SECTION REPORT
FAMILY LAW

http://www.sbotfam.org **Volume 2008-3 (Fall)**

NEWSLETTER EDITOR
Georganna L. Simpson
1349 Empire Central Drive, Ste. 600
Dallas 75247
214.905.3739; 214.905.3799 (fax)
glslaw@gte.net

Message from the Chair

Wow! what a Summer we had! After a successful Advanced Family Conference in August, we are already looking at a new year approaching. Immediately after our conference, the national politics opened up our future to the American people electing the first woman or Black American to the executive level. Each of us will also be electing judges in the next election. Although our system in Texas still commands that every judicial candidate run on a party platform, we must strive for candidates who promise fairness – fairness that knows no party and honesty that does not belong to any political group! Let's do our part to inform our clients and friends to learn about judicial candidates and overlook the straight party ballot!!! There is really not a "Republican" justice or a "Democratic" justice – and our judiciary must be independent and fair!!

The upcoming New Frontiers in Marital Property Seminar in Napa is almost a sell out, so get registered today!!! Back by popular demand in December is the Advanced Family Law Drafting in Austin. Also, don't forget the TAFLS Trial Institute – Trial Treasures in Tampa – coming up in January, the rooms are quickly filling up, so call today. Have a great Fall and see you Napa, Austin, and Tampa!

----------Wendy Burgower, Chair

COUNCIL ADMINISTRATIVE ASSISTANT
Christi A. Lankford. 1-800-283-8099
Section Wear and Publications

EDITOR'S NOTE

I want to thank all of you for your kind comments regarding the Section Report. I still need and want your participation. All of you writers out there please contribute an article – let us know who you are and what you have to say. Please feel free to send me articles from your local section meetings so that all of us can share the information. Articles are due on the last day of each quarter for the following section report. So November 30 is the deadline for the December 15 Section Report. I have also give a big thank you to my law clerks, Ian Pittman, a third-year law student at the University of Texas, and Chris Gabriel, a second-year law student at SMU Deadmon School of Law, for their assistance in summarizing all of the cases. Chris also contributed an article for this report.

TABLE OF CONTENTS

TABLE OF CASES

IN BRIEF

Family Law From Around the Nation

by
Jimmy L. Verner, Jr.

Best interest: A child's love for his mother does not prevent termination of parental rights when the child's best interest would be served by severing his relationship with his abusive and drug-addicted parents. *In re: William B.*, 78 Cal.Rptr. 3d 91 (Cal. App. 2008). An agreement to arbitrate custody and visitation issues "violates the court's parens patriae obligation to protect the best interests of the children and is void as a matter of law." *Fawzy v. Fawzy*, 948 A.2d 709 (N.J. App. Div. 2008). After mother fled with child from Idaho to Oregon to escape father's domestic abuse, it was not in the child's best interest for a magistrate to order mother either to return to Idaho or to relinquish temporary custody of the child. *Schultz v. Schultz*, 187 P.3d 1234 (Ida. 2008).

Child support: A Mississippi court held that disability benefits received by a child because of her father's injury must be offset against the father's child support obligation, but the father could not receive a child support credit when disability payments exceed child support payments. *Keith v. Purvis*, 982 So.2d 1033 (Miss. App. 2008). A New York family law court joined the majority of courts in other states that exclude higher education loans and grants as income for child support purposes. *Mariana D. v. Frank D.*, 858 N.Y.S.2d 864 (Queens County Family Court 2008). Another New York court erred in setting child support when one of the two children lived with the obligor because the court used the percentage rate for only one child and also "capped" the obligor's income for child support purposes based on the child living with him. *Santana v. Santana*, 51 A.D.3d 542 (N.Y. App. Div. 2008).

De facto parents: A Virginia court refused to adopt the de facto parent doctrine as unnecessary - because Virginia recognizes non-parent rights under its "person with legitimate interest" statute - but affirmed denial of visitation after a same-sex breakup for failure to prove harm to the child should visitation be denied. *Stadter v. Siperko*, 661 S.E.2d 494 (Va. App. 2008). A California juvenile court acted properly when it dismissed, without an evidentiary hearing, a grandmother's petition to place her grandchildren with her because the grandmother's petition showed that as a matter of law, the grandmother had not "assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection" and "assumed that role for a substantial period." *In re R.J.*, 2008 WL 2504687 (Cal. App. 2008).

Hague cases: A federal district court abused its discretion by deferring to a state court when asked to identify the habitual residence of the children and whether they had been wrongfully removed to the United States from Israel. *Barzilay v. Barzilay*, ___ F.3d ____, 2008 WL 2952427 (8th Cir. 2008). In a split decision, the Second Circuit refused to require the return of a child to her father in Chile because the father had rights only of access, not custody, under Chilean law. *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142 C (2nd Cir. 2008). The Seventh Circuit affirmed a district court's order that children be returned to their father in Venezuela, agreeing with the district court that the father having once struck his son with a video-game cord, if true, did not constitute clear and convincing evidence that there would be a grave risk to the children if returned to him. *Vale v. Avila*, ____ F.3d ____, 2008 WL 3271920 (7th Cir. 2008).

Postjudgment issues: The Ninth Circuit's Chief Judge vehemently dissented to the majority's award of term life insurance proceeds to the deceased's first wife: "The majority reaches a senseless, unjust and cruel result by awarding half a million dollars to the former wife of a peace officer felled in the line of duty, leaving the officer's widow and children out in the cold." *Life Ins. Co. of North America v. Ortiz*, ____ F.3d ____, 2008 WL 2940533 (9th Cir. 2008). A California state employee transformed his retirement benefits into community

property when he repurchased "service credits" after his first wife withdrew her share of them. *In re: Sonne*, 80 Cal.Rptr.3d 453 (Cal. App. 2008). When an ex-husband's Social Security benefits automatically reduced the ex-wife's share of his retirement, a Delaware trial court acted properly by reopening the parties' agreed property division. *Stanley v. Stanley*, ___ A.2d ____, 2008 WL 2961790 (Del. 2008).

Underemployment: An Indiana court reversed a trial court's dismissal of an inmate's motion to modify child support based upon his incarceration, reiterating that under Indiana law, committing a crime "is not quite the same" as failing or refusing to work. *Clark v. Clark*, 887 N.E.2d 1021 (Ind. App. 2008). The Alaska Supreme Court upheld a trial court that denied a motion to modify child support when the obligor testified she quit her job for another one that paid approximately half as much because she had to travel too much to see her children but failed to document her travels. *Sawicki v. Haxby*, 186 P.3d 546 (Alas. 2008). The New Hampshire Supreme Court did not reach the question whether an obligor who shot himself in the face was voluntarily unemployed or underemployed because there must first be a finding that an obligor is physically or mentally incapacitated. *In re Marriage of Fontaine*, ___ A.2d ____, 2008 WL 3893750 (N.H. 2008).

Wrong button. Husband began an affair with wife's sister prior to marriage and continued thereafter. Two weeks after wife signed husband's immigration application, husband announced he was leaving but did not say for whom. Wife's son later called wife's sister, his aunt, to learn whether she would be joining him and his mother for lunch. Aunt was dining at a restaurant with husband; aunt mistakenly pushed "answer" instead of "stop" on her cell phone. Because son had put the call on speaker, both wife and son heard husband professing his love for aunt, assuring her "that they would be together once he got his share of money and property" from wife, and told aunt that he had married wife only to gain permanent resident status. The trial court found that husband had lied to both women and annulled the marriage based on fraud: Husband wanted to "have his cake and eat it too" by engaging in sexual relationships with wife and her sister at the same time. *In re Marriage of Ramirez*, 81 Cal.Rptr.3d 180 (Cal. App. 2008).

Columns

Evaluating Analytical Gaps in Expert Testimony: Taking the Measure of Mental Health Testimony—Part Three

by

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

In Parts One and Two of this series, Dr. Jones, a psychologist, had conducted a child custody evaluation. He concluded that mother was depressed and testified that her emotional responsiveness to the child, as a result, was compromised. Dr. Jones's expressed his opinion that the child's best interest in the case would be served if the court granted father the right to establish the child's primary residence. Our question was how mom's lawyer might see behind the curtain of Dr. Jones's opinion to understand the reasoning Dr. Jones brought to his findings and testimony.

In Part One, we highlighted the distinction between experts' conclusions and their opinions. Recall that experts' conclusions are within the social science sphere; conclusions arise from the data mental health experts gather, consider, and review. In contrast, experts give opinions when they apply their conclusions to the legal standard the court is considering—e.g. the best interest of the child or criminal responsibility.

[1] *John A. Zervopoulos, Ph.D., J.D., ABPP is a clinical and forensic psychologist who directs PSYCHOLOGYLAW PARTNERS, a forensic consulting service providing consultation to attorneys on social science issues and testimony. He can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com*

In Part Two, we emphasized that when lawyers gauge the quality of experts' conclusions and opinions, they should bear in mind, among several considerations, two interacting concepts: reliability and the analytical gap test. Reliable testimony is testimony the court can trust. And because conclusions and opinions, ultimately, are inferences, the analytical gap between data relied upon—hopefully produced or gathered from reliable methods—and the conclusions and opinions must not be "too great." The court will deem an analytical gap that is too great as reflecting unreliable testimony. *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 726 (Tex. 1998).

Sometimes, though, lawyers experience difficulty gauging the nature of the analytical gap in expert testimony. For example, unfamiliarity with social science concepts used by the expert or with the expert's methods may compromise the lawyer's ability to weigh the expert's reasoning; retaining a consultant could address these concerns.

But experts also may, in several ways, compound the problem by hiding analytical gaps in their reasoning and inferences. For instance, in our example, Dr. Jones may use ill-defined, abstract psychological concepts to support and communicate his opinions. Dr. Jones referred to mother's *low self-esteem* and *depression*, mother's *compromised emotional responsiveness* to the child, and the child's close relationship or *attachment* to father. These abstract statements may be meaningful, if defined adequately and rooted in professional literature, or relate little, if any, research-based information for the court to apply in the case. If the latter, Dr. Jones may be using abstract terms to hide unacceptably wide analytical reasoning gaps between his data and conclusions.

Or, Dr. Jones may hide an analytical reasoning gap between his data and conclusions by basing his inference that the child has a close relationship with father on data derived from questionable methods. For example, suppose Dr. Jones relied on drawings in which the child placed herself nearer to the father than to the mother. While Dr. Jones may support his conclusion by invoking *general acceptance* among some mental health professionals of such drawing methods (unfortunately, a community of psychologists rely on this drawing procedure), the empirical relationship between the intensity of a parent-child bond and the relative placement of family figures in a drawing has not been adequately demonstrated. Questionable methods produce unreliable data, whether or not a group of professionals customarily employ those methods. U.S. Supreme Court Justice Stephen Breyer illustrated this when he noted that expert testimony grounded in so-called generally accepted principles of astrology could not satisfy *Daubert's* general acceptance factor. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999).

Alternatively, Dr. Jones may try to hide analytical gaps in his reasoning by insisting that the court trust his conclusions solely because he is an expert in child custody matters. But case law refers to this as *ipse dixit* testimony— "It is not so simply because an expert says it is so." *Gammill*, 972 S.W.2d at 726. Such testimony, by itself, cannot reliably support expert conclusions and opinions.

How may mother's lawyer expose Dr. Jones's attempts to hide analytical reasoning gaps that may be "too great?" She should approach Dr. Jones's materials and testimony with a basic question for Dr. Jones: "How do you know what you say you know?" This key inquiry provides mother's lawyer with an orientation to analyze Dr. Jones's materials as well as a specific inquiry when she examines him in a deposition or at trial. Using this approach, mother's lawyer will force Dr. Jones to define his terms, clarify his conclusions and opinions, and provide a roadmap for the inferences he used to connect his data to his conclusions and opinions. If, then, Dr. Jones produces an unclear, poorly defined roadmap, mother's lawyer can alert the court to unacceptably wide analytical gaps in Dr. Jones's testimony and clarify the extent to which the court should rely on that testimony. Teachers implore fifth grade math students to "show their work" to assure themselves that the students know how to get to the correct answer. The U.S. and Texas Supreme Courts expect no less from experts who testify.

Life Insurance in Divorce

by
Christy Adamcik Gammill, CDFA[2]

Life Insurance is often used in divorce to secure future obligations to an ex-spouse including Child Support, Alimony or Property Settlement payments. There are multiple options for structuring life insurance policy(s) to protect the interest of the recipient ex-spouse or "Payee". The purpose of this article is to address the pros and cons of each of these key issues.

SHOULD A NEW OR EXISTING POLICY BE UTILIZED?

A new life policy can be more attractive to an individual who is in good health. Life insurance seems to be getting less expensive due to improved mortality tables and increased competition. The Insured/Owner should not cancel or replace an existing policy before new coverage is secured. Most insurance companies do not charge to underwrite an Insured. Until the Insured has been underwritten it is not known if keeping an existing policy or purchasing new coverage is in the best interest of the parties. New life policies have a two year contestability clause. A fresh new policy that is owed by the Payee to whom the obligations are owed, often provides the most secure, cost effective solution.

An existing policy can be the best solution in some cases. Many people purchased term policies 8 to 10 years ago, and only a short period remains before the premiums skyrocket. This can put all parties at risk which could have been avoided by properly restructuring the coverage as part of the settlement agreement. Existing life insurance is typically recommended if the Insured has existing health issues and if the premium guarantee period exceeds the payment obligation period.

Is the premium being paid? Policies can lapse for many reasons including bank draft issues, intentional lapsing of the policy, or accidentally. To avoid this issue, the ex-spouse can be made Owner of the policy, an Interested Party (which allows for them to communicate with the insurer to periodically verify coverage), or the policy can be Collaterally Assigned to the ex-spouse to secure their expected payments will be received. The recipient ex-spouse is most secure when they are paying the premiums rather than finding out the policy is in its grace period for lack of payment. The Payor Spouse can pay alimony payments to recipient ex-spouse to cover the premiums, which obligates the Payor and gives confidence to the Payee that the premiums are getting paid.

The type of policy may be a compelling factor. Permanent policies include Whole Life, Universal, and Variable Universal Life. Often the best option for using an existing Permanent Policy is to collaterally assign it to the ex-spouse during the obligation period. Term Insurance is designed to cover obligations that end by a specified period of time. Term premiums typically stay the same for a specified period of time and can be matched directly to the obligation. It is usually a cleaner transaction to purchase a new term policy with the recipient ex-spouse as Owner and Beneficiary until the financial obligation has been satisfied, or use and assign an existing policy to the recipient ex-spouse during the obligation period.

Any of the above mentioned factors may come into play when a client is expecting future payments from a former spouse and desires protection. Each party may have their own reasons for wanting to retain ownership of an existing policy, regain control of the policy beyond the obligation period or reduce the percentage of insurance received by the Payee as the financial obligation declines. The individual situation of divorcing parties, including the financial and emotional issues involved, should be taken into consideration when assessing the clients' need for certainty in the event of the unexpected. The lives of the parties can be dramatically altered by poor planning and execution of life insurance in divorce.

