SECTION REPORT
FAMILY LAW

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Message from the Chair

It seems just days ago, I welcomed you in the first Section Report of my term. This year is coming to a close as we await our annual meeting this April in Ft. Worth. Our Marriage Dissolution Seminar will be at the new Omni in Ft. Worth, starting April 16-April 17, 2009. This year we will host the first Marriage Dissolution Boot Camp on the Wednesday afternoon before the seminar. It is just another example of your section working for you!!! Keep your eyes open this spring, as the legislature continues to introduce bills that will affect your practice. Our legislative committee will be working hard, in conjunction with the Texas Family Law Foundation, to protect our practice and our field of law. This is also our second session in partnership with TTLA, who will continue to monitor our bills and our package. Thank you for making this year so memorable for me, as I hand the chair gavel over to Judge Doug Woodburn. I hope to see each of you in Ft. Worth this April, and thanks again for your support.

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

COUNCIL ADMINISTRATIVE ASSISTANT
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Section Wear and Publications

2009-2010 RECOMMENDED NOMINATIONS SLATE
STATE BAR OF TEXAS
FAMILY LAW SECTION

Pursuant to Article VI, Section 1 of the Bylaws of the State Bar of Texas, Family Law Section, the Nominating Committee of the Section hereby forwards the following names for the following positions on the Family Law Council:

Officers

CHAIR:	**DOUG WOODBURN**
CHAIR-ELECT:	**CHARLIE HODGES**
VICE-CHAIR:	**RANDY WILHITE**
TREASURER:	**TOM AUSLEY**
SECRETARY:	**DIANA FRIEDMAN**
IMMEDIATE PAST CHAIR:	**WENDY BURGOWER**

Nominations to the Class of 2014

1.	**KRISTAL CORDOVA**	**SAN ANTONIO**
2.	**SHERRI EVANS**	**HOUSTON (Re-appointment)**
3.	**RICHARD FRY**	**AUSTIN**
4.	**LATRELLE BRIGHT JOY**	**LUBBOCK**
5.	**KYLE SANDERS**	**HOUSTON**

Heather King nominated to fill the vacancy in the Class of 2012.
Bob Sullivan nominated to fill the vacancy in the Class of 2010.

EDITOR'S NOTE

I want to thank Wendy for all of her help and support this year. She has done a wonderful job leading our section. Spring is a time of new beginnings and, the Spring Report will now be designated as the second report of each year as the Bibliography Report will be designated as the first report of each year and will be coming out on January 15 of each year along with the Attorney General tax tables and a full listing of the prior year's cases. This way all of the section members will be able to have the means by which to calculate their client's child support as quickly as possible. This year will also be the first year that a Legislative Report will come out in addition to the regular quarterly reports. The Legislative Report will come out as a separate and companion report on June 15 of each year that the legislature is in session. Again, I want to invite all members of the section to submit articles for the Section Report.

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IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

A deal's a deal: The New York Court of Appeals upheld the parties' French premarital agreement, which characterized property that each spouse "may come to own subsequently by any means whatsoever" as that spouse's separate property. *Van Kipnis v. Van Kipnis*, ___ N.E.2d ___, 11 N.Y. 573 (N.Y. Dec. 18, 2008). The Iowa Supreme Court held a premarital agreement valid despite claims of duress, undue influence and unconscionability, observing (among other things) that wife's counsel had written on a draft of the agreement that it would "waive all [wife's] rights as spouse!" *In re Marriage of Shanks*, 758 S.W.2d 506 (Iowa Dec. 12, 2008) (exclamation point in original). In a split decision, a Florida appellate court applied a marital settlement agreement to terminate a former wife's alimony because she "cohabited" with another person when the prison in which she was incarcerated assigned her a cellmate. The dissent agreed with the trial court that this construction led to "an absurd result, unthinkably bizarre and at odds with any reasonable interpretation intended by the agreement drafters." *Craissati v. Craissati*, 997 So.2d 458 (Fla. App. Dec. 10, 2008). In Oregon, a dissolution settlement agreement could not be rescinded when one of the parties refused dog visitation because the settlement agreement included a severability clause. *Wolf v. Taylor*, 224 Or. App. 245, 197 P.3d 585 (Dec. 3, 2008).

Child Support: The Ohio Supreme Court held that a court is not required to reject an agreement between obligor and obligee to forgive child support arrearages despite a statutory proscription that a court "may not retroactively modify an obligor's duty to pay a delinquent support payment." *Byrd v. Knuckles*, 120 Ohio St.3d 428, 900 N.E.2d 164 (Ohio 2008). Depending on several factors, an Indiana court may include a father's retirement contributions as income for child support purposes; the court also found the mother to be voluntarily unemployed when she moved in with her employer and quit working. *Saalfrank v. Saalfrank*, 899 N.E.2d 671 (Ind. App. Dec. 31, 2008). A father's failure to exercise any possession of his children ("residential time" in Washington) can warrant a child support award above the statutory advisory amount. *Krieger v. Walker*, No. 147 Wash. App. 952, 199 P.3d 450 (Wash. App. Dec. 29, 2009).

Custody/Visitation: In a 3/2 split decision, the South Dakota Supreme Court reversed a change of custody to a father, observing that the father "demonstrated a clear disregard for [the child's] wellbeing when he fought tooth and nail to maintain his child support obligation [at] $150.00 per month, especially in light of [the mother's] modest part-time income, higher education expenses, and lack of assets. [The father] used the full power of his financial resources to keep from paying an additional $213.00 per month for the basic necessities of life for his child." *Pietrzak v. Schroeder*, 2009 S.D.1, 759 N.W.2d 734 (S.D. Jan. 7, 2009). The Georgia Supreme Court refused to enforce a punitive self-executing change in visitation as against public policy when the mother moved out of state. *Rumley-Miawama v. Miawama*, 284 Ga. 811, 671 S.E.2d 827 (2009). The North Dakota Supreme Court affirmed a trial court's decision to reduce a father's visitation because his new wife was "hostile" toward his former wife. *Siewert v. Siewert*, 2008 N.D. 221, 758 N.W.2d 691 (2008).

Division: A Virginia appellate court reversed a trial court's ruling that a husband pay his wife half his military retirement benefits retroactive to nearly a year prior to the filing of suit. In addition, and even though the husband was a criminal, the husband should not be required to pay the wife's attorney's fees of $20,000 when the husband received only a few thousand dollars more than that in the divorce. *Cusack v. Cusack*, 53 Va. App. 315, 671 S.E.2d 420 (Va. App. Jan. 20, 2009). A California husband's mere assertion that property purchased during marriage is community property failed to rebut the presumption of separateness arising from the wife taking title to property in her name alone. *In re: Brooks*, 169 Cal. App. 4th 176, 86 Cal. Rptr. 3d 624 (Cal. App. Dec. 16, 2008). A Florida appellate court abused its discretion by awarding each spouse a half interest in the wife's veterinary business because the award created an "intolerable situation" by forcing "two

parties who have stated that they do not want to continue to work together after their divorce to do just that." *Lift v. Lift*, No. 4D07-1168, ___ So. 2d ___, 2009 WL 18678 (Fla. App. Jan. 5, 2009) (Without hint of irony, the court said the parties agreed that the trial court had erred.).

Domestic violence: The federal Gun Control Act, 18 U.S.C. § 922(g)(9), forbids a person from possessing a firearm if the person as been convicted of a misdemeanor crime of domestic violence. After careful parsing of the statute, a divided United States Supreme Court held that the predicate offense need not include as an element of the crime that it was committed against one in a domestic relationship with the offender but only that the victim, in fact, stood in a domestic relationship with the offender. *United States v. Hayes*, No. 07-608, ___ S.Ct. ___, 2009 WL 436680 (U.S. Feb. 24, 2009).

ERISA: In the Fall 2007 FLS Report, this column reported on *Kennedy v. Plan Administrator*, in which the Fifth Circuit held that an ex-wife's waiver of any interest in her deceased husband's retirement plan in their divorce decree violated ERISA's anti-alienation clause in the absence of a QDRO. In 2009, the United States Supreme Court affirmed the Fifth Circuit but on different grounds. The Supreme Court held that the ex-spouse's waiver did not violate ERISA's anti-alienation clause because the waiver assigned nothing. Nevertheless, a plan administrator must follow the plan rather than give effect to a waiver. But the Court's decision absolved only the plan administrator: The Court did not "express any view as to whether the Estate could have brought an action in state or federal court against [the ex-spouse] to obtain the benefits *after they were distributed."* *Kennedy v. Plan Administrator*, ___ S.Ct. ___, 2009 WL 160440, at n.10 (U.S. Jan. 26, 2009) (emphasis added). *See full summary below under miscellaneous cases.*

Odds & ends: If one applies for a green card for one's spouse, based on an informal marriage requiring that the parties lived together, then the spouses must have lived together because "living together" means living together. *People v. Hassan*, No. B194141, 168 Cal.App.4th 1306, 86 Cal. Rptr. 3d 314 (Cal. App. Dec. 3, 2008). A 17-year-old in foster care was not entitled to payment by the state for her automobile liability insurance based on the statutory requirement that foster parents provide "liability insurance with respect to a child." *In re: Corrine W.*, 45 Cal.4th 522, 198 P.3d 1102 (Cal. Jan. 22, 2009). If you hide a recording device inside your daughter's teddy bear to spy on your ex in Omaha, you might get sued in federal court. *Lewton v. Divingnzzo*, No. 8:2009cv00002 (U.S. Neb. Jan. 2, 2009) (Complaint).

Columns

CONSULTING V. TESTIFYING EXPERTS: IS THERE A PROBLEM?

by

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

Ms. Jones, a prominent lawyer, retained psychologist Dr. Smith as an expert in a contentious case. Dr. Smith reviewed all case documents, discussed case themes with Ms. Jones, and helped Ms. Jones develop questions to select a sympathetic jury. Later, Ms. Jones called Dr. Smith to testify at trial. Are Dr. Smith's actions in his consulting and testifying expert roles in this case a problem? It depends. Mixing these expert roles may seem like a problem, but the line distinguishing those roles, at times, may be unclear. Not attending to Dr. Smith's expert role distinctions may have significant implications for Ms. Jones, Dr. Smith, and the Court.

