. App.—Fort Worth 2009, no pet. h.) (8/31/09)

Facts: Father and mother divorced in 1988. Trial court appointed mother SMC and father PC. Trial court ordered father to pay $33 per week, ordered father's employer to withhold the amount owed from father's wages and ordered that all child support payments were to be made through Tarrant County Child Support Office. In 05/07, father filed a "Motion to Confirm Child Support Arrearage, Motion to Clarify Release of Lien and Motion for Offset" with a "Release of Child Support Lien" signed by an AG child support order and dated 11/23/05 attached. The release stated that the child support obligation had been satisfied. In response, AG filed a motion to confirm child support arrearages attaching a schedule of father's child support payments. Trial court ordered the parties to submit further written arguments and vacated a previously filed administrative writ of withholding. The AG argued that the release only applied to one specific bank account, there was no consideration and only the mother had the right to discharge father's obligation. After the arguments, trial court described the release as a contract and discharged father's obligations. AG filed a motion for new trial containing an affidavit by the child support officer. The affidavit stated that the release was only issued because the bank account was closed, and that the release referenced the wrong code section (T.F.C. 157.322 instead of 157.321). Trial court did not rule on AG's motion for new trial, and the motion was overruled by operation of law. AG appealed.

Held: Reversed and Remanded.

Opinion: A release constitutes prima facie proof of payment since it is valid on its face. Public officers may make only such contracts as they are authorized by law to make. The AG is authorized to enter into agreements for the purpose of carrying out the agency's responsibilities and may provide a release of judgment un-

der T.F.C. section 231.104(a). The arrearages were not assigned to the AG, therefore the law did not authorize the AG to release husband's obligation. The release was therefore invalid.

Editor's Comment: *When an obligee receives financial assistance from the state, the state is automatically assigned the right to collect child support from the obligor so that the state can reimburse itself. Because there had been no such assignment here, the AG had no power to release child support arrearages. That right belonged to the obligee. J.V.*

SAPCR
Termination of Parental Rights

T.F.C. 263.405(b) and (i)'S PROCEDURAL RESTRICTIONS DO NOT VIOLATE DUE PROCESS.

¶09-5-23. ***In re J.S.***, ___ S.W.3d ___, 2009 WL 1636816 (Tex. App.—Eastland 2009, no pet. h.) (6/11/09)

Facts: TDFPS petitioned for termination of mother's rights on 4/12/07, and submitted a family service plan on 6/1/07. Trial court adopted family service plan on 6/8/07. After mother failed to comply with family service plan, trial court held a bench trial on 4/18/08 where it orally ordered the termination of mother's right. Trial court later entered a written termination order on 4/21/08. Mother filed a notice of appeal on 4/30/09, alleging that T.F.C. §263.405(b) and (i) violate her due process rights and that the evidence was insufficient to support termination.

Held: Affirmed.

Opinion: Mother claimed that T.F.C. §263.405(b) was unconstitutional because it required her to file a S.O.P. within 15 days, before the preparation of the reporter's record, and mother's counsel was appointed after three hearings had already taken place. No actual errors were found in the record, however, so there was no violation of due process rights. Mother claimed TFC §263.405(i) was unconstitutional because it barred appellate courts from examining the factual sufficiency of the evidence through this language: "a claim that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal." This language does not actually bar insufficiency claims completely, but only vague, global claims. It thus does not violate mother's due process rights. Mother alleged that the evidence was factually and legally insufficient to support termination, but there was evidence that mother had failed to comply with the family service plan by not obtaining a permanent residence.

EVIDENCE OF NEGLECT WAS SUFFICIENT TO SUPPORT TERMINATION OF PARENTAL RIGHTS

¶09-5-24. ***In re E.S.C.***, 287 S.W.3d 471 (Tex. App.—Dallas) 2009 (6/15/09)

Facts: After receiving an allegation of neglect, TDFPS caseworker interviewed mother and her MHMR caseworker. TDFPS determined Mother had bipolar disorder and was going to be admitted to a state hospital. TDFPS caseworker determined that Mother had no family or friends who could care for children. TDPFS filed a SAPCR seeking conservatorship and termination of Mother's parental rights. On 5/12/06, trial court designated TDFPS as temporary conservator and adopted TDFPS's service plan. Mother complied with some, but not all of the requirements. TDFPS noted that Mother lacked ability to care for the children during supervised visitation. In a 10/07 bench trial, TC terminated parental rights of Mother and four alleged fathers to Children. Mother appealed, alleging factual and legal insufficiency.