---

[2] Christy Adamcik Gammill, CDFA is a fee-based financial consultant with Liberty Financial Group. She can be reached at Christine.Adamcik@LibertyFinancialGroup.org

Articles

Who Is a "Person Acting As a Parent?"

by
George Christian Gabriel[1]

Unlike when *The Brady Bunch* first aired, the blended family with children from prior relationships is now common. In fact, with over 50% of all marriages ending in divorce, non-traditional and stepparent families may be approaching the norm. The nuclear family has evolved considerably since the term was in its infancy in the 1950s. Postmodern culture has witnessed the rise of diverse household arrangements such as homosexual couples raising children and multi-parent family assemblies such as those Texas has seen in the news this year. Add to the changing makeup of the family the present economy that coerces families to relocate from state to state more frequently in order to find employment, and the need to understand how a court determines whether an individual is a "person acting as a parent" is crucial to child custody disputes. The reason is understandable: before a court may hear the substance of a child custody case involving an out-of-state order or parties living in different states, it must first determined under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) that it has jurisdiction.

To determine if Texas has jurisdiction to hear a child custody case in which persons other than the parents are involved, the court may have to determine if that person is a "person acting as a parent." Typically, the non-parent is a grandparent or a stepparent, but what about a domestic partner, boyfriend/girlfriend, an aunt/uncle, or even a cousin? The Texas adoption of the UCCJEA defines "person acting as a parent" as a person other than a parent who has physical custody (physical care and supervision) of the child for six consecutive months within a year preceding commencement of the child custody proceeding and claims a right to legal custody under the law of the state. TEX. FAM. CODE ANN. § 152.201(13)-(14) (Vernon 2008). The term "person acting as a parent" factors prominently in chapter 152 of the Texas Family Code Subchapter C, which determines whether a Texas trial court has jurisdiction to to make an initial determination regarding child custody, whether Texas retains exclusive continuing jurisdiction, or whether Texas may modify a determination from another state. TEX. FAM. CODE ANN. § 152.201-03 (2008).

Regardless of whether it is a modification or an initial child custody jurisdiction determination, "a Texas court may make [a] custody determination ***'only if'*** Texas is the child's home state at the time the proceeding is filed or Texas was the child's home state within six months of the commencement of the proceeding and the child is absent but a parent or "person acting as parent" continues to reside in the state." *In re Barnes*, 127 S.W.3d 843, 847 (Tex. App. 2003, orig. proceeding) (emphasis in original). Thus, either in a modification or an initial custody determination, in order for a Texas trial court to find that subject-matter jurisdiction exists, they must find that the home state requirements are met. *Wieland v. Wieland*, No. 01-01-00663-CV, at *3 2002 WL 467214, (Tex. App.--Houston [1st Dist.] March 28, 2002, no pet.) (not designated for publication).

Initial Determination

A Texas court does not have the jurisdiction to hear an initial determination unless Texas was the home state prior to commencement of the suit, or if the child is outside the state at the time of commencement, Texas has jurisdiction if a parent or "person acting as a parent" continues to live instate. TEX. FAM. CODE ANN. § 152.201 (Vernon 2008). The code defines "home state" in § 152.102(7) as "The state in which a child lived with a parent or "person acting as a parent" for at least six consecutive months immediately before the commencement of a child custody proceeding…" *In re Oates*, 104 S.W.3d 571, 576 (Tex. App--El Paso 2003, orig. proceeding) (emphasis in original). Texas courts have jurisdiction to make an initial child custody determination only if Texas is the home state of the child on the date of the commencement of the proceeding,

[1] Chris Gabriel is a second-year law student at Southern Methodist University Deadmon School of Law.

or was the home state of the child at some time *within six months before* the commencement of the proceeding and the child is absent from this state but a parent or "person acting as a parent" continues to live in this state. *In re Burk*, 252 S.W.3d 736 (Tex. App. Houston [14th Dist.] 2008, orig. proceeding).

Exclusive Continuing Jurisdiction

If Texas has made an initial determination affecting a child and subsequently a Texas court or a court of another state determines that the child, the child's parents, and "any person acting as a parent" do not presently reside in Texas then Texas loses exclusive continuing jurisdiction over the determination. TEX. FAM. CODE ANN. § 152.202(2) (Vernon 2008). The UCCJEA specifically grants exclusive continuing jurisdiction over child-custody disputes to the state that made the initial custody determination. *In re Forlenza*, 140 S.W.3d, 373, 375 (Tex. 2004). "Generally, a court that has jurisdiction to make an initial child custody determination also has exclusive continuing jurisdiction over the child custody matter. *In re McCoy*, 52 S.W.3d 297, 303 n.2 (Tex. App.-Corpus Christi 2001, orig. proceeding).

Jurisdiction to Modify Determination

A Texas court can modify the child custody determination of another state if a Texas court or the court of the other state determines that the child, parent, and any "person acting as a parent" no longer live in the other state. TEX. FAM. CODE ANN. § 152.203(2) (Vernon 2008). In order to modify a determination, Texas must be the home state of the child on the date of the commencement of the proceeding. *Oates*, 104 S.W.3d at 577. Texas courts must satisfy a two-prong test in order to modify an order affecting the parent-child relationship from another state: 1) Texas must be the child's home state, and 2) the child, a parent or a "person acting as a parent" does not live in the state that made the initial determination. *In re S.L.P.*, 123 S.W.3d 685, 688 (Tex. App. – Fort Worth 2003, no pet.).

Even though it can be a crucial factor in getting a court to hear a child custody case, Texas's jurisprudence defining and applying the term "person acting as a parent" is stark, aside from a few cases. Hence, for further guidance, the answer may lie in looking to the application of the language by other states' courts. In canvassing the law from the various states that have interpreted the term, it is important to note that the UCCJEA was enacted and adopted across the states to achieve the general purpose of promoting uniformity and harmonization of the laws governing custody issues. *Forlenza*, 140 S.W.3d at 375; *Arjona v. Torres*, 941 So. 2d 451, 454 (Fla. Dist. Ct. App. 2006). On September 1, 1999, Texas adopted the UCCJEA, which was created to eliminate the inconsistencies, such as uncertainties as to exclusive, continuing jurisdiction that the UCCJA spawned due to differing state adoptions and interpretations. *Forlenza*, 140 S.W.3d at 374-75. Essentially, the nationwide confusion as to jurisdiction in child custody cases stemmed from the UCCJA's lack of guidance as to a priority for one of its bases for jurisdiction, leading different states to exercise jurisdiction. *Powell v. Stover*, 165 S.W.3d 322, 325 (Tex. 2005). The UCCJEA aimed to remedy this uncertainty by prioritizing home state jurisdiction. *Id.* This furthers the overarching goal of the UCCJEA: "to promote cooperation with the courts of other states" and "to avoid jurisdictional competition and conflict with the courts of other states." *Id.* at 326. Even though the UCCJEA was designed to remedy defects in the UCCJA, the general objectives of the UCCJA and the UCCJEA are the same. *McCoy*, 52 S.W. 3d at 303. Citing case law from other states in order to illuminate the term "person acting as a parent," a court of another state noted "that although each state's version of the UCCJEA may vary from that of other states, there appears to be at least a modicum of uniformity as to the definition of "person acting as a parent…" *Patrick v. Williams*, 952 So. 2d 1131, 1139 (Ala. Civ. App. 2006).

So who can be a "person acting as a parent?" In order to get a better sense of the requirements of the two steps required for being a "person acting as a parent," it is important to further explore the various courts pronouncements.

Step One: Physical Custody for Six Months.

Texas has stressed that to achieve the status of "person acting as a parent," the adult must have physical custody of the child for a period of six consecutive months. *Oates*, 104 S.W.3d at 576. The El Paso Court of Appeals ruled that a maternal grandmother who had physical custody of her grandchild for over six months achieved the status of "person acting as a parent" in order to establish the child's home state. *Ruffier v. Ruffier*, 190 S.W.3d 884, 890 (Tex. App. – El Paso 2006, no pet.). Similarly, a New York Family Court determined that grandparents (who had been appointed guardians by both parents) with whom the child lived for more than six months were "persons acting as parents." *In re Mark L.*, 506 N.Y.S.2d 1020, 1021 (N.Y. Fam. Ct. 1986). A Missouri Court of Appeals has also ruled that an Indiana resident grandmother who cared for her dying daughter's child (her grandchild) for approximately one month in New Jersey could not meet the "six consecutive months" needed for "home state" jurisdiction by tacking this month onto the preceding five months the child's mother, a New Jersey resident, had spent caring for the child. *In re B.R.F.*, 669 S.W.2d 240, 246 (Mo. Ct. App. 1984). To qualify as a "person acting as a parent," several courts have imposed a six-months plus requirement which stipulates that the six months of physical custody of the child encompass common sense parental duties and responsibilities. *O'Rourke v. Vuturo*, 49 638 S.E.2d 124, 127 (Va. Ct. App. 2006) (stepfather who was child's sole financial support and spent time with child throughout the day for period exceeding six months satisfied the requirement of the statute); *Hangsleben v. Oliver*, 502 N.W.2d 838, 843 (N.D. 1993) (grandparents who provided basic care, food, and clothing for grandchild for a period of six months were "persons acting as parents"); *Harper v. Landers*, 348 S.E.2d 698, 700, (Ga. Ct. App. 1986) (grandmother who had lived with, taken care of, and gave children emotional and financial support while her daughter, the children's mother, was dying was a "person acting as a parent"). Under Texas law, this makes the claim to a right of custody possible considering that any person, other than a foster parent, who has had actual possession and control of the child for six months within 90 days preceding the date of the filing of the petition has automatic standing to file for a claim of managing conservator. Tex. Fam. Code § 102.003(a)(9).

Step Two: A Claim to the Right of Custody.

In *Oates*, the individuals vying for "persons acting as a parent" status, failed to overcome the first step of the requirement (six months of physical custody), thus the court did not address the second step of the requirement (a claim to the right of custody), beyond the statutory language. *Oates*, 104 S.W.3d at 576. Likewise, in an earlier case decided under the UCCJA, the San Antonio Court of Appeals did not discuss the claim to the right of custody prong because the six-month time period had not been reached. *Grimes v. Grimes*, 706 S.W.2d 340, 342 (Tex. App.--San Antonio 1986, writ dism'd). In *Ruffier*, the El Paso Court of Appeals ruled that an overseas grandparent had achieved the status of "person acting as a parent" by satisfying the six-month requirement, but the court did not address any claim to the right of custody that the grandparent had. *Ruffier*, 190 S.W.3d at 890. However, *Ruffier* was a case to determine if Texas had subject-matter jurisdiction, so it may have been dispositive that the child had not been in Texas for six consecutive months prior to commencement, thus Texas could not be the child's home state. *Id.* Again, because Texas has not specifically discussed in detail the second step of the requirement (a claim to the right of custody), it is instructive to look to other states interpretations of the UCCJEA language.

A California Court of Appeals ruled that in order to be a "person acting as a parent," that person must have a colorable claim (a claim that is advanced in good faith on some plausible legal theory) to a right to custody. *Rogers v. Platt*, 199 Cal. Rptr. 532, 537 (Cal. Ct. App. 1988). That court went on to enumerate several ways in which a colorable claim to the right to custody can arise, including a natural relationship with the child or other close familial relationships. *Id.* A Nebraska Court of Appeals stated that "a person whose only claim to the custody of a child is that he or she has had possession of the child for a few months in the recent past does not have a colorable right to the custody of the child and is not thereby a person acting as a parent." *Garcia v. Rubio*, 670 N.W.2d 475, 484 (Neb. Ct. App. 2003). Along these lines, the Alabama Court of Civil Appeals recently found that although some children were in the physical custody of their grandparents for a period of six months within a year preceding commencement, the grandparents were not "persons acting as parents" because they had not been awarded legal custody nor did they claim a right to legal custody. *Peter-*

son v. Peterson, 965 So. 2d 1096, 1100 (Ala. Civ. App. 2007). In a case that liberalized the requirement, the Virginia Court of Appeals ruled that by seeking custody of the child in an initial pleading, a person necessarily sought legal custody of the child for purposes of determining their status as a "person acting as a parent." *O'Rourke*, 49 638 S.E.2d at 127. Correspondingly, the Court of Civil Appeals of Alabama and the Appellate Court of Illinois have both determined that a grandparent met the definition of a "person acting as a parent" because the grandparent had physical custody of the children for six months and had claimed a right to custody by filing a petition for custody. *Patrick*, 952 So. 2d at 1139; *In re Bozarth*, 538 N.E.2d. 785, 790 (Ill. App. Ct. 1989).

A Survey of the Noteworthy Cases

In *Oates*, while divorce was pending, the children lived with their dying father in Texas, and the mother lived in New York. *Oates*, 104 S.W.3d at 574. More than six months prior to commencement, the father died and the children moved in with their grandparents who also lived in Texas. *Id.* The court stated that Texas would only have jurisdiction to hear the case filed for grandparent access if the children lived with a parent or "person acting as a parent" for six months immediately before commencement. *Id.* The court held that the grandparents did not qualify as "persons acting as parents" because the children had lived with them for only three months. *Id.* at 577.

In *Ruffier*, the question at issue was whether Texas was the child's home state for the purpose of an initial child custody determination. *Ruffier*, 190 S.W.3d at 888. For almost one year, the child lived overseas in Belarus (another state for purposes of the UCCJEA) with his maternal grandmother who the court deemed a "person acting as a parent." *Id.* at 890. However, that the child had not been in Texas for six consecutive months prior to commencement may have weighed heavier than the "person acting as a parent" position in the court's decision that Texas was not the home state. *Id.*

In a landmark case on the topic, the Georgia Court of Appeals ruled that a grandmother who lived with her grandchildren and their mother (her daughter), prior to the mother's death, and subsequently sought custody, was a "person acting as a parent," providing the children with emotional and financial support. *Harper*, 348 S.E.2d at 700. The Georgia court stated that the grandmother was a "person acting as a parent" "both during times of [the children's mother's] disability and after her death" and as such, the state's interest in continuing exclusive jurisdiction remained even though the children were not in the state because a "person acting as a parent" continued to live there. *Id.* at 157-59.

In another instructive case, a husband sought custody of his wife's child, who he had helped to raise, after the mother took the child and left him to return to the child's biological father. *O'Rourke*, 638 S.E.2d at 145-46. Because the husband met the requirements of a "person acting as a parent," having lived for six months with the child and the mother of the child, and because he requested custody in his pleading, thus claiming a right to legal custody, he was a "person acting as a parent." *Id.* at 148. The court also took into consideration the parent-child relationship that the child and the husband shared and that the husband had attended to the child's daily needs and provided the child's sole financial support. *Id.* at 145-46.

In *Peterson*, an Alabama court deferred jurisdiction to a North Carolina court based on a determination that the grandparents with whom the children lived for a six-month period in Alabama were not "persons acting as parents." *Peterson*, 965 So.2d at 1099-1100. The court found that even though the grandparents had physical custody for a period of six months, they failed the second step of the statute: they did not qualify as "persons acting as parents" because they had not claimed a right to the legal custody of the children. *Id.* at 1100.