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The familiar distinctions between consulting and testifying expert roles suggest potential problems. The consulting expert, retained by the lawyer to assist with the case, does not testify at trial and is not subject to deposition or other discovery. In contrast, the testifying expert's mental impressions and opinions, as well as the facts, methods, and materials used to derive those opinions are discoverable. TEX. R. CIV. P. 192.7(c) and (d).

Apart from certain capital murder cases (*see Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995)), two key questions arise when lawyers blur the consulting and testifying expert roles in a case: What are the consequences of blurring the roles? Is there a line that distinguishes the two roles?

Consequences of blurring consulting and testifying expert roles impact two legal issues: protection of the lawyer's work-product, and assurance to the court that the testifying expert's opinions are reliable. While the work-product doctrine shields the consulting expert's work from discovery, TEX. R. CIV. P. 192.5 (b)(1), this protection may be removed on those matters if the testifying expert reviews the work or thinking of the consulting expert; the testifying expert, if asked, must disclose everything reviewed that informed the opinion. TEX. R. CIV. P. 192.3 (e). In federal court, "data and information *considered* by the witness …" is discoverable—ostensibly, a larger net than just "reviews." FED. R. CIV. P. 26 (a)(2)(B)(ii).

In addition, blurring consulting and testifying roles may raise legitimate questions about the reliability of the testifying expert's opinion. TEX. R. EVID. 702 notes that testifying experts participate in a case to "assist the trier of fact to understand the evidence or to determine a fact in issue." The testifying expert's purpose is not to advocate for a party or testify as the sponsoring lawyer's alter-ego. *Trigon v. U.S.*, 204 F.R.D. 277, 295 (E.D. Va. 2001). Unfortunately, testifying experts may offer opinions on almost any theory, regardless of its merit, and for "the proper fee." *DuPont v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995). To deter this, trial judges have the responsibility to ensure that expert testimony shows some indicia of reliability; unreliable, untrustworthy testimony cannot assist the court. *Id.* Lawyers should challenge the reliability of an expert's testimony if the expert cannot show sufficient "independence" from sponsoring lawyers to justify his or her role as one that "assists" the court.

Despite the risks of blurring roles, the line that distinguishes consulting from testifying experts is often unclear. For instance, consider Dr. Smith in our example—a testifying expert who also helped Ms. Jones, the lawyer, to prepare and strategize her case. Or, consider the testifying expert who only informs the lawyer about the strengths and weaknesses of an opposing expert's report. Dr. Smith's example clearly shows an expert blurring the roles; the trial judge can legitimately question whether Dr. Smith's opinion as a testifying expert is independent enough from the legal team to "assist" the court by offering reliable, trustworthy testimony—a *Robinson-Daubert* concern. The latter example is less clear: one may argue that when the testifying expert informs the sponsoring lawyer about the quality of an opposing expert's report, such information may highlight, by contrast, the reliability and trustworthiness of the testifying expert and, thus, "assist" the court.

How should lawyers address the different expert roles in a case?

- Keep your consulting and testifying experts apart. Just like lawyers should assume that anything they tell testifying experts is discoverable, anything testifying experts review or consider from consulting experts is discoverable.
- Always ask opposing testifying experts if they have reviewed or considered materials from a consulting expert in the case or have even talked to another expert in the case.
- Think twice if you decide to designate an expert with whom you have consulted in your case as a testifying expert. Many courts will waive the work-product privilege on matters you previously discussed with the expert.
- Especially attend to the possibility that testifying experts who are "professional" advocates in their work outside the courtroom are blurring expert roles. Many of these experts get overly involved with the lawyers and clients who retain them. Their testimony may reflect their advocacy agendas rather than reliable, trustworthy testimony about the case at hand that will assist the court.

FINANCIAL STRATEGIES IN 2009
WHAT YOU NEED TO KNOW ABOUT THE HOUSE

by
Christy Adamcik Gammill, CDFA[1]

Family lawyers and their clients are likely finding that the current financial crisis is making it more challenging to find solutions for splitting assets between divorcing clients. Client 401(k)s have become 201(k)s, home values may be worth less than their cost, or, one or more of the divorcing parties may be at risk of losing their job or their business. It has always been more expensive to provide for two households than one. Fewer resources caused by reduced asset values or lower cash flows make things even more difficult.

Home values may be one of the client's largest assets and largest cash outflow items before and after divorce. Advisors and their clients should give careful consideration to addressing the home sale and/or downsizing of each client's real estate needs. A year ago, many clients would fight to stay in their home. Many clients are now concerned if *anyone* can afford to keep the house, or if they both downsize, will each of them have enough cash for a down payment or can each person qualify based on more stringent mortgage requirements.

Lending rules have tightened significantly, especially in cases of divorce. Stated Income is no longer an option. Other actions may be necessary while the couple is still together so that the non-working spouse may qualify for a new mortgage. Mortgage companies are requiring (in cases with a non-working spouse) that an operating checking account be open in the name of that individual. A client must show evidence of payments for at *least* 3 months for Temporary Support, Child Support or Alimony. If a new mortgage is going to be the best financial option, it is important to ensure appropriate steps are taken to qualify.

Gina Jackson of Cornerstone Mortgage Company [2] has outlined these requirements below.

"Pro-active Steps to Qualify for a New Mortgage"

1. **Income**
    a. History of receipt of Child Support/Alimony
    b. Verification of new job
    c. Bonus/Severance income
    d. Capital gains income
    e. 4506 requirement
    f. Stated or No document loan

2. **Assets**
    a. Verification of down payment
    b. History of asset-based income

3. **Credit**
    a. Risk-based pricing
    b. Credit repair
    c. Inquiries

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[2] Gina Jackson, Sr. Vice President, Cornerstone Mortgage Company, 5600 West Lovers Lane, Suite 204, Dallas, Texas 75209: Direct line 214-350-8977.

4. New Appraisal Requirements
   a. One pending sale or listing
   b. Days on Market for subject and comps
   c. Foreclosures
   d. Declining market
   e. Desk review

5. Jumbo Financing
   a. Lenders out of business
   b. Widened spreads/tighter guidelines
   c. Financial Services Division

Before the financial meltdown, a non-working spouse used to qualify for Stated Income with a moderate net worth if investment assets were over a certain amount. The days of Stated Income are no longer unless there is a record of the investment assets producing income from dividends or interest. In addition to a good credit history and other criteria being met, proof of historical Child Support or Alimony payments and/or having a new job is going to be the most important factor in today's market.

It is important to have professionals in place to appraise their home as well as having a realtor pull neighborhood comps to meet future lending requirements. Once the estimated market value of the home has been determined and income sources verified, the parties should be better prepared to make decisions regarding their real estate needs and options.

Articles

THE QUEST FOR THE GOLDEN EGG: GAMETE MARKET REFORM THROUGH REGULATION

by
Marie E. McGrath[4]

PART II

The Donor Market: Appropriate Government Intervention

Government regulation implies an associated cost and societal acceptance of a practice. "We must respect that we are dealing in human goods that deserve moral and legal protection."[5] Currently the ethical and moral issues surrounding Advanced Reproductive Technology (ART), including human gametes are social and political hot beds. Perhaps it is out of lack of knowledge, complete knowledge, fear that we are headed down that slippery slope of human engineering or for moral/religious convictions that we approve or disapprove of its use in one respect or another. It is for this reason that the temptation exists not to place restrictions on an industry that does have its own form of checks and balances and continue to let the practitioners, patients, market, tort system and the courts work out the issues. However with the legislative body silent, the executive and judicial branches of government are left to grapple with the issues. Too much is delegated to the other branches with a silent voice of the people. For that reason, the rest of this paper is devoted to a summarization of specific areas in the commerce of gametes, eggs in particular, with recommendations for government intervention.

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[4] Marie McGrath graduated from the University Of Houston Law Center in May of 2008 and was admitted to the Texas State Bar in November 2008. She has an MBA from Pace University and a B.S. from the State University of New York at Buffalo. Part I of this article appeared in the Winter 2008 Family Law Section Report.

[5] BIOETHICS COUNCIL REPORT at 230, (personal statement of Professor Dresser et. al.).

To start, there are several areas of ART today that are generally accepted and common place. With the birth of millions of babies worldwide through the use ART we can now place precious faces on the use of a technology that in its beginning endured some of the very same criticisms and cries of the apocalyptic slippery slope of human engineering that the newer biotechnologies are receiving today. It is hard to deny those couples who desire to experience what many seem to do with little thought and ease the joy of parenting now that we have seen that it is children that are being creating, not monsters or scientific experiments. There is much yet to be learned about technological intervention in what would otherwise be a natural unobservable process and much is at stake.

SPECIFIC SUGGESTIONS: SELECTION OF DONOR- MINIMUM AGE REQUIREMENT: 21

American Society for Reproductive Medicine (ASRM) guidelines recommend that donors be of legal age, preferably between 21 and 34, and that any donor less than 21 should be evaluated by a qualified mental health professional with decisions regarding acceptance into a donor program evaluated on an individual basis.[6]

Women of 18 years of age are hardly defined as such yet, and may not legally buy alcohol or cigarettes in some states, and have just begun to drive in most states. They are at the very beginning of their maturation process into woman and adulthood and should not be entrusted to be able to discern the risks and ramifications of a very adult decision at such an early age. This is also not a decision for a practitioner with either a research or profit motive to decide. For this reason a minimum age requirement of 21 is necessary.

SELECTION OF DONOR- PAYMENT:

In its report on the guidelines for financial incentive the ASRM recommends that payment to women providing oocytes be fair and "not so substantial that they become undue inducements that will lead donors to discount risks."[7] It determined a baseline for compensation based upon an hourly basis using sperm donation rates. The calculated rate per hour for sperm donation is $60 - $75 for one hour of work. Women should expect to get at least 56 times that or $3,360 - $4,200 for the hours on average that they will be expected to spend in the process.[8] In addition compensation for the difference in risk and requirements of sperm and oocyte donation should be considered and is appropriate.[9] In the end it is suggested that anything above $5,000 require justification and anything above $10,000 is excessive.

Excessive inducements to egg donors can compel women who might not otherwise consider becoming a donor to do so. The process of retrieving ova is invasive and risky.[10] The high fees that can be obtained can be particularly attractive to those who may be financially vulnerable, such as college students.**[11]** The higher the payment the more likely it is that those particularly vulnerable may not fully or adequately consider the risks of donation. In addition, "Although the data are unclear at this time, it is possible that fertility drugs and oocyte donation procedures could increase a woman's future health risks including the risk of impaired fertility."[12] The chance that young women may dismiss the potential emotional and psychological consequences of donation in particular if they were to develop infertility problems themselves later on further increases with the lure of high payments.

