SECTION REPORT
FAMILY LAW

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Message from the Chair

It is hard to believe that my year as chair of the Family Law Section is almost over. It seems like it was only yesterday that I was planning my year and deciding what I wanted to see accomplished by the Family Law Council and its committees. You are experiencing one of those accomplishments right now – reading our section report online. I am very excited about the plans Georganna Simpson and her Board of Editors have in store for this endeavor in the future. I am also very proud of the Legislative Committee, having just returned from a council meeting wherein our section's 2009 proposed legislative package was presented. Jack Marr and his committee have worked extremely hard to develop a set of proposed changes to the Family Code that, if passed, would greatly benefit our members. We will have this package posted on our website very soon, so please visit it often, and see what proposals are being made. Norma Trusch and her Formbook Committee have been diligently working all fall and winter to bring the Texas Family Law Practice Manual into conformity with all of the new legislative changes from 2007. And, our hard-working award-nominated Pro Bono Committee has six new pro bono seminars scheduled throughout this spring and into next fall, covering practically the entire state. I am so appreciative of all of the hours these volunteers have devoted for the Family Law Section and its members. I am truly proud to be associated with this group, and it has been an extreme honor to have served this past year as its chair.

----Sally Emerson

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Section Wear and Publications

EDITOR'S COMMENT

I am very excited about this report because it is introducing a new feature – regularly appearing columns. One of the columns contributors is John A. Zervopolous, Ph.D., J.D., who will present various psychological issues of interest to our section. The other is Christy Adamcik Gammill, CDFA who will present various financial planning issues facing divorcing spouses. Additionally, Richard Warshak, Ph.D. requested and the board of editors agreed to allow him to use the Section Report to conduct a survey to assist an on-going ALI research project. I hope that each of you will take the time to complete the very brief survey. I would also like to thank WestLaw once again for its on-going support and provision of the hyperlinks throughout the on-line version of this report. Finally, I would be very remiss if I did not once again thank my law clerk John H. Chase and two of his fellow UT Law Students, Orlando Gutierrea and Ian E. Pittman, in helping me to summarize the case law and putting the report together.

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In Brief

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Child Support: A California court held that a personal injury settlement - unallocated as to the components of damage it represented - is not income for child support purposes, likening the settlement to a "return of capital" rather than income. *In re: Rothrock*, 70 Cal. Rptr. 3d 881 (2008). A New York trial court correctly included a father's pre-tax health insurance deductions, as well as an alleged "one-time payment" from the father's employer, as income for child support purposes. *Bellinger v. Bellinger*, 847 N.Y.S.2d 783 (App. Div. 2007). The New Hampshire Supreme Court held that the parents' agreement that the father's parental rights be terminated did not constitute a "special circumstance" authorizing the trial court to order less-than-guideline child support. *Carr v. Edmunds*, 938 A.2d 89 (2007). A Minnesota court held that undistributed Subchapter S earnings - which the court pointed out are reported as income on an individual's tax returns although the individual does not actually receive them - are not income for child support purposes, provided that the earnings were retained for a "business reason." *Hubbard County Health & Human Servs. v. Zacher*, 742 N.W.2d 223 (Minn. App, 2007) (collecting cases).

ERISA: A Plan Administrator concluded that a divorce decree ordering a father to designate his son as primary beneficiary of a life insurance policy constituted a QDRO even though the father never made that designation. *Mattingly v. Hoge*, 2008 FED. App. 0023N (6th Cir. 2008). The Fifth Circuit reminds us that although child support can be collected from pension benefits, the obligee must obtain a QDRO to get them. *Taliaferro v. Goodyear Tire & Rubber Co.*, No. 06-40570 (U.S. App. 5th Cir. Feb. 7, 2008). When children from a prior marriage sued their father's widow to enforce a prenuptial agreement in which the widow waived any claim to her husband's retirement benefits, a district court properly dismissed the suit because the prenuptial agreement did not meet ERISA's requirements. *Greenebaum Doll & McDonald PLLC v. Sandler*, 2007 FED App. 0822N (6th Cir. 2007).

Marital agreements: A New York court held that threatening divorce to induce a spouse to sign a postnuptial agreement does not constitute duress because spouses have the right to sue each other for divorce. *Garner v. Garner*, 848 N.Y.S.2d 741 (App. Div. 2007). Similarly, an Illinois court held that threatening divorce to induce a philandering husband to agree to convey the marital residence to the wife should the husband stray again did not invalidate the agreement. *In re: Tabassum*, No. 2-06-0843 (Ill. App. Dec. 7, 2007). In Massachusetts, a clause in an antenuptial agreement forfeiting a wife's right to seek alimony should she oppose "the granting of a divorce" to the husband did not prevent the wife from seeking alimony when she did not oppose the divorce but only the terms of the divorce. *Vakil v. Vakil*, 879 N.E.2d 79 (Mass. 2008). A North Carolina premarital agreement (prepared from a formbook) by which each party released all rights to the other's property – "including all marital rights" - neither divided the parties' property nor waived equitable distribution upon divorce. *McIntyre v. McIntyre*, 654 S.E.2d 798 (N.C. App. 2008).

Same-Sex update: In a split decision, the Rhode Island Supreme Court held that Rhode Island courts are without jurisdiction to grant divorces to same-sex couples because when the legislature enacted the divorce statute in 1961, "marriage" unequivocally meant heterosexual relationships. *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007). In New York, an appellate court held a man ineligible for survivor's benefits under Workers' Compensation Law because that law permits benefits to a surviving spouse, not to the survivor of a civil union entered into in Vermont. *Langan v. State Farm Fire & Casualty*, 849 N.Y.S.2d 105 (App. Div. 2007).

Termination: The Illinois Supreme Court held that termination of parental rights does not automatically dissolve a parent's obligation to pay child support unless the child is subsequently adopted. *Illinois Dep't of Healthcare & Family Servs v. Warner*, No. 103289 (Ill. Jan. 25, 2008). A California appellate court, holding that even "abject poverty" by itself cannot warrant termination of parental rights, reversed a father's termination because the only reason for termination appeared to be the father's "inability to obtain suitable housing for financial reasons." *In re G.S.R.*, No. B197000 (Cal. App. Jan. 8, 2008).

Third parties: In a split opinion, the Connecticut Supreme Court held that *Troxel's* requirements apply to third-party visitation proceedings but not to suits for custody by third parties (in this case, an aunt). *Fish v. Fish*, 285 Conn. 24 (2008) (collecting cases). Departing from rulings in other states, the Hawaii Supreme Court held a "best interests" grandparent visitation statute unconstitutional rather than judicially amend it to comply with *Troxel*. *Doe v. Doe*, 172 P.3d 1067 (Haw. 2007) (collecting cases). A California court of appeals reversed that part of an order that a child's stepfather and uncle participate in sexual abuse counseling because the trial court lacked jurisdiction to order the child's relatives - other than her parents - to do anything. *In re Silvia R.*, 159 Cal. App. 4th 337 (2008).

Valuation: A Utah trial court correctly valued Mr. Stonehocker's used-car dealership ("Stoney's Motors") when it excluded the value attributable to his personal goodwill. *Stonehocker v. Stonehocker*, 2008 UT App 11. In Tennessee, appreciation in a company's stock, which the husband received by gift from his father, did not constitute marital property because the husband did not "substantially contribute" to the stock's appreciation merely by working for the company. *Keyt v. Keyt*, No. M2005-00447-SC-R11-CV (Tenn. Dec. 19, 2007). A North Dakota court did not err when it found the value of an insurance business to be less than either party (or their experts) claimed. *Evenson v. Evenson*, 742 N.W.2d 829 (N.D. 2007).

Columns

Distinguishing Conclusions from Opinions: Taking the Measure of Mental Health Testimony—Part One

by

John A. Zervopoulos, Ph.D., J.D., ABPP [*] [†]

Dr. Jones, a psychologist who had conducted a child custody evaluation, took the stand. On direct examination, she stated that because mother was depressed and psychological research showed that depressed mothers are less emotionally responsive to their children than mothers who are not depressed, the child's best interest would be served if the court granted father the right to establish the child's primary residence. Mother's lawyer had difficulty understanding how Dr. Jones's evaluation data supported the opinion but was unable to crack Dr. Jones's certainty, especially when Dr. Jones invoked research to support his conclusions. Mother's lawyer felt that her examination of Dr. Jones lacked focus in the face of Dr. Jones's certitude.

Lawyers in cases other than family law may feel similar frustrations with mental health experts who proffer confident opinions supported by seemingly relevant research. But how can lawyers get behind those opinions to understand the reasoning that these experts bring to their findings and testimony? A key is to determine the difference between the experts' *conclusions* and experts' *opinions*. Doing so will aid trial preparation and focus deposition and trial questions.

How do conclusions and opinions differ? In short, conclusions arise from the data mental health experts gather, consider, and review. As a result, conclusions are within the social science sphere. 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. Case law appears to meld the notions of expert conclusions and opinions. But lawyers who consider these concepts separately in their thinking, preparation, and expert examinations will improve their understanding of experts' testimony. Let's look briefly at why.

The tie between data and conclusions makes sense and is legally required—"[C]onclusions and methodology are not entirely distinct from one another."[1] Obviously, data from unreliable methods—poor interviewing, inappropriate testing, lack of considering relevant information from sources outside the evaluation—cannot lead to reliable conclusions. Experts link data to conclusions by interpretation and synthesis, products of their knowledge, experiences, and training. Experts' conclusions are reasoned inferences from their data. There are no required conclusions to any set of data, even if the data arises from reliable methodology. Consequently, lawyers should keep in mind the adage that "there is much that may slip between the cup and the lip" when they address this subjective element to any expert conclusion. And be aware that experts' connections between their evaluation or therapy data and conclusions may not be as tight as experts try to present in their testimony—experts may try to hide the reasoning they use to support their conclusions.

In contrast to *conclusions*, experts give *opinions* when they apply their conclusions to legally-relevant case questions. For example, given the expert's conclusion that mother is depressed and, therefore, may not be adequately responsive to her child, will the best interest of the child be served by granting father the right to designate the child's primary residence? Or, in a criminal case, is the defendant legally responsible for the

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[1] *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 725 (Tex. 1998) ("*Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion").

act with which he has been charged? Not all psychologists agree that mental health experts should offer expert opinions beyond social science conclusions. But if the expert offers an opinion, lawyers should ask how the expert understands the legal standard at issue. While the expert may not be expected to know the standard as a lawyer would, the expert may misunderstand the standard or have idiosyncratic views of it in ways that might compromise the opinion's reliability or expose the expert's biases.

In sum, expert conclusions and expert opinions address different issues. How, then, should lawyers gauge the reliability of experts' conclusions and opinions and exploit the difference? We'll discuss this in the next issue.