Held: Affirmed.

Opinion: The evidence at the bench trial showed that mother had physically neglected children before TDFPS stepped in. Children had suffered from untreated infections. This was sufficient to support trial court's finding that mother's rights should be terminated under TFC §161.001(1)(O). The neglect, along with mother's mental health issues, supported a finding that termination was in children's best interests.

TRIAL COURT ERRED IN DECLARING TFC §161.002(B) UNCONSTITUTIONAL.

¶09-5-25. ***In re C.M.D.***, 287 S.W.3d 510 (Tex. App.—Houston [14th Dist.] 2009, no pet. h.) (6/25/09)

Facts: Mother dated Father for several months while visiting her sister in California. Mother returned to Texas and discovered she was pregnant. Father cut off contact with mother after she informed him of Child. Mother decided to give up Child for adoption. On 10/19/07, a private adoption agency brought an adoption petition regarding Child. It requested that Trial Court terminate Father's parental rights as he had not registered with the Texas paternity registry pursuant to TFC §161.002(b). Father did not attend termination proceedings, and Trial Court did not appoint an ad litem to represent him. Trial Court refused to terminate Father's rights and, sua sponte, declared TFC §161.002(b) unconstitutional because it did not require due diligence to locate father, service of process on father, appointment of an attorney ad litem to represent father's interests or a best interest finding. Adoption agency appealed.

Held: Reversed and Remanded

Opinion: Although Trial Court did have jurisdiction to consider the constitutionality of TFC §161.002(b) sua sponte, it must presume that the statute is constitutional. Unwed fathers do not automatically have full constitutional parental rights but must express interest in the child to assert those rights. The only evidence in the record shows that Father lacked interest in Child. Even if Trial Court chose to disbelieve that evidence, it had no affirmative evidence to suggest that Father had suffered an actual injury. Without evidence of actual injury, it was error for Trial Court to declare TFC §161.0029(B) unconstitutional.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING CONTINUANCE WHEN MOTHER WAS RESPONSIBLE FOR DELAY IN COMMUNICATING WITH HER ATTORNEY.

¶09-5-26. ***In re Z.J.C.***, ___ S.W.3d ___, 2009 WL 2179976 (Tex. App.—Waco 2009, no pet. h.) (7/22/09)

Facts: T.D.F.P.S. removed children from mother's home in 01/08 due to the deplorable state of her home. Mother was admitted to the hospital on the day of the removal, and was discharged a few days later in 2/08. In 03/08, mother mover to Houston. She missed court dates, did not communicate with her children and failed to provide monetary support.

Held: Affirmed.

Opinion: Although mother did not file a timely statement of points, but she included specific issues for review in her motion for new trial. As mother did not challenge the constitutionality of the statement of points requirement or complain that trial counsel was ineffective for failing to file a statement of points, her appeal is limited only to the issues raised in the motion for new trial. In her motion for new trial, mother only attacked the sufficiency of evidence for the "knowingly" element of T.F.C §161.001(1)(D) – trial court's finding that mother knowingly allowed the children to remain in conditions which endangered their physical or emotional well being. The large amount of trash and filth in the house observed by the T.D.F.P.S. investigator was sufficient to support trial court's finding.

Mother's second issue in her motion for new trial was trial court abused its discretion in denying her motion for continuance. The motion for continuance alleged that mother's counsel was unable to contact her until

11/20/08, less than two weeks before the 12/1/08 trial. At a hearing on the motion for continuance, trial court ruled that the delay in communication was due to mother's actions. There was evidence to support this claim, so trial court could not show harm. Furthermore, mother cannot show harm from the denial of a continuance because she did not even allege that she would have been helped by a continuance. Mother also alleged that trial court violated her due process rights by denying her continuance but that issue was not presented in her motion for new trial and is therefore waived.