Excessive fees may also encourage women to become biological parents of children they may never know.[13] Considering recent trends in law and public opinion to protect a child's right to know his or her genetic parents, a large inducement may compel women to ignore, or to not fully contemplate the implications of being a parent. They may not fully appreciate that some day they may be staring at the face of their own

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[6] ASRM Guidelines *supra* note 33.
[7] ASRM Financial Incentive s*upra* note 38, at 218.
[8] *Id.* at 219.
[9] *Id.*
[10] BIOETHICS COUNCIL REPORT at 150.
[11] *Id.*
[12] *Supra*, note 51 at 217.
[13] BIOETHICS COUNCIL REPORT at 150-51.

genetic creation who is asking legitimate questions about their background. It is not hard to imagine a scenario where a seriously ill child in need of a cure turns to find his genetic parents for help; a bone marrow transplant or organ donation. While some may not hesitate, others may not even think of the consequences at such an early age of maturity, with visions of tens of thousands of dollars in their head.

High payments for ova may convey the idea that oocytes are commercial property that can be bought and sold.[14] Some argue that the essence of human life is not something that should be commercialized at all and allowing it devalues human life. Moreover, high payments for ova could amount to greater economic inequality and discrimination.[15] Those who have the socially desirable combination of characteristics – an Ivy League education, superior test scores, and superior looks, will gain an even further economic advantage over those who do not possess those characteristics. They will be compensated for their genetic makeup increasing their competitive edge in a society that already tends to value and compensate these individuals in the workplace. Those who do not have all of those genetically superior attributes may start at a further economic disadvantage.

Racial disparity and discrimination may also be advanced by a free market in ova. The National Institutes of Health Embryo Research Panel in 1994 predicted that an open market in ova could increase racial discrimination where wealthy, white ovum donors would be solicited by high payments for couples wishing to conceive a child, while poor minority women would be compensated by researchers offering substantially lower payments.[16] Finally, those who can afford the "elite" donors will be procreating a "superior" gene pool. This could lead to the birth of persons with those traits that are more socially desirable, a form of positive eugenics.[17]

Women should be fairly compensated for the time, inconvenience, physical and emotional demands associated with oocyte donation.[18] Compensation should not be so substantial as to lead them to discount the physical and psychological risks of oocyte donation or to reward those donors who happen to be born with the right genetic combination.

Government intervention in this case should amount to passing legislation that prohibits offers for and payments to gamete donors[19] that are unreasonable and excessive. While a specific dollar amount would be hard to discern as situations vary, on what defines unreasonable and excessive the ASRM guidelines provide good evidence that a reasonable person could use. By using the terms unreasonable and excessive, which admittedly can be vague, the market system is permitted to work but offers protection to those who may be lured by high offers for compensation. Moreover, it would also serve to protect offers for and acceptance by women that might be at amounts below that which is reasonable, the underpayment and exploitation of donors who may not have been born with the same genetic makeup or those who are more financially vulnerable.

FEDERALLY FUNDED INITIATIVE OF THE SAFETY OF FERTILITY DRUGS

The FDA plays a role in the regulation of the oocyte donor and retrieval process. FDA regulations provide oversight to gamete and embryo donation including mandatory registration of ART programs, federal inspection of programs that provide donation, required documentation and protocols related to donor screen-

[14] *Supra* note 56.
[15] BIOETHICS COUNCIL REPORT at 150.
[16] *Id.*
[17] *Supra* note 56.
[18] *Supra* note 56.
[19] High payments to all gamete donors, sperm and oocyte, should be regulated. Particularly troublesome are high payments to ova donors who undertake substantially more time and risk associated with donation as compared to sperm donors.

ing.[20] These are primarily related to adherence to laboratory practices in the process[21] and to the screening of potential donors for various communicable diseases.[22]

Where the FDA can perhaps be of particular help is in the long terms study and evaluation of the drugs that are used to stimulate ovarian production. The safety of the drugs used in ART has been studied, evaluated and given a sort of yellow light – proceed with caution. In-vitro fertilization in the short run has been deemed relatively safe for women and children that have undergone it and at present there does not appear to be an increased risk of cancer to women who have undergone the use of ART and fertility drugs.[23] However, it has been noted that further studies and surveillance are required as this is an industry still in its youth.[24] It also has been suggested that use of fertility drugs by women who have undergone the entire ART process: ovarian stimulation, oocyte retrieval, reinsertion of embryos and resulting pregnancy may be afforded extra protection against ovarian cancer.[25] The risk to women who undergo ovarian stimulation solely for the purpose of ovum donation without a resultant pregnancy is less clear. In addition, it is still uncertain as to whether the use of repeated doses of ART drugs may increase the risk of ovarian cancer, but it should certainly be something that a woman considering one or repeated cycles of donation be compelled to take under consideration. Moreover, many of these studies are performed internationally, not here in the United States.[26] Because the studies are still unclear, a physician is not under an obligation to disclose such. The potential still exists for long term risks and it is likely that only the educated egg donor would ask. Studies typically indicate that more research needs to be done as this technology is in its infancy and that the research subjects may not have started to show long term effects yet. In addition, there are no requirements for patient monitoring and reporting that would permit such a long term study.

Consider also the fact that young women at the age of 21 may be likely to ignore the possibility of future disease as they are young and healthy now for several thousand dollars also indicates that perhaps they are in need of protection.

The short term risks of ovarian hyper stimulation are readily known and controllable. However, it is the long term risks are still unclear and with the ASRM advising that fertility drugs and the oocyte donation procedures could increase a woman's future health risks including impaired fertility. Some studies have linked fertility drugs to certain types of cancers, an early onset of menopause and many have been criticized because of poor design and scientific controls. What is clear, however, is that more research should be conducted and we should at the very least set up a federally funded program to evaluate the continued safety of the use of these drugs. Public money should be spent to test the safety of fertility drugs by researchers in the United States where we can be assured of accuracy of the studies involved.

MULTIPLE OOCYTE DONATION CYCLES:

As another protection to women who undergo ovarian stimulation purely for donation purposes, there should be a maximum allowable times that she may undergo this procedure. This is to ensure the health and welfare of women until we have further evaluated the use of multiple cycles of super-ovulatory drugs. The ASRM suggest that the maximum number a woman be permitted to undergo oocyte donation procedures is six.[27] This number is defined for consanguity reasons in a given population per city.[28] Given that more study

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[20] *See* ASRM, 2006 Guidelines for gamete and embryo donation, *supra* note 50 (summarizing the criteria established by the FDA).

[21] FDA Current Good Tissue Practice for Human Cell, Tissue, and Cellular and Tissue-Based Product Establishments; Inspection and Enforcement, 21 C.F.R. § 16, 1270, 1271 (2004).

[22] FDA Eligibility Determination for Donors of Human Cells, Tissues and Cellular and Tissue-Based Products, 21 C.F.R. § 210, 211, 820, 1271 (2004).

[23] Talha Al-Shawaf et. al., *Safety of Drugs Used in Assisted Reproductive Techniques*, 28 Drug Safety 513, 524 (2005).

[24] *Id.*

[25] *Id.* at 519.

[26] BIOETHICS COUNCIL REPORT at 194.

[27] *See* ASRM, *Repetitive Oocyte Donation*, 82 Fertility & Sterility S1, 58-9 (2004).

[28] *Id.*

is needed to evaluate the repeated use of fertility drugs without a resultant pregnancy, the maximum number of allowable oocyte donation cycles regardless of whether it is for reproduction or research purposes should be capped at two. This would serve a twofold purpose of protecting the health of women who undergo the process until we learn more and also to curb opportunities that a financial incentive provides for those that do elect to undergo the procedure.

INFORMED CONSENT:

The decision to become an egg donor or a donor recipient is not a light one. It involves moral, emotional, medical and legal considerations and has future implications in all of these respects. It is not one that should be undertaken without careful consideration especially given the financial incentives.

Consent is required primarily to protect the practitioners. Consent should also be required to be *informed*. The advisory group on Assisted Reproductive Technologies of the New York State Task Force on Life and Law developed a model process for informed consent for egg donors and a guidebook funded by the Ford Foundation. The guidebook is a comprehensive Question and Answer booklet covering all aspects of the egg donation process from prescreening to selection and the process from start to finish, including the egg donors right to end the procedure at any point.[29] It serves as a model that could be reproduced in every state donations are being accepted, a sort of required reading. It was not funded by the state of New York, however, it was funded by a grant from private industry. As a result not everyone is guaranteed equal access.

Because this is such a highly charged emotional procedure, egg donor recipients could also benefit from some form of guidebook advising them of the contract and parenting laws in their state, the process, any health risks to them or their resulting child and any of course of any federal laws should they be enacted.

Finally, we rely on and trust our physician everyday to help us make informed decisions about our health. For those procedures that are not medically necessary, and are more voluntary in nature, we should be more skeptical of those who stand to profit from the services they provide. This may be especially true in the egg donor/recipient situation where the patient(s) may be under severe emotional distress (not being able to have a child) or the pressure of financial gain. It is one thing to say that you are willing to absorb any and all risks for a medical procedure you agree to be performed on you, but it is quite another thing to absorb the risk for someone else's benefit.

The medical profession relies heavily on it guidelines and professional oversight with much success. My concern in this area is that the guidelines are still in their infancy as this technology is comparatively new. Unfortunately in this case the practitioners who will guide us also stand to make a profit. There should be some separation of those creating the guidelines with those that stand to profit. So that meaningful guidelines can be created with a formal mechanism of enforcement.

NATIONAL REGISTRY AND DATABASE OF PARTICIPANTS

It is recommended by the ASRM guidelines that the donor acknowledge in a consent form her responsibility to notify the donor program of changes in her health.[30] This is to inform the donor recipients of any potential illnesses of children born as a result. A corresponding duty should be owed to the donors that their identity remains confidential. Donors who wish to have no contact with children born from the use of their eggs may be nervous about agreeing to such. If there was such a database and the child at some point in the future was in need of an organ or tissue and the egg donor was a match could she be compelled or pressured by the parents or even a court to be an organ or tissue donor? Maybe she would want to know and would want to help. For that reason there should be a confidentiality requirement in all egg donor agreements unless they are expressly waived by the donor.