Under the Texas criteria of *Oates* and *Ruffier*, a "person acting as a parent" must surpass the six month physical custody requirement needed to establish the status of person acting as a parent. *See Oates*, 104 S.W.3d at 576; *Ruffier*, 190 S.W.3d at 890. The Texas cases also seem to be in line with the *Hangsleben* common sense definition, which may seem more rigorous but may also be an expansion of the term "physical

custody," requiring that the adult provided the child with "basic care, food, and clothing for a period of six months." *See* *Hangsleben*, 502 N.W.2d at 843

Considering *Rogers*, a "person acting as a parent" must satisfy having a colorable claim to custody via the filing of a petition to establish custody. *See* *Rogers*, 199 Cal. Rptr. at 537. In line with the *Harper*, a "person acting as a parent" need only provide the child with emotional and financial support for six months and to file a claim for custody. *See* *Harper*, 348 S.E.2d at 700. *O'Rourke* appears to set the minimum for satisfying the claim to a right of custody prong: the "person acting as a parent," must (at least) seek custody of the child in an initial pleading. *O'Rourke*, 49 638 S.E.2d at 127.

Thus, under the collective understanding of the UCCJEA regarding the meaning of "person acting as a parent," practically any person can be a "person acting as a parent" as long as they have had physical custody in which they have cared for and/or supported the child for a period of six months and have filed a claim for custody of the child. As practitioners it is important to understand how the courts have defined "person acting as a parent" since it will likely become a more litigated issue in child custody cases as the nuclear family continues to transform.

Guest Editors for this report include Michelle May O'Neil (*M.M.O.*) and Jimmy Verner (*J.V.*)

DIVORCE
Grounds and Procedure

TRIAL COURT ABUSED ITS DISCRETION BY DISSMISSING CASE FOR WANT OF PROSECUTION WITHOUT RULING ON INMATE'S REQUEST TO APPEAR IN ALTERNATIVE MEANS.

¶ 08-3-01. ***Reese v. Reese***, 256 S.W.3d 898 (Tex. App.—Dallas 2008) (06/13/08)

Facts: Husband and wife married in 1981 and separated in 1987. On 03/08/08, while incarcerated, husband filed a petition for divorce and an affidavit of inability to pay costs. Wife was served via publication. Wife did not answer or appear. Husband moved for default judgment. The trial court did not rule on the motion. On 04/20/06, trial court sent husband notice of dismissal hearing set for 08/02/06 accompanied by a note instructing him to have wife served, that he could not proceed with service by publication, and encouraged him to hire local counsel. On 05/08/08, husband filed a motion requesting counsel or, in the alternative, to allow him to appear by bench warrant, by conference call, or by affidavit. The trial court did not take any action on husband's motion. On 08/26/08, trial court signed an order of dismissal for want of prosecution.

Held: Reversed and remanded. Trial court abused its discretion by dismissing the case for want of prosecution.

Opinion: A trial court has the authority to dismiss cases for want of prosecution under TCRP 165(a) or the court's inherent power, but the court must give notice and an opportunity to be heard before it dismisses. As in *Boulden v. Boulden*, 133 S.W.3d 884, 886 (Tex. App.—Dallas 2004, no pet.), husband, imprisoned, did everything he could to respond to the trial court's notice of dismissal, proposing alternative means such as appointing him counsel, conference call, or bench warranting; thus trial court abused its discretion by dismissing the case for want of prosecution without ruling on his requests to appear in alternative means. Litigants cannot be denied access to the courts simply because they are inmates.

TRIAL COURT MUST ACT ON MOTION FOR BENCH WARRANT OR ALTERNATIVE MEANS OF APPEARING BEFORE DISMISSING CASE FOR WANT OF PROSECUTION

¶ 08-3-02. ***In re Marriage of Bolton***, 256 S.W.3d 832 (Tex. App.—Dallas 2008) (06/04/08)

Facts: Husband filed his original petition for divorce pro se as an inmate incarcerated in the TDCJ. Along with his petition husband filed a documents entitled "Inmate Unsworn Declaration of Inability to Pay Costs" and "Petitioner's Motion for Bench Warrant to Attend Final Hearing, and in the Alternative, Motion for Hearing by Conference Call, and in the Alternative, Motion for Court to Accept Affidavit of Testimony." Husband later sent a letter to the Collin County District Clerk asking that wife be served by publication, reminding the clerk that he was indigent and including a proposed "Final Decree of Divorce" for the trial court's consideration. Trial court subsequently informed husband that his case would be dismissed for want of prosecution unless he delivered to the court coordinator a written request for final trial setting. In response, husband filed a request for a final trial setting. Trial court set the case for trial 06/18/07. On that day, husband's case was called and, when no one appeared, trial court signed an order dismissing husband's case for want of prosecution. Husband then filed motion for new trial, motion to reinstate the case under TRCP 165a, and notice of appeal.

Held: Reversed and remanded. Trial court abused its discretion by dismissing the case for want of prosecution.

Opinion: Husband could not physically appear in court and, being indigent, he could not retain the services of an attorney to appear on his behalf. Husband informed the trial judge of these facts in his motions and letters. Husband moved for a bench warrant or alternative means of appearing. By requiring husband to appear at a hearing while not acting on his motion for a bench warrant or to conduct the hearing by telephone conference or other means, the trial judge effectively closed the courthouse doors to husband.

Editor's Comment: *These two cases illustrate that there needs to be a better balance between controlling inactive cases through the dismissal dockets versus prematurely dismissing cases that need the court's attention. M.M.O.*

A TRIAL COURT ORDER VACATING A PRIOR RULING EFFECTIVELY RETURNS THE ORIGINAL MOTION TO THE TRIAL COURT'S DOCKET

¶ 08-3-03. ***In re* Hidalgo,** ___ S.W.3d ___, 2008 WL 3844463 (Tex. App.—Dallas 2008 orig. proceeding) (08/20/08)

Facts: Husband and wife divorced in California in 2002. Divorce decree incorporated an agreement which stated that husband would pay wife spousal maintenance and pay the premiums on a life insurance policy covering husband for wife's benefit. In 2003, wife filed the divorce decree in Texas as a foreign judgment. In 2005, wife filed a motion to enforce the decree alleging that husband failed to pay the life insurance premiums. Wife requested reimbursement for premiums that she had paid in order to keep the policy current and requested an order requiring husband to continue paying the premiums. Husband replied he was no longer required to pay the premiums because he retired in 2005. On 01/03/06, trial court signed an order denying wife's motion. Wife subsequently filed a motion for rehearing on 01/09/06, asking that the court reform its 01/03/06 order to state that, if husband returned to work before age 65, he be required to pay spousal support and life insurance premiums as required by the divorce decree.

On 04/04/06 (91 days after the 01/03/06 order), trial court entered a written "ruling" that stated the court had jurisdiction under TRCP 329(b) and vacated "its prior ruling." Trial court further found husband was obligated to pay spousal support and maintain the life insurance policy until wife's death. Further, trial court

stated in the 04/04/06 ruling that husband owed wife $7900 for the life insurance premiums that she had paid and $1150 in attorney's fees.

Husband subsequently filed a motion for a new trial and motion to confirm the 01/03/06 ruling. On 07/05/06, trial court granted husband's motion to confirm the 01/03/06 ruling. Trial court's order stated that wife's motion for rehearing did not extend the court's plenary power, and, as such, its jurisdiction ended on 02/02/06. Furthermore, trial court's order stated that even if wife's order did extend its plenary power under TRCP 329(b), no final order was issued before 04/18/06. Wife filed a petition for writ of mandamus and an appeal, claiming that the motion for rehearing operated to extend trial court's plenary power under TRCP 329(b), and that trial court's 04/04/06 written ruling constituted a final order.

Held: Mandamus granted. Trial court's 04/04/06 ruling vacated the 01/03/06 order and effectively returned the motion for enforcement to trial court's docket.

Opinion: Wife's 01/09/06 order sought a substantive change, and therefore it extended trial courts plenary power under TRCP 329(b). Trial court's 04/04/06 order expressly "vacate[d] its prior ruling," referencing the 01/3/06 judgment. By vacating rather than modifying its judgment, the trial court effectively granted a new trial, which was within its power to do at that time. The effect of this order was to return wife's original motion for enforcement to trial court's docket. "The 07/05/06 order was signed outside the time period within which a trial court may revive a prior judgment by vacating the order granting a new trial–seventy-five days from the date of the original judgment. We thus conclude the 07/05/06 order seeking to reinstate the 01/03/06 judgment is void, and that the trial court abused its discretion by signing it."

DIVORCE
Division of Property

ISLAMIC MARRIAGE CONTRACT SIGNED AFTER A CIVIL CEREMONY BUT BEFORE A RELIGIOUS CEREMONY CANNOT BE ENFORCED AS A PREMARITAL AGREEMENT

¶ 08-3-04. ***Ahmed v. Ahmed***, ___ S.W.3d ___, 2008 WL 2514451 (Tex. App.—Houston [14th Dist.] 2008) (06/17/08)

Facts: Husband and wife, both of Indian descent and Islamic, married in a civil ceremony for an arranged marriage in Nov. 1999. However, husband and wife waited to cohabitate until after the religious ceremony, six months later. As part of the religious ceremony, husband and wife signed an Islamic marriage certificate, which contains a $50,000 "Mahr" (a contract in which the husband agrees to give the wife a sum of money either at the time of marriage or deferred in the event of a divorce). Divorce proceedings began in July 2005, trial court determined that the Mahr was a valid premarital agreement and awarded wife $50,000. Husband appealed.

Held: Affirmed in part, reversed and remanded in part. The Mahr cannot be considered a valid premarital agreement because it was signed after the civil ceremony.

Opinion: The Mahr cannot be enforced as a premarital agreement because the parties made the agreement after being legally married in their civil ceremony. Per TFC § 4.001(1), a premarital agreement is an agreement made in contemplation of marriage. Wife argues that the religious ceremony controlled. Texas does not distinguish between civil and religious marriages. It is the marital status, not the ceremony, that is significant. The record is devoid of any evidence as to whether the parties intended the Mahr payment to come from the Husband's separate or the community property; because trial court's award of $50,000 to wife pursuant to the

Mahr materially impacted the distribution of the assets, case must be remanded to reconsider distribution. Trial court must also consider if Mahr is enforceable on grounds other than as a premarital agreement.

Dissent: Mahr is unenforceable as a premarital agreement and the trial court's award enforcing the agreement must be reversed and remanded for reconsideration of the assets. The interests of justice, however, are not served by allowing wife the opportunity to recharacterize/relitigate the Mahr on another theory.

AWARD OF PREJUDGMENT INTEREST FOR A DIVISION OF PROPERTY PURSUANT TO A RULE 11 AGREEMENT IS GENERALLY IMPROPER

¶ 08-3-05. ***Bufkin v. Bufkin,*** ___ S.W.3d ___, 2008 WL 2584495 (Tex. App.—Dallas 2008) (07/01/08)

Facts: Prior to marriage, husband and wife signed a premarital agreement, which held that all income and property acquired by either spouse prior to the 5th anniversary was separate property and that all income and property acquired by either spouse after the 5th anniversary was community property. Husband and wife were married for 9 years. The divorce was protracted. A divorce decree ("1st Decree") was signed after the first trial that awarded husband all stocks, dividends, a residence, and a ranch as separate property. Wife appealed the 1st Decree and later signed an agreement with husband to limit the appeal to summary judgment questions and the characterization of stock dividends as separate property in the 1st Decree. The Court of Appeals reversed and remanded the case for a new division of the community estate. The 2nd trial court judgment ("2nd Decree") awarded W community property rights in the stock dividends and valuation increases in the residence and ranch and awarded wife pre-judgment interest in the valuation increases from the date of the 1st Decree. Husband appealed claiming that trial court was limited in the 2nd division of the community estate to the issue of stock dividends based on husband and wife's agreement prior to the 1st appeal and that the award of prejudgment interest was improper.

Held: Affirmed in part, reversed and rendered in part. Trial court's division of the community estate was affirmed, but the prejudgment interest was overruled and judgment rendered in husband's favor.

Opinion: Trial court was required on remand to make a new division of the community estate and was not limited to the issue of the stock dividends on which wife originally appealed. Because appellate courts cannot reverse only one piece of a property division, it must remand the entire community estate for a new division. However, the award of prejudgment interest was improper. The Texas Finance Code governs prejudgment interest, section 302.002 does not contemplate prejudgment interest in contracts not involving extensions of credit; since the terms of the parties' premarital agreement did not contemplate any extensions of credit, Finance Code § 302.002 does not provide for prejudgment interest. Likewise, since there are no claims for wrongful death, personal injury, property damage or condemnation, Finance Code §302.101 and § 302.201 do not allow for recovery of prejudgment interest. Since there is no statutory basis for the prejudgment interest, wife is required to plead for that specific relief in order for the award to be proper, a prayer for general relief does not suffice.

AN INEQUITABLE AND UNJUST DIVISION OF PROPERTY WILL NOT SUPPORT RELIEF VIA A BILL OF REVIEW ABSENT CHANGE IN CIRCUMSTANCES

¶ 08-3-06. ***In re*** **Marriage of Noonan**, ___ S.W.3d ___, 2008 WL 2967115 (Tex. App.—Amarillo 2008) (08/04/08)

Facts: Husband and wife were married in 1973. In 2001, husband and wife executed a post-nuptial agreement. Husband filed for divorce in Jan. 2003. The parties entered into, and trial court subsequently entered, an agreed divorce decree that incorporated the terms of the post nuptial agreement. Husband and wife remarried in 2004, but in 2005 wife filed for divorce. The trial court for the second divorce entered summary

judgment against wife for certain matters regarding the property of the parties. Wife then filed a bill of review that claimed the post-nuptial agreement and agreed divorce decree from the first divorce should be set aside, because she entered into the agreement under duress and that husband committed fraud that did not allow wife to understand the extent of her property rights. Trial court dismissed wife's motion for bill of review by summary judgment, wife appealed.

Held: Affirmed. Wife did not show a change in circumstances that would require trial court to issue a bill of review.

Opinion: Wife retained counsel prior to the original trial court entering the agreed divorce decree. Wife's counsel was made aware of the potential fraud and duress claims regarding the post-nuptial agreement, and wife had opportunity to challenge the post-nuptial agreement before it was incorporated into the agreed divorce decree. "At the end of the day, it appears to this Court that what is presented is nothing more than allegations that the decree of divorce provided an inequitable and unfair division of the marital estate. An injustice in a final order will not support relief for a party by a bill of review."

DIVORCE
Post-Decree Enforcement

QUASI-ESTOPPEL PRECLUDES A PARTY FROM ENFORCING A PRIOR MEDIATIED SETTLEMENT AGREEMENT AFTER PARTICIPATING IN SUBSEQUENT MEDIATION AND TRIAL

¶ 08-3-07. ***Brooks v. Brooks***, 257 S.W.3d 418 (Tex. App.—Fort Worth 2008) (06/05/08)

Facts: Husband and wife divorced after 30+ years of marriage. Subsequently, husband and wife entered into a MSA that divided their property. One year later, husband and wife's attorneys (but not husband and wife) signed a letter, which stated "Pursuant to our conversation today, it is agreed that the MSA dated 05/20/04 is void and this matter will be mediated again at a time mutually agreed upon by the parties and attorneys." No agreement was reached in the subsequent mediation, and trial was held over a year later. At trial, both husband and wife presented proposed property divisions; wife also testified that she had osteoporosis and disc problems with her back that was so severe that they precluded her from working. The trial court divided the property and awarded indefinite spousal maintenance to wife. Before the divorce decree was signed, husband filed a motion for substitution of counsel, which was granted. Husband's new counsel filed a motion for new trial, contending that the MSA should have been the basis for trial court's ruling, and that there was no evidence or insufficient evidence for the trial court to order spousal maintenance for wife.