Creative Options for Accessing Retirement Plan Asserts Before Age 59 ½

By

Christy Adamcik Gammill, CDFA*

Lack of liquidity is often a problem encountered when dividing assets in divorce cases. Houses, businesses, and retirement plans each pose unique challenges and opportunities for creative settlements. Retirement assets may be held in a 401(k), pension plan or an IRA. Typically, retirement plan asset distributions taken prior to age 59½ are assessed a 10% penalty by the IRS in addition to ordinary income tax. There are exceptions to avoid the 10% penalty, creating options for utilizing retirement assets to gain liquidity from a property settlement. Examples of liquidity needs at time of divorce are:

- Supplemental Income
- Savings or Emergency Reserves
- Pay-off Debt
- Down Payment for New Home
- Legal Fees

RETIREMENT PLAN DISTRIBUTION OPTIONS PRIOR TO AGE 59 ½

- **Qualified Domestic Relations Order or "QDRO"**
  Transfer of Qualified Assets from Plan Participant to an Ex-Spouse or "Alternate Payee"
  - Distributions may be taken with a QDRO from a Qualified Plan:
    - Pension Plans
    - 401(k) Plans and 403(b) Plans
    - KEOGH Plans, Money Purchase Plans, and Profit Sharing Plans
  - Individual Retirement Accounts or "IRAs" do NOT apply
  - Alternate Payee may disburse funds with a QDRO into multiple accounts or places so there does not have to be a full distribution of the qualified plan or retirement assets:
    - Partial Rollover IRA – Check is made payable to Third Party Trustee For the Benefit of IRA owner
    - Partial Qualified Distribution - Check is made payable to Alternate Payee and may be cashed or deposited into account of Alternate Payee's choice
- **IRS Code 72(t) – Substantially Equal Periodic Payments or "SEPP":**
  - Distributions must be taken for the Greater of 5 Years or until age 59 ½
    - 52 year old must take payments at least 7 ½ years
    - 58 year old must take payments at least 5 years

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- "Periodic Payments" means at least one payment is taken per year
- IRA assets are eligible for SEPP
- 401(k) or other qualified plan assets are not eligible for SEPP unless account owner no longer works for that employer
- Owner does not have to take SEPP with all of the IRA money – separate accounts may be established
  - Rollover IRA taking SEPP
  - Rollover IRA
- There are three (3) different methods that may be used to calculate the minimum distributions

- **Immediate Annuity**
  - Purchase Immediate Annuity versus manage the assets
  - Insurance company guarantees payments to Annuitant
  - Substantially equal payments must be made within one year from date of purchase and paid at least annually
  - Retirement assets available to use with an Immediate Annuity
    - IRA
    - 401(k) or other Qualified Retirement Plan assets with a QDRO
- **Age 55 Employee Separation from Service**
  - Separation from service during or after the year in which he or she attained age 55 (or 50 for certain qualified employees)
  - Distributions may be taken from eligible Qualified Plans
  - Partial or Full Distribution may be taken
  - IRA assets do NOT apply

Each of the IRS's exception rules to premature retirement plan distributions has a number of moving parts that must be accurately administered and processed. Too frequently the mistake has been made where a QDRO has been processed and the Alternate Payee rolled over 401(k) funds into an IRA with the intent of taking a distribution [from the IRA. Once the funds have been put into an IRA, however, the QDRO exception rules no longer apply and there will be a 10% penalty on any funds distributed unless the IRA exception rules can be used. If the Alternate Payee mistakenly rolls 401(k) funds into the IRA instead of taking a distribution and having funds made payable to him or herself, it can be a costly mistake. In this case and any situation it is particularly important to consult legal, tax, and financial advisors to determine the best option(s) and procedures for accessing funds from retirement plans.
Please visit the IRS website to read more about qualified distributions from retirement plans at *http://www.irs.gov/pub/irs-pdf/p575.pdf* .

Articles

An Overview and Survey Regarding the American Law Institute's "Approximation Rule" Proposal

by

Richard A. Warshak, Ph.D. *

The purpose of this article is to provide a brief overview of a proposal to reform child custody law advanced by a prestigious and highly influential group of legal scholars, and then to invite readers to respond to a very brief survey that will provide the first empirical data directly bearing on the debate regarding this proposal.

The American Law Institute

To understand the importance of this project, it is essential to know something about the power of the group that has created the proposal. The American Law Institute [ALI] is an elite organization that promotes reform in all areas of the law.[1] It was established in 1923 by the likes of William Howard Taft, Charles Evans Hughes, and Elihu Root. Currently, it comprises an elected membership of eminent law professors, judges, and lawyers, and *ex officio* membership of the Chief Justice of the United States, the Associate Justices of the Supreme Court, the Chief Judges of the United States Courts of Appeals, the Attorney General and Solicitor General of the United States, the chief justices of the state supreme courts, law school deans, and the presidents of various legal organizations, including the national and state bar associations.

Through its publications and Restatements of Law, the ALI exercises tremendous influence on the landscape of law in the United States. The impact of its family law reform proposals, *Principles of the Law of Family Dissolution* [hereinafter the *Principles*] published in 2002 after four preliminary drafts, is already being felt in legislatures, courts, and law school curriculums.[2] Professor Robin Wilson opines, "It is difficult to overstate the degree of the ALI's influence. As of March 1, 2004, state and federal courts have cited the Restatements 161,486 times."[3] Professor Wilson continues, "Because of the prestige of the ALI, judges will undoubtedly rely on the *Principles* as they have relied on the ALI's Restatements. Legislators are also likely to turn, rightly or wrongly, to the *Principles* for guidance. . . ."[4]

The Survey of Family Law Attorneys

The ALI *Principles* proposes the *approximation rule* to govern decisions regarding the division of the child's time with each parent, i.e., the physical (residential) custody of children whose parents live apart from each other – in Texas law terms, the periods of possession.

The *Principles* makes a number of assumptions and predictions about how the approximation rule will work in practice and expects the rule to accomplish certain objectives. The proposal, described below, has

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[1] American Law Institute, http://www.ali.org/ (last visited January 27, 2008).

[2] American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (Matthew Bender & Co., Inc. 2002).

[3] Robin F. Wilson, *Introduction, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION at 2 [fn 5] (Robin Fretwell Wilson ed., 2006).

[4] *Id.*, at 3.

generated much debate in the law and mental health literature.[5] But, to date the debate consists largely of speculations about how the proposal would work if endorsed by state legislatures. What is missing from the literature on the approximation rule is empirical research that could provide evidence directly relevant to the goals of the proposal.

It is in this context that I am requesting help from readers of this article. The brief (one minute) survey in which you are invited to participate will provide the first empirical data directly concerned with the approximation rule and will likely play an important role in its acceptance or rejection by legislatures throughout the country. To increase the likelihood that your responses will provide data that is independent of any particular position regarding the proposal, I am not going to describe the various assumptions, predictions, and objectives of the approximation rule in this article, nor will I discuss my own position on the issues. I merely provide the background you need to respond to the brief survey. In a subsequent article, I will present the results of the survey and discuss how the results relate to the assumptions and goals of the approximation rule proposal.

In order to respond to the survey, it is essential to know the language of the rule, the exceptions to the rule, and ALI's definition of caretaking functions. These are provided next, followed by a link to the survey questions. Please note that all responses are anonymous and will be tallied on a group basis. To reciprocate, when articles are published that include the data from this survey (in addition to an article in this Report, I expect to write an article presenting the results of a similar survey of custody evaluators, and an article in a law review) I will email a pdf file of the published articles to any survey respondent who requests these.

The Approximation Rule

The ALI *Principles* proposes that, in contested physical custody cases, "[T]he court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation."[6]

Exceptions to the Approximation Rule

The *Principles* designates exceptions that modify the application of the approximation rule.[7] These exceptions include allocations designed:

> (a) to permit the child to have a relationship with each parent which, in the case of a legal parent or a parent by estoppel who has performed a reasonable share of parenting functions, should be not less than a presumptive amount of custodial time set by a uniform rule of statewide application;
>
> (b) to accommodate the firm and reasonable preferences of a child who has reached a specific age, set by a uniform rule of statewide application;
>
> (c) to keep siblings together [if] necessary to their welfare;
>
> (d) to protect the child's welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs;
>
> (e) to take into account any prior agreement made before and outside the immediate context of the separation considering the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child;

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[5] *See Id*.; Richard A. Warshak, Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids, 45 FAM. CT. REV. 600-619 (2007); Richard A. Warshak, The Approximation Rule, Child Development Research, and Children's Best Interests After Divorce, 1 CHILD DEV. PERSPECTIVES 119-125 (2007); Barbara A. Atwood, Comment on Warshak: The Approximation Rule as a Work in Progress, 1 CHILD DEV. PERSPECTIVES 126-128 (2007); Mary E. O'Connell, When Noble Aspirations Fail: Why We Need the Approximation Rule, 1 CHILD DEV. PERSPECTIVES 129-131 (2007); Robert E. Emery, Rule or Rorschach: Approximating Children's Best Interests, 1 CHILD DEV. PERSPECTIVES 132-134 (2007); Michael E. Lamb, The "Approximation Rule": Another Proposed Reform that Misses the Target, 1 CHILD DEV. PERSPECTIVES 135-136 (2007); and Richard A. Warshak, Best Interests and the Fulfillment of Noble Aspirations: A Call for Humbition, 1 CHILD DEV. PERSPECTIVES 137-139 (2007).

[6] PRINCIPLES, *supra* note 2, at § 2.08 (1).

[7] *Id.*

(f) to avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical, or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangements;

(g) to accomplish the relocation objectives that: "The court should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose."

(h) to avoid substantial and almost certain harm to the child.

Additional exceptions to the rule include situations where a parent has:

(a) abused, neglected, or abandoned a child

(b) inflicted domestic violence or allowed another to inflict domestic violence;

(c) abused drugs or alcohol, or another substance in a way that interferes with the parent's ability to perform caretaking functions;

(d) interfered persistently with the other parent's access to the child.

Definition of Caretaking Functions

For purposes of implementing the approximation rule, the ALI *Principles* defines caretaking functions as follows:

Caretaking functions are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others.[8] Caretaking functions include but are not limited to all of the following:

(A) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;

(B) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(C) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;

(D) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(E) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(F) arranging for health-care providers, medical follow-up, and home health care;

(G) providing moral and ethical guidance;

(H) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

Take the Survey

By clicking on the following link, you will reach the survey questions. (If the link does not work, please copy and paste the URL into the address line of your browser.) The survey will take about one minute to complete. As you respond to the survey, please keep in mind and feel free to consult the above descriptions of the rule, the exceptions, and the definition of caretaking functions.

If you can give a few additional minutes of time, there is an optional second part to the survey. The results of Part 2 will shed light on the impact of stressful life events on a child's development and either con-

[8] PRINCIPLES, *supra* note 2, at § 2.03 (5).

firm or challenge some popular beliefs about divorce. At the end you will be given the opportunity to provide your email address to receive free reprints of journal articles reporting the survey results.
http://www.surveymonkey.com/s.aspx?sm=zXTUDQ35g8LmPkxAADjEtw_3d_3d

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County Courts at Law: What are the Limits of their Jurisdiction over Divorces?

by

John H. Chase*

As Texas district courts' dockets become increasingly full, many practitioners opt to file their family law cases in the County Courts at Law when this option is available.[1] Unfortunately, this is often done without considering the extent of those courts' jurisdiction in family law cases and divorces in particular. Many County Courts at Law have monetary limits to their jurisdiction, allowing them to hear only cases whose amount in controversy falls within certain dollar limits. Unlike some other family law cases, divorces are property cases with a monetary value. As such, divorces are subject to the same monetary jurisdictional limits applicable to other cases in the County Courts at Law. However, at the present time, not all practitioners and courts appear to be aware of their local enabling statute, which may have a low monetary jurisdictional limit, which in turn may result in that court not having subject-matter jurisdiction.

The county court system in Texas is complex, with two different types of County Courts in existence: the Constitutional County Courts created by the Texas Constitution, and the County Courts at Law created by Texas statute.[2] This distinction between the two county court systems is misleading even to practitioners.[3] The Texas Constitution limits each county to a single Constitutional County Court.[4] By statute, these Constitutional County Courts do not have jurisdiction over suits for divorce.[5] Rather, these courts have concurrent jurisdiction with the justice courts in civil matters with an amount in controversy between $200, and $10,000, and concurrent jurisdiction with the district court in civil cases with an amount in controversy between $500 and $5000.

The Texas Legislature has created statutory County Courts at Law in 84 counties where the local caseload has become too large for the district courts to manage.[6] Unlike their constitutional cousins, these County Courts at Law vary considerably in their functioning, and, most importantly, in their jurisdiction, because each County Court at Law was established by a separate enabling statute that created the specific court. These courts and their enabling statutes are found in sections 25.0041 through 25.2512 of the Texas Government Code. The default jurisdictional limits of these County Courts at Law are described by Government Code section 25.0003, which is frequently expanded by the county's corresponding enabling statute. The default jurisdictional limit only grants jurisdiction for "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000 ...."[7] Whether the County Court at Law has jurisdiction over a particular divorce action depends upon that court's separate statute. Fifty-four have enabling statutes granting that County Court at Law jurisdiction over all family law cases and proceedings. Thirteen have statutes granting that County Court at Law the same jurisdiction as the district court, with either no monetary limit or a very

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[1] *See* Texas Courts Online, *New Family Law Cases Filed in Texas District and County-level Courts Fiscal Years 1997 to 2006* at 3, available at http://www.courts.state.tx.us/pubs/AR2006/trends/family-law-cases-fy97-06.pdf.