REQUIRING TRIAL COURT HEARING TO DETERMINE APPELLATE ISSUES AS NON-FRIVOLOUS AS A PREREQUISITE FOR A FREE RECORD DOES NOT VIOLATE DUE PROCESS.

¶09-5-27. ***In re S.N.***, ___ S.W.3d ___, 2009 WL 2209863 (Tex. App.—Eastland 2009, no pet. h.) (7/23/09)

Facts: Father and mother lived together with children. In 03/07, TDFPS removed children due to reports that father had beaten one of them, was abusive to the other and that both parents used drugs in the home. TDFPS petitioned for termination of father's rights. Father was convicted of injury to a child, pled no contest and was sentenced to 15 years. During the termination hearing, appellant was in prison and eligible for parole in 02/09. Trial court found 1) that father had engaged in criminal conduct resulting in his confinement leading to an inability to care for child for not less than 2 years; 2) that father had been convicted of injury to a trial; and 3) that termination was in child's best interest. On 10/14/08, father filed a notice of appeal, arguing that T.F.C. §263.405(b) and (i) was unconstitutional, and that the evidence was insufficient to support the findings. Trial court found that the insufficiency arguments were frivolous, but the constitutional arguments were not.

Held: Affirmed.

Opinion: Father argued T.F.C. §263.405(b) and (i) are unconstitutional because they violate indigent parents' due process rights and that T.F.C. §263.405(i) violates separation of powers. A parent appealing termination has a right to a meaningful appeal. The legislature has enacted various safeguards, such as allowing for an extension to file a statement of points and the appeal of a trial court's determination that appellate issues are frivolous. In light of these safeguards, father has not demonstrated that the statutes are unconstitutional on face. Because father did not take advantage of the safeguards and failed to identify any meritorious claims, the statutes are not unconstitutional as applied in this case. Father did not raise the separation of powers claim in his statement of points, so it is waived.

MISCELLANEOUS

COHABITATION DID NOT CREATE A CONSTRUCTIVE TRUST

¶09-5-28. ***Smith v. Deneve***, ___ S.W.3d ___, 2009 WL 1492997 (Tex. App.—Dallas 2009, no pet. h.) (5/29/09)

Facts: In 1991, appellant and appellee began living together. In 1998, they moved into a house together which appellee took title to in her name only. In 2003, they acquired a boat which she also took title of. In 09/05, appellant sued appellee for divorce. Appellee denied that there was a marriage between the two parties and filed for summary judgment. Appellant filed a first amended petition in which he asserted claims based on an implied cohabitation agreement, constructive trust, partnership/joint venture, and quantum meruit. Appellee filed a second motion for summary judgment. Appellant filed a second amended petition, adding a claim for a resulting trust on the house and the boat. Appellee specially excepted to the implied cohabitation agreement which trial court struck after appellant failed to amend it. Appellee filed a third motion for summary judgment. After a hearing, trial court sustained appellee's objections to appellant's summary judgment

evidence, ordered that appellant take nothing and awarded appellee attorney's fees. Appellant appealed the summary judgment rulings.

Held: Affirmed in part; Reversed and remanded in part.

Opinion: Proving the existence of a common law marriage in Texas requires establishing that a man and a woman: 1) agreed to be married; 2) lived together in Texas as husband and wife after the agreement and 3) held themselves out as husband and wife. T.F.C. §2.401(a)(2). The only evidence of the holding-out prong was appellant's testimony in his affidavit that they introduced themselves and others had introduced them as husband and wife. This did not create a genuine fact issue because it did not establish either that they consistently conducted themselves as husbands and wife, or that the community viewed them as married.