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[29] *See* N.Y. State Task Force on Life and The Law, *Thinking of Becoming an Egg Donor: Get the Facts Before You Decide!, available at* http://www.nysl.nysed.gov/scandoclinks/ocm55609098.htm.

[30] ASRM 2006 Guidelines, *supra* note 33.

An added benefit of a national registry is the ability for studies and further medical evaluation of donors, recipients and the long term safety of the drugs used in the process.

Often times the market system works and the protections that regulation offers tend to operate at the extremes – prohibiting offers and payment for $100,000 to attractive, ivy-league egg donors, setting a minimally acceptable age 21, for donors, mandating informed consent and defining what it should entail. Other times regulation can protect us through its investment in long term studies, promoting the efficiency of legitimate scientific studies and the freedom to pursue such.

Commentary: Donors for Reproduction vs. Donors for Research

In our quest for knowledge and advancements in the area of human disease we are increasingly turning to the very material that creates life. To some it makes sense to turn to gametes and the egg in particular, the essence of human life, to generate cures that sustain life and treat disease. To others to tinker with our genetic material and essence of life amounts to murder and we are at the apex of that apocalyptic slippery slope.

In the first of its kind in this country, California voters passed Proposition 71 in November 2004.[31] It authorizes the spending of $3 billion of public funds to be used for stem cell research in the hope that we will find cures to debilitating disease and genetic abnormalities.[32] In September 2006, California's Governor, Arnold Schwarzenegger, signed SB120 a bill that prohibits compensation to women who donate their eggs for scientific research.[33] There were no similar prohibitions placed on women who donate their eggs for reproductive purposes.

California is not alone in its ban on compensation of ovum donors to research. Massachusetts, Connecticut, Indiana and Maryland prohibit compensation to egg donors for embryonic stem cell research.[34] Indeed the National Research Council has guidelines which advise against compensation.[35] These guidelines point to a major ethical concern being that payments might "create an undue influence or offer inducement that could compromise prospective donors' evaluation of the risks of the voluntariness of her choices."[36]

Those in opposition of payments to egg donors purely for research argue that large amounts of money would unduly induce women of lower income statues to subject themselves to the unnecessary risks associated with ovarian hyper-stimulation and egg donation. Their arguments invoke the rhetoric of the protection of women's bodies against commercialization and unnecessary health risks. On the one hand, payment to egg donors is criticized as "coercive" because the market value may be too high, on the other hand, it may be "exploitive" because the market value is too low and may attract only those that are absolutely desperate to make money to undergo the procedure.[37]

Those in support, contend that these arguments are paternalistic. Women do not need the protection of the law from themselves and unnecessary health risks, they are intelligent and competent to make an informed decision. In addition, they point out that health care providers, scientists, pharmaceutical companies and institutions are all acceptable profit takers from the process while the subjects and providers of the research material are not.

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[31] Center for Genetics and Society, *The California Stem Cell Program At One Year: A Progress Report*, (Jan. 2006) at 3.
[32] *Id.*
[33] 2006 Cal. ALS 483, §125355 (2006).
[34] 105 CMR 960.006(a); C.G.S.A. § 19a-32d(c)(3); IC 35-46-5-3; Md. Ann Code art. 83A, § 5-2B-12.
[35] Committee on Guidelines for Human Embryonic Stem Cell Research, National Research Council, GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH 85 (2005).
[36] *Id.*
[37] Radhika Rao, Compensation for Egg Donors in Stem Cell Research, 21 BERKTLJ 1055, 1062 (Summer 2006).

We should take a lesson from our brethren across the pond: relying on true "egg donations" (i.e. uncompensated) for research or for reproduction does not work. In February of this year the British government approved the compensation of women who donate their eggs to stem cell research.[38] This was prompted by the critically short supply of eggs due to a ban on payment to egg donors for any purpose in the United Kingdom.[39] It would allow women already undergoing ovarian hyper-stimulation and fertility treatments to receive a discount if they agree to donate some of the eggs produced as a product of the treatment to research.[40] Those that are donors for research only could receive $500 for each fertilization cycle to cover costs including travel or lost wages.[41]

Let us also be cognizant in our own country of the problems of the current system for procurement of organs and other tissue. The current organ donor program in this country prohibits the sale of human organs and relies on altruism as the incentive for individuals to donate their body parts after death.[42] The number of organ donor recipients on a waiting list in December of 1987 was 13,153 and by May of 1995 that number tripled to 39,845.[43] However, the number of organ donors did not increase as much growing from 4,000 to only 4,357 in the same time period.[44] Reliance on a legal system that prohibits the use of financial incentives has created a severe shortage.[45] While a detailed discussion of the ethics and problems of the organ procurement system in the United States is beyond the scope of this paper, it does serve to highlight an important point. If a system that does prohibits financial incentive cannot get sufficient numbers of people to donate their organs and tissue to save another's life after they are dead, and presumably do not need them anymore, what makes us think that relying on altruistic notions of the furtherance of humanity will induce donors today to undergo health risks that they may have to play out during their lifetime?

To those who argue that it is the risk to women's health that they are protecting by banning donors for research I ask this? If we are truly concerned about the health risk that women are subject to, both the short (relatively known) and the longer (relatively unknown) term health risks, why does it matter if the eggs are procured for reproduction or research? Isn't it fact the process that is troublesome? Why are those women who undergo repeated procedures for the sake of donating eggs to help an infertile couple achieve their dreams of a child not deserving of the concern over their health? Why is the payment of thousands of dollars to them okay while not to those donating for research purposes? Those truly interested in protecting the health of women would be better focused on ensuring the safety of these drugs used by women regardless of their purpose as opposed to drawing arbitrary lines in terms of who may get paid and who may not, when they all undergo the same process.

Conclusion

The oocyte donor market is a self regulated industry, alive and growing, virtually free of governmental control. While self regulation offers some very real protections there are no real mechanisms for punishment or mandatory compliance. The proposed government regulation in this area will serve to protect us in several ways. It will decrease the risks and or exploitation involved in offering and accepting both outrageous and inadequate payments to gamete donors. It will mandate uniformly available information and which will help provide truly informed consent, and it serves as a formal mechanism to evaluate and keep the public informed about the safety of currently accepted procedures and drugs used, identifies future risks to our health. Finally it will provide a formal mechanism which will enable the market system to work yet be held accountable through punishment for noncompliance.

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[38] Science in Brief, LA TIMES, Feb. 24, 2007 at 14.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *See* Andrew J. Love, *Replacing our Current System of Organ Procurement with a Futures Market: Will Organ Supply be Maximized?* 37 Jurimetrics J. 67 (1997).
[43] *Id.* at 170
[44] *Id.*
[45] *Id.* at 168.

THE IMPORTATION OF DOMESTIC VIOLENCE VICTIMS AND EFFORTS TO STOP IT: THE MAIL-ORDER BRIDE INDUSTRY AND THE INTERNATIONAL MARRIAGE BROKER REGULATION ACT

By: Ramsey Burke Patton[46]

The mail-order bride industry has been a part of America since colonial times.[47] Over the years the industry has evolved from a service designed to fill basic human needs, such as providing a spouse to pioneer men populating the west and reuniting displaced citizens during periods following wars and other significant human tragedies, to a full-service commercial enterprise with money-back guarantees reaching millions of people via the internet.[48] International marriage brokers ("IMBs") have emerged as vehicles by which men are placed in contact with foreign women with the ultimate goal of marrying a foreign woman and bringing her to the United States. Estimates of the number of men who use such brokers to find foreign spouses range from 8,000 to 12,000 men per year to 11,000 to 16,500 men per year, based on the source.[49] Aside from facilitating contact between the parties via the Internet and telephone, many IMBs arrange romance tours, which bring men directly to the countries where the women are located to meet eligible brides and allow the parties to participate in social activities and gatherings.[50] The potential foreign brides are obtained through advertisements in local newspapers and magazines, as well as through word of mouth.[51] The vast majority of these women are from Southeast Asia, including the Philippines, and Russia and other countries comprising the former Soviet Union.[52]

Over the past several years, reports and incidents of abuse and violence involving mail-order brides has drawn the attention of advocates and legislators.[53] In 1995, a pregnant woman who immigrated to the United States from the Philippines as a mail-order bride was shot and killed by her husband in a Seattle courthouse lobby.[54] She had only lived ten days with him due to his abusive behavior.[55] In 2000, a Washington state resident murdered his second Russian mail-order bride while looking for a third mail-order bride.[56] He had previously been married to another Russian woman whom he met through an international matchmaking organization.[57] Additionally, advocacy group publications and websites contain numerous reports of other domestic incidents involving abuse of mail-order brides.[58]

Domestic violence in general is notoriously underreported in the United States.[59] Experts have reported to Congress that every reason exists to believe the incidence of abuse of foreign wives is higher in that popu-

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[47] Christina del Vecchio, "Match-Made in Cyberspace: How best to Regulate the International Mail-Order Bride Industry," 46 Colum. J. Transnat'l L. 177, 182 (2007).
[48] *Id*. at 183-185.
[49] Arin Greenwood, "For Mail-Order Brides, Happily Ever After" ABA Journal, February 2008.
[50] del Vecchio, 186-187.
[51] Robert J. Scholes, The "Mail Order Bride" Industry and Its Impact on U.S. Immigration, in Immigration Naturalization Serv., International Matchmaking Organizations: A Report to Congress, Appendix A (1999), available at www.uscis.gov/files/article/MOBrept_full.pdf.
[52] Scholes, 2.
[53] *See* del Vecchio, 193.
[54] Immigration Naturalization Serv., International Matchmaking Organizations: A Report to Congress, 5.
[55] *Id.*
[56] Brandon Robinson, "The Disruption of Martial E-Harmony: Distinguishing Mail-Order Brides from Online Dating in Evaluation 'Good Faith Marriage,'" 13 Pub. Int. L. Rep. 252, 255 (2008).
[57] *See id*; Kerry Abrams, "Immigration Law and the Regulation of Marriage," 91 Minn. L. Rev. 1625, 1653. (2007).
[58] *See, e.g.*, Tahirih Justice Center: Illustrative Cases of Women and Their Children Exploited and Abused Through the International Marriage Broker Undustry 2 (2006), available at http://tahirih.org/legal/docs/IMBRACasesfor2005Intro(SHORT).DOC.; http://www.courier-journal.com/article/20090218/BRIDE14/90218025(last visited Feb. 28, 2009). *See also* del Vecchio, 193.
[59] del Vecchio, 193.