[2] Texas Courts Online, *Overview of Court System Structure and Jurisdiction*, available at http://www.courts.state.tx.us/pubs/court-overview.pdf

[3] For example, the legal encyclopedia *Texas Jurisprudence*, under its description of family law jurisdiction, states that "[b]y statute, county courts are denied jurisdiction of suits for divorce." 39 TEX. JUR. 3D *Family Law* § 428 (2008) (citing the constitutional county court statute but making no mention of county courts at law).

[4] TEX. CONST. art. V, §15.

[5] TEX. GOV'T CODE ANN. § 26.043(4)

[6] Texas Courts Online, *Court Structure of Texas*, available at http://www.courts.state.tx.us.

[7] TEX. GOV'T CODE ANN. § 25.0003(c)(1)

high monetary limit.[8] However, nineteen County Courts at Law have enabling statutes that do not address this issue at all, meaning that they are subject to the default jurisdictional limits.[9] Those seventeen County Courts at Law have jurisdiction over divorces only if they have an amount in controversy between $500 and $100,000. A contested divorce involving property with a value over $100,000 (or under $500, which is much less likely) could not be heard by one of these courts. If a divorce is granted under these circumstances, the divorce decree would be void as beyond the court's subject-matter jurisdiction.

What this "Rube Goldberg-like"[10] set of statutes amounts to is a system of courts that have more subject-matter jurisdiction than a constitutional county court, but less than a state district court. The problem arises when one of these County Courts at Law hears a family law case, which is clearly within the jurisdiction of a district court, but not a constitutional county court. For example, approximately five years ago, a practitioner filed a case in the local county court and alleged a common-law marriage with no children and requested a divorce and division of the marital estate. The jurisdictional limit on this court was $150,000. During the trial on the common-law marriage issue, the court heard evidence regarding a ranch valued at $250,000 that would be part of the property division if a common-law marriage existed. At this point in the trial, it was clear that this county court did not have subject-matter jurisdiction. However, apparently neither the court nor the parties were aware of this fact at the time. It was not until after the trial had been completed and a common-law marriage had been found that this problem was discovered by the losing party, who immediately filed a plea to the jurisdiction and motion to dismiss. At that time, the county court sent the parties to mediation, where the case was settled. A final decree was then entered by the county court, after the district court refused to allow the matter to be transferred to the district court for entry. No appeal was pursued by either party. The question remains, however, whether the divorce decree is void and how many other existing divorces may also be void.

The issue of family law jurisdiction in County Courts at Law has been addressed once by Texas Courts. This occurred in 1995 in *Underwood v. Underwood*, 902 S.W.2d 152 (Tex. App.—Houston [1st Dist.], no pet.). In this case, the pleadings alleged $150,000 in damages from a failure to follow a Final Decree of Divorce. However, the enabling statute for the Brazoria County Courts at Law, where this case was heard, only granted jurisdiction over civil cases "where the matter in controversy ... does not exceed $100,000."[11] The appellate court was able to resolve the problem by pointing out that "the Government Code also gives statutory county courts jurisdiction over 'family law cases and proceedings.'"[12] This separate provision eliminates the monetary limits on jurisdiction for family law cases.[13] What the Court of Appeals failed to point out was that Section 25.0222 is the separate enabling statute for Brazoria County; nineteen other counties' statutes omit a separate "family cases and proceedings" provision or any other provision expanding the court's jurisdiction beyond the $100,000 default limit.[14] Therefore, the court's solution would not apply to these other counties. If the fact scenario from *Underwood* appeared in one of those counties, such as in the example given above, it is not at all clear that the appeals court could find a way to justify jurisdiction in the County Court at Law.

A Possible Solution

In addition to Brazoria County, fifty-four other county enabling statutes have separate provisions for family law cases and proceedings. Also, thirteen county enabling statutes grant the County Court at Law the same jurisdiction as district courts, without exceptions for family law.[15] Both of these methods provide these

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[8] Bowie, Calhoun, Cameron (up to $1 million), Dallas, El Paso, Galveston, Gregg, Kaufman (except County Court at Law No. 2), Kendall, Panola, Parker, Rockwall, Smith.

[9] These counties include: Bell, Bexar, Cooke, Collin, Denton, Erath, Grayson, Harris, Harrison, Hopkins, Hunt, Jefferson, McLennan, Nueces, San Patricio, Taylor, Tom Green, Travis (jurisdictional limit increased to $250,000), and Victoria.

[10] The Texas Research League, *The Texas Judiciary: a Proposal for Structural-Functional Reform* 12 (1991)

[11] TEX. GOV'T CODE ANN. § 25.0222(a)(1)

[12] Underwood v. Underwood, 902 S.W.2d 152, 154 (Tex. App—Houston [1st Dist.], no pet.) (citing TEX. GOV'T CODE ANN. § 25.0222(a)(3))

[13] Id.

[14] These counties include: Bell, Bexar, Cooke, Collin, Denton, Erath, Grayson, Harris, Harrison, Hopkins, Hunt, Jefferson, McLennan, Nueces, San Patricio, Taylor, Tom Green, Travis (jurisdictional limit increased to $250,000), and Victoria.

[15] These counties grant concurrent jurisdiction with the district courts: Bowie, Calhoun, Cameron (up to $1 million), Dallas, El Paso, Galveston, Gregg, Kaufman (except County Court at Law No. 2), Kendall, Panola, Parker, Rockwall, Smith.

specific County Courts at Law with jurisdiction to hear any family law case, regardless of the amount in controversy.

However, the increased caseload in these courts shows a need for greater uniformity within the statutory framework. There is a growing need for family law cases to be heard in County Courts at Law.[16] Instead of waiting for individual enabling statutes to address this need, Texas would be better served if the Legislature adopted a single uniform provision in order to establish jurisdiction in a clear, organized way throughout the state. This can be most easily accomplished by creating a general provision to the Texas Government Code that mirrors the provisions already in use by several county enabling statutes. The Legislature should add a provision to the Texas Government Code so that Section 25.0003(c) would read:

> **§ 25.0003**
> ...
> (c) In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in:
> ...
> (3) family law cases and proceedings

This would mirror the language used by Government Code § 25.0222(a)(3) and cited in *Underwood*. Such an addition would make true the *Underwood* court's statement that "[t]he Government Code does not impose a monetary limit on the county court's jurisdiction over 'family law cases and proceedings.'"[17] Of course, to fully solve the problem, the Legislature will also have to address and grandfather in the potential void divorces that have fallen through the cracks over the years. At a minimum, the nineteen counties most at risk for this problem should consider revising their enabling statutes.

What's in a name?
Parenting Coordination vs. Family Psychotherapy

by
Aaron Robb, M.Ed., NCC, LPC-S[18]

Recently some of my colleagues and I have run into a string of attorneys and litigants calling us to ask if we accepted health insurance for parenting coordination services. This was surprising at first, as it was akin to someone calling up and asking if we would bill their health insurance for mediation, but this has now happened with sufficient regularity that it seems that there may be a common misconception developing that should be addressed.

First let's look at how psychotherapy and other reimbursable services are billed. The vast majority of insurance companies look at two major factors in authorizing payment: diagnosis and CPT code. Diagnosis is something that most laypersons have familiarity with – labels such as depression, bipolar disorder, alcohol dependence, etc. CPT stands for "current procedural terminology" and the CPT codes, published by the American Medical Association, define the nature of a particular healthcare service for billing purposes.

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[16] From 1994 to 2004, sixteen counties shifted family law cases from district courts to county-level courts that had never heard such matters before: Aransas, Bowie, Burnet, Galveston, Henderson, Hood, Lamar, Medina, Montgomery, Moore, Nacogdoches, Orange, Polk, Potter, Smith, and Williamson. Texas Courts Online, *New Family Law Cases Filed in Texas District and County-level Courts Fiscal Years 1997 to 2006* at 3, available at http://www.courts.state.tx.us/pubs/AR2006/trends/family-law-cases-fy97-06.pdf.

[17] Underwood, 902 S.W.2d at 154.

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Each insurance provider will have rules and procedures regarding for which diagnosis and CPT code combinations they reimburse. Like many heath care services, there are mental health services that may have CPT codes and, while important for a patient's health, are not covered by insurance.[19] Similarly there are diagnoses in both physical and mental health for which insurance companies will not reimburse.

Implicit in this diagnosis and coding paradigm are a number of assumptions about creating treatment plans, setting measurable treatment goals and acting within the bounds of accepted practices for mental health professionals. Explicit in this paradigm is where the focus of service, choice of directions, and the chief duty, is owed: to the clients seen in psychotherapy and the issues that they wish to bring to the psychotherapist.

Parenting coordination serves a different function and operates under a different paradigm – as currently defined in Texas statutes the role of a PC is "to assist the parties in resolving parenting issues" (TFC 153.605). Additionally the "duties of a parenting coordinator must be specified" by the court appointing the PC (TFC 153.606). The role is narrow in scope, and rather than the direction of services being set by the participants it is spelled out in the court order. Likewise, the overriding goal of the process is **dispute resolution** rather than psychotherapeutic insight or alleviation of emotional difficulties.[20]

The inherent difference in psychotherapy and dispute resolution functions that mental health professionals may be involved in is not only recognized in the professional literature,[21] but can also be seen in Texas licensing laws. Definitions of professional therapeutic services for Licensed Marriage and Family Therapists (TAC 801.42) detail family therapy and mediation as separate areas of professional practice. Both are **therapeutic**, but only one is **therapy** – not just a semantic difference, but also one that acknowledges that there are differences in goals and procedures inherent in treatment and dispute resolution services.

That all being said, let's bring this back to submitting a bill for PC services to a healthcare insurance company. Mental health professionals are required to bill only for those services actually rendered.[22] There is no CPT code for "parenting coordination"[23] and so any billing through insurance will have to involve "creative" shoehorning into a covered area. Secondly there is no diagnosis inherent in PC work (again, just as there is no diagnosis inherent for persons who become involved in mediation). Even for those families where there is a diagnosable mental health condition noted for one or more of the family members, parenting coordination is not treatment for that (or any) particular diagnosis.

Mental health professionals of all stripes have a duty to be forthright in their dealings, both with their patients and the public at large. The problems in "creative" billing submissions should be readily apparent, especially the associated perils of fraud allegations that could accompany such submissions. If a health insurance company clearly understands that parties are participating in a court-related dispute resolution process related to their co-parenting difficulties and chooses to provide some sort of reimbursement that's great! Having struggled with managed care limits most of my professional career it seems unlikely, but hope springs eternal.

If parents want to participate in a service that is covered by health insurance then they should consider family therapy (court ordered or otherwise) – an old standby that, with a litigation-aware professional, can have substantial positive outcomes for parents who are motivated to gain personal insight and willing to change their behaviors. If the parties are in need of a dispute resolution process parenting coordination or mediation may be the more appropriate way to go. There are also non-confidential services under various names[24] (too numerous to detail fully in this short article) that, in line with current national parenting coordination practices, provide methods for reporting back to court when monitoring of treatment compliance or other serious issues exist in a family system.

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[19] An excellent example of this is Medicare's lack of coverage for some preventative medicine services offered by physicians, see for instance http://www.aafp.org/fpm/20040400/49maki.html

[20] To further reinforce this point, PC is currently covered under the same ADR confidentiality provisions as mediation – see TFC 153.0071(g)

[21] See for instance Kirkland & Kirkland (2006) Risk management and aspirational ethics for parenting coordinators. *Journal of Child Custody* 3(2), at 40

[22] See for instance TAC 801.44(j) and TAC 681.41(r)

[23] https://catalog.ama-assn.org/Catalog/cpt/cpt_search_result.jsp?_requestid=815277

[24] Such as co-parenting case management or co-parenting facilitation

Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*)

DIVORCE
Grounds and Procedure

COURT APPROVAL OF A DIVORCE SETTLMENT DOES NOT CONSTITUTE RENDITION OF JUDGMENT—A PARTY CAN REVOKE CONSENT UNTIL THE TRIAL COURT OFFICIALLY ANNOUNCES ITS DECISION

¶ 08-1-1. **Cook v. Cook**, ___ S.W.3d ___, 2007 WL 4371405 (Tex. App.—Fort Worth 2007) (12/13/07).