Held: Affirmed. Quasi-estoppel precludes husband from asserting that the MSA is still enforceable after participating in the second mediation and subsequent trial where he introduced his own property division, and a trial court has the discretion to award spousal maintenance based on testimony by one party.

Opinion: "The principle of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken… it would be unconscionable to allow [husband] to enforce the MSA after taking the clearly inconsistent position that it is unenforceable by participating in a second mediation and trial and proposing his own property division at trial that differs from the terms of the MSA." Wife was eligible for spousal maintenance under TFC § 8.051 (spousal maintenance is available if married for more than 10 years and have insufficient property to support yourself, plus incapacitating disability), and although there was no medical evidence of wife's disability introduced at trial, a trial court can rely on testimony from a party at trial when awarding spousal maintenance.

FAILURE TO PAY DEBTS ORDERED IN DIVORCE DECREE IS NOT ENFOCEBALE BY CONFINEMENT UNLESS IT INVOLVES FAILURE TO PAY CHILD SUPPORT OR FAILURE TO DELIVER SPECIFIC PROPERTY

¶ 08-2-08. ***In re* Martinez**, 2008 WL 2261199 (Tex. App.—San Antonio 2008, orig. proceeding) (memo op.) (06/04/08)

Facts: Husband and wife divorced in 2003. The divorce decree that ordered husband and wife were equally liable for 4 credit card accounts and home mortgage, but no date was specified as to when each debt was to be fully paid. Trial court found wife in contempt for failure to pay pending debts on 07/18/07 and ordered that if wife failed to make full payments within 60 days she would be confined for up to 18 months. On 09/19/07, trial court issued Findings of Fact and Conclusions of Law that wife had failed to make any payments between July 2003 and January 2005 in compliance with the divorce decree, and ordered confinement. Wife appealed trial court's contempt order, but the appeal was dismissed because the validity of a contempt order cannot be attacked by direct appeal. Wife then filed petition for writ of mandamus, claiming that trial court abused its discretion by conditioning confinement of the failure to pay debts.

Held: Mandamus granted. Confinement by contempt for failure to pay debts violates Art. I, § 18 of the Texas Constitution, which provides that "[n]o person shall ever be imprisoned for debt."

Opinion: Wife was threatened with confinement based on the failure to pay, as a part of the division of the estate of the parties, one-half of the debts incurred on various accounts. Because these "debts" did not involve the failure to pay child support or otherwise involve the delivery of specific property pursuant to a division of the community estate, wife's obligation to pay these debts is clearly not enforceable by confinement by contempt.

Editor's Comment: *Enforcement of provisions regarding the payment of debts contained within the division of property in a divorce remains problematic. It is elementary that we do not have debtor's prison in our country. This opinion reminds us that our prohibition against debtor's prison extends even to enforcement of the provisions for debt in a divorce decree. Unfortunately, where parties have joint debt created during a marriage, their joint liability continues even after the divorce. It is important to advise clients prior to entering into an agreement dividing debts as to the effect of such division of joint debts. When possible, it may be better to use joint assets to pay off the joint debts to avoid future problems. M.M.O.*

Editor's Comment: *A client whose ex-spouse is ordered to pay the home mortgage can be protected by a deed of trust to secure assumption, but how does one protect against an ex-spouse's failure to pay unsecured debt? One solution would be to advise the client to pay the debts of the other spouse prior to divorce (if able to do so) and take those payments into account when dividing the community estate. But most clients would react to that suggestion with what charitably might be described as incredulity. J.V.*

AFFIDAVIT FILED IN SUPPORT OF SUMMARY JUDGMENT MUST CONTAIN COMPETENT EVIDENCE TO SUPPORT THE JUDGMENT OR IT IS IMPROPER

¶ 08-3-09. ***Eberstein v. Hunter***, ___ S.W.3d ___, 2008 WL **2791514** (Tex. App.—Dallas 2008) (07/21/08)

Facts: Husband and wife divorced in 2001 and signed an AID that was incorporated into the decree. Husband agreed to pay contractual alimony to wife in the amount of $10K until 04/01/04, $7K until 05/01/06, and $3K until 06/01/09. In 2005, wife filed a petition to enforce for amounts owed under the AID and attorney's fees in conjunction with the proceeding. Wife stated in an affidavit that husband owed $100,000 for 07/01/03 through 04/01/04, $91,000 for 05/01/04 through 05/01/05, $84,000 from 06/01/05 through 05/01/06, and $3,000 through 06/01/06, for a total of $278,000. Wife's attorney filed an affidavit in support of wife's request for attorney's fees that stated a reasonable fee for representation of wife would be $50,000. Trial court

granted wife's motion for summary judgment and awarded wife $281,000 for unpaid alimony, $27,082.58 for prejudgment interest, and $20,000 for attorney's fees. Husband appealed.

Held: Modified in part, reversed and remanded in part, and affirmed in part.

Opinion: Wife's affidavit supported award of unpaid alimony because she relied on the AID to calculate the amount of unpaid payments due, and noted the aggregate amount of the unpaid amount. Those statements are not conclusions, wife was reciting facts based on her personal knowledge. However, wife stated that husband owed $278K through 06/01/06, but trial court entered judgment on 07/11/06 and added $3,000 for payment due through 07/01/06; however there is no evidence that husband did not make the 07/01/06 payment, and the additional $3,000 should be omitted and the prejudgment interest recalculated. The award of attorney's fees was improper, because wife's attorney did not provide any factual basis for his statement that $50,000 would be a reasonable fee.

Editor's comment: *When trying to prove up attorneys fees by summary judgment, the attorney's affidavit needs to incorporate the same types of evidence that one would present at trial. It isn't enough to just conclude a lump sum fee. The fee amount requested must be supported by specific factual statements. I anticipate we will see more appellate decisions on the application of summary judgments to the family law context as they become more frequently utilized. M.M.O.*

MARITAL PROPERTY RIGHTS

DESIGNATION OF AN EX-SPOUSE AS BENEFICIARY OF A LIFE INSURANCE POLICY AFTER DIVORCE OR ANNULMENT IS NOT NULLIFIED BY FAMILY CODE § 9.301

¶ 08-3-10. ***Gray v. Nash,*** ___ S.W.3d ___, 2008 WL 2510722 (Tex. App.—Fort Worth 2008) (06/19/08)

Facts: In 1997, husband and ex-wife divorced, the divorce decree required husband to purchase a life insurance policy with a death benefit of at least $60,000 with ex-wife as irrevocable beneficiary as trustee for the benefit of daughter. Husband purchased a life insurance policy with a death benefit of $500,000 and designated daughter as beneficiary. Husband remarried in 1998, and submitted a change of beneficiary form to the insurer that stated "$60,000 shall be paid to ex-wife" and the balance to be paid to wife. In 2001, trial court issued a modification order that appointed husband primary joint managing conservator, the order included a finding that husband was current in all child support payment obligations and ordered that husband's child support obligation be terminated. Husband died in 2006, wife submitted a claim for the full $500,000 death benefit to insurer; insurer paid $60,000 into trial court's registry and paid the balance to wife. Wife and ex-wife filed cross-motions for summary judgment; trial court denied ex-wife's motion and granted wife's motion, awarding wife the $60,000 in the court's registry. Ex-wife appealed.

Held: Reversed and rendered. TFC § 9.301 only applies to ex-spouses who are named as beneficiaries *before* divorce or annulment.

Opinion: An insurance policy is a contract, under the contract the insurer was obligated to pay ex-wife $60,000 on husband's death. TFC § 9.301(a) specifies that only divorce decrees and annulments nullify beneficiary designations; because the unambiguous language of section 9.301 limits its application to insurance policies issued *before* a court renders a decree of divorce or annulment, it does not nullify husband's designation of ex-w as beneficiary after the divorce was final. Ex-wife has an insurable interest in husband's life because under Texas Ins. Code § 1103.054, an individual may apply for a life insurance policy on the individual's own life and designate as beneficiary any individual. Thus, the legislature has conferred an insurable interest on those persons named by an insured as beneficiaries in a policy on the insured's own life. The proceeds of the policy are not considered excess child support to ex-wife. There is no evidence that husband ob-

tained life insurance coverage solely to comply with the divorce decree, and ex-wife was unconditionally and unambiguously designated as a beneficiary in her individual capacity rather than as a trustee for the benefit of the child.

SAPCR
Conservatorship

★★★★★ Texas Supreme Court ★★★★★

A PARENT MUST BE GIVEN A MEANINGFULL OPPORTUNITY TO BE HEARD BEFORE A TRIAL COURT AWARDS TEMPORARY GRANDPARENTAL VISITATION

¶ 08-3-11. ***In re* Chambless,** 257 S.W.3d 698 (Tex. 2008) (per curiam) (06/27/08)

Facts: Trial court appointed mother managing conservator and father possessory conservator of 7-year-old child, with paternal grandparents supervising father's visitation. Father died in a motorcycle accident and paternal grandparents filed a petition seeking visitation. At the hearing, grandparents claimed that child would be significantly harmed if he did not know his father's side of the family. Grandparents offered into evidence a social study report by a court-appointed social worker that stated depriving grandparent access would be "very detrimental" to child's emotional well-being. The social worker was not able to attend the hearing; as such mother did not have an opportunity to cross examine her. Trial court denied mother's motion for a directed verdict in which mother argued that grandparents had failed to show that child would suffer significant physical or emotional impairment absent grandparent visitation. Trial court recessed the hearing until social worker was available and signed an interim visitation order allowing grandparents 3 days of visitation per month over mother's objection and without giving mother a chance to present evidence on the matter. Mother filed petition for writ of mandamus in the Fort Worth Court of Appeals, which was denied. Mother then sought the same relief from the Supreme Court.

Held: Mandamus granted. Trial court abused its discretion by not allowing mother the opportunity to cross examine the social worker or to present evidence prior to entering its temporary order.

Opinion: Grandparent possession is governed by TFC chapter 153. A trial court abuses its discretion when it grants access to a grandparent who has not proved by a preponderance of the evidence that denial of possession of or access would significantly impair the child's physical health or emotional well-being. Mother also said that if given the opportunity, she would present evidence that grandparent visitation was not in the child's best interest. Thus, trial court abused its discretion in awarding the paternal grandparents temporary visitation without affording mother a meaningful opportunity to be heard.

PRINCIPLES OF ESTOPPEL OR QUASI-ESTOPPEL CANNOT CONFER STANDING OR SUBJECT MATTER JURISDICTION IN A SAPCR CASE WHERE NONE EXISTS UNDER THE FAMILY CODE

¶ 08-2-12. ***In re* H.G.,** ___ S.W.3d ___, 2008 WL 2355008 (Tex. App.—San Antonio 2008) (06/04/08)

Note: On 04/23/08, court of appeals issued an opinion and judgment affirming the trial court's ruling (*In re* H.G., 2008 WL 1805516); appellants filed a motion for rehearing. The motion was denied, but court withdrew the 04/23/08 opinion and issued this opinion in its place; the 04/23/08 judgment remains unchanged.

Facts: Grandparents were named managing conservators of children after biological parent's parental rights were terminated. Adoptive mother and adoptive father later adopted children with grandparent's consent after adoptive mother promised grandparents that they would be permitted on-going visitation with the children.

Two years after the final adoption, adoptive parents filed for divorce; the decree named adoptive mother and adoptive father joint managing conservators of the children. Eight months after the divorce decree, grandparents filed a petition seeking "possession or access to the children," claiming that adoptive mother and adoptive father secured grandparents' consent for adoption by promising continued visitation after the adoption, and that estoppel or quasi-estoppel prohibited them from denying visitation. Adoptive mother filed a motion to strike the petition, claiming that grandparents had no standing and there was no basis in law for estoppel or quasi-estoppel. The trial court dismissed grandparents' claim for lack of standing. Grandparents appealed.

Held: Affirmed. Estoppel or quasi-estoppel cannot be used to confer standing or subject-matter jurisdiction where none exists.

Opinion: The Legislature has provided a comprehensive statutory framework for standing in a SAPCR and no cases have held that estoppel or quasi-estoppel can confer standing were none exists under the legislative framework. Estoppel or quasi-estoppel may preclude parties from arguing facts that negate standing, but it cannot confer subject-matter jurisdiction where none exists. TFC §§ 154.433 and 154.434 establish "a bright line before which a grandparent's request for access of a grandchild may be made and after which it may not." Therefore, grandparents' standing is statutorily precluded

Dissent: Because the grandparents were the managing conservators at the time of the children's adoption, their consent to the adoption was statutorily required. In order to obtain that consent, adoptive mother represented to the grandparents that they would be allowed on-going visitation rights. These representations were made prior to the adoption at a time when the grandparents had standing to seek continued possession of and access to the children. Taking into consideration the best interest of these children, the trial court in this case could and should have exercised its equity jurisdiction of quasi-estoppel, because it would be unconscionable to allow adoptive mother to assert a position contrary to her promise that the grandparents would be allowed continued access if they consented to the adoption to deny their standing.

ORAL AGREEMENT BETWEEN PARTIES TO MODIFY CHILD CUSTODY AGREEMENT IS NOT ENFORCEABLE UNLESS IT HAS COURT APPROVAL

¶ 08-3-13. ***In re* Kubankin**, 257 S.W.3d 852 (Tex. App.—Waco 2008, orig. proceeding) (06/05/08)

Facts: Mother and father divorced in 2003. Under the divorce decree, they were designated JMC, with mother having the exclusive right to determine the legal domicile of the children. Subsequently, mother and father modified the custody provisions of the decree on an annual basis, which the trial court approved. The latest modification approved by the trial court in Jan. 2008 appointed father as managing conservator of child with the right to determine residence and granted mother the right of possession during certain holidays, including Spring Break. Father and child resided in Ohio. Mother brought child to Texas during Spring Break. Mother testified that she had conversations with father both before and during Spring Break about child's unhappiness with his living arrangements and that she talked to father about the possibility of child moving back to Texas with her. On 03/21/08, mother emailed father a proposed modification order that would designate mother as child's managing conservator, give mother the right to physical possession of child subject to father's visitation rights, and require father to make monthly child support payments (which the Jan. 2008 order did not require). Father responded with an email that staid the proposed order "looks fine" except for the child support provisions. Child stayed with mother in Texas after Spring Break, and mother enrolled child in a Waxahachie ISD elementary school. Father filed a habeas petition on 04/03/08, trial court set a hearing for 04/25/08. At the conclusion of the hearing, trial court denied father's petition because father had agreed to the change in custody and because "it isn't good for this kid to be bounced back and forth between these school districts like that." Father subsequently filed a petition for a writ of mandamus to force TC to issue habeas relief.

Held: Mandamus granted. The Jan. 2008 order was still in effect, therefore father was entitled to possession of child, and TC should have granted father's habeas petition.

Opinion: Father was entitled to possession based on the Jan. 2008 order. The email conversation between mother and father on 03/21/08 does not supersede the Jan. 2008 order. Court approval is required to make custody modifications enforceable. There was no evidence that any of the exceptions (that father voluntarily relinquished control of child for more than 6 months or that there was a serious immediate question regarding the child's welfare) to the requirement that trial court grant the habeas petition in this case.

Dissent (Note): This Court's judgment may become moot if the trial court renders and signs a modification order that documents the parties' agreement regarding the right to possession of the child before the child is transferred back to Ohio where he is not getting the counseling the trial court has already determined it would be in the child's best interest to receive, and which he is currently receiving in Ellis County.