lation than for the nation as a whole.[60] Indeed, various factors indicate mail-order brides are at increased and particular risk for domestic violence.[61] In a mail-order bride transaction, the consumer-husband has almost complete control.[62] The men often seek foreign wives who will be submissive and who have "traditional" values.[63] The men tend to desire wives who are happy to be the homemaker and not concerned with a career or her own interests.[64] Experts who have extensively studied men who seek mail-order brides have observed that the men often are seeking control more than a loving, enduring relationship.[65] On the other hand, the vast majority of the mail-order brides are searching for a better life.[66] These women typically come from places in which jobs and educational opportunities for women are scare and the wages low.[67] Conflict often emerges as the mail-order bride begins to gain independence by adjusting to the new environment, making new friends, and gaining some level of fluency with the language while the husband continues to assert domination over her.[68] Husbands may wield additional power and intimidation over the foreign wife by threatening deportation.[69]

In response to the ever-emerging picture of what life is actually like for many mail-order brides, Congress passed the International Marriage Broker Regulation Act of 2005 ("IMBRA") in an attempt to regulate the courtships that occur between U.S. citizens or residents and foreigners.[70] IMBRA became effective on March 6, 2006. Under IMBRA, each IMB must collect and disseminate certain background about the man seeking a foreign bride before any contact between the man and the potential foreign bride occurs.[71] The IMB must conduct a search of sex offender public registries.[72] Next, the IMB must obtain a signed certification from the U.S. client accompanied by documentation of his criminal history, including any permanent or temporary restraining orders, arrests or criminal convictions associated with trafficking or drugs and alcohol, current or previous marriages, the ages of any child the man has under eighteen years of age, and every state and country in which the man has resided since the age of eighteen.[73] This background information must be translated into the language of the foreign women.[74] Failure to follow this procedure may result in criminal and civil penalties.[75] If a couple proceeds with a courtship through an IMB without following IMBRA, the foreign fiancée may be denied a visa.[76]

Additionally, IMBRA requires any U.S. citizen who seeks to sponsor a fiancée using a K-1 visa (whether through an IMB or not) to include information on any criminal convictions for any specified crime.[77] Specified crimes include domestic violence, abusive sexual contact, stalking, and any convictions for offenses relating to controlled substances or alcohol.[78]

Further, IMBRA mandates that a consular officer may not approve a petition for a K-1 fiancée visa unless the office has verified that: (1) the petitioner has not, previous to a pending petition, petitioned for a fian-

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[60] Scholes, 8.
[61] del Vecchio, 194.
[62] Intertional Matchmaking Organizations: A Report to Congress, 4.
[63] Scholes, 4.
[64] Scholes, 4.
[65] *Id*.
[66] *Id*. at 3.
[67] *Id*.
[68] *Id*. at 8.
[69] *See* de Vecchio, 194.
[70] Abrams, 1653.
[71] *See* 8 U.S.C.A. §1375a(d)(2)(A).
[72] *See* 8 U.S.C.A. §1375a(d)(2)(A)(i).
[73] *See* 8 U.S.C.A. §1375a(d)(2)(B).
[74] *See* 8 U.S.C.A. §1375(d)(3)(A)(iii)(I)-(III).
[75] *See* 8 U.S.C.A. §1375a(d)(5).
[76] *See* 8 U.S.C.A. §1375a(b(1)(C).
[77] *See* 8 U.S.C.A. §1184(d)(1).
[78] *See* 8 U.S.C.A. §1184(d)(3)(B).

cée visa with respect to two or more applying aliens and (2) if the petitioner has been previously approved for a fiancée visa, two years have elapsed since the filing of such previously approved petition.[79]

IMBRA also commissions the Department of Homeland Security to develop a pamphlet on legal rights and resources for immigrant victims of domestic violence and to translate the pamphlet into the native language of the immigrants.[80]

Thus far, only one court has directly addressed IMBRA. In *European Connections & Tours, Inc. v. Gonsales*, the Northern District of Georgia upheld the constitutionality of IMBRA. Despite challenges to the contrary, the Court held that the Act did not constitute an unconstitutional regulation of commercial speech or a content-based restriction of protected speech.[81] The federal district court also held that IMBs' rights under the Equal Protection Clause were not violated by the Act.[82] The Court further found that IMBRA was "highly likely" to reduce domestic abuse and that "[t]he health and safety of foreign women that IMBRA seeks to protect substantially outweighs any pecuniary harm that IMBRA may cause to some IMBs."[83]

In a somewhat related case, prior to the enactment of IMBRA, the Fourth Circuit Court of Appeals affirmed a jury award of $92,000 in compensatory damages and $341,500 in punitive damages for a foreign bride against an IMB after her American husband mentally and physically abused her within months of the marriage and the IMB told her if she left the relationship she would deported.[84]

It is likely too early to predict how effective IMBRA will be in decreasing domestic abuse of mail-order brides. Interestingly, IMBs seem concerned about, and perhaps even threatened by, the passage of IMBRA as illustrated by posts on their websites. One IMB refers to IMBRA's requirements as "cumbersome"[85] and, on a page that seems not to have been updated since IMBRA took effect, advises clients to "obtain as many addresses as they can now" for potential foreign brides before the IMB must gather information and the men must provide information to the IMB before contacting a potential foreign bride under IMBRA.[86] Another IMB appears to tout IMBRA as the product of American women's lobbying efforts to prevent American men from easily meeting the "wonderful" foreign women who are eligible brides.[87] Ultimately, the Act is a step in the right direction. With increasing awareness of domestic violence and the struggles faced by foreign brides, hopefully mail-order brides will have a better future.

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[79] *See* 8 U.S.C.A. §1184(d)(2)(A)
[80] *See* 8 U.S.C.A. §1375a(a)(1).
[81] *See* 480 F. Supp.2d 1355 (N.D. Ga. 2007).
[82] *See id.*
[83] *European Connections & Tours, Inc.*, 480 F. Supp.2d at 1381.
[84] *See Fox v. Encounters Int'l*, No. 05-1139, 05-1404, 2006 WL 952317 (4th Cir. (Md.) April 13, 2006).
[85] *See* http://www.loveme.com/information/new_law.shtml (last visited Feb. 27, 2009).
[86] *See* http://www.loveme.com/information/qua.shtml (last visited Feb. 27, 2009).
[87] *See* http://www.goodwife.com (last visited Feb. 27, 2009).

GRANDPARENT RIGHTS IN TEXAS: DOES A GRANDPARENT STAND A FIGHTING CHANCE?

by
Allen R. Griffin and
Holly Frymire Griffin[88]

The intuitive notion that a grandparent's influence is important in the development of a child has been given much attention in the psychological and legal arenas in recent years. One new study, appearing in the February 2009 *Journal of Family Psychology*, published by the American Psychological Association, concludes that spending time with a grandparent is linked with better social skills and fewer behavior problems among adolescents, especially those living in single-parent or stepfamily households.[89] In 2000, the U.S. Supreme Court handed down its landmark opinion, *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, Justice O'Connor reasoned on behalf of the plurality that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into private realm of the family to further question ability of that parent to make best decisions concerning the rearing of that parent's children." *Id.* at 69. In the intervening years since *Troxel*, the Texas Legislature and Courts have in great part followed the idea that the State should not involve itself in the private decisions of a *fit* parent. However, with increased life spans, and the social and financial pressures caused by death, divorce, addiction and the current state of economic conditions, a grandparent's role in the lives of his or her grandchildren will likely increase. The focus of this article is to succinctly address the legal options available to grandparents seeking redress in the Texas court system when their efforts to involve themselves in their grandchildren's lives have gone without result.

General Standing Under §102.003

At present, a grandparent has a limited number of options in the event he or she is seeking custody of a grandchild. A grandparent's first step is to determine whether he can maintain standing under the fourteen categories of the general standing statute, Section 102.003 of the Texas Family Code. The most typical applicable categories under this statute would be Sections 102.003(a)(11), 102.003(a)(13) or 102.003(a)(9).[90]

Section 102.003(a)(11) gives standing to a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than ninety days preceding the date of the filing of the petition *if* the child's guardian, managing conservator, or parent is *deceased* at the time of the filing of the petition.[91] And Section 102.003(a)(13) gives standing to a relative of the child within the third degree of consanguinity (which would include a grandparent) if *both* parents of the child are *deceased* at the time of filing.[92]

Under §102.003(a)(9), a grandparent can maintain standing if he has had "actual care, control, and possession of the child for at least six months ending not more than ninety days preceding the date of the filing of the petition."[93] The ninety days do not need to be continuous and uninterrupted.[94] The Fort Worth Court of Appeals held that there must be some showing of an abdication of parental duties by the parents before a

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[89] "Grandparenting and Adolescent Adjustment in Two-Parent Biological, Lone-Parent, and Step-Families," Shalhevet Attar-Schwartz, PhD, The Hebrew University of Jerusalem; Jo-Pei Tan, PhD, University of Putra; Ann Buchanan, PhD, and Julia Griggs, PhD, University of Oxford; Eirini Flouri, PhD, University of London; *Journal of Family Psychology*, Vol. 23, No. 1.
[90] TEX. FAM. CODE §102.003(a).
[91] TEX. FAM. CODE §102.003(a)(11).
[92] TEX. FAM. CODE §102.003(a)(13). (Compare with TEX. FAM. CODE §153.431 which states that if both parents of a child are *deceased*, the court can consider appointing a parent or sibling of a *deceased* parent as managing conservator, but such consideration does not alter or diminish the discretionary power of the Court.)
[93] TEX. FAM. CODE §102.003(a)(9).
[94] TEX. FAM. CODE §102.003(b).

grandparent will have standing to bring a suit for custody under Section 102.003(a)(9).[95] In *M.J.G.*, the court found that even though the children were living in the grandparent's home and that the grandparents performed day-to-day caretaking duties for the children, the children's parents were also living with the children in the grandparent's home, and there was no evidence that the parents did not also care for the children nor was there any evidence that the parents had abdicated their parental duties and responsibilities to the grandparents.[96] In *In re Kelso*, the Court of Appeals granted mandamus where the grandparents had been appointed temporary joint managing conservators, but had failed to show that they had had actual care, control, and possession of the child for at least six months, ending not more than ninety days before they filed their suit.[97] The Court stated that even considering the evidence in the light most favorable to grandparents, the evidence did not show that mother voluntarily relinquished permanent care, control, and possession of child to grandparents for the six months preceding their filing of the suit, and there was no evidence that child's abode in Hood County was fixed or permanent; rather, the evidence was that it was temporary, sometimes up to several months at a time, but always depending on mother's consent.[98]

It should be noted that the parental presumption must still be rebutted at a trial on the merits in an original conservatorship suit – "(s)tanding to sue does not mean a right to win, but merely a right to be heard."[99] However, "once custody, even between two parents, is established by court order, the parental presumption does not apply to any subsequent custody proceeding regardless of the parties involved."[100]

Grandparent Standing Under §102.004(a)

In the event that a grandparent does not fit into any category under the general standing statute (i.e., §102.003), the next step in the analysis would be to determine whether he or she can maintain standing under §102.004(a), which applies to all cases filed on or after September 1, 2007.[101] Under this section, the grandparent must offer proof that: 1) the child's present circumstances significantly impair the child's physical health or emotional development, or 2) that both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.[102] In short, the child's parents must either agree to the suit being filed, ***or*** the grandparent must show that the child's present living environment significantly impairs the child's physical health or emotional development. There is no question that this is high burden of proof for a grandparent to show "significant impairment."