Facts: Husband filed "Objection to the Entry of Judgment and Motion for a New Trial" due to his claim that he repudiated the agreement prior to rendition of judgment. On July 29, 2005, the visiting trial judge approved the settlement and stated "[u]pon submission of the final decree and signed by the Court, the divorce will be granted at that time, not today." The trial court granted the divorce when the visiting trial judge signed the decree on December 2, 2005. Husband contended that many of the "agreement[s]" and "stipulations" in the agreement took place without his presence or participation on November 8, 2005.

Held: Reversed and remanded. Trial court improperly granted divorce and rendered judgment after Husband withdrew his consent to the agreement.

Opinion: The appellate court found that Husband had withdrawn his consent prior to rendition of the divorce. Husband is allowed to revoke consent per TFC 7.006(a), which states: "To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before *rendition of the divorce* or annulment unless the agreement is binding under another rule of law." The appellate court determined that, based on the language used by the visiting judge, that there was an intent to approve the divorce settlement, but not a clear intent to render judgment. The delaying of the granting of the divorce evidences intent not to render judgment. The appellate court stated that "[t]he fact that the trial court approved the settlement agreement … does not transform such approval into a rendition of judgment."

Wife argued that there was no need to reverse and remand because she is entitled to enforce the Rule 11 agreement as a contract. In the alternative, Wife argued that the appellate court could modify the judgment and affirm as modified. The appellate court stated that a judgment rendered after consent is revoked is void and there is no authority for an appellate court to affirm a void judgment as modified. The appellate court agreed that a void judgment does not preclude the trial court, after proper notice and hearing, from enforcing a settlement agreement that complies with TRCP 11 even if one party has revoked consent. This judgment would not be an "agreed judgment" but a "judgment enforcing a binding contract." However, an action to enforce a settlement agreement, after consent is withdrawn, must be based on pleading and proof. Wife had not sought enforcement of agreement as a contract through pleadings and proof and as a result the appellate court could not be certain that enforcing a void judgment would be harmless to Husband. The appellate court pointed out that the parties still had the right to seek or avoid the enforcement of the agreement as a contract.

Dissent: There is a difference between the rendition of a divorce and the signing and entry of the judgment. Rendition occurs when parties have consented and the judge has agreed that the settlement agreement is just and right as to all matters before the court. Based on the transcript, all parties consented to the agreement, and the judge rendered judgment: "Based upon the agreements of the parties, the Court will find that it is a fair, just, and right division of the parties on the property. Based upon the agreement of the parties, the Court

finds it in the best interest of this minor child. And the agreement the parties have reached regarding the conservatorship and visitation is approved believing that to be in the best interest of the child."

TFC 7.006(b) states that upon presentation of a "written agreement concerning the division of property and the liabilities of the spouses," the trial court must determine whether the agreement is "just and right." Once the court determines the terms are just and right, "those terms are binding on the court." The fact that the trial judge stated that the division was just and right, and the parties had consented in open court, means that the rendition of the divorce was complete. After a judgment is rendered by oral pronouncement the entry of a written judgment is purely a ministerial act. As a result, despite the fact that the settlement agreement had not yet been signed or judgment entered, rendition of the divorce had taken place in open court.

Editor's Comment: *The problem with the appellee's position, and with the dissent, is that the trial court did not utter or write the magic words ("the divorce is granted") at the hearing where the parties proved up their settlement. In fact, the trial court specifically stated that the divorce would be granted when the court signed the decree, "not today." J.V.*

WAIVER OF SERVICE FOR FIRST AMENDED PETITION DOES NOT APPLY TO SECOND AMENDED PETITION

¶ 08-1-2. **Smith v. Smith,** 241 S.W.3d 904 (Tex. App.—Beaumont 2007) (12/13/07).

Facts: Wife filed original petition and first amended petition for divorce. Husband signed a waiver of service for the first amended petition. Wife then filed a second amended petition, which was served on husband's attorney. Wife did not attempt to serve this second amended petition directly on husband. Husband did not appear at the trial and the court granted the divorce on the grounds of adultery and cruelty. The trial court entered a judgment granting wife substantially all the community property and maintenance. Husband appealed.

Held: Reversed and remanded. The trial court granted relief beyond that requested in the first amended petition. As a result, husband or his agent should have been served with the second amended petition. However, the attorney served by wife was not husband's attorney of record and therefore was not his agent.

Opinion: The second amended petition was significantly different from the first amended petition. Among other things, it alleged cruel treatment and requested an unequal share of the estate. The trial court's judgment, while not granting all of the relief requested in the second amended petition, went well beyond the first amended petition. Therefore, husband's waiver of service in the first amended petition did not apply. Furthermore, the attorney served by wife only advised husband on particular issues in the divorce; he had not enter any court appearances and was not husband's attorney of record. As a result, service on him did not fulfill the requirements of TRCP 21a.

RULE 18B OF RULES OF CIVIL PROCEDURE ALLOW PARTIES TO WAIVE THEIR RIGHT TO SEEK RECUSAL—JUDGE IS NOT REQUIRED TO RECUSE SUA SPONTE WHEN PARTIES HAVE WAIVED THEIR RIGHT TO SEEK RECUSAL

¶ 08-1-3. **Blackwell v. Humble,** 241 S.W.3d 707 (Tex. App.—Austin 2007). (12/14/07)

Facts: Divorce decree named father and mother JMC of children. The trial court judge had practiced law with father in the past. As shown on the record, Mother was aware of this relationship at the time of the divorce and did not object. Father's home was primary place of residence for children and mother had visitation rights. Several months later father filed a motion for enforcement and modification due to alleged failure of mother to return children and threats to father in front of children. At the hearing, Father filed supplemental petition seeking to suspend mother's visitation pending mental health evaluation of mother.

Father later filed an "amended supplemental" petition with additional allegations against mother. Shortly before the hearing on father's motion, mother filed a motion to recuse the trial court judge due to his previous relationship with father. The trial court referred the motion to the presiding judge, who denied the motion due to untimely filing and insufficient grounds for recusal. The hearing on the amended supplemental petition was held, new orders were issued, and a status hearing was set. Before the status hearing mother filed a second motion for recusal, asserting that the trial judge should have recused himself sua sponte, or on mother's first motion. This motion was assigned to a second judge. Father filed a response, asserting that the grounds for recusal had been disclosed during the divorce proceeding and therefore mother waived her right to seek recusal. Mother's second motion to recuse was denied. The trial court entered orders limiting mother's visitation, allowing father's brother and his mother to intervene, and naming them as PCs. Mother appealed, arguing that the trial court judge should have recused himself sua sponte, or when Mother filed her first motion to recuse, or that Mother's second motion for recusal should have been granted.

Held: Affirmed in part, reversed and remanded in part. Mother's motions for recusal were waived and untimely filed. Also, the record did not support the trial court's possessory orders.

Opinion: Appeals Court found that while Rule 18a allows recusal by a trial court judge sua sponte or by a motion, such a motion must be filed at least ten days before date of trial or hearing. Also, "[i]f the grounds for recusal are fully disclosed on the record, a party may waive her right to seek recusal" and "[w]ithout a proper and timely motion to recuse, rule 18a's mandatory provisions are never triggered." In this case, the previous relationship between father and the trial court judge was disclosed on the record during the earlier divorce proceeding. The appeals court stated that if the trial judge was impartial at the divorce, there was no reason to believe that the he should not be considered impartial for the purposes of later hearings. In addition "[e]ven if we were to assume that [the trial judge] had an absolute duty to raise the issue of recusal on his own motion, [mother] stated she did not wish to have the judge recused, and [mother] has not cited any authority that would require [the trial judge] to insist on recusing himself over the parties' wishes."

Therefore, the appeals court found that the first motion was not timely filed, failed to allege sufficient grounds for recusal, and was properly denied by the presiding judge. The appeals court also agreed with the denial of the second motion for recusal because, despite some discomfort with the language of rule 18b, the text can be interpreted to allow the parties to waive their rights to seek recusal.

However, the trial court's decision to strictly limit mother's visitation was not consistent with its decision to keep her as JMC. This issue was remanded to the trial court for further proceedings.

Editor's Comment: *The Court also notes in this opinion a reaffirmation of the application of res judicata to modification suits – that predivorce evidence may be admissible to corroborate similar post-divorce conduct. The Court also addresses the quantity of evidence required for a nonparent to intervene and seek conservatorship based on substantial past contact. The grandma here had enough (because she gave details on how often she saw the kids) and the uncle did not (because his statement was conclusory about his contact with the kids and lacked detail). The dissent would give both grandma and uncle standing to sue for conservatorship and criticizes the majority's interference with the trial court's discretion. M.M.O.*

HUSBAND FILES FOR DIVORCE MORE THAN TWO YEARS AFTER SEPARATION IN AN INFORMAL MARRIAGE—CANNOT OVERCOME THE PRESUMPTION THEY WERE NOT MARRIED

¶ 08-1-4. **Joplin v. Borusheski,** ___ S.W.3d ___, 2008 WL 116114 (Tex. App.—Dallas 2008) (01/14/08).

Facts: The parties began living together in 1983. In 2003, appellee moved to Wisconsin. Appellant then filed a divorce action, claiming that they had entered into an informal marriage. Appellee sought a declaratory judgment that they were never married. After appellant's case in chief, appellee moved for a directed verdict on the ground that the divorce action was brought more than two years after the parties separated. The trial court granted the motion. This appeal followed.

Held: Affirmed. The trial court reasonably concluded that appellant failed to produce sufficient evidence to rebut the statutory presumption that they were not married.

Opinion: "If the proponent of the marriage does not commence a proceeding to prove the marriage ... within two years of the date ... the parties ... separated and ceased living together, then there is a rebuttable presumption that the parties did not enter into an agreement to be married." TFC § 2.401(b). The trial court determined that the parties separated in March 2003, while the divorce action was not brought until August 2005. The appellant presented testimony to attempt to rebut the presumption. However, the trial court was the sole judge of the credibility of the evidence and reasonably concluded that such evidence was insufficient to overcome the presumption.

ATTORNEY'S FEES CAN BE RECOVERABLE FOR DEFENDING AGAINST A COUNTERCLAIM BUT STILL NEED SUFFICIENT EVIDENCE OF ATTORNEY'S FEES

¶ 08-1-5. **Brockie v. Webb,** ___ S.W.3d ___, 2008 WL 352674 (Tex. App.—Dallas 2008). (2/11/08)

Facts: Attorney initially represented wife in a divorce proceeding, but terminated representation prior to trial due to non-payment of attorney's fees. Attorney filed a motion to withdraw as counsel for failure to pay attorney's fees. The trial court granted the motion, and on the same day attorney filed its petition in intervention seeking the unpaid attorney's fees. Wife filed an original counterclaim to the petition in intervention. At the conclusion of trial, the trial court granted the petition in intervention. The trial court entered judgment for attorney in the amount of $16,467.72 for the divorce representation, and additional attorney's fees in the amount of $33,803.95 incurred in defending wife's counterclaim for legal malpractice. Wife appealed the trial court's decision, claiming that the evidence was legally and factually insufficient to support the award of attorney's fees in favor of attorney; and that the evidence was legally and factually insufficient to support the award of additional attorney's fees in favor of attorney for fees incurred in defending against the counterclaim.

Held: Affirmed in part, reversed and remanded in part. The court held that the appellant did not show that no evidence existed to support the adverse finding with regards to the initial award of attorney's fees presented. With regards to the attorney's fees for the counterclaim, the court held that attorney's fees can be awarded if the counterclaim and the initial claim arise from the same transaction and the same facts are required to defend the counterclaim. However, the court remanded for Attorney's failure to show adequate proof to justify the $33,803.95 award.

Opinion: "[I]f the plaintiff's breach of contract claim and the defendant's counterclaim arise from the same transaction and the same facts required to prosecute the claim are required to defend against the counterclaim, then attorney's fees may be appropriate… However, we conclude [Attorney] failed to present factually sufficient evidence from which a factfinder could determine the reasonableness and necessity of the fees incurred in defending the counterclaim."