SIGNING AN AGREED JUDGMENT CONSTITUTES A GENERAL APPEARANCE AND CONSENT TO PERSONAL JURISDICTION THAT WAIVES ANY DEFECT IN SERVICE

¶ 08-3-14. ***In re* C.R.B.,** 256 S.W.3d 876 (Tex. App.—Texarkana 2008) (06/13/08)

Facts: Trial court signed a SAPCR order granting 3rd party sole managing conservatorship of mother's child. Mother was not served with a citation, did not sign a waiver of service, and did not appear in person at the hearing resulting in the SAPCR order. However, mother did sign the SAPCR order as "approved and consented to in both form and substance." Mother timely filed a bill of review challenging the SAPCR order, which the trial court denied. The trial court issued findings that mother knowingly and intentionally signed the agreed judgment and that when she signed she understood that she was giving up custody of her child, and that her signature was not obtained by deception or fraud. Mother appealed trial court's denial of her bill of review, contending that the SAPCR order was void because it was entered without service, without waiver of service, or a general appearance.
Held: Affirmed. Mother made a general appearance and waived service by signing the agreed judgment.

Opinion: An agreed judgment constitutes a general appearance. Mother's signature is evidence that she had knowledge of the proceedings and elected not to contest the agreed judgment. By signing the judgment, mother consented to the personal jurisdiction of trial court and recognized that an action was properly pending. Therefore, mother waived any defect in the service of citation.

Editor's comment: *This case stands for the proposition that neither service nor waiver of service is necessary, provided that the party signs the judgment. The opinion cites to a couple of cases out of Houston that allowed signature on an agreed modification order to suffice for service or waiver of service. It appears that the appellant in this case didn't make any constitutional challenge to due process. It also appears from the opinion that the appellant didn't challenge certain findings on appeal regarding the fraud claims made by the appellant. Those two appellate points might have made a difference in the outcome. As a practical matter, I wouldn't rely on this line of opinions to stop getting service or waivers of service on supposedly agreed cases. With a waiver of citation, you have the added protective measure of notarization to ensure that no fraud has taken place. M.M.O.*

GRANDPARENT HAS STANDING TO BRING SAPCR TO MODIFY PREVIOUS CUSTODY ORDER FOLLOWING DEATH OF PARENT PRIMARY CONSERVATOR

¶ 08-3-15. ***In re* M.P.B.,** 257 S.W.3d 804 (Tex. App.—Dallas 2008). (06/20/08)

Facts: When child was 2 months-old, trial court adjudicated father's paternity. It appointed mother and father JMC and named mother primary conservator. Mother and child lived with grandmother for 3 months, after which mother and child moved to their in own apartment near grandmother. The child, however, spent more time at grandmother's residence than mother's apartment, including every weekend. Further, grandmother clothed child, taught ABCs, and was primary caregiver. Father moved to California and had limited contact with child. M died in a house fire when child was 20-months old. Grandmother then filed suit seeking primary conservatorship, and later, father filed for habeas corpus seeking possession of child. Trial court denied father's habeas petition. Father then countersued seeking SMC, and filed a motion to dismiss grandmother's petition on the grounds that she lacked standing to file a SAPCR. Trial court denied father's motion to dismiss. Trial court, after a bench trial, appointed grandmother as non-parent primary JMC with exclusive right to designate primary residence, and father as parent JMC. Father appealed.

Held: Affirmed. Grandmother had standing.

Opinion: Grandmother had standing to bring a SAPCR under TFC §102.003(a)(9). Six months of actual care, control, and possession need not be continuous and uninterrupted, but the court must consider the child's principal residence (1. Fixed place of abode, 2. occupied consistently, 3. permanent, not temporary) during the relevant time preceding commencement. The record shows there were at least six months when grandmother had actual care, control and possession, and although this was not exclusive, the record does not suggest this pattern of possession and care giving was intended to be a temporary arrangement as it satisfied the elements to be child's principal residence.

In modification proceeding there is no parental presumption. Thus modification proceedings favor the best interest of the child over the parent's right to primary possession. Under *In re P.D.M.*, 117 S.W.3d 453 (Tex. App.—Fort Worth 2003), death of a primary conservator does not terminate a prior conservatorship determination and must be modified. Grandmother expressly sought modification and trial court treated as modification, entering order in "best interest" of child. Given father's history of drug use, lack of involvement with child, and grandmother's involvement with child, trial court did not abuse its discretion by determining it was in child's best interest to appoint grandmother primary conservator.

Editor's comment: *The court reminds us that a grandparent may obtain standing other than in his or her capacity as a grandparent. J.V.*

THE PARENTAL PRESUMPTION IN FAMILY CODE § 153.433 DOES NOT APPLY TO NON-PARENTS THAT HAVE BEEN DESIGNATED JOINT MANAGING CONSERVATOR

¶ 08-3-16. ***In re* Smith,** ___ S.W.3d ___, 2008 WL 2611216 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (07/03/08)

Facts: Trial court named paternal grandfather and his wife JMC of child, parents named possessory conservators with limited access. Paternal grandmother filed a petition for grandparent access under TFC § 153.432. Subsequently, trial court referred the case to the court's "juvenile law master." Master conducted hearing on grandmother's petition and awarded standard access to grandmother while terminating parent's visitation rights during the pendency of the suit. Trial court adopted master's rulings. Grandfather requested that trial court conduct a de novo appeal under TFC § 201.015(f), trial court denied grandfather's request. Grandfather filed a petition for writ of mandamus claiming that trial court abused its discretion by denying the request for de novo appeal, holding that grandmother had standing to request access, and adopting the master's ruling

that grandmother be awarded access pending final disposition because she had not rebutted the parental presumption.

Held: Mandamus denied.

Opinion: Trial court did not abuse its discretion by denying grandfather's request for de novo appeal. The 316th District Court is designated as a 'juvenile court" under Tex. Gov. Code § 23.001, under Gov. Code § 54.697 trial court "may adopt, modify, correct, reject, or reverse the master's report or may recommit if for further information, as the court determines to be proper and necessary in each case. TFC § 153.433 does not limit grandmother's standing. Non-parents may not claim the parental presumption in TFC § 153.433. Logically, the plain language of the "parental presumption" limits the application of the presumption to *parents*. Under the unambiguous statutory language, grandparents, though JMC, are not parents.

AWARD OF GRANDPARENT ACCESS CANNOT BE MADE ABSENT PROOF THAT DENIAL OF ACCESS WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL WELL-BEING

¶ 08-3-17. ***In re* J.P.C.**, ___ S.W.3d ___, 2008 WL 2780700 (Tex. App.—Fort Worth 2008) (07/17/08)

Facts: Mother and father were married 05/20/96, they had one child, who was born 03/29/99. Mother filed for divorce from father in May 2002, after the divorce was filed, father went to live with his parents (grandparents). Subsequently, trial court entered temporary orders appointing parents JMC, with mother being primary, and awarding father standard possession subject to grandparent's supervision. In March or April 2003, the divorce proceedings were halted when father was diagnosed with a terminal disease. Father died on 05/09/04. On 05/18/04, grandparents filed an original petition for grandparent access. On 01/31/07, trial court granted grandparent possession of and access to child. On 05/18/07, trial court signed its order granting grandparents possession and access. Mother appealed.

Held: Reversed and rendered. Grandparents did not prove by a preponderance of the evidence that denial of access would harm child's physical or emotional well-being to overcome the statutory presumption that mother was acting in child's best interest.

Opinion: Although the section governing grandparent access (TFC § 153.433) does not mention best interest, TFC § 153.002 dictates that the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child. TFC § 153.433 presumes that a parent acts in the child's best interest, and it permits grandparents to obtain court-ordered access only upon a showing that denial of access will "significantly impair the child's physical health of emotional well-being." Grandparents only presented their opinions and an opinion of a paternal aunt. The mere opinion of the grandparents themselves and an interested, non-expert witness that the grandparents should be granted access does not overcome the statutory presumption, nor does it support the court's interference with mother's parental rights by awarding the grandparents court-ordered access to child.

THE UCCJEA REQUIRES THAT A CHILD AND PARENT LIVE IN A STATE FOR SIX CONSECUTIVE MONTHS PRIOR TO THE COMMENCEMENT OF A CUSTODY SUIT; ADDITIONALLY A STATE'S EXCLUSIVE, CONTINUING JURISDICTION UNDER THE UCCJEA CANNOT BE LOST ABSENT A FINDING BY A COURT

¶ 08-3-18. ***In re* Tiere**, ___ S.W.3d ___, 2008 WL 3411930 (Tex. App.—Tyler 2008 orig. proceeding) (08/13/08)

Facts: Mother and Father were married and lived in New Jersey with their children. On 01/03/06, Mother and children left New Jersey and moved to Texas. On 02/01/06, Father filed for divorce in New Jersey. On 03/03/06, the N.J. court ordered that father have temporary custody of children and ordered mother to return children to N.J. immediately. On 04/03/06, the N.J. court held a show cause hearing and again ordered mother to return the children, mother and children returned on 04/07/06. On 04/23/06, the N.J. court entered a custody and visitation order appointing father as the parent with primary residence. On 04/28/06, the N.J. court entered a consent order for dismissal stating mother and father had reconciled and both parties wished to dismiss the proceeding; mother and father both signed the consent order. On 04/29/08, mother, father, and the children left N.J. for Texas. On 08/18/06, father left Texas and retuned to N.J. Mother filed for divorce in Texas on 08/21/06, father filed a special appearance objecting to the Texas court's jurisdiction. The Texas trial court held a hearing on the special appearance during which mother testified that she and the children moved to Texas on 01/03/06 and were only absent for three weeks in April 2006 and for a one week visit to Chicago in March 2006. The Texas trial court found that it had jurisdiction of the case and all the parties. On 10/30/06, the Texas trial court appointed mother as temporary sole managing conservator and father as temporary possessory conservator, and denied father visitation until further order of the court.

On 02/27/07, the N.J. court vacated the 04/28/06 consent order for dismissal and reinstated the divorce case, finding that mother obtained father's consent by means of fraud and committed this fraud to regain custody of the children and to relocate to Texas. The N.J. court stated that it was aware that a Texas trial court had assumed jurisdiction over custody issues involving the children and refused to exercise jurisdiction over such custody issues unless and until the Texas trial court relinquished jurisdiction. On 04/18/07, father filed a motion to dismiss and for costs under the UCCJEA in the Texas trial court, arguing that the N.J. court had exclusive, continuing jurisdiction. On 08/24/07, the N.J. court entered a final judgment of divorce, which acknowledged that the Texas trial court had stayed custody jurisdiction pending a hearing. The N.J. court stated that father's request for custody and parenting time could be revisited if Texas conceded that New Jersey had jurisdiction.

On 08/29/07, the Texas trial court held a hearing and telephone conference between mother, mother's Texas and New Jersey attorneys, father's Texas and New Jersey attorneys, and the presiding judge for the N.J. divorce case. On 09/25/07, after the hearing and conference, the Texas trial court found that on 08/21/06, the children had lived in Texas for at least six consecutive months with mother and that they physically lived in Texas for eight months, except for a temporary absence from the state for a period of three to four weeks in April 2006. The Texas trial court found that the children's physical presence in Texas determined the children's home state. Further, it found that no other state or court had exclusive, continuing jurisdiction over the parties or children on the date the Texas divorce suit commenced and that no child custody determination had been commenced in the court of another state at the time of the Texas divorce suit. The Texas trial court denied father's motion to dismiss and for costs under the UCCJEA. Father filed a petition for writ of mandamus.

Held: Mandamus granted. The Texas trial court did not comply with the UCCJEA.

Opinion: Mother and children moved to Texas on 01/03/06 and lived in the state for approximately three months before moving to Chicago for one week at the end of March 2006 and to New Jersey for at least three weeks in April 2006. They returned to Texas on 04/29/06 and lived continuously in the state until 08/21/06, approximately four months. In total, the children lived in Texas for seven months before mother filed for divorce and custody on 08/21/06; however, these months were not consecutive. Because the children did not

live with mother in Texas for a period of six consecutive months before she filed for divorce and custody, Texas is not the children's home state Therefore, the Texas trial court abused its discretion by including periods of absence from the state in calculating the length of the children's residence in Texas and by finding that Texas was the children's home state as of 08/21/06..

Even if Texas were the children's home state, the result would not change. The N.J. court acquired exclusive, continuing jurisdiction over the children by its 03/03/06 custody order. The UCCJEA does not require that the N.J. divorce case be ongoing. Consequently, the Texas trial court abused its discretion when it ruled that it had exclusive, continuing jurisdiction because the N.J. divorce case was voluntarily dismissed.

The N.J. court did not lose its exclusive, continuing jurisdiction because no court made a determination as required by the UCCJEA that neither the children nor a parent presently resided in N.J., resulting in N.J. losing its exclusive, continuing jurisdiction. Therefore, the Texas trial court abused its discretion by exercising jurisdiction because the N.J. divorce case gave N.J. exclusive, continuing jurisdiction.

A NON-PARENT IN A SAME SEX RELATIONSHIP MUST MEET THE STANDING REQUIREMENTS OF FAMILY CODE SECTION 102.003(a)(9) TO HAVE STANDING TO FILE A SAPCR

¶ 08-3-19. ***In re* Smith**, ___ S.W.3d ___, 2008 WL 3522346 (Tex. App.—Beaumont 2008 orig. proceeding) (08/14/08)

Facts: Mother and female partner were in a long term, monogamous relationship. In 2002, Mother gave birth to twins conceived by artificial insemination using sperm from an anonymous donor. Four months after the twins were born mother and female partner filed a joint SAPCR. Trial court entered the SAPCR order when the twins were 4 months old. The SAPCR order appointed mother and female partner JMC, gave them "equal possession of the children at all times[,]" and provided "that no stated provisions for possession and access are necessary in light of the fact that the parties cohabitate in the same primary residence." Mother and female partner separated in February 2008, and female partner filed a petition to modify the SAPCR. Trial court entered a temporary order giving female partner access to and supervision of the twins. Mother filed a petition for writ of mandamus, seeking to vacate both the 2002 SAPCR naming female partner JMC and the 2008 temporary orders because female partner lacked standing to file the 2002 SAPCR.

Held: Mandamus granted. Female partner did not have standing to file the initial SAPCR, and trial court cannot enter temporary orders enforcing an order that is void.

Opinion: A non-parent must meet the requirement of TFC § 102.003(a)(9) ("a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition[.]") to have standing to file an initial SAPCR. Because female partner did not meet these requirements at the time the 2002 SAPCR was filed, she lacked standing. Because the original SAPCR order is void, the temporary orders arising out of the motion to modify the void order must be vacated.

Editor's comment: *The Beaumont Court finds no relevance to the original intent of the parties or the same-sex partner's six year relationship with the children. This case underscores the absolute precision with which people must adhere to the procedural requirements of the Family Code in order to establish and protect their rights to non-biological children in the event that their relationship with the biological parent should end, as well as the jealousy with which the law in Texas guards the right of a parent to make decisions concerning their child at the time the* present *litigation ensues. This case also reiterates the time-sensitive nature of an individual's rights in this type of increasingly common situation. Here, the partner was, in essence, a mother to these children for six years, yet, because she acted two months too quickly in filing the 2002 SAPCR, the Beaumont Court found she had no right to a continuing relationship with the children, regardless of the parties' original intent. Had she waited until the twins were six months old before filing the original SAPCR (to*

meet the six month standing requirement), this case might have had a very different outcome. Also interesting to note in this case is the Beaumont Court's determination that since the 2002 order was an agreed order, it resolved no controversy between the parties, thus, the biological mother's standing was not sufficient to confer jurisdiction on the trial court. M.M.O.