In the case of *In re Vogel*, the Houston Court of Appeals (14th Dist.) found "significant impairment" where, following the child's mother's sudden death, father removed the child from mother's funeral, took child to his lawyer's office, and then left the child in care of non-relative family friends. Father also admitted to a history of alcoholism, drinking heavily following mother's death, and he admitted that could not provide for child's financial needs.[103]

In an unreported case, the court found "significant impairment" where the evidence showed that mother was bi-polar, had been under psychiatric care, hospitalized and had threatened suicide. Evidence of abuse and neglect by mother was presented, including evidence of the mother's sexual promiscuity in the home, pornography in the home and unsanitary living conditions for the children.[104]

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[95] *In the Interest of M.J.G. and J.M.J.G.*, 248 S.W.3d 753 (Tex.App.–Fort Worth 2008, no pet.).

[96] *Id.* at 758-59.

[97] *In re Kelso*, 266 S.W.3d 586, 590-91 (Tex.App.–Fort Worth 2008, orig. proceeding).

[98] *Id.*

[99] *In the Interest of S.S.J.*, 153 S.W.3d 132, 137-38 (Tex.App.– San Antonio, 2004, no pet.).

[100] *In re V.L.K.*, 24 S.W.3d 338, 342-43 (Tex. 2000).; *In re P.D.M.*, 117 S.W.3d 453, 457-58 (Tex. App.– Fort Worth 2003, pet. denied).

[101] TEX. FAM. CODE §102.004(a).

[102] *Id.*

[103] *In re Vogel*, 261 S.W.3d 917 (Tex.App.– Houston [14th Dist.] 2008)

[104] *In the Interest of A.L.S.*, No. 09-05-00062-CV, 2006 WL 75369 (Tex.App.– Beaumont January 13, 2006, no pet.).

In *M.J.G.*, the grandparents maintained that they had standing under because they had established "a close and ongoing relationship with the children."[105] The court denied standing under §102.004(a) because the grandparents failed to show "that the grandparent/grandchild relationship was so essential to the children's well-being that they would be physically or emotionally harmed if they did not live with the (grandparents)."[106]

Grandparent Standing to Intervene Under §102.004(b)

In the event that a SAPCR is currently pending, then a grandparent may request leave of the court to file a petition in intervention requesting either managing conservatorship or possessory conservatorship, *if* (and this is a very big *if*) there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. While a grandparent may not file an original suit to seek appointment as a possessory conservator, he may do so by intervening in a pending lawsuit.[107] The Austin Court of Appeals reasons in its opinion in *McCord v. Watts* that "once the child's best interest is before the court and being litigated, the trial court has discretion to determine that intervention by grandparents may enhance the trial court's ability to adjudicate what is in the best interest of the child."[108] In other words, grandparents should not be given the right, except in an emergency, to bring a suit requesting managing conservatorship or possessory conservatorship and disrupt a child's living environment unless a child's life has already been disrupted with custody litigation. This relaxed standing rule for intervention promotes the overriding policy in all suits affecting the parent-child relationship, that of protecting the best interest of the child.[109]

Grandparent Access Under Chapter 153

After the amendments to the grandparent access statutes in 2005, a grandparent's ability to seek possession of and access to a grandchild has been narrowed to a few, very tightly defined, sets of circumstances. In other words, the Texas Legislature took *Troxel* to heart, and pushed through legislation that they would hope to pass constitutional muster according to United States Supreme Court's plurality's opinion.

A biological or adoptive grandparent may request possession of or access to a grandchild by either filing an original suit, or a suit for modification.[110] And, a biological or adoptive grandparent may request possession of or access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.[111] However, a step-grandparent may not request access under this statute.[112]

The threshold determination requires a grandparent to show that at least one biological or adoptive parent of the child has not had that parent's parental rights terminated,[113] and that the grandparent's child who is the parent of the grandchild:

(A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
(B) has been found by a court to be incompetent;
(C) is dead; or
(D) does not have actual or court-ordered possession of or access to the child.[114]

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[105] *In re M.J.G.* at 761.
[106] *Id.*
[107] TEX. FAM. CODE §102.004(b).
[108] *McCord v. Watts*, 777 S.W.2d 809, 812 (Tex.App.–Austin 1989, no writ).
[109] *Whitworth v. Whitworth*, 222 S.W.3d 616, 621 (Tex.App.–Houston [1st Dist.] 2007, no pet.).
[110] TEX. FAM. CODE §153.432(a).
[111] TEX. FAM. CODE §153.432(b).
[112] *In re Derzapf*, 219 S.W.3d 327, 332 (Tex. 2007).
[113] TEX. FAM. CODE §153.433(1)
[114] TEX. FAM. CODE §153.433(3)

Nonetheless, a biological or adoptive grandparent may not request possession of or access to a grandchild if:

(1) each of the biological parents of the grandchild has:

(A) died;
(B) had the person's parental rights terminated; or
(C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and

(2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.[115]

If the grandparent requesting possession meets all of criteria set out above, *then* that grandparent must overcome the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being.[116]

The Texas Supreme Court did not weigh in on *Troxel* until 2006, releasing its per curiam opinion, *In re Mays-Hooper*, a case decided before the applicability of 2005 amendments to the grandparent access statutes.[117] In essence, the Supreme Court found the facts indistinguishable from the facts in *Troxel*, and therefore ruled that the judgment must be the same.[118] The Supreme Court stated that, as in *Troxel*, "there was no evidence that the child's mother was unfit, no evidence that the boy's health or emotional well-being would suffer if the court deferred to her decisions, and no evidence that she intended to exclude (the grandparent)'s access completely."[119]

In *Derzapf*, the trial court had granted visitation to the biological grandmother and step-grandfather finding that "denying the grandparents access would significantly impair the children's physical health or emotional well-being."[120] The trial court's decision was based in large part upon the testimony and written report of the court-appointed psychologist. At an evidentiary hearing, the expert testified that it "would not be healthy" to cut the children off from the grandparents; that the children had a "lingering sadness" regarding their lack of contact with the grandparents; but that the "(sadness) did not 'rise to a level of significant emotional impairment.'"[121] The Texas Supreme Court granted mandamus relief, directing the trial court to vacate the temporary orders granting visitation to the grandparents, emphasizing that "(t)he Legislature set a high threshold for a grandparent to overcome"[122] (i.e., the "significant impairment" standard). The Court then echoed *Troxel* in stating that "(a) court may not lightly interfere with child-rearing decisions made by (a fit parent) simply because a 'better decision' may have been made."[123]

Derzapf also stands for the proposition that a mandamus action is a proper vehicle to challenge a trial court's award of temporary visitation to a grandparent.[124] The Court held that temporary orders granting visitation "without overcoming the statutory presumption that (a parent) is acting in (the) children's best inter-

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[115] TEX. FAM. CODE §153.434
[116] TEX. FAM. CODE §153.433(2)
[117] *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006)(per curiam).
[118] *Id.* at 778.
[119] *Id.*
[120] *Derzapf* at 331.
[121] *Id.* at 330.
[122] *Id.* at 334.
[123] *Id.* (citing *Troxel* 530 U.S. at 73).
[124] *Id.* at 334-35.

est" is a divestiture of a fit parent's right to possession of his children.[125] Such a divestiture is irremediable, and mandamus relief is therefore appropriate.[126]

The Texas Supreme Court has recently held that a parent must be afforded a "meaningful opportunity to be heard before a trial court awards temporary grandparental visitation."[127] In *Chambless*, the trial court entered an "interim" visitation order awarding visitation to grandparents after denying mother's motion for a directed verdict following presentation of grandparent's case-in-chief.[128] The Court granted mandamus relief, and directed the trial court to vacate the temporary order. [129]

In *In re J.R.D.*, a recent unreported case out of the Dallas Court of Appeals, the Court reversed and rendered a judgment that had awarded visitation to grandparents.[130] The only evidence offered at trial was (1) copies of the temporary orders granting grandparents access; and (2) testimony from the mother and the grandmother.[131] The grandmother testified that she felt that the grandchild needed to know his grandparents and she felt it was important for her to have a relationship with her grandson because it was "all [she] had left" of her son, the child's father, who had recently died.[132] The Dallas Court of Appeals found that there was no evidence in the record that denial of access would significantly impair the grandchild's physical health or emotional well-being, and rendered judgment denying the grandparents access.[133] It is clear that a heartfelt plea of a grandparent, standing alone, will not withstand appellate scrutiny.

Since *Troxel*, and its progeny, and the recent amendments to the grandparent standing and grandparent access statutes, a grandparent's legal road to custody of, or possession of and access to a grandchild has become arduous, especially when the facts are closely contested. Accordingly, a practitioner representing a grandparent should not enter into such a lawsuit without a game plan to obtain expert testimony to help withstand the challenges at every stage of the proceeding. The practitioner should also have one eye towards the appellate court, and he or she will do well to hire an appellate consulting expert to pave the way for a judgment that will hold up on appeal.