COURT MASTER'S HEARING AND RECOMMENDATION FOR APPROVAL SERVED TO VERIFY A MOTION TO REINSTATE

¶ 08-1-6. ***In re* Charles Allan Dobbins,** ___ S.W.3d ___, 2007 WL 541901 (Tex. App.—Dallas 2008, orig. proceeding) (2/29/08).

Facts: Wife petitioned for divorce in July 1990. In November, the case was dismissed for want of prosecution. Thirty days later, wife filed an unverified motion to reinstate the case. Although the motion was unverified, the trial judge signed an order reinstating the case in January 1991. The final decree of divorce was signed in April 1991. Sixteen years later, the trial court signed an order terminating father's parental rights after finding that father had executed an unrevoked or irrevocable affidavit of relinquishment. Four months

later, the OAG filed a motion to confirm a child support arrearage against father. Father responded by claiming that the original decree was ineffective because the divorce action was dismissed and not reinstated within the trial court's period of plenary power. Specifically, he claimed that the motion to reinstate was unverified, and therefore did not extend the court's plenary power. The trial court denied the motion.

Held: Mandamus denied. The court master's hearing on the motion and subsequent recommendation of its approval served to verify the motion.

Opinion: The appellate court recognized that, typically, "only verified motions to reinstate extend a trial court's plenary power." However, the Texas Supreme Court has recently ruled that "procedural rules should be construed and applied so that the right of appeal is not necessarily lost to technicalities," and that an affidavit supporting a motion to reinstate served to verify the motion. In this case, there was no affidavit attached to the motion. However, the order granting reinstatement was approved by the court master after a hearing the motion. The court of appeals concluded that "[g]iven the supreme court's directive ... that we liberally construe procedural rules so decisions turn on substance rather than procedural technicality, ... the combination of the evidentiary hearing with the court master's recommendation of approval, within thirty days, was an adequate substitute for the more technical verification requirement ...."

Dissent: "The procedure sanctioned here is nothing like that involved in *Guest*, in which an actual affidavit, sworn to by the party's former attorney, was timely filed with the court. Here we have an unsworn, barebones motion to reinstate ...." The majority makes too many assumptions in its attempt to conclude that the hearing and approval by the court master in this case are an "'adequate substitute' for rule 165a's plain requirement that a motion to reinstate be verified." The court's plenary power had expired and the divorce decree was void.

***Editor's Comment**: This is a troubling case. In effect, it holds that Tex. R. Civ. P. 165a(3) does not mean what it says. Furthermore, the case raises the question whether a trial court that refuses to hear an unsworn motion to reinstate has abused its discretion. J.V.*

DIVORCE
Division of Property

GRANTING OF PROPERTY DEED TO SPOUSE CREATES A PRESUMPTION OF GIFT

¶ 08-1-7. **Magness v. Magness,** 241 S.W.3d 910 (Tex. App.—Dallas 2007) (12/20/07).

Facts: Wife held title to the home prior to marriage. After marriage, she refinanced the home, executing a deed transferring a one-half interest in the home to her husband. The couple divorced and wife claimed that she did not intend the deed to be a gift transferring ownership to husband. Husband did not testify about whether wife had made a gift. The trial court found that husband and wife each owned a one-half separate interest in the home. Wife appealed.

Held: Affirmed. The granting of the deed to husband created a presumption that wife intended a gift. The trial court did not err in finding that this presumption was not overcome.

Opinion: Inception of title shows that the house was originally wife's separate property. The question remaining is whether the wife intended the deed transfer to constitute a gift. "A deed for property from one spouse as grantor to the other spouse as grantee creates a presumption the grantee spouse received the property as separate property by gift." This presumption may be rebutted by proof of fraud, accident, or mistake.

The trial court, as the exclusive judge of credibility and weight given to evidence, determined that this presumption was not rebutted. This was not an abuse of discretion.

Editor's Comment: *Signing what the title company puts in front of you, ignorant of the consequences, is insufficient to rebut the gift presumption. Affirmative factual evidence – not just conclusions – of fraud, accident, or mistake must be shown. This case provides fairly clear direction for the all-to-common refinance situations. M.M.O.*

Editor's Comment: *The wife testified that she signed the deed as a condition of refinancing the house. The opinion states that a trial court is "free to disbelieve any or all" of a party's testimony. However, the uncontroverted testimony of even an interested witness binds a court if the testimony "is readily controvertible, it is clear, positive, direct, and there are no circumstances tending to discredit or impeach it."* E.g., In re Doe 4, 19 S.W.3d 322, 325 (Tex. 2000). *Had the wife not testified on cross that "I see my name on there, and it says warranty deed, but I don't know when and why and how," the trial court might have been reversed. J.V.*

SAPCR
Conservatorship

★★★★★ Texas Supreme Court ★★★★★

IF TERMINATION OF PARENTAL RIGHTS IS REVERSED ON APPEAL, THEN CONSERVATORSHIP APPOINTED SOLELY UNDER FAMILY CODE § 161.207 FAILS DUE TO LACK OF INDEPENDENT SUPPORT FOR CONSERVATORSHIP ORDER UNDER FAMILY CODE § 153.131

¶ 08-1-8. ***In re*** **D.N.C.,** ___ S.W.3d ___, 2008 WL 344806 (Tex. 2008) (2/8/08).

Facts: The trial court terminated mother's parental rights under TFC § 161.001(1)(D) due to a finding that mother had endangered her children. The trial court made no additional findings and appointed DFPS as SMC. On appeal, mother challenged the sufficiency of the evidence supporting the termination order but did not separately challenge the appointment of DFPS as SMC.

The Court of Appeals reversed the termination order on factual insufficiency grounds, and also reversed the trial court's conservatorship appointment. The Court of Appeals reasoned that no findings had been made under TFC §153.131 that would independently support the conservatorship order, and thus DFPS's appointment was solely the consequence of the trial court's termination decision under TFC §161.207 and had to be reversed as well.

Held: Petitions for review denied. Reversal of the conservatorship order was not erroneous. If termination of parental rights is reversed on appeal, then conservatorship appointed solely under TFC § 161.207 fails due to lack of independent support for the conservatorship order under TFC § 153.131.

Opinion: DFPS argued that the Trial Court was erroneous under *In the Interest of J.A.J.*, ___ S.W.3d ___, 2007 WL 3230169 (Tex. 2007). "In *J.A.J.*, however, the Department requested conservatorship pursuant to TFC § 153.131 and the trial court made the specific findings that the statute requires: that appointment of a parent as J.A.J.'s managing conservator would not be in his best interest because it would significantly impair his physical health or emotional development, and that appointment of the Department was in J.A.J.'s best interest. In light of these findings, we emphasized that the differing elements and standards of review applied to conservatorship and termination orders required separate challenges on appeal. *Id.* In this case, by comparison, the only available statutory mechanism for the Department's appointment was as a consequence of the termination pursuant to [TFC §] 161.207…. Accordingly, *J.A.J.* does not apply, and [mother's] challenge to the conservatorship appointment was subsumed in her appeal of the parental-rights termination order."

MOTHER'S JURY DEMAND SURVIVED THE STRIKING OF HER ANSWER AND COUNTER-PETITION AS A SANCTION—BUT DID NOT CHALLENGE THE SANCTION ITSELF

¶ 08-1-9. **In re A.S.,** 241 S.W.3d 661 (Tex. App.—Texarkana 2007) (12/4/07).

Facts: Mother and father were divorced in 2005. Father later filed a motion to modify, seeking mental examination of both mother and the child. The trial court ordered the examinations, but mother refused to comply. The trial court struck mother's answer and counter-petition as a sanction for her noncompliance. Father was granted a default judgment and was named SMC of the child. Mother appealed, claiming that she was entitled to a jury determination of the issues raised in father's motion.

Held: Reversed and remanded. "[A] 'defaulting' defendant in a family law matter is still entitled to rely on her jury demand and have a jury trial on any fact question related to the custody modification when the jury demand is not struck."

Opinion: Mother did not object to the sanctions themselves, although the appellate court strongly suggested that they were inappropriate. Instead, she complained that her jury demand survived the striking of her answer and counter-petition. She analogized this issue to a case wherein a jury demand survived death penalty sanctions in a divorce case, *Marr v. Marr*, 905 S.W.2d 331, 333-34 (Tex. App.—Waco 1995, no writ). The court of appeals agreed. In addition, the court found that a default judgment cannot be taken in a family law modification case and the fact-finder must hear evidence and make findings on the change in circumstances and best interest issues. Mother's jury demand was still outstanding, so she was entitled to have a jury hear the factual issues in the case. This error by the trial court was harmful and requires reversal.

Editor's Comment: *It is unclear how Mother preserved error in this appeal. The opinion does not state that Mother objected to the trial court's failure to accord her a jury trial or that she filed a motion for new trial post-judgment. In* Marr, *the appellant had no opportunity to object because her lawyer did not receive notice of the trial until minutes before it began. J.V.*

FAILURE OF A NON-PARTY TO TAKE A POLYGRAPH AND/OR TESTIFY AT TRIAL IS NOT SUFFICIENT BASIS FOR ISSUING AN INJUNCTION

¶ 08-1-10. ***In re* B.N.B.,** ___ S.W.3d ___, 2007 WL 444466 (Tex. App.—Dallas 2008) (2/20/08).

Facts: Father was appointed the child's SMC. The trial court's order, however, contained an injunction against stepmother, Father's wife, from being with the child unless father was also present. The record showed that this injunction was issued due to stepmother's failure to take a polygraph test and her absence from court on the second day of the trial when mother's counsel attempted to call stepmother to testify. Father appealed the issuing of the injunction, claiming that since stepmother was not a party to the case, the court could not compel her to take a polygraph nor could the trial compel her to testify without a subpoena; and that the trial court had impermissibly inferred facts relating to the best interest of the child from these actions when issuing the injunction.

Held: Reversed. Father's order appointing him SMC was amended to strike the challenged injunction.

Opinion: "The record makes clear that the basis of the trial court's injunction was its displeasure at [stepmother]'s failure to undergo a polygraph examination and attend the second day of trial, and Father's failure to make her do either to the court's satisfaction. Because these facts do not constitute legally and factually sufficient evidence to support a finding that [stepmother] may harm or abuse B.N.B., the trial court's imposition of the injunction constitutes an abuse of discretion."

SAPCR
Child Support

RESIDUAL STATUTE OF LIMITATIONS IN CIVIL PRACTICE AND REMEDIES CODE §§ 34.001 AND 31.006 APPLIES TO CHILD SUPPORT ACTION

¶ 08-1-11. **Burnet-Dunham v. Spurgin,** ___ S.W.3d ___, 2007 WL 4304888 (Tex. App.—Dallas 2007). (12/11/07)

Facts: Father and mother divorced in 1967. The court awarded custody of the two children to mother and ordered father to pay child support. Subsequently, both children lived with father for a period of time, with their grandparents for a period of time, and one of the children lived in another facility for a period of time. There was no further court involvement until 2006, when wife filed a notice of application for a judicial writ of withholding and a child support lien seeking unpaid child support from father. The youngest child was 46 years old at the time. After a hearing, the trial court determined that FC § 157.327 was not available to mother and that it did not have jurisdiction to determine arrearages. Mother appealed.

Held: Affirmed. Mother's actions are barred by the residual statute of limitations found in Civil Practice and Remedies Code Sections 31.006 and 34.001.

Opinion: Although father failed to plead the statute of limitations defense, the court of appeals determined that the issue was tried by consent. FC § 157.261(a) provides that, once a child support payment is overdue , it becomes a final judgment. In this case, the last child support payment was due when the youngest child turned eighteen in 1979. This final payment became a final judgment at that time. CPRC § 34.001(a) states that if a writ of execution is not issued within ten years of the judgment, the judgment is considered dormant. CPRC § 31.006 provides that a dormant judgment can only be revived with in two years of the date it became dormant. Therefore, "the civil practice and remedies code provides a twelve-year 'residual' limitations period for final judgments." This limitation applies to mother's attempts to obtain both a child support levy and a lien. Her action seeking a judicial writ of withholding is also barred. FC § 158.101 states "except as otherwise provided in this chapter, the procedure for a motion for enforcement of child support as provided in Chapter 157 applies to an action for income withholding." Chapter 158 does not provide for any exceptions, so § 157.261 applies and each missed payment is a final judgment. The residual limitation applies to each of them; the trial court was correct to dismiss wife's actions for lack of jurisdiction.