TRIAL COURT CANNOT MODIFY CHILD CUSTODY RIGHTS IF A PARENT HAS NOT BEEN SERVED WITH PROCESS, HAD NOT WAIVED PROCESS, AND DID NOT VOLUNTARILY APPEAR BEFORE TRIAL COURT

¶ 08-3-20. ***In re* D.A.P.**, ___ S.W.3d ___, NO. 14-06-00975-CV (Tex. App.—Houston [14th Dist.] 2008) (08/26/08)

Facts: In 1998, mother and father were divorced in Washington State. The divorce decree named mother sole managing conservator of child, but did not order that father pay child support because the court ostensibly did not have personal jurisdiction over father (who lived in Texas). In 2005, AG filed a petition in trial court seeking a child support judgment against father, alleging that child lived in Washington with mother. Father filed a counter-petition, alleging that child actually resided with him in Texas and that Texas had jurisdiction over all parties. Father also requested that trial court render a standard possession order. In June 2006, trial court heard an unrecorded hearing on the merits of the petition and counter-petition. Trial court found the father owed a child support duty to mother, appointed mother and father as joint managing conservators, and entered a standard possession order. Mother filed a motion for new trial, which was overruled by operation of law. Mother appealed, claiming that trial court modified her child custody rights even though she had not been served with process, had not waived process, and had not voluntarily appeared.

Held: Reversed and remanded. Trial court abused its discretion by modifying mother's child custody rights without serving her with process.

Opinion: "[T]he record in this case shows that [mother] had not been served with process, had not waived service of process, and did not voluntarily appear before the trial court conducted the trial and rendered its final order regarding custody. Therefore, the trial court erred in modifying the Washington child custody order. Consequently, the trial court abused its discretion by denying [mother]'s motion for new trial in this regard.

SAPCR
Child Support

★★★★★ Texas Supreme Court ★★★★★

EX PARTE TEMPORARY RESTRAING ORDERS MUST COMPLY WITH TEXAS RULES OF CIVIL PROCEDURE 680 AND 684

¶ 08-3-21. ***In re* Office of Attorney General,** 257 S.W.3d 695, 51 Tex. Sup. Ct. 1112 (Tex. 2008, orig. proceeding) (per curiam) (06/27/08)

Facts: Trial court directed that several orders for child support payments be remitted by AG to a private company that collects and disburses such payments for a fee. AG sought mandamus in court of appeals seeking to modify 560 child support orders after the 5th Circuit decision in *O'Donnell v. Abbott*, 481 F.3d 280, 282 (5th Cir. 2007), which held that federal law prohibited AG from remitting child support payments to a third party absent parental authorization. While mandamus was pending in the court of appeals, trial court entered an ex

parte TRO directing AG to continue making the payments to the third party and set a hearing. Court of appeals denied mandamus. AG then filed a petition for writ of mandamus in the Supreme Court challenging the TRO. AG also filed a motion requesting emergency stay of the TRO. While the motion was pending, trial court issued two amended orders, the first extended the TRO 14 days, and the second extended the TRO indefinitely as a temporary injunction.

Held: Mandamus granted. Trial court's TRO and subsequent orders violated the TRCP.

Opinion: The TRO and the amended orders violate TRCP 680 & 684, in that the orders were granted *ex parte* and trial court failed to explain why the orders were granted without notice. The orders do not define the injury or explain why that injury is irreparable, and the orders were issued without meeting the bond requirement. The second amended order purports to carry forth the original TRO as a temporary injunction, but since trial court issued it without a hearing, it is not properly an injunction, but, rather, a continuation of the TRO. Mandamus was granted without hearing oral argument, pursuant to TRCP 52.8(c), because AG presented evidence that Texas could lose federal funding if AG is forced to comply with the orders.
Editor's comment: *This case chronicles merely the latest round in the ongoing campaign by the Texas Attorney General's Office to require all child support to be paid through the Child Support Disbursement Unit rather than through court-appointed guardians ad litem. Although the Texas Supreme Court decided the case correctly, the Court did not reach the merits of the underlying dispute. J.V.*

AN AGREED ORDER THAT DOES NOT MODIFY A PRIOR CHILD SUPPORT OBLIGATION DOES NOT BAR RECOVERY FOR UNPAID CHILD SUPPORT THAT ACCRUED PRIOR TO THE AGREED ORDER

¶ 08-3-22. ***In re* P.D.D.**, 256 S.W.3d 834 (Tex. App.—Texarkana 2008) (06/05/08)

Facts: Mother and father were divorced in 1994. The decree stated there were no children and none expected, but mother found herself pregnant after the divorce and filed an action to modify in a SAPCR. An agreed order of paternity found father to be the father and ordered him to pay child support and health insurance for the child. It also named mother SMC and father possessory conservator, with a standard possession order. In 2003, father moved to Arizona and remarried. Relations soured over the visitation agreement in 2004. Mother moved without providing father a forwarding address to reach child. In Nov. 2004, father filed an action for contempt to compel enforcement of his custodial rights. Mother was held in contempt and ordered to pay father's attorney's fees. Father was also granted compensatory possession days. In July 2005, father filed a motion to modify custody. Mother responded with a request for modification of the child support obligation. A hearing commenced, but an agreed order was entered on 10/15/05 that vacated father's award of attorney's fees, returned the standard possession order, and stated: "it is ordered that all relief requested in this case and not expressly granted is denied." The order further stated that "all other terms of the prior orders not specifically modified in this order shall remain in full force and effect." In March 2006, mother filed an application for enforcement of the child support order to recover unpaid child support and reimbursement of health insurance premiums. Trial court found that the agreed order from 10/15/05 barred mother's claims by res judicata. Mother appealed.

Held: Reversed and remanded. Mother was not required to raise a claim for unpaid child support and medical expenses at the time she sought modification of the custody order, and the agreed order did not modify father's child support obligation.

Opinion: Mother was not required to litigate the claim for delinquent payments when responding to a motion to modify custody or future child support. She could have raised the claim for unpaid medical insurance at the time she sought to modify custody, but she was not required to do so since the subject matter was different and did not arise from the same transaction. Thus, mother's recovery on these issues was not barred by res judicata. An agreed judgment must be governed by the law of contracts, nothing in the order modifies the

child support obligation, thus it ratifies the existing/prior order. Father's unilateral understanding that the parties intended to bar mother's claim was not an agreement. It does not constitute grounds to alter the order to incorporate things it excludes. Therefore, the agreed order also does no bar mother's claim.

Editor's comment: *Perhaps the trial court's order would have been affirmed had the agreed order not included the phrase, "All other terms of the prior orders not specifically modified in this order shall remain in full force and effect." J.V.*

A PARTY MUST EXERCISE DUE DILIGENCE TO PROSECUTE ALL LEGAL REMEDIES BEFORE A BILL OF REVIEW IS GRANTED

¶ 08-3-23. ***In re* A.G.G.,** ___ S.W.3d ___, 2008 WL 2514807 (Tex. App.—San Antonio 2008) (06/25/08)

Facts: Father was required by the terms of the divorce decree to pay the mortgage on the residence occupied by mother, and the decree stated that "no child support or medical support shall be paid by [father] so long as he pays the mortgage… to the present holder of such debt, GMAC Mortgage Company." Mother filed a "Counterpetition to Modify Parent-Child Relationship and Request for Temporary Orders Regarding Child Support" that sought to "change the place of payment for child support," as grounds for modification mother stated that the house had been sold and the order should be changed so that child support in the amount that father was paying for the mortgage should be paid directly to mother. Neither father nor his attorney attended the hearing on 05/24/05, at the conclusion of the hearing trial court, instead of entering temporary orders, signed an Order in Suit to Modify Parent-Child relationship, which granted mother's request and ordered father to pay "child support" in the same amount as previously ordered directly to mother. Father filed a bill or review, which trial court denied.

Held: Affirmed. Father did not exercise due diligence to prosecute all legal remedies against the order.

Opinion: Father had actual knowledge of the judgment based on trial court's 05/24/05 order, and the ability to file a Motion for New Trial; however, the motion was not filed. Therefore, father did not exercise due diligence to prosecute all legal remedies against the order. Father did not file any special exception to mother's counter-petition, nor did he appear at the hearing to challenge mother's characterization of the payments as "child support." Therefore, Father not entitled to a bill of review.

FAMILY CODE SECTION 232.004 DOES NOT PROVIDE A BASIS, SEPARATE AND APART FROM FAMILY CODE SECTION 232.003, FOR AN ENTRY OF A LICENSE SUSPENSION ORDER

¶ 08-3-24. ***In re* C.G.,** ___ S.W.3d ___, 2008 WL 3844463 (Tex. App.—Dallas 2008) (08/19/08)

Facts: Mother and father divorced in 1991, father was ordered to pay $390 per month in child support. In 2005, mother filed suit alleging that father owed $67,663.13 in back child support and sought a judgment confirming the amount of unpaid child support. Mother also sought an order suspending father's licenses "pursuant to TFC § 232.004." Mother's motion, however, *did not* allege that father had been provided with an opportunity to make payments toward the overdue child support under a court-ordered or agreed repayment schedule and that father had failed to comply with the repayment schedule. In July 2006, trial court ruled in mother's favor, and issued an "Order of License Suspension," which stated that father's license was being suspended in accordance with TFC § 232.004. Father appealed, claiming that TFC § 232.004 was subject to TFC § 232.003(a)(2) and (3), which provide that an obligor must be provided with a repayment schedule and a court must find that obligor failed to comply with the repayment schedule before a court can order the suspension of licenses.

Held: Reversed. TFC § 232.004 does not provide a separate mechanism for a trial court to suspend an obligor's licenses.

Opinion: "The trial court abused its discretion in rendering an order of license suspension pursuant to TFC § 232.004 because that section does not provide a basis, separate and apart from section TFC § 232.003, for entry of a license suspension order. Further, there is no evidence to support any implied findings that: (1) Father had been provided with an opportunity to make payments toward the overdue child support under a court-ordered or agreed repayment schedule; and (2) Father has failed to comply with the repayment schedule. Thus, the entry of the license suspension order cannot be sustained on the basis of TFC § 232.003(a)."

Editor's comment: *Doesn't seeking equitable relief based on skipping a hearing and failing to file a motion for new trial call to mind the proverbial defendant who sought mercy from the court as an orphan after murdering his parents? J.V.*

A TRIAL COURT CANNOT DECLINE TO ENTER A JUDGMENT ON A PROVEN CHILD SUPPORT ARREARAGE DURING A MODIFICATION PROCEEDING

¶ 08-3-25. ***In re* J.I.M.,** ___ S.W.3d ___, 2008 WL 3895939 (Tex. App.—El Paso 2008) (08/21/08)

Facts: In 1999, Mother and father divorced. The divorce decree stated that father was required to pay mother $800 per month in child support, and contained a formula which provided that the monthly child support amount would automatically adjust by a percentage equal to the percentage change in father's salary. During the following 3 years, father's income increased to the point where the formula contained in the decree required that he pay $2,000 a month in child support. On 10/08/02, father filed a motion to modify his child support obligation. Father contended that the statutory maximum child support was $1,200 per month, and the divorce decree could not compel him to pay an excess amount without a showing that child's needs exceeded that amount. Father's motion also requested a retroactive reduction of his obligation to the date that he filed the motion. On 11/19/03, mother filed a motion for enforcement of a child support arrearage. On 12/10/03, trial court held a hearing on both motions. Father testified that at the time he filed the motion he was paying $1,200 per month in child support. Mother argued that despite father's requested reduction, he remained obligated to make support payments in accordance with the decree, and that because he failed to pay in full, she was entitled to a money judgment for the amount of the arrearage. On 06/14/05, trial court entered a judgment granting father's motion to modify, and denying mother's motion for enforcement. Trial court further ruled that since the modification resulted in a reduction of father's obligation during the pendency of his motion to modify, mother's request for enforcement of the terms of the divorce decree during the same time period was moot. Mother appealed.

Held: Reversed and remanded. TFC §§ 157.262 and 157.263 do not provide an exception to a trial court's duty to enter judgment on a proven arrearage during a modification proceeding

Opinion: "In the situation before us, the trial court was presented with two, potentially conflicting motions; one to modify and reduce a child support obligation, and one to enter judgment on an arrearage. The trial court concluded that its power to decrease [father]'s support obligation under TFC § 156.401 and § 154.126 included the ability to erase [mother]'s claim for arrearages, rendering her claim for enforcement moot. In doing so, the trial court failed to recognize the distinction between its broad discretion to modify child support obligations, and its lack of discretion to enter judgment on a proven arrearage."

A PARENT IS ENTITLED TO AT LEAST 10 DAYS NOTICE OF A HEARING FOR ENFORCEMENT OF CHILD SUPPORT UNDER FAMILY CODE SECTION 157.062

¶ 08-3-26. ***In re* A.L.R.,** ___ S.W.3d ___, 2008 WL 3971762 (Tex. App.—Waco 2008) (memo op.) (08/27/08)

Facts: Mother and father divorced in 2001. Mother was awarded SMC of children. On 07/15/05, father filed a motion to modify to get temporary custody of children. During the hearing on father's motion to modify, mother and father agreed to temporary orders that would reflect children's desire to live with father in Louisiana. Trial court set a bench trial for 01/06/06. Mother drove to Louisiana from College Station, TX every other weekend to take possession of the children until such a time that father began to deny mother's visitation because of past-due child support. Mother and father filed motions, the trial court sent the parties to mediation, but the issue was not resolved. Mother subsequently moved to Oregon. On 10/26/06, father filed a motion for enforcement of child support, a copy of the motion was mailed to mother at her old address. Mother sent a reply contesting the amount owed. A hearing was set for 11/27/06, and notice was served to mother's address in Oregon on 11/25/06. The case was called to trial on 11/27/06 despite mother's absence, and trial court finalized the temporary orders, granted father an arrearage judgment for past-due child support and medical expenses, and granted father's attorneys' fees in the amount of $6,700. Mother appealed.

Held: Reversed and remanded. Mother was entitled to at least 10 days notice of a hearing for enforcement of child support under TFC § 157.062

Opinion: "This case was started as a contested matter by [father] to ask for permission to move the children to Louisiana. By making an appearance in that contested case, [mother] became entitled to notice of the trial setting as a matter of due process. Here, the record establishes that [mother] was not served with notice of the hearing until 11/25/06. The hearing was held on 11/27/06. A trial court's failure to comply with the rules of notice in a contested case deprives a party of the constitutional right to be present at the hearing, to voice her objections in an appropriate manner, and results in a violation of fundamental due process."

Dissent: Mother did not challenge the findings of fact, only that she did not receive adequate notice. "Where the trial court's findings of fact are unchallenged by complaint on appeal, they are binding on the appellate court and are entitled to the same weight as a jury verdict, unless the contrary is established as a matter of law or there is no evidence to support the finding… I believe the findings of fact support the trial court's judgment. Because the trial court's findings of fact are not challenged on appeal, and the unchallenged findings support the judgment, the Court should affirm the judgment."