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[125] *Id.* at 335.
[126] *Id.* (citations omitted).
[127] *In re Chambless*, 257 S.W.3d 698, 700 (Tex. 2008).
[128] *Id*. at 699.
[129] *Id*. at 700.
[130] *In re J.R.D.*, 2007 W.L. 4415879 (Tex.App.–Dallas December 19, 2007).
[131] *Id*.
[132] *Id*.
[133] *Id*.

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

DIVORCE
Grounds and Procedure

TRIAL COURT IS REQUIRED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW IF REQUESTED FOLLOWING DIVISION OF PROPERTY ON DIVORCE

¶ 09-2-01. ***In re Marriage of Palacios,*** **___ S.W.3d ___,** 2008 WL 5412053 (Tex. App.—Amarillo) (12/30/08)

Facts: Husband and wife divorced in 2008. Following trial, husband requested that trial court enter findings of fact and conclusions of law so that he could challenge the division of property. Trial court failed to enter the findings of fact and conclusions of law, so father filed appeal. On 09/23/08 court of appeal abated case to trial court, setting a deadline of 10/23/08 for trial court to enter findings of fact and conclusions of law. Trial court failed to do so.

Held: Reversed and remanded for a new trial. Trial court erred by failing to enter findings of fact and conclusions of law.

Opinion: Pursuant to TFC § 6.711, a trial court is required to enter findings of fact and conclusions of law in a suit for dissolution of marriage when properly requested by one of the parties. The failure of the trial court to do so is presumed to be harmful unless contrary evidence appears on the face of the record. From the face of the record here, the court could not say that the trial court's omission was harmless because the court did not know what the trial court considered to be separate property; nor did it know the valuation placed on the property that was subject to the division order.

Editor's Comment: *Findings of fact and conclusions of law involve the possibility of great peril for a trial attorney. As the attorney for the party trying to protect the judge's ruling, you must timely draft proposed findings and submit to the court for signature. As the attorney for the party challenging the judge's ruling, you must timely file the request for findings, which can be hairy if you have special child support or possession issues, timely file the notice of past due findings, and timely file objections to any findings that are entered by the court. Failure to do all of this can result in reversal of the trial court's judgment without ever reaching the merits of an appeal. If you are not familiar with the rules and requirements for drafting FOF/COL or in requesting them to preserve appellate rights, then consult with an appellate lawyer. There are several of us out there who are willing to consult with attorneys to help answer deadline questions and such. M.M.O.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING 100% OF TAX LIABILTY TO HUSBAND WHEN HUSBAND EXERCISED SOLE CONTROL OVER BUSINESS AND TAXES FOR COMMUNITY ESTATE

¶ 09-2-02. ***In re S.A.A.,*** ___ S.W.3d ___, 2009 WL 456996 (Tex. App.—Dallas 2009) (02/25/09)

Facts: Husband and wife separated in 07/05. Wife filed for divorce and obtained a default judgment against husband. Wife's default judgment was vacated when husband filed a motion for new trial due to wife's preg-

nancy at the time of the divorce. Trial court orally pronounced husband and wife divorced following a bench trial, however husband and wife could not agree on the language for the final decree. Trial court allocated the entirety of the marital tax debt to husband. Husband appealed.

Held: Affirmed as modified. Trial court did not abuse its discretion by allocating 100% of marital tax liability to husband.

Opinion: Trial court did not abuse its discretion by ordering that husband pay 100% of the marital tax debt. In light of the respective resources and capacities of husband and wife, as well as the sole control husband exercised over the taxes and business, at least some evidence of a substantive and probative nature supports trial court's division of tax liability.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING TEMPORARY SPOUSAL SUPPORT PENDING DISSOLUTION OF MARRIAGE

¶ 09-2-03. ***In re Small,*** ___ S.W.3d ___, 2009 WL _____, No. 14-08-01075-CV (Tex. App.—Houston [14th Dist.] 2009) (orig. proceeding) (02/26/09)

Facts: In 04/05, a jury found that husband and wife had entered a common law marriage in 1991. On 05/17/05, trial court adopted jury's findings in an interlocutory judgment. On 11/01/05, trial court signed an order which required that husband pay wife temporary spousal support in the amount of $4,000 a month and $25,000 in attorney's fees. Wife subsequently filed a motion for enforcement. On 03/08/06, trial court held a hearing on wife's motion. On 04/20/06, trial court filed an order finding husband in contempt for failure to past spousal support from 11/01/05 to 03/01/06 in the amount of $20,000. Husband filed a petition for writ of mandamus asking court of appeals to reverse trial court's contempt order and to modify the spousal support order. Husband's petition was denied

In 10/07, a second jury trial was held on issues of community property. The jury found that husband had committed fraud with respect to the community property rights of wife. On 10/26/07, trial court granted wife's motion for appointment of joint receivers. On 11/08/07, husband filed for bankruptcy.

On 10/ 29/08, trial court held a hearing on wife's fifth motion to enforce. Wife asked trial court to direct husband to pay the $20,000 in arrears previously ordered on 04/ 20/06 and $124,000 in arrears through 10/01/08. On 10/31/08, trial court entered an order, finding that husband had the ability to pay temporary spousal support from 04/01/06 through 10/01/08, and was in arrears of $124,000.00 for that period. Trial court found husband in contempt and assessed imprisonment for 179 days. Trial court, however, probated husband's sentence for one year provided that husband paid the $124,000.00 in arrears in four installments of $31,000 each on or before 12/01/08, 01/03/09, 02/0209, and 03/02/09. Trial court also assessed attorney's fees and costs in the amount of $8,694.15 against husband. Trial court further ordered husband to pay the $20,000.00 in arrears from the 04/20/6 contempt order, and $25,000.00 in attorney's fees, as directed in the 11/01/05 order.

Husband filed a petition for writ of mandamus, claiming that he was denied due process because he was not allowed to put on his defenses to wife's motion to enforce, that he is not financially able to pay the court-ordered temporary spousal support, and, alternatively, that the 11/01/05 order awarding temporary spousal support is void.

Held: Mandamus denied. Trial court did not abuse its discretion by finding that husband had the ability to pay the ordered spousal support, or by awarding the spousal support originally.

Opinion: Although trial court erroneously refused to allow introduction of a document regarding husband's bankruptcy, husband was able to testify to the facts and present witnesses that also testified to his facts. Trial court did not abuse its discretion by finding husband financial able to pay temporary support. Despite husband's lack of substantial income, he possessed certain items of community property, such as a yacht valued

at over $1,000,000, which a jury found that he had fraudulently transferred outside the marital estate. Evidence supported trial court's award of temporary spousal support pending the final dissolution of marriage, therefore trial court did not abuse its discretion.

TRIAL COURT ABUSED ITS DISCRETION BY DENYING FATHER'S MOTION TO DISQUALIFY MOTHER'S ATTORNEY DUE TO CONFLICT OF INTEREST

¶ 09-2-04. ***In re Z.N.H.,*** ___ S.W.3d ___, 2009 WL 474067 (Tex. App.—Eastland 2009) (02/26/09)

Facts: On 11/30/98, mother and father divorced. Divorce decree named mother SMC of child and father PC. On 06/07/01, trial court entered an agreed order modifying the parent-child relationship which contained a geographical limitation provision that required mother to establish child's primary residence in Taylor County, Texas. On 02/27/02, trial court entered a judgment nunc pro tunc that included the Taylor County geographical limitation provision. In 02/06, mother's husband changed jobs, which required mother and child to relocate to Coppell, Texas. On 07/19/06, mother informed father that she and child were moving. On 07/28/06, mother filed a petition to modify the parent-child relationship requesting that trial court lift the Taylor County geographical restriction in the judgment nunc pro tunc so that she could establish child's primary residence outside Taylor County. Father filed a cross-petition and an amended cross-petition to modify the parent-child relationship. Father requested that trial court appoint mother and himself as JMC of child and to modify the judgment nunc pro tunc to provide that he would have the right to establish child's primary residence in Taylor County. On 12/19/06, mother filed a motion for substitution of counsel. Trial court entered an order substituting mother's new attorney as the attorney of record and discharging her former attorney. On 01/22/07, father filed a motion to disqualify mother's new attorney from representing mother. Father claimed that, on 07/20/06, he and his wife had consulted with the same attorney regarding the facts of this case. Father stated that the consultation lasted thirty-five to forty minutes and that he shared "very personal information." Father asserted that his consultation with mother's attorney gave rise to a conflict of interest that disqualified mother's attorney from representing mother. Mother's new attorney testified that he had no recollection of the meeting. Following a hearing, trial court denied father's motion to disqualify mother's attorney. On 03/05/08, a four-day jury trial commenced. The jury found in favor of mother. Based on the jury's verdict, trial court entered an order granting modification requested by mother and denying the modification requested by father. Father appealed.

Held: Reversed and remanded. Trial court abused its discretion by denying father's motion to disqualify.

Opinion: In denying father's motion, the trial court relied on mother's attorney's testimony that he had no recollection of his meeting with father and his wife. The trial court also relied on a lack of evidence that father and his wife had disclosed to mother's attorney any specific matters that could not be found in the court's file. However, once father met his evidentiary burden of showing that mother's attorney's representation of mother violated Disciplinary Rule 1.09(a)(3), father was entitled to a conclusive presumption that he and his wife imparted confidences and secrets to Myers. As such, in making its ruling, the trial court should not have considered Myers's lack of recollection of the meeting and a lack of evidence of the disclosure of any specific matters that could not be found in the court's file.