Editor's Comment: *The appellate court expressly disagreed with the Texarkana Court of Appeals in* In re Kuykendall, 957 S.W.2d 907, 910 (Tex. App.—Texarkana 1997, no pet.), *as well the San Antonio Court of Appeals* (In re T.L.K., 90 S.W.3d 833, 838-39 (Tex. App.—San Antonio 2002, no pet.) *and the 14th District Court of Appeals in Houston* (In re S.C.S., 48 S.W.3d 831, 835-36 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). *G.L.S.*

Editor's Comment: *This case finally shows some desire by the courts to place limitations on child support collections. Other cases (disapproved by the Dallas court in this case) have pointed to the public's interest in child support collections as being the reason for almost unlimited ability to collect child support. But, limitations applies to most criminal prosecutions and civil suits – for example, there is a five year limitation on prosecuting someone for abandoning or endangering a child. Are child support collections any more in the public interest than prosecuting someone who endangers a child? The Dallas Court of Appeals reached the right decision in this one. M.M.O.*

Editor's Not: *Although it is true that Tex. Fam. Code § 157.261(a) provides "a child support payment not timely made constitutes a final judgment for the amount due and owing," how could a writ of execution be issued without a written judgment? If an untimely child support payment constitutes a final judgment, is it necessary to file suit to obtain a judgment, or may an obligee proceed directly to execution? Is non-homestead real estate automatically encumbered if its owner falls behind in child support payments? No doubt this opinion raises many more questions. J.V.*

TRIAL COURT DID NOT ABUSE DISCRETION IN FINDING FATHER WAS INTENTIONALLY UNDEREMPLOYED

¶ 08-1-12. **McLane v. McLane,** ___ S.W.3d ___, 2007 WL 4556704 (Tex. App.—Houston [1st Dist.] 2007) (12/20/07)

Facts: Father and mother divorced in 2003. They agreed that mother would have primary custody of the child and father would pay child support. Several months later, father sought a reduction of his child support. The associate judge reduced father's payments, but denied his request for a retroactive reduction. The court found that father was intentionally underemployed. Father appealed to the referring court, which affirmed the associate judge's ruling. Father appealed again.

Held: Affirmed. In light of the evidence, the trial court did not abuse its discretion in finding that father was intentionally underemployed.

Opinion: Father presented evidence at trial that he was unable to increase his income because of a variety of factors, including spending "a lot of time defending 'false claims of child abuse,'" the high price of gas, and hurricane Rita. He also claimed that mother interfered with his relationships with his clients so he couldn't grow his law practice. The evidence, however, also showed that father was licensed to practice law, that he practiced law for over nine years, and that he received work or training as real estate agent, insurance salesman, financial planner and social worker.

TEMPORARY EMPLOYMENT BETWEEN AN ORDER AND A MOTION TO MODIFY DOES NOT CONSTITUTE A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES

¶ 08-1-13. ***In re* J.D.D.,** ___ S.W.3d ___, 2008 WL 73437 (Tex. App.—Texarkana 2008) (1/8/08).

Facts: Mother and father were divorced in 2002. After an appeal and a remand, father was ordered to pay child support based on his potential income. Father filed a petition to modify the payments, which was denied except for an interlocutory order slightly reducing father's child support obligation and finding him to be intentionally unemployed. Father then worked temporarily before being fired for abandoning his job. After this, father filed another petition to modify, contending that his unemployment was a material and substantial change in circumstances and his child support obligation should be reduced. The trial court denied his petition.

Held: Affirmed. Father was unemployed at the time the interlocutory order was entered and was unemployed at the time he filed this petition. The fact he was temporarily employed in between was not a material and substantial change in circumstances.

Opinion: In the appellate court, father attempted to show that there was a change in circumstances between the time of the divorce decree and the petition. However, father's petition itself, and the record of the trial court hearing, show that father intended to modify the interlocutory order, not the decree. Father circumstances were not changed in between these two dates. "In November 2004, Father had closed his optical business and was unemployed. In November 2005, Father had abandoned his job with Vision City and was

unemployed." Also, Father had the burden of proving that he was no longer intentionally unemployed. The evidence supported the trial court's finding that he did not meet this burden.

MODIFICATION TO A FINAL DECREE OF DIVORCE MUST SHOW EVIDENCE OF CHANGE IN CIRCUMSTANCES FROM TIME DECREE ORIGINALLY ISSUED

¶ 08-1-14. ***In re* C.C.J.,** ___ S.W.3d ___, 2008 WL 384556 (Tex. App.—Dallas 2008) (2/14/08).

Facts: Under the terms of the Final Decree of Divorce, mother was to receive child support from father in the amount of $1025 per month; and father and mother each had the right, subject to the agreement of the other parent, to make decisions concerning the children's education. A year after the divorce father filed a petition to modify, seeking the exclusive right to make educational decisions on behalf of the children. Mother filed a counter-petition, requesting in relevant part the exclusive right to make educational decisions on behalf of the children and an increase in father's child support obligations. Following trial, a memorandum containing orders modifying the parties' final divorce decree was signed by the trial judge, providing that mother "shall have the right to make final decisions concerning the education of the children after a good faith effort to exchange information and ideas and reach an agreement with [father]." Further, the court ordered father to pay child support to mother in the amount of $1126 per month. Father appealed the memorandum modifying the Final Decree of Divorce.

Held: Reversed in part, affirmed in part. The court (1) reversed the portion of the trial court's order granting modification of child support and rendered judgment that modification of child support is denied; and (2) affirmed the portion of the trial court's order respecting educational decisions on behalf of the children.

Opinion: "In order to determine whether there has been a material and substantial change in circumstances, the trial court must examine and compare the circumstances of the parents and any minor children at the time of the initial order with the circumstances existing at the time modification is sought." The court found that there was no evidence in the record of the financial circumstances of mother and children at the time of the initial order, and therefore the trial court abused its discretion to increase the amount of monthly child support. However, the court found that the record supported that there had been a material and substantial change in the circumstances regarding the educational decisions that supported the trial court's modification respecting that issue.

SAPCR
Termination of Parental Rights

FAMILY CODE §§ 263.405(B) AND 263.405(I), AS APPLIED TO THIS CASE, VIOLATED MOTHER'S RIGHT TO DUE PROCESS

¶ 08-1-15. ***In re* D.M.,** ___ S.W.3d ___, 2007 WL 4357665 (Tex. App.—Waco 2007) (op. on rehearing) (12/12/07).

Facts: The trial court terminated mother's parental rights. She filed her notice of appeal late, but within the grace period. She did not file a statement of points on which she intended to appeal.

Held: Affirmed. Not knowing your client wanted to appeal within the deadline is a reasonable explanation. Also, Family Code subsections 263.405(b) and 263.405(i), as applied to this case, violate mother's right to due process. However, the trial court did not abuse discretion in denying her request for a trial extension.

Opinion: The appellate court conducted a lengthy *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), due process analysis and determined that the private interests at stake, combined with the risk of error, outweighed the government interests served by the statute. Although the application of error preservation rules does not, as a general matter, violate due process, a "different calibration" of the *Eldridge* factors in a particular termination case could pose a threat. In this case, the statute had only been in effect for one year prior to mother's trial. Also, there have been many documented cases of parents failing to preserve issues due to the statute at issue during that one year. Finally, mother's appellate counsel was not appointed until after the deadline for filing a statement of points had expired. These facts call for a "different calibration" of the due process analysis: mother's due process rights were violated by subsections 263.405(b) and (i), and the appellate court must address her issues on appeal. However, the court of appeals also found that the trial court was within its discretion when it determined that mother did not show "extraordinary circumstances" to support her request for a trial extension.

Dissent: Not knowing your client wanted to appeal within the deadline is not a reasonable explanation implying an extension of the deadline. Also, the majority's due process argument should only apply in cases where the statement of points was filed untimely; here, the statement was never filed at all.

Editor's Comment: *For a thorough discussion regarding the Statement of Points issue, please see the article entitled, Termination of Parental Rights and Family Code § 263.405(i): Expediency at the Expense of Due Process by Jeremy C. Martin and John H. Chase in the Winter 2007 Family Law Section Report. G.L.S.*

FAMILY CODE SECTION 263.405(I) VIOLATES THE SEPARATION OF POWERS PROVISION OF THE TEXAS CONSTITUTION

¶ 08-1-16. ***In re* D.W.,** ___ S.W.3d ___, 2008 WL 467328 (Tex. App.—Fort Worth 2008) (1/17/08).

Facts: DPFS filed a petition to terminate mother's rights after documented physical abuse of her children by their step-father and grandmother. Mother filed a motion to extend the final hearing deadline by 180 days. The trial court denied her motion and terminated her parental rights. On the fifteenth day after the order was entered, mother's trial counsel filed a notice of appeal and statement of points, but only raised insufficient-evidence points. Mother's appellate counsel was appointed on the sixteenth day, and a motion for new trial and supplemental statement of points was filed on the twenty-first day. The supplemental statement contended that the evidence was insufficient to support termination and that the statement of points requirement in Family Code § 263.405(i) violates both the separation of powers provision of the Texas constitution and the due process provision of the United States Constitution.

Held: Affirmed. The evidence was sufficient to support the trial court's decision to terminate mother's parental rights. However, TFC § 263.405(i) of the family code is void as a violation of the separation of powers provision of the Texas constitution. The statute unduly interferes with the court's substantive appellate powers as granted by the Texas constitution.

Opinion: "This issue [of the statute's constitutionality] could not have been addressed by the trial court in the first instance and thus need not have been preserved in the trial court to be raised here." Mother properly preserved her complaint by raising the issue in her appellate brief. The appellate court found that it could not decide the case on alternate, non-constitutional grounds because the statute in question bars the court from considering any of mother's issues.

No court has yet addressed the constitutionality of TFC § 263.405(i) under the separation of powers clause. Under that clause, "[a]ny attempt by one branch of government to interfere unduly with the powers of another is null and void." The court's jurisdiction over an appeal may arise under either the constitution or a specific statutory grant. The court's "constitutional jurisdiction extends to appeals in all cases of which the district courts have original jurisdiction, which includes termination cases. Appeals in termination cases have long predated TFC § 109.002 and its predecessor statutes." While the legislature may restrict and regulate such constitutional jurisdiction, "any attempt to [*interfere* with this jurisdiction] would be null and void." Also, "while due process prevents undue restriction on parents in exercising their right to appeal, it is restrictions on our judicial power that implicate the doctrine of separation of powers."

The court of appeals used the separation of powers analysis from the court of criminal appeals case, *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987). In that case, the court found the Speedy Trial Act unconstitutional because it imposed a deadline on readiness for trial by county attorneys who are members of the judiciary. This Act went beyond a procedural guideline and "encroached upon the prosecutorial discretion of the county attorney and thereby violated the Separation of Powers Clause." The court used a two-pronged analysis in *Meshell:* (1) What was the nature of the legislative action, and (2) did that action encroach on the power of the judicial branch?

The court of appeals in this case found that TFC § 253.405(i) is not actually directed at the goals of reducing post-judgment and appellate delays:

> Instead, it is directed at simply prohibiting exercise of [the court's] appellate power to review issues. Rather than expediting the postjudgment and appellate process and cutting down on delay, it merely guarantees the Department an affirmance of all errors not listed in a statement of points, regardless of merit. The consequence of [the statute] is that, if complaints are not listed in a statement of points, even meritorious complaints otherwise timely and properly preserved for appeal under the rules are forever barred from appellate review.

Furthermore, the accelerated appeal process already expedites the postjudgment and appeal timeline. The statement of points requirement does nothing to speed up this process. The statute does not serve to provide a

more orderly and efficient judicial system. Therefore, it is does not aid in the goals the legislature sought to accomplish. It "merely guarantees that the Department wins by blocking the exercise of [the court's] appellate judicial function."