Editor's comment: *Being served on Saturday for a Monday trial 1,500 miles away violates due process. J.V.*

SAPCR
Termination of Parental Rights

★★★★★ Texas Supreme Court ★★★★★

TEXAS SUPREME COURT NEITHER APPROVED NOR DENIED COURTS OF APPEALS RULINGS REGARDING THE CONSTITUTIONALITY OF FAMILY CODE § 263.405(i)

¶ 08-3-27. ***In re* S.K.A.,** ___ S.W.3d ___, 2008 WL 2872671 (Tex. 2008) (per curiam) (07/25/08)

¶ 08-3-28. ***In re* K.W.,** ___ S.W.3d ___, 2008 WL 2872668 (Tex. 2008) (per curiam) (07/25/08)

¶ 08-3-29. ***In re* D.W.,** ___ S.W.3d ___, 2008 WL 2872621 (Tex. 2008) (per curiam) (07/25/08)

¶ 08-3-30. ***In re* J.J.,** ___ S.W.3d ___, 2008 WL 2872616 (Tex. 2008) (per curiam) (07/25/08)

¶ 08-3-31. ***In re* D.F.,** ___ S.W.3d ___, 2008 WL 2872614 (Tex. 2008) (per curiam) (07/25/08)

Facts: Supreme Court received petitions for review from cases decided in the Texarkana, Fort Worth, and Houston [1st Dist.] Courts of Appeals regarding the constitutionality of TFC § 263.405(i) (timely filed statement of points in SAPCR).

Held: Petition denied.

Opinion: "In denying the petition, we neither approve nor disapprove the holding of the court of appeals regarding the constitutionality of TFC § 263.405(i)."

Editor's comment: *In In re M.N. (summarized infra), the Texas Supreme Court finessed the debate over TFC § 263.405(b)'s constitutionality by holding that the statute does not prohibit the granting of a motion to extend the fifteen-day deadline to file a statement of points for appeal. J.V.*

★★★★★ Texas Supreme Court ★★★★★

TEXAS SUPREME COURT NEITHER APPROVED NOR DENIED COURT OF APPEALS RULING REGARDING WHETHER FAMILY CODE § 263.405(i) PROHIBITS AN APPELLATE COURT FROM CONSIDERING AN INEFFECTIVE ASSITANCE OF COUNSEL CLAIM THAT WAS RAISED FOR THE FIRST TIME ON APPEAL

¶ 08-3-32. ***In re* G.B.,** ___ S.W.3d ___, 2008 WL 4000613 (Tex. 2008) (per curiam) (08/29/08)

Facts: Supreme Court received petition for review for a case decided in the Houston [1st Dist.] Court of Appeals regarding whether TFC § 263.405(i) prohibits an appellate court from considering an ineffective assistance of counsel claim that was raised for the first time on appeal.

Held: Petition for review denied.

Opinion: "In denying the petition, we neither approve nor disapprove the holding of the court of appeals regarding whether TFC § 263.405(i) prohibits an appellate court from considering an ineffective assistance of counsel claim that was raised for the first time on appeal."

★★★★★ Texas Supreme Court ★★★★★

THE PROVISONS OF TEXAS RULE OF CIVIL PROCDEURE 5 ALLOWS A TRIAL COURT TO EXTEND THE TIME FOR FILING A STATEMENT OF POINTS FOR APPEAL UNDER FAMILY CODE SECTION 263.405

¶ 08-3-33. ***In re* M.N.** ___ S.W.3d ___, 2008 WL 3391189 (Tex. 2008) (08/27/08)

Facts: On 08/04/06, mother's parental rights were terminated, and DFPS was appointed permanent managing conservator of child. On 08/25/06, mother filed a statement of points for appeal and motion for new trial, however that date was more than 15 days after the final order was signed, and therefore outside the time limit set by TFC § 263.405(b). On 09/05/06, mother filed a motion to extend the time for filing her statement of points. Trial court held a hearing on mother's motion on the same day and signed an order extending the time

limit for mother to file her statement of points, found that her statement of points was timely filed, and denied her motion for new trial. Mother appealed. On appeal, DFPS argued that trial court did not have authority to extend the time for mother to file her statement of points and that she had not timely filed them. COA held that mother had not preserved any issues for appeal and affirmed the termination order. Mother appealed COA's ruling.

Held: Reversed and remanded. Trial court did not abuse its discretion in granting mother's motion to extend the time for filing her points of appeal, and her statement of points was timely filed.

Opinion: "TFC § 263.405 does not address whether the trial court may grant an extension of the deadline for filing a statement of points. Thus, we must decide whether a "timely-filed" statement of points under TFC § 263.405(i) includes a statement such as [mother's] that is filed beyond the fifteen-day limit set by section 263.405(b), but within an extended time period granted by the trial court and before the thirty-day hearing required by TFC § 263.405(d)… we hold that the provisions of TRCP 5 apply to the question of whether the trial court may extend the time for filing a statement of points for appeal under TFC § 263.405. Accordingly, the trial court could grant [mother's] motion to enlarge the time for filing her statement of points if [mother] showed good cause for her failure to timely file it."

Dissent: "For better or for worse, the Legislature in TFC § 263.405(b) set a firm 15-day deadline for filing a statement of points for appeal. Reasonable people can dispute the efficacy of this hard-and-fast deadline, but few can dispute its clarity… I would (1) hold that court-made rules of procedure do not trump the Family Code's 15-day deadline"

THE TERM "ENDANGER" UNDER FAMILY CODE § 161.001 DOES NOT REQUIRE THAT THE CHILD SUFFER ACTUAL INJURY

¶ 08-3-34. ***Lumpkin v. Department of Family and Protective Services***, S.W.3d , 2008 WL 2388146 (Tex. App.—Houston [1st Dist.] 2008) (06/12/08)

Facts: Trial court terminated mother and father's parental rights to children based on a finding that their actions endangered their children. Mother and father filed motions for new trial, notices of appeal, affidavits of indigency, and SOP. Trial court conducted a hearing and denied the motions for new trial, found that mother was indigent but father was not, and determined that, based on statement of points, appeals would be frivolous. Mother and father appealed, challenging the legal and factual sufficiency of the evidence that they endangered children.

Held: Affirmed, the evidence presented at trial supported the trial court's finding that mother and father endangered children.

Opinion: "Endanger" under TFC § 161.001(1)(D) and (E) does not require that the conduct be directed at the child, or that the child suffers actual injury. Conduct that subjects a child to a life of uncertainty and instability also endangers the child's physical and emotional well being. The evidence showed that mother and father used drugs, could not provide stable housing or sufficient food, and frequently left the children with relatives for long periods of time. This evidence is sufficient to show that mother and father endangered the children's physical and emotional well being.

"ABUSE AND NEGLECT" UNDER FAMILY CODE § 161.001(1)(O) SHOULD BE DEFINED ON A CASE BY CASE BASIS

¶ 08-3-35. ***In re* A.A.A., ___ S.W.3d ___, 2008 WL 2548802 (Tex. App.—Houston [1st Dist.] 2008)** (op. on rehearing) (06/26/08)

Facts: On 01/25/06, DFPS took child into custody after mother left child at a shelter following her arrest and subsequent 2 days in jail for shoplifting and DFPS could not reach anyone on the child's emergency contacts list on file at the shelter. Mother did not see child after her release from jail on 01/25/06, and on 01/26/06, DFPS filed a petition for protection of a child, conservatorship, and termination of the parent-child relationship. Trial court issued a temporary order naming DFPS child's temporary SMC. Child was initially placed in foster care, but in May 2006, DFPS moved child to mother's relative, who expressed an interest in adopting child. Between Jan. and Dec. 2006, mother moved between shelters in Texas and residences in Louisiana, changed jobs several times, and only visited child 6 out of a possible 24 times. Additionally, mother was not financially supporting child during the period that child was placed with mother's relative. Following trial in Feb. 2007, trial court signed a judgment terminating mother's parental rights and appointing DFPS child's SMC. Mother appealed.

Held: Affirmed.

Opinion: DFPS proved by clear and convincing evidence that mother failed to comply with a court order after child was removed for "abuse and neglect" under TFC § 161.001(1)(O). "Abuse and neglect" should be defined on a case by case basis. DFPS presented evidence to trial court that mother did not make any effort to find out child's location after she was released from police custody, which supports trial court's finding of neglect. Additionally, the evidence was sufficient to support trial court's finding that termination of mother's parental rights was in child's best interest. The goal of establishing a stable, permanent home for a child is a compelling state interest. Mother's frequent moves and job changes weigh against her ability to provide a stable, home for child.

A DETERMINATION THAT AN APPEAL WOULD BE FRIVOLOUS UNDER FAMILY CODE § 263.405 DOES NOT DEPRIVE AN INDIGENT PARTY REPRESENTED BY NEW APPELLATE COUNSEL OF DUE PROCESS

¶ 08-3-36. ***In re* A.F., ___ S.W.3d ___, 2008 WL 2521868 (Tex. App.—Beaumont 2008)** (06/27/08)

Facts: Mother and father were indigent parties to a custody proceeding initiated by DFPS. After a jury trial, trial court terminated mother and father's parental rights, mother and father's trial counsel withdrew and they were appointed appellate counsel. Appellate counsel, after consulting with trial counsel, filed a statement of points for appeal. Trial court conducted a hearing and determined that appeal would be frivolous, which means an indigent party is not entitled to a trial court record transcribed without cost. Mother and father appealed, claiming that TFC § 263.405(b) (SOP must be filed within 15 days of final judgment) and (i) (court of appeals cannot consider and issues not included in SOP) unconstitutionally deprive them of their due process and equal protection rights, because appellate counsel representing an indigent party for the first time cannot adequately discharge her duty without the trial record.

Held: Affirmed. TFC § 263.405 did not deprive mother and father of their due process rights.

Opinion: Mother's and father's procedural due process rights were not violated due to lack of access to the reporter's record. Trial counsel was available to consult with appellate counsel, and appellate counsel had access to trial counsel's notes for the hearing. Both mother and father were able to communicate with appellate counsel and attend the hearings. "Balanced against the Legislature's clear intent to quickly determine the status of children in Department custody and the presumption that the process established by the Legislature

comports with due process, the private and governmental interests involved and the risk of an erroneous deprivation of parental rights do not compel us to re-write the Family Code to craft a procedure that will make it easier for parents to present their points for appeal."

Dissent: "An indigent party must be afforded a record of sufficient completeness to permit consideration of a factual sufficiency claim. In my view, the post judgment record here, in which an attorney summarizes the trial evidence, is not a record of sufficient completeness… I believe that the appropriate order under the circumstances is to require the record of the evidence to be transcribed and filed."

UNDER FORMER FAMILY CODE § 263.401, IF MOTION FOR NEW TRIAL IS GRANTED AFTER FINAL JUDGMENT, A TRIAL COURT MUST ENTER FINAL ORDERS OR EXTEND THE STATUTORY DISMISSAL DEADLINE

¶ 08-3-37. ***In re* Walker,** ___ S.W.3d ___, 2008 WL 2611347 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding) (06/30/08)

Facts: On 07/18/06, trial court appointed TDFPS temporary managing conservator of mother's 2 minor children. On 06/28/07, trial commenced on TDFPS's petition, trial concluded on 07/10/07 and trial court orally rendered an order terminating mother's parental rights. On 08/01/07, mother filed a motion for new trial, which the trial court granted on 08/28/07. Sometime in 03/08, mother filed a "motion to dismiss and for immediate return of children," arguing that because trial court granted her motion for new trial and set aside its termination order, trial court did not timely render a final order within the statutory one-year deadline. Mother further argued that because the statutory deadline had expired, there was no timely final order, and the trial court never extended the statutory dismissal deadline, trial court was required to dismiss the case under former TFC §263.401. Trial court denied mother's motion to dismiss, and mother filed her petition for writ of mandamus.

Held: Mandamus granted. By granting mother's motion for new trial, trial court effectively vacated its prior order, and no order or extension was entered within one year as required by former TFC §263.401

Opinion: "In granting the new trial, trial court set aside the original termination order, thus allowing the parties to "proceed without prejudice from previous proceedings" because the granting of the new trial had the "legal effect of vacating the original judgment and returning the case to the trial docket as though there had been no previous trial or hearing." "Nothing in the record indicates that the trial court made the requisite findings or rendered the type of order prescribed under former TFC § 263.401(b) in order to grant an extension to retain the suit on its docket."

FAILURE TO PRESENT SUBSTANTIAL QUESTIONS FOR REVIEW OR TO COMPLY WITH COURT OF APPEALS FILING DEADLINES SUSTAINS TERMINATION OF PARENTAL RIGHTS

¶ 08-3-38. ***In re* J.B.**, ___ S.W.3d ___, 2008 WL 2758663 (Tex. App.—Beaumont 2008) (07/17/08)

Facts: TDFPS petitioned trial court to terminate the parental rights of mother and father on multiple grounds. After conducting a hearing, trial court found that both mother and father had constructively abandoned child to the State and had failed to perform the necessary actions to obtain return of child pursuant to a prior order. Trial court further found that father had engaged in criminal conduct that resulted in his incarceration and inability to care for child for at least 2 years. Trial court found that termination of both parents' parental rights was in child's best interest and terminated the parental rights of mother and father. Mother filed a "Motion for New Trial[,] Statement of Appellate Points[, and] Request for Indigency Hearing." On 02/19/08, trial court conducted a hearing on the motion for new trial. Both mother and father's counsel appeared at the hearing. Father did not appear due to his incarceration, but he testified by phone. Mother did not appear and did

not file an affidavit of indigence. Mother's counsel testified that he could not contact mother and that her phone number was no longer in service. Father testified that he was incarcerated, that he could not afford to pay for the appeal, and requested that trial court appoint an attorney, and waive all costs of appeal. Trial court denied mother and father's claims of indigence, and found that their statement of points lacked merit. One month later, father filed an affidavit of inability to pay costs of appeal with Court of Appeals, and both mother and father filed notices of appeal. Court of Appeals informed mother and father of the date that appellants' briefs were due, and that Court of Appeals would presume that any non-responsive party did not contest trial court's ruling. Mother did not file a response. Father's counsel filed a response by letter. The letter did not state the grounds for appeal or provide any authorities or record references.

Held: Affirmed. The evidence supported the trial court's finding, and neither mother nor father presented a substantial issue for review.

Opinion: Mother's absence from the hearing on the motion for new trial, as well as her failure to comply with Court of Appeal's deadlines is evidence that she was not complying with TDFPS and taking the necessary actions to secure the return of child. Father's testimony and circumstances showed that he couldn't care for child, and thus terminating his parental rights was in the best interest of the child.

Dissent: Father is indigent, and had a right to appointed appellate counsel and an accelerated appeal under TFC §§ 107.013(a)(1), 263.405(e). "By letter, this Court notified counsel of the due date for appellant's brief, and informed counsel that if the Court did not receive a brief or other response, the Court would presume the trial court's post-trial findings were not contested. We received from counsel a letter forwarding an affidavit of indigency, and stating that [father] "would like" to appeal the order on the §263.405 hearing. I believe under the circumstances this Court should require briefing-by some counsel representing [father]-on the trial court's findings under § 263.405."