Obtaining a constructive trust requires proving actual fraud or the existence and breach of a fiduciary relationship. Appellant argued that he and appellee's relationship created a fiduciary relationship. As evidence, he pointed to their joint bank account with right of survivorship, their joint auto insurance policy and their mutual contribution to living expenses. Mere subjective trust of another, however, does not create a fiduciary relationship. Appellant would only be justified in believing in the existence of a fiduciary relationship if he was accustomed to relying on the judgment and advice of the other party throughout a long association in a business relationship. There was no evidence that he was guided by appellee's advice or received financial relationship from her. Sharing of living expenses does not raise a fact issue of the existence of a fiduciary relationship.

A resulting trust arises by operation of law when one person receives the title but all or part of the purchase price is paid by another. Appellant claimed he was entitled to a resulting trust on the house and the boat. He contributed $5,000 in lottery winnings towards the down payment on the house. Appellee claims that she purchased the property in her own name, with her own property and that appellee was not obligated by the mortgage. Since there was no evidence that appellee actually used the funds he gave her for the down payment on the house, trial court was correct to grant summary judgment against appellant. Trial court erred, however, in granting summary judgment as to appellant's claim of a resulting trust on the boat because appellee did not request summary judgment on that claim.

WIFE CONCEALING 5 OF HER 8 PREVIOUS MARRIAGES WAS SUFFICIENT TO JUSTIFY ANNULMENT.

¶09-5-29. ***Leax v. Leax***, ___ S.W.3d ___, 2009 WL 1635199 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) (6/11/09)

Facts: Husband and wife married 7/1/01. They lived in husband's home until wife moved out on 3/12/07 while husband was on cruise with his child. Wife took majority of household items and $33,000 from a joint checking account, leaving $1,700 in the account. Wife then filed for divorce, alleging conflict of personalities and cruel treatment. She asked for a disproportionate share of communal property based on the cruel treatment and husband's superior separate resources. After interrogatories revealed that wife had 8 previous marriages, husband filed a counter-petition asking for annulment asking for a disproportionate share of the marital estate due to wife's fraud. At a 12/3/07 bench trial, wife testified that husband had threatened her and that she moved out during the cruise because she feared for her safety. Husband testified he was a widower and that wife had revealed two prior marriages while they were dating. He said she had admitted a third prior marriage right before they were married because he was about to find out about it. He testified that he had specifically asked about any prior marriages besides the three he knew about and she said there were no other marriages. Wife testified she had told husband about all of her marriages. Husband testified that wife had encouraged him to go on the cruise without her, and that he had no idea of any problem in the marriage when he left. Trial court granted the annulment on 12/19/07. In its 1/16/08 findings of fact and conclusions of law, trial court found that wife had materially misled her husband about her prior marriages to induce husband to rely on

them to enter into the marriage. Trial court also found that wife had induced husband to take a cruise without her, and that husband and wife had not voluntarily cohabitated after husband learned about the other marriages. Trial court ruled that husband was entitled to an annulment of the marriage on the basis of fraud under T.F.C. §6.107.

Held: Affirmed.

Opinion: T.F.C. §6.107 allows a court to grant an annulment when (1) the non-requesting party used fraud to induce the petitioner to marry; and (2) the petitioner has not voluntarily cohabitated after learning of the fraud. Establishing fraudulent inducement requires proving that a false material representation "(1) was known to be false when it was made, (2) was intended to be acted upon, (3) was relied upon, and (4) caused injury." Annulment can only be based on fraud when the fraud concerns an issue essential to the marriage. Trial court's findings supporting these elements were not against the overwhelming weight of the evidence. Although wife argued that TFC §6.109 (referring to concealed divorces 30 days or less prior to a marriage) was the only section allowing a trial court to annul a marriage due to a concealed marriage, the section is not exclusive. Although merely concealing a prior marriage might not be sufficient for an annulment, the extreme number of wife's prior marriages was sufficient to justify annulment.