In its analysis of whether the statute encroached on the power of the judicial branch, the appellate court utilized the approach used by the court of criminal appeals in *Amarillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990). In that case, the court found that "*when* and *how* cases shall be decided may not be dictated by the legislature but are matters solely for the judicial branch of government." Applying this to the instant case, the court of appeals found that "the statute bars our consideration of all issues not listed even when they were properly preserved for review under the rules of procedure. In effect, the legislature decides for us that complaints not listed in a timely statement of points are waived." This tells the court how to rule on issues before it. As a result, the statute violates the separation of powers provision of the Texas constitution and is void.

The court went on to consider mother's issues and determined that her request for extension was not supported by the evidence and that the trial court's denial was appropriate.

Dissent and concurrence: The dissenting and concurring opinion found that mother failed to make a record of the hearing on her motion. As a result, the majority made its ruling without reaching the merits of mother's complaint. This made it unnecessary to decide the separation of powers issue.

However, the opinion goes on to state that the right to appeal termination of parental rights is statutory under TFC § 109.002, not constitutional. Furthermore, the Supreme Court stated in *Seale v. McCallum*, 287 S.W. 45 (Tex. 1926), that "the principle is fixed that the legislature has the power to limit the right of appeal." The majority opinion shows a preference for the court-made rules of error preservation over the legislature's rules. Whether a statute serves proper policy goals is an issue for the legislature. "[W]e may not refuse to follow [statutes] merely because we believe they are flawed or that they fail to promote the legislature's objectives."

Dissent: The dissenting opinion agrees that the majority did not need to reach the separation of powers issue and therefore does not join in any analysis of it.

SUMMARY JUDGMENT EVIDENCE IS INADEQUATE TO SUPPORT TERMINATION OF FATHER'S PARENTAL RIGHTS

¶ 08-1-17. **Dowell v. Dowell,** ___ S.W.3d ___, 2008 WL 344649 (Tex. App.—El Paso 2008) (2/7/08).

Facts: Mother and father were divorced in 2002 and entered into an MSA naming them JMC. Father consistently neglected to pay child support and was in contempt in 2003. Twp years later, father was convicted of a federal drug offense and was incarcerated with an expected release date of 2012. Father filed a motion to modify seeking to have his child support obligation suspended while he was in jail. Mother responded with a petition to terminate his parental rights. Her petition was based on father's failure to pay child support and inability to care for the children due to his incarceration. Mother then filed for summary judgment, which motion was granted by the trial court. Father appealed claiming that the summery judgment evidence did not conclusively show that termination was in the child's best interest.

Held: Reversed and remanded. The evidence entered by mother is largely conclusory and does not separate father's pre-divorce and post-divorce conduct.

Opinion: The court of appeals found that while the evidence of father's failure to pay child support and his incarceration are probative of the best interest issue, they are not enough to support summary judgment. Mother's additional evidence of domestic violence and non-support is largely conclusory. Much of the conduct alleged by mother also occurred during the marriage; the final divorce decree is res judicata as to the best interest of the child during the course of the marriage. Her evidence of these acts could only be used in com-

bination with later acts to show a continuing course of conduct by father. The summary judgment evidence does not do this.

Editor's Comment: *A child's "best interest" is a mixed question of law and fact and therefore especially unsuitable for determination by summary judgment. Yet this opinion states: "There may be instances where the acts or omissions of the parent, standing alone, are sufficient to establish as a matter of law that termination is in the best interest of the children." When one follows the cite accompanying this statement - to an unpublished Dallas Court of Appeals opinion - a basis for termination by summary judgment becomes clear: criminal convictions for sexual abuse of a parent's own child. J.V.*

FAMILY CODE § 263.405(I)'S STATEMENT OF POINTS REQUIREMENT VIOLATED FATHER'S DUE PROCESS RIGHTS BECAUSE THE RISK THAT HIS PARENTAL RIGHTS WERE TERMINATED IN ERROR WAS TOO HIGH

¶ 08-1-18. ***In re* J.O.A.,** ___ S.W.3d ___, 2008 WL 495324 (Tex. App.—Amarillo 2008) (2/7/08).

Facts: Mother has four children and a documented history of drug abuse and domestic violence. She tested positive for cocaine and barbiturates during the birth of her two youngest children. At that point, DFPS intervened and removed the children from mother and father's custody and filed suit to terminate both parents' parental rights. The trial court appointed a relative as SMC of the two oldest children without terminating parental rights. The court terminated both parents' rights as to the youngest children. Five days after the final order was signed, mother's trial counsel filed a notice of appeal and motion to withdraw. Father's counsel did the same the following day. The trial court never ruled on either motion to withdraw, but appointed appellate counsel to both parties more than fifteen days after the final order. Neither party filed a timely statement of points or motion for new trial.

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

Opinion: The trial counsel for both parties had a continuing obligation to provide effective assistance because the court did not rule on either counsel's motion to withdraw. The counsels' failure to file a timely statement of points constitutes an ineffective assistance of counsel. Therefore, the court of appeals considered the parents' claim that applying the statement of points statute under their circumstances would violate their due process rights.

"The Texas Supreme Court has held that in cases where counsel was ineffective in preservation of jury charge error, due process considerations did not require our procedural rules to be set aside." However, the Court also suggested that "the failure to preserve a factual sufficiency question might very well rise to the level of a due process violation depending on a 'different calibration of the [*Mathews v.*] *Eldridge*, [424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)] factors.'" The appellate court then conducted an *Eldridge* analysis of the case.

The court found that the private and governmental interests at stake weigh "in favor of permitting a sufficiency review when counsel unjustifiably fails to follow procedural requirements." The third factor, the risk of an erroneous deprivation of the parents' rights, was considered the "most critical" factor. The court stated that:

> [W]here ineffective assistance of counsel has prevented a review of the sufficiency of the evidence, and a review of the sufficiency of the evidence reveals that there is a high probability that a parent's rights have been erroneously terminated, then due process considerations (i.e., the *Eldridge* factors) weigh in favor of a sufficiency analysis, notwithstanding a procedural impediment. We acknowledge that this reasoning will require an appellate court to review both legal and factual sufficiency issues to determine if it should even consider those issues. Any lack of logic in this process can be attributed to the lack of logic in the statute itself.

The court of appeals then reviewed the record and determined that the risk of error was too high as to the termination of father's parental rights as to the two youngest children. These two issues were remanded to the trial court. The other issues were affirmed.

SAPCR
Parentage

AFFIRMATIVE DEFENSES MUST BE RAISED THROUGH A MOTION FOR SUMMARY JUDGMENT—NOT A MOTION TO DISMISS

¶ 08-1-19. ***In re* D.K.M.,** ___ S.W.3d ___, 2007 WL 4462383 (Texas App.—Austin 2007). (12/20/07)

Facts: D.K.M. was born in 1993. In 2004, mother filed a petition seeking to adjudicate D.K.M.'s paternity, alleging that the defendant, not her husband, was the child's father. The defendant filed an answer and a motion to dismiss arguing that the action was barred by the statute of limitations described in FC § 160.607. The defendant responded that the limitations were tolled by the Federal Servicemembers Civil Relief Act. The trial court dismissed the suit with prejudice. This appeal followed.

Held: Reversed and remanded. An affirmative defense such as the running of a statute of limitations must be raised through a motion for summary judgment, not by a motion to dismiss.

Opinion: A "motion to dismiss is the functional equivalent of a plea to the jurisdiction challenging the court's authority to determine the subject matter of the cause of action." Such a motion does not contain the same procedural safeguards and evidentiary requirements as a motion for summary judgment and are thus "fraught with uncertainty." In this case, it is unclear what rules and principles the trial court used to come up with its decision. It is also unclear what credibility or weight was given to the competing evidence. Therefore, it is unclear what rules and standards should be applied on appeal.

ADOPTION

A TRIAL COURT FINDING OF NO ABUSE, WHEN IT CONTRADICTS A DFPS FINDING OF ABUSE, IS NOT AN ABUSE OF DISCRETION WHEN THE TRIAL COURT EXPLAINS ITS DETERMINATION OF WHAT IS IN THE BEST INTERESTS OF THE CHILDREN

¶ 08-1-20. ***In re* DFPS** ___ S.W.3d ___, 2007 WL 4462654 (Tex. App.—Austin 2007, orig. proceeding). (12/19/07)

Facts: Foster children were placed with foster parents who had plans to adopt. A caseworker for the child placement agency became concerned about abuse and made the decision to remove the children. She notified the adoption unit worker in the CPS division and requested removal. Approval was granted without additional investigation and without notification to the court, the children's attorney ad litem, or the GAL. Children were removed and foster parents filed a motion for an evidentiary show-cause hearing to determine if removal was in the best interests of the children. DFPS filed a motion for continuance to postpone a ruling on the children's placement until its investigation was complete. The court ordered the foster children returned while the investigation continued. The following week, DFPS found that abuse had occurred. The trial court then issued an order confirming its earlier ruling returning the children and finding "no abuse, exploitation, or

neglect." DFPS filed a petition for writ of mandamus seeking to vacate the trial court's order, claiming that the court abused its discretion by preventing DFPS from proceeding with its investigation, entering its own finding of 'no abuse,' and ordering that the children be returned to their foster home. DFPS argued that the trial court could consider whether abuse occurred and could base its best interest determination on whether the alleged abuse occurred, but that the trial court could not write down the basis of its best interest determination or reveal it on the record, because DFPS wanted to preserve its right to make an original determination of abuse.

Held: Mandamus denied. The trial court did not abuse its discretion by expressing its rationale for its placement ruling on the record during the hearing and in a subsequent written order.

Opinion: The finding of "no abuse, exploitation, or neglect" in the court's order was relevant and necessary to support the court's ruling that the children should be placed with their foster parents. "Without such an express finding, a ruling that it is in the children's best interest to return to the home where the alleged abuse occurred is either: (i) an implied finding that the abuse did not occur, or (ii) an abuse of discretion." DFPS's "only remaining complaint is that the court's decision about the alleged abuse should have been provided by implication only-not stated on the record or reduced to writing. We reject the Department's unsupported assertion that the county court at law abused its discretion by expressing the rationale for its placement ruling on the record during the hearing and in a subsequent written order."

DOMESTIC VIOLENCE

EXPIRED PROTECTIVE ORDERS MAY BE APPEALED DUE TO "COLLATERAL CONSEQUENCE" EXCEPTION TO THE MOOTNESS DOCTRINE

¶ 08-1-21. **Clements v. Haskovec,** 2008 WL 152450 (Tex. App.—Corpus Christi 2008) (1/17/08).

Facts: Adult daughter believed her father was abusive toward mother. Daughter attempted to remove mother from home but was prevented by father and was told to not return. Father later invited daughter over to visit mother several times and daughter occasionally took mother to daughter's home.

Months later, mother was at daughter's home and expressed fear of Father. Mother stayed overnight. The next day, daughter and mother attempted to return to mother's home and to obtain mother's personal possessions so that mother could live with daughter.

One week later, a sheriff's deputy came to arrest father due to a sworn complaint by daughter and heard mother state her fear for her life while with father. The next day daughter filed for a PO against father. The trial court issued the PO against father and father appealed. Mother PO expired and mother died during the pendency of the appeal.

Held: Affirmed. Collateral consequences exception prevents appeal from being moot. Evidence before the county court "was legally and factually sufficient to support the protective order."

Opinion: "Although an expired order is ordinarily moot, this appeal is live under the 'collateral consequences' exception to the mootness doctrine." This doctrine is only in effect when prejudicial events have occurred that continue to stigmatize individuals. An expired PO has both social stigmas and legal consequences and therefore the doctrine applies. The court of appeals reviewed the record and determined that the evidence was sufficient to support the trial court's entry of the PO.

MISCELLANEOUS

★★★★★ TEXAS SUPREME COURT ★★★★★

AMENDED MOTION FOR NEW TRIAL FILED AFTER EARLIER MOTION HAS BEEN OVERRULED DOES NOT EXTEND THE TRIAL COURT'S PLENARY POWER

¶ 08-1-22. ***In re* Brookshire Grocery Co.,** ___ S.W.3d ___, 2008 WL 53702 (Tex. 2008) (01/4/08).