FAMILY CODE SECTION 263.405(i) IS NOT FACIALLY UNCONSTITUTIONAL

¶ 08-3-39. ***In re* N.C.M.**, ___ S.W.3d ___, 2008 WL 3457028 (Tex. App.—San Antonio 2008) (08/13/08)

Facts: Father's parental rights were terminated. Father filed a statement of points for appeal, and trial court determined that father's appeal would be frivolous. Father appealed, however, father did not challenge trial court's ruling that an appeal would be frivolous. Father argued that the TFC § 263.405(i) is facially unconstitutional because it arbitrarily removes the right to challenge the legal and factual sufficiency of the evidence on appeal.

Held: Affirmed. Father did not show that TFC § 263.405(i) always has and always will operate unconstitutionally.

Opinion: "Although we agree with [father] that appellate counsel often has little to no background on what occurred at trial other than information obtained from trial counsel or the client, we cannot agree with [father] that these circumstances automatically result in depriving parents whose parental rights have been terminated of their due process and equal protection rights. Therefore, we conclude appellant has not established that section 263.405(i) by its terms, always has and always will operate unconstitutionally."

A FATHER WHO ADMITS PATERNITY IS ENTITLED TO A TRIAL TO MAKE DFPS PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HE VIOLATED FAMILY CODE § 161.001(1) BEFORE HIS PARENTAL RIGHTS CAN BE TERMINATED

¶ 08-3-40. ***In re* C.M.C.,** ___ S.W.3d ___, NO. 14-07-00881-CV (Tex. App.—Houston (14th Dist.] 2008) (08/28/08)

Facts: In 2006, police responded to a disturbance call at mother's apartment. When they arrived, they found mother making threats to kill a third person. Mother's 3 children under 5 years old were in the apartment with her. Mother was taken to a psychiatric hospital, where it was determined that she was a danger to herself and others. An emergency psychiatric evaluation was performed, and mother was admitted to an in-patient mental health facility. DFPS took emergency custody and placed the children in foster care. On 06/28/06, at an initial permanency hearing, trial court approved a parenting plan which required that mother maintain contact with her children through supervised family visits, attend all court hearings, and maintain contact with her caseworker. A bench trial took place on 09/18/07. TDFPS presented evidence that mother had failed to comply with the parenting plan. During the trial the children's therapists, case workers, and foster families testified that the children had reported various forms of emotional, physical and sexual abuse when they were in mother's custody, and did not show a desire to be returned to mother. Trial court terminated mother's parental rights following the bench trial based on TFC §161.001(1) subsections (N) and (O), and appointed DFPS the children's SMC.

At the bench trial, DFPS also sought the termination of father's parental rights. Father was notified that mother identified him as the father of the children on 05/25/06. Five days later, on 05/30/06, father contacted DFPS. Father returned a signed copy of the family-services plan and participated in one permanency hearing via telephone. Father was served with the DFPS's second amended petition on 01/26/07. On 07/24/07, father's court-appointed attorney filed an answer in which father was identified as the biological father of the children. Prior to the bench trial, father's attorney informed the court that father could not be present at the trial due to financial difficulties, but requested that father be able to participate via telephone; the request was denied. During trial, DFPS testified that father had signed a parenting plan, but had failed to comply with its provision. Furthermore, DFPS testified that father was hard to get a hold of and that he had only communicated with DFPS via telephone on two occasions. DFPS requested that trial court terminate father's parental rights under TFC § 161.002(b)(1). Trial court also terminated father's parental rights. Mother and father appealed.

Held: Affirmed in part, reversed and remanded in part. TDFPS met its burden with regard to mother, but not father.

Opinion: DFPS proved that mother had failed to comply with the parenting plan as required by § TFC 161.001(1)(O), and a reasonable trier of fact could conclude that terminating mother's parental rights was in the children's best interest. However, DFPS did not meet its burden with regards to father. DFPS requested that father's parental rights be terminated under TFC § 161.002(b)(1), which authorizes the termination of an alleged biological father's parental rights if, after being served with citation he does not respond by timely filing an admission of paternity or counterclaim. Father's actions in contacting DFPS 5 days after being served, communicating that he did not want his parental rights to be terminated, and filing an answer with the court in which he identified himself as the children's father were sufficient to put DFPS and trial court on notice that father admitted his paternity and wanted to oppose termination of his parental rights. Further, "by admitting his paternity, [father] is entitled to proceed to trial and require the department to prove by clear and convincing evidence that he engaged in one of the types of conduct listed in TFC § 161.001(1) and that termination of his parental rights is in the best interests of his children."

MISCELLANEOUS

★★★★★ 5th Circuit Court of Appeals ★★★★★

SEVERAL TDFPS ACTIONS IN CONDUCTING CHILD ABUSE INVESTIGATION WERE FOUND TO BE VIOLATIONS OF THE FOURTH AMENDMENT, HOWEVER BECAUSE THE LAW AT THE TIME THE ACTIONS TOOK PLACE WAS UNCLEAR TDFPS WAS NOT LIABLE FOR DAMAGES

¶ 08-3-41. ***Gates v. Texas Department of Protective and Regulatory Services***, ___ F.3d ___, No. 06-20763, 2008 WL 2931313 (5th Cir. 2008) (07/28/08)

Facts: Mother and father are parents of 13 children – two biological and eleven adopted. On Friday, 02/11/00, father sent adoptive son to school with a Ziploc bag full of candy wrappers, which he had stolen from the kitchen and eaten, safety pinned to his shirt as punishment, as well as a note to his teachers explaining the punishment and requesting that they call father if there were any questions. At 8:30 a.m. on 02/11/00, a school district employee called the statewide child abuse hotline complaining of the punishment, as well as alleging that one year ago father had punished adoptive son by handcuffing him to a bed for a day. Based on that information, intake specialist at the abuse hotline classified the report as Priority 1, which must be investigated within 24 hours.

DFPS dispatched an investigator to the school. Upon arriving, investigator noted that adoptive son had a mark on his hand and on his face. Investigator then transported adoptive son to the Child Advocacy Center (CAC) for a videotaped interview. Upon arrival, adoptive son was interviewed by CAC workers. Adoptive son told CAC workers that following father's discovery that he had stolen food, father pushed and kicked him, made him sit in the "chair position" with his back against the wall, and run up and down stairs until his legs hurt. Adoptive son also said that in the past, father had punished him for stealing food by making him take "throw up medicine," running, and moving bricks. Finally, adoptive son noted that he had been spanked with a board in the past. Following the removal of adoptive son from the school, DFPS sent 6 more investigators to interview the other siblings at the school. After those investigators interviewed the children at school, the 6 investigators went to lunch. At approximately 1:00 p.m., adoptive son was returned to DFPS offices, and DFPS called father to inform him that adoptive son had been removed from school, and to request permission to interview the other children. Father denied permission, and arrived at the DFPS offices 10 minutes later to discuss the matter. DFPS did not inform father that adoptive son was in the building at that time nor did it allow him to meet with adoptive son.

While father was at the DFPS office, the 6 DFPS investigators who had interviewed the siblings at the school that morning were informed while they were at lunch that they should go to the family home and interview the other siblings. The 6 investigators, accompanied by 2 Sherriff's Deputies, arrived at the family home between 3:00 and 3:30 p.m., before the children had returned on the school bus. Family's housekeeper was at the home, and the parties dispute whether housekeeper consented to the entry. The 6 investigators entered the home, and when the other children arrived home on the school bus, began the interview process of the other children at that time. While still at the DFPS office, father received a phone call from one of the children telling him that DFPS investigators were at their house and asking questions. Father immediately returned to the house. Father ordered the DFPS investigators to leave, but they did not comply. Nor would the DFPS allow father to speak to the children. At one point, one of the deputies took father outside and threatened to put him in the squad car. Mother arrived home at approximately 5:15 and was also not permitted to see the children.

The DFPS investigators conducted interviews of the children at the home. During the interviews, the investigators learned that father's punishments included physical exercises and spankings with a belt or a board. One young child claimed that "dad hurts the big kids." Another child stated that she was scared to

live at home because father "gets so mad." Based on the report from the school and the children's interviews, DFPS made the decision to remove the children from the home that evening. Mother and father were given a form notice that their children were being removed because their "physical health or safety was in immediate danger" and "there was no time to obtain an emergency court order before removal." On Monday, 02/14/00, the next business day, DFPS filed a SAPCR. A hearing was conducted the same day, and trial court ordered the children returned to mother and father the same day.

Mother and father (and children, with mother and father as next friend) filed suit against DFPS, the Sherriff's department, and individual employees. The suit included, among others, claims of unlawful search and seizure, excessive force, interference with family relations, removal of the children without a hearing, intentional infliction of emotional distress, a § 1983 privacy claim, false imprisonment, and violation of the U.S. Constitution. Trial court granted summary judgment in favor of the defendants, and mother and father appealed.

Held: Affirmed. Although the actions of DFPS violated the Fourth Amendment, the law at the time the events took place was not clearly established, and the government's interest in stopping child abuse and the doctrine of qualified immunity tips the balance in favor of DFPS. However, going forward after this opinion, such actions would be held unconstitutional and DFPS would be liable for damages.

Opinion: The entry into the family home violated the Fourth Amendment to the U.S. Constitution. There were no exigent circumstances or any areas of recognized special needs that would allow entry. Likewise, remaining in the home after father asked DFPS to leave was a violation of the Fourth Amendment. However, since the law in this area was not clearly established in 2000, DFPS and the individuals are entitled to qualified immunity.

Seizing adoptive son from the school also violated his Fourth Amendment rights. To remove a child from a public school for the purposes of interviewing him in a central location without a court order, DFPS must have reasonable belief that the child has been abused and probably will suffer further abuse at the end of the school day. At the time DFPS investigator removed adoptive son from his school, the only information that was corroborated was the existence of the Ziploc bag full of wrappers. While the investigator also observed two small marks on adoptive son, there is no indication that investigator asked adoptive son how he received the marks. And there was no information that would indicate that adoptive son would suffer physical abuse if he returned home. However, the law in this case was not clearly established at the time of the incident, and it would not be reasonable to expect DFPS employees to comply with constitutional standards that were not articulated before this opinion.

Seizing the children, by removing them from the home, however, did not violate the Fourth Amendment. While there is no "child abuse" exception to the Fourth Amendment that allows a government employee to seize a child, and the government may not seize a child from his or her parents absent a court order, parental consent, or exigent circumstances (such as reasonable belief that the child is in imminent danger of physical or sexual abuse if he remains with the parents), in this case, given the totality of the information gained from interviews, it was not unreasonable for DFPS to remove the children.

Mother and father also claim that DFPS has an unconstitutional practice of failing to obtain a court order prior to the removal of children. Although DFPS did violate the Fourth Amendment by seizing adoptive son, that is only one incident and does not point to a practice of such actions.

NUNC PRO TUNC ORDERS ARE FOR THE CORRECTION OF CLERICAL ORDERS, THEY MAY NOT BE USED TO MODIFY AN ORDER PREVIOUSLY MADE

¶ 08-3-42. ***In re* Cherry**, ___ S.W.3d ___, 2008 WL 2736906 (Tex. App.—Austin 2008) (op. on rehearing) (07/10/08)

Facts: On 08/15/2005, mother pleaded guilty to the offense of interference with child custody in a plea bargain agreement. The punishment agreed to was that mother would receive 3 years' deferred adjudication, a $1,500 fine, and 15 days in jail. Following the final hearing on 10/18/2005, trial court signed an "Order of Deferred Adjudication; Community Supervision," which specified that mother would receive 3 years deferred adjudication, and listed the commencement from the date of the offense (10/18/2004) rather than the date of the order. On 10/24/2007, mother filed a motion to discharge and dismiss, claiming that she was entitled to discharge from community supervision because she had successfully completed the terms of her deferred adjudication on 10/18/2007. Instead, on 10/29/07, trial court signed a "Nunc Pro Tunc Order of Deferred Adjudication; Community Supervision" which changed the commencement date of mother's deferred adjudication from 10/18/04 to 10/18/05. Mother filed a motion to vacate the Nunc Pro Tunc Order, trial court vacated its order and held a hearing during which the State called 2 witnesses who both testified that the original order specified a commencement date of 10/18/04; following the hearing trial court issued a 2nd Nunc Pro Tunc Order that again changed the date of commencement to 10/18/05. Mother filed a petition for writ of mandamus.

Held: Mandamus granted. Trial court cannot use a nunc pro tunc order to reform a judicial error.

Opinion: The trial court lacked jurisdiction to extend the probation term after mother's deferred adjudication term had ended; unless the deferred adjudication has proceeded to an "adjudication of guilt" or trial has modified, revoked or dismissed the deferred adjudication prior to the probationary term, trial court's jurisdiction ends when the term expires. Here, there was neither an "adjudication of guilt" nor any hearing concerning revoking, continuing, or modifying community supervision before the expiration of mother's deferred adjudication. Therefore, trial court had no jurisdiction to modify or extend the community supervision. Although nunc pro tunc orders can be entered at any time, even after a court's jurisdiction has ended, nunc pro tunc orders are for correction of clerical errors, not judicial errors; a nunc pro tunc order may not be used as it was used here—to modify an order previously made.

Dissent: "For reasons stated in the panel's opinion on original submission, I would deny the amended petition for writs of mandamus and prohibition and dismiss as moot the motion for temporary relief."

Editor's comment: *The court held that the record must support a change by nunc pro tunc. Because the trial court did not state the commencement date for deferred adjudication on the record at sentencing, the only evidence of the commencement date was found in the judgment itself, which could not be impeached in the later habeas corpus hearing. J.V.*

NON-PARTY'S FAILURE TO OBEY A SUBPOENA IS NOT ENFORCEABLE BY SANCTIONS

¶ 08-3-43. ***In re* Suarez**, ___ S.W.3d ___, 2008 WL 3906416 (Tex. App.—Dallas 2008 orig. proceeding) (08/26/08)

Facts: Mother and grandmother were involved in a habeas corpus proceeding in a child custody suit. During the proceeding, grandmother's attorney issued a subpoena duces tecum to compel DFPS caseworker to attend a hearing in the child custody suit. Caseworker failed to appear at the initial hearing and at two subsequent hearings. Grandmother filed a motion for sanctions against caseworker and DFPS individually, jointly and severally for failure to appear at the hearings. Trial court issued citations to caseworker and DFPS, informing them that grandmother had sued them in the underlying habeas proceeding in a motion for sanctions. Caseworker and DFPS filed a response stating that they were non-parties to the suit and thus not subject to sanc-

tions. Trial court held a hearing on grandmother's motion for sanctions and eventually entered an order granting grandmother's motion for sanctions. Caseworker and DFPS filed this petition for writ of mandamus.

Held: Mandamus granted. Caseworker and DFPS were not parties to the suit and thus not subject to sanctions. TRCP 176.8 allows for enforcement against non-parties by contempt, but not by sanctions.

Opinion: "We decline to hold that a party can file a motion for sanctions against a non-party, serve the motion on the non-party with a citation informing it that it has "been sued," and thereby subject the non-party to possible sanctions based on its alleged violation of a subpoena occurring before the sanctions motion was filed. Neither will we muddle the rules' clear provision for addressing the failure to obey a subpoena–a motion for contempt pursuant to TRCP 176.8."

Editor's comment: *The court observed that the caseworker denied being served with subpoena "although it is undisputed that TDFPS cashed the check for the witness fee accompanying that subpoena." J.V.*