Editor's Comment: *The opinion observes that courts in other states generally have found that a single, concealed prior marriage does not warrant annulment because the prior marriage "in no way impedes the carrying out of the marital obligations and does not go to the fundamentals of the relationship." One court did find that concealing five of seven prior marriages is fraudulent. In this case, concealing five of eight prior marriages constituted fraud because it "clearly goes to the essentials of the marriage." Thus is born the "Octo-spouse Rule": To avoid potential annulment, a prospective spouse who has been married more than once before had better 'fess up. J.V.*

PARENT WHO HAS POSSESSION OF THE CHILDREN FOR MORE THAN ONE-HALF OF THE CALENDAR YEAR IS ENTITLED TO THE CLAIM CHILDREN AS EXEMPTIONS ON THEIR TAX RETURN

¶09-5-30. ***In re S.L.M.***, ___ S.W.3d ___, 2009 WL 2343264 (Tex. App, -- Dallas 2009, no pet. h.) (7/31/09)

Facts: Mother brought child custody proceeding against father. The trial court appointed father and mother as joint managing conservators and awarded mother right to claim children as exemptions on her tax return. Father appealed.

Held: Affirmed in part, reversed in part.

Opinion: The question of income tax exemptions is an area of federal law that has preempted state law and must be determined according to applicable federal statutes. When a person is entitled to a federal income tax exemption, the trial court may not take it away. Federal law provides that if the parents claiming a qualifying child do not file a joint return together, such child shall be treated as the qualifying child of "the parent with whom the child resided for the longest period of time during the taxable year." An exception to this general rule applies to parents who are divorced, legally separated, or have lived apart for the last six months during the calendar year. For purposes of this subsection, the "custodial parent" is the parent having custody of the child for the greater portion of the calendar year and the "noncustodial parent" is the parent who is not the custodial parent.

The trial court awarded Father possession of the children on Tuesdays after school until school starts on Thursday and on Fridays after school until 1:00 p.m. on Sunday. Mother has possession of the children Thursdays after school until school starts on Fridays and on Sundays at 1:00 p.m. until school starts on Tues-

day. During the normal periods of possession, Father has possession of the children for approximately 100 hours a week as compared to 68 hours a week for Mother.

We conclude that, pursuant to the trial court's order, Father has possession of the children for more than one-half of the calendar year. Accordingly, he is entitled to claim the children as exemptions on his federal tax return.

***Editor's Comment**: Unless the parties agree to alter tax law for the exemptions, the courts cannot make such an award. The federal law will always trump what a state court tries to allot in that regard. Any agreement between two custodial parents should contain an order for the parent to sign the relevant IRS form assigning the tax exemption to have any hope of enforceability.*

TRIAL COURT DID NOT ERR BY REQUIRING FATHER TO INVOKE PRIVILIGE AGAINST SELF-INCRIMINATION ON A QUESTION-BY-QUESTION BASIS.

¶09-5-31. ***Murray v. T.D.F.P.S.*** ___ S.W.3d ___, 2009 WL 2476690 (Tex. App.—Austin 2009, no pet. h.) (8/13/09)

Facts: In 06/07, father lived with mother, their two children, and paternal grandmother. On 06/11/07, father was alone at home with children. When mother and grandmother returned home, they discovered one child blue in the face and having difficulty breathing. Grandmother called 911, but father decided to drive children to hospital before an ambulance arrived. On the way to the hospital, father lost control of the car and drove into a ditch. When the ambulance arrived at the scene, child was pronounced dead at the scene. The autopsy revealed child's injuries resulted were consistent with child abuse. The medical examiner also discovered over one hundred bruised on child's body. At jury trial regarding termination, TDFPS called father as a witness and questioned him regarding the events leading to child's death. Trial court required father to invoke his 5th amendment rights on a question by question basis. TDFPS also introduced evidence that father was prone to angry outbursts and had a criminal record. Jury recommended termination, and trial court did so. Father appealed, arguing that there trial court should not have required him to assert his privilege against self-incrimination on a question-by-question basis and should not have admitted his prior criminal records or recordings of phone calls he made from the jail.

Held: Affirmed.

Opinion: In civil proceedings, there is no right to make a blanket assertion of privilege and refuse to answer any questions. Furthermore, fact finders are permitted to make negative inferences from a party invoking the privilege in a civil case. Therefore, trial court did not err by requiring father to invoke his 5th amendments right on a question-by-question basis. Father argued that evidence should have been excluded because it was prejudicial but he made no showing that it was unfairly prejudicial.