Facts: In the underlying tort action, the jury returned a verdict in favor of the plaintiff. After the verdict, but before the judgment was signed, the defendant filed for JNOV and a new trial. The trial court denied both motions. Twenty-nine days after the judgment the defendant filed a second motion for new trial. The trial court granted this motion for new trial on February 1. The COA granted mandamus relief to the plaintiff, ruling that the trial court's plenary power expired on January 10, thirty days after it overruled the first motion for new trial. The defendant then requested mandamus relief from the Supreme Court.

Held: Mandamus denied. Statutory interpretation of TRCP 329b provides that an amended motion for new trial may be filed only when no preceding motion for new trial has been overruled and it is filed within thirty days of judgment.

Opinion: "[T]hroughout the history of TRCP 329b, timely amended motions for new trial have always been limited to those filed before the trial court overruled a preceding motion, regardless of whether leave of the court was required." Otherwise, the motion is not considered timely for the purposes of extending the trial court's plenary power. However, such a motion could still be granted by the trial court within its thirty-day period of plenary power. Also, the court's plenary power can be extended by a timely filed new 329b motion, such as a motion to modify, correct, or reform the judgment. "In this case, because the only 329b motion ... filed was a motion for new trial, the trial court's plenary power expired January 10, 2005, thirty days after it overruled the first motion."

Dissent: "Tricky procedural rules threaten substantive rights." TRCP 329b contemplates multiple motions within the thirty day period and nothing in the rule suggests that the overruling of a motion challenging a judgment precludes the litigant from filing additional such motions. Also, the majority's reading of the history of the statute is incorrect. Before the 1981 amendments, the rules did not provide for a motion to modify, correct, or reform a judgment. A motion for JNOV also did not extend the trial court's plenary power. The 1981 amendments were an effort to establish a more lenient standard. It makes no sense for an amended motion for new trial to be the one exception to the general rule that motions assailing a judgment extend the trial court's plenary power.

Rule 1 of the Tex. R. of Civ. P. states that "[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive review." As a result, although "[t]he text of the amended rule does not require either my construction or the Courts ... Rule 1 requires the one less likely to create pitfalls for litigants."

Editor's Comment: *Although this case did not involve a family-law matter, motions for new trial are often filed in family-law matters and can be a trap for the unwary. As the Texas Supreme Court notes, the rules regarding these motions are very technical in nature. The better practice is to pause and step back a little and take sufficient time – you have 30 days – and think through your case more objectively before filing a motion for new trial. G.L.S.*

RIGHT TO ACT AS CHILD'S NEXT FRIEND PASSES TO SURVIVING PARENT REGARDLESS OF OMISSION OF EXPLICIT LANGUAGE IN SAPCR

¶ 08-1-23. ***In re* Collins,** ___ S.W.3d ___, 2007 WL 4386119 (Tex. App.—Houston 2007, orig. proceeding). (12/17/07).

Facts: Mother and father never married and had a child. Both parents were named as JMC, with mother as PC and with the exclusive right to represent child in legal actions and "other decisions of substantial legal significance." Child resided with mother until mother was killed in a fire. Father asserted capacity as child's next friend and intervened in an existing suit for damages from the fire. Two days before the intervention, childs's maternal grandparents (MG), purporting to act as child's next friend, filed a wrongful death suit and their own individual claims for damages.

MG obtained an ex parte temporary restraining order. MG then requested a provision that would restrain father from "filing legal causes of action or making legal decisions on behalf of the child or the interest in her deceased mother's estate." MG then filed a petition to modify, seeking SMC of child and again asking trial court to restrain Father. Father counter-petitioned for SMC of child. At a hearing, the trial court assigned an amicus attorney for child and established amicus as next friend of the child. At an additional hearing, the trial court ordered both MG and father to cease their lawsuits on behalf of the child.

Trial court later signed TO appointing father and MG as JMC with MG having right to designate primary residence of child. Father then sought mandamus relief to compel the trial court to vacate certain portions of the orders establishing amicus as next friend of child. Father asserted that trial court's orders conferred rights to amicus that went beyond Section 107.003 of the Texas Family Code. These rights included authorizing the amicus to hire legal counsel to represent child, to appear as next friend, and the right to receive compensation for work performed beyond the conservatorship action. MG claimed father waived right to protest as a result of judicial admission and also had no authority to bring suit on child's behalf.

Held: Mandamus granted. The trial court abused its discretion by ordering father to cease prosecuting child's claims as her next friend and by ordering the amicus to act as child's next friend, to hire counsel to represent her, and to be paid for services connected with the various wrongful death suits.

Opinion: Appellate Court ruled that Father's statement that he "respected" the trial court decision was not the same as a judicial admission. Father did not waive his right to serve in the capacity of a parent. Appellate court dismissed MG's argument that language in prior order establishing possession and conservatorship did not grant father the right to take legal action on behalf of child at the death of the mother. Mother's rights were extinguished at her death and right to take legal action on behalf of child passed to father at mother's death. Father was within his rights as a parent to assert the child's legal claims.

The appointment of the amicus was appropriate, per Texas Family Code § 107.003, as regards the SAPCR. The trial court did have power of discretionary appointment under §107.021, however, the power of the amicus to be appointed next friend was granted under the incorrect premise that there were two parties, "*neither of whom [had] any legal right to represent this child.*" Father did have legal right to assert child's claims and was acting as child's next friend. Nothing in the statute allows amicus to act as child's next friend in other lawsuits. The trial court's actions were not consistent with child's interests and child's interests were already well served by attorneys hired by father on behalf of child.

A DISCOVERY ORDER FOR ELECTRONIC DATA IS NOT OVERBROAD IF APPROPRATELY TAILORED TO PREVENT UNAUTHORIZED DISCLOSURE OF PRIVILEGED OR CONFIDENTIAL INFORMATION

08-1-24. ***In re* Honza**, 242 S.W.3d 578 (Tex. App.—Waco 2007, orig. proceeding). (12/28/07).

Facts: Defendants filed a writ of mandamus compelling Respondent Judge to set aside a discovery order permitting a forensic expert to create a mirror image of computer hard drives in order to locate particular doc-

uments and iterations of those documents. Defendants argued that the order was (1) overbroad; (2) authorized the disclosure of information protected by attorney-client privilege; and (3) authorized the disclosure of Defendant's other clients information that that was not relevant to the suit. Appellate court issued an order staying Respondent's discovery and, three weeks later, while the second trial was underway, an order staying the trial.

Held: Mandamus denied. Respondent appropriately tailored the discovery order to prohibit the unauthorized disclosure of privileged or confidential information and no abuse of discretion is shown.

Opinion: The court of appeals found that the order, while giving the expert access to the full hard drives, limited what the expert could turn over to the opposing party. "Any order requiring the imaging of a computer hard drive necessarily grants the expert who is conducting the imaging process access to all data on that hard drive. Here, the respondent specifically limited the expert's search to two documents; gave the [Defendants] a 'right of first refusal' with regard to determining which documents or information are relevant to those two documents and responsive to [Plaintiff's] discovery request; imposed stringent limitations on inadvertent disclosures to prevent any unintended waiver of confidentiality or privilege; and placed all participants in the imaging process under a carefully drawn protective order." The court noted that although Texas courts have not yet spoken on this issue, these procedures follow the guidelines established by similar federal and state court rulings.

Editor's Comment: *Although this case did not involve a family law matter, its holding is applicable to discovery in family-law matters, which are increasingly requiring exploration of computer hard drives. G.L.S.*

FILING A HAGUE CONVENTION PETITION AS PART OF AN EXISTING SAPCR SUIT SATISFIES THE CIVIL ACTION COMMENCMENT REQUIREMENTS OF ICARA

¶ 08-1-25. ***In re* J.J.L.-P.,** ___ S.W.3d ___, 2008 WL 371776 (Tex. App.—San Antonio 2008). (2/13/08).

Facts: Father and mother were both citizens of Mexico. Child was born out of wedlock to father and mother in Mexico. The couple eventually separated, and at the time in question the child lived with father in Mexico, and mother lived in Texas with husband (a U.S. Citizen). In December 2005, father agreed for the child to travel to the United States with mother and her husband, for what father believed to be a visit for the holidays. Mother and husband, however, intended to permanently retain the child in order to begin his legal immigration into the United States. When father learned of mother's intent, he obtained legal counsel in Texas and filed a SAPCR in District Court to secure the return of the child to Mexico. After returning to Mexico following the filing of his custody action, father learned about his rights under the Hague Convention from the Central Authority in Jalisco, Mexico. Father then filed a Hague Convention petition in District Court, which was attached to his initial custody action. The District Court, ruling on the Hague Convention petition, found for father, and ordered the child to be returned to father's custody in Mexico. Mother appealed the decision, citing lack of jurisdiction due to the fact that, under ICARA, father was required to file his Hague Convention petition as a separate and distinct lawsuit from his SAPCR case to properly invoke the trial court's jurisdiction to determine his rights under the Convention; and that father waived the right to file a Hague petition by filing the initial SAPCR in Texas.

Held: Affirmed. The court held that the language of ICARA allowed father the discretion to file a Hague Convention Act as either a part of an existing pleading, or as an entirely separate civil action. The court also held that since father did not learn of his rights under the Hague Convention until after filing the initial SAPCR, he could not have waived those rights.

Opinion: The court rested its analysis on the inclusion of the word "may" in the relevant section of ICARA in order to find that father could file a Hague Convention petition as a pleading in an existing custody suit. "Because Congress did not include the word "shall" within [the relevant section of ICARA], as it did elsewhere

within the statute, [father] had the discretion to file his petition, as he did, as a pleading in his existing custody suit or as a separate and distinct lawsuit from his custody action." With regard to the waiver issue, the court stated that "[g]iven the fact that [father] did not learn of his rights under the Hague Convention until after he had filed the custody action, we decline to adopt the [mothers's] waiver rational because a valid waiver of one's Hague Convention rights cannot occur without knowledge of the mandates of the Convention."

TEXAS COURTS MUST FOLLOW PROTOCOL ESTABLISHED UNDER THE HAGUE CONVENTION WHEN ADJUDICATING INTERNATIONAL CHILD CUSTODY DISPUTES

¶ 08-1-26. **In re A.V.P.G,** ___ S.W.3d ___, 2008 WL 391433 (Tex. App.—Corpus Christi 2008) (2/14/08).

Facts: Mother and father were both foreign nationals; father was a citizen of Belgium and mother was a citizen of Mexico, both resided in Belgium with two children from the marriage. Mother's parents came to stay in Belgium, and subsequently assisted mother in procuring Mexican Passports for the children after representing to the Mexican Embassy that originals had been lost. When father was away on business, mother and mother's parents left the country with the children without father's knowledge and returned to Mexico to take up residence. Father immediately reported the abduction on the same day that he became aware of it to Belgian police, and was awarded exclusive parental custody of his children after filing with Belgian court shortly thereafter. An international arrest warrant was issued for mother, who was apprehended while crossing into McAllen, Texas. Following the arrest, mother's parents were ordered to take up residence in Texas and enroll children in a McAllen school pending mother's trial. Father subsequently filed a request for the return of children with the NCMEC, and following that filed a request for return in State District Court. The court denied the request on the grounds that father had not filed the request within one year of the date of the abduction, that the children were well settled, and that returning the children to Belgium would risk potential emotional or physical harm to the children. Father appealed.

Held: Trial court's ruling was reversed, and children were ordered returned to father's custody in Belgium. The court held that father's filing with the NCMEC satisfied Article 12 of the Hague Convention (codified by ICARA) of commencing proceedings before a judicial or administrative body within one year of the date of the abduction. The court also held that the children's transient nature, which consisted of moving from Belgium to Mexico to McAllen in the past year, did not establish that the children were well settled. Finally, the court held that the mother had not shown that the children were in "grave danger" of emotional or physical harm if returned to father's custody in Belgium, as is required by case law.

Opinion: "Once a petitioner has established that the retention or removal was wrongful and in violation of the petitioner's custodial rights, the court *must* order the child's return to the country of habitual residence unless the respondent demonstrates that one of the [Hague Convention's] four narrow exceptions apply." Since mother could not prove any of the exceptions, the trial court should have returned the children to father, as the exceptions "[are] not license for a court in the country where the children ended up to speculate about where the children would be happiest."