Editor's Comment: *This is why you should keep a conflicts list of everyone that you meet with where the meeting exchanges confidential information. Your staff can be instructed to do this for you. Also, having potential new clients fill out a form with name, address, etc. that you keep can provide the historical information. When you are called upon to determine whether there is a conflict, you will have the information available to you to conclusively say whether there is a conflict or not. M.M.O.*

DIVORCE
Division of Property

PUTATIVE SPOUSE HAS NO INTEREST IN PROPERTY ACQUIRED BY SPOUSE PRIOR TO PUTATIVE MARRIAGE

¶ 09-2-05. ***Bailey-Mason v. Mason,*** ___ S.W.3d ___, 2008 WL 5158912 (Tex. App.—Dallas 2008) (12/10/08)

Facts: Husband and wife married in 1951 and separated in 1978. In 1979, husband purchased a home. That same year, husband initiated divorce proceedings, and listed the home as community property. The divorce was subsequently dismissed for want of prosecution. In 1989, husband began living with mother in the home. Husband and mother were ceremonially married in 1991. Husband and mother had two children. In 1998 or 1999, husbanded deeded home to children. In Oct. 1999, husband died. Both wife and mother claimed surviving spouse status and sought appointment as executor of husband's estate. Probate court found that wife was surviving spouse, as husband and wife were never divorced. Wife subsequently brought a suit for partition, and sued mother as managing conservator and next friend of the children. Trial court found that wife owned half of home, and the children each owned one quarter. Trial court also found that home could not be partitioned in-kind, and ordered home sold and proceeds distributed to wife and the two minor children. Mother appealed, claiming that as putative spouse of husband, she was entitled to an undivided one-half interest in home that superseded wife's interest. Alternatively, mother claimed reimbursement on behalf of the children for property taxes, utilities, insurance, and repairs and improvements to home in the 8 years between father's death and conclusion of the suit.

Held: Affirmed. Under TFC §3.002, wife, not mother, was entitled to an undivided one-half interest in home upon husband's death.

Opinion: A putative spouse is entitled to the same property rights as a lawful spouse. However, a putative spouse can only claim property acquired during the putative marriage. Husband acquired home in 1979, 10 years before the ceremonial marriage to mother. As such, mother had no ownership interest in home. Further, mother's claim for reimbursement for property taxes, utilities, and insurance fails because these are not "improvements" to real property. The claim for reimbursement for repairs and improvements also fails, because an obligation to repay does not arise when one co-tenant improves property without the other co-tenant's consent.

Editor's Comment: *Another aspect of this case concerned judicial estoppel. The court held that wife was not judicially estopped from seeking partition of the residence even though in an earlier suit she testified that she had no interest in the residence. Judicial estoppel did not apply because wife nonsuited the first case rather than litigate it to a conclusion. J.V.*

CLARIFICATION ORDER DEFINING CHARACTER OF INCOME GENERATED FROM MULTI-LEVEL MARKETING COMMISSIONS EARNED AFTER DIVORCE NEEDS CLARIFICATION

¶ 09-2-06. ***Murray v. Murray,*** **___ S.W.3d ___,** 2008 WL 5265048 (Tex. App.—Fort Worth) (12/18/08)

Facts: Husband and wife were divorced on 08/04/03. Husband was, and continued to be, employed as an independent broker in a multiple-level marketing company that provides discounted rates on health care. As an independent broker, husband sells monthly memberships in the discounted health plans and recruits other brokers to do the same. The members and brokers recruited by husband, as well as members and brokers re-

cruited by them, and so on, are husband's "downline." At the time of the divorce, there were thousands of members and brokers in husband's downline. The 2003 divorce decree divided husband's residual income generated from his downline, as it existed on 08/04/03, 60% to wife and 40% to husband. After the divorce proceedings, wife noticed that her checks for 60% of the residual income began to decrease. In 07/07, wife filed a petition for enforcement, or in the alternative clarification. Trial court's clarification order indicated that wife was entitled to 60% of the residual commissions from "the specific persons or entities that are identified as the base and down-line brokers of [husband and wife] existing on the date of 08/04/03." Husband appealed trial court's clarification order.

Held: Affirmed as modified. Trial court had the power to clarify the 2003 divorce decree, but it did not have the power to award wife any residual income that constituted an expectancy.

Opinion: Due to the ambiguous wording of the divorce decree, trial court did not abuse its discretion by issuing a clarification order. Although the downline income stream earned during marriage does not constitute and expectancy and is therefore community property, any potential growth of the downline income stream after 08/04/03 is an expectancy because the growth is contingent on husband or his brokers adding new members or brokers. As such, the clarification order should be modified to ensure that wife does not receive any income generated that is the result of brokers and members added after 08/04/03.

INCOME ACCRUED DURING MARRIAGE FROM A TRUST IN WHICH ONE SPOUSE HAS AN INTEREST IN THE CORPUS IS COMMUNITY PROPERTY

¶ 09-2-07. ***Sharma v. Routh,*** ___ S.W.3d ___, 2008 WL 5443213 (Tex. App.—Houston [14th Dist.] 2008) (12/31/08)

Facts: In 08/02, husband and wife were married. Prior to the marriage, husband's first wife died and created two trusts. The first trust was a "marital deduction trust," which consisted of two medical buildings. The marital trust named husband as trustee and a foundation husband and first wife created as remainder beneficiary. The terms of the marital trust stated that husband, as trustee, was entitled to distributions from the trust principal in order for husband to maintain himself in accordance with the standard of living to which husband was accustomed. The second trust was a "family trust," which consisted of shares of stock of a medical corporation. The family trust also named husband as trustee and the same foundation as remainder beneficiary. The family trust had similar language which stated that husband was entitled to distributions from the trust principal in order for husband to maintain himself in accordance with the standard of living to which husband was accustomed.

In early 2003, husband created a tax-exempt 501(c)(3) foundation. Husband was also a member of the board of trustees of this foundation. Husband, as trustee of the marital trust, then transferred the two medical buildings that constituted the corpus of the marital trust to the 501(c)(3) foundation that he created. The transfer was secured by 5 promissory notes. The first note for $30,000,000 was made payable to the marital trust, the second note for $1,000,000 was made payable to a corporation that husband owned, and the final three notes totaling $5,000,000 were made payable to the medical corporation which constituted the corpus of the family trust.

In 2004, husband and wife separated. Husband filed a divorce petition and obtained a default judgment. Wife then moved for a new trial, and trial court set aside the original divorce decree. On 10/10/05, trial commenced. Trial took 13 days, and a major point of contention during the trial was the proper characterization of the interest that accrued during marriage from the marital and family trusts. On 01/26/06, trial court signed the final decree of divorce. In its finding of facts and conclusions of law, the trial court found that the trust assets had accrued over $2.3 million in interest during the course of the marriage, found that the accrued interest was community property, and awarded 50% of the accrued interest to wife. Husband appealed the trial court's characterization, claiming that the trust income is his separate property because he has no interest in the trust corpus, and he acquired the interest by gift or devise.

Held: Affirmed. Husband had both an interest in the trust corpus and received income from the trust during marriage. As such, any income received from the trust during marriage was community property.

Opinion: If one spouse has an interest in the corpus of a trust and receives income from the trust during marriage, the income is community property. Although each trust had a remainder beneficiary of the corpus remaining in the trust (if any) upon husband's death, the trust was created for the benefit of husband and contemplated that the entire trust, both income and principal, could be expended for husband's benefit, at his sole discretion. It is further undisputed that the interest payments were distributed to husband and placed in his personal account. Because husband had an interest in the corpus and made distributions from the corpus to himself, the income from the corpus is community property.

Furthermore, husband did not "constructively receive" any income from the sale of trust assets that was earmarked for donation to the 501(c)(3) foundation. The fact that husband may have intended to receive the funds and subsequently donate them to a third party does not change the character of the property. Once distributions were made to husband, any funds distributed became community property.

Finally, husband did not prove by "clear and convincing" evidence that he acquired the interest payments during marriage by gift, devise, or descent. Therefore, husband failed to rebut the statutory presumption that interest payments received during marriage are community property.

Dissent (J. Frost): The majority erred by adopting the vague "interest in the corpus" standard to determine marital property rights in a trust. Instead, the majority should have decided that income distributions are community property only if the recipient has a present possessory right to part of the corpus. The evidence proves, as a matter of law, that husband acquired all trust income by devise or gift. The unambiguous language of first wife's will requires the trustee of the marital trust and family trust to distribute all trust income to husband. Further, husband had no interest in the remainder of either trust, as they both expire upon husband's death. As such, the majority should have held that 1) the trusts were valid testamentary trusts, 2) husband had no present, possessory right to any part of the trust corpus, 3) husband was not effectively an owner of the trust corpus during marriage to wife, and 4) the trust income, as a matter of law, is not community property.

DIVORCE
Post-Decree Enforcement

★★★★★ Texas Supreme Court ★★★★★

AGREEMENTS INCORPORATED IN A DIVORCE DECREE ARE CONTRACTUAL OBLIGATIONS THAT ARE NOT ENFORCEABLE BY CONTEMPT

¶ 09-2-08. ***In re Coppock,*** ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 361, 2009 WL 353499 (Tex. 2009) (02/13/09)

Facts: Husband and wife divorced in 2003. Trial court's final decree of divorce incorporated a mediated settlement agreement. The MSA purported to permanently enjoin husband and wife from communicating with each other "in a coarse or offensive manner." Other the next two years, wife communicated with husband a number of times in a manner that he felt violated the decree. Husband filed a motion to enforce the decree, which trial court granted. Trial court found 84 instances where wife violated the divorce decree and held wife in contempt. Trial court initially ordered that wife serve 3 consecutive sentences of 180-days imprisonment. Trial court subsequently suspended wife's sentence, instead placing her on 3 years of community supervision if she spent 4 nights in county jail and paid husband's attorney's fees. When wife failed to report for 4 nights in county jail, trial court issued a writ of capias for her arrest. Court of appeals treating wife's petition for writ of habeas corpus as a petition for writ of mandamus, denied relief.

Held: Habeas granted. Agreements incorporated in a divorce decree are contractual in nature and not enforceable by contempt.

Opinion: Command language is essential to create an order enforceable by contempt. Merely incorporating an agreement into the recitals of a divorce decree, without a mandate from the court, is not sufficient. In this case, the divorce decree does not contain sufficient language to advise the parties that refraining from or engaging in the described conduct is mandatory. Although reciting that the injunction is "binding on both parties," the judgment does not order or mandate compliance. Moreover, the judgment itself states that the parties' agreement, as recited therein, is "enforceable as a contract." Without decretal language making clear that a party is under order, agreements incorporated into divorce decrees are enforced only as contractual obligations. Obligations that are merely contractual cannot be enforced by contempt.

Editor's Comment: *As an introductory matter to enforcement by contempt, there must be command or order language. Otherwise, no contempt. Did there really need to be another published case on this well-established concept? The Texas Supreme Court apparently thought the issue needed further clarification. Now, hopefully, it is clear enough. M.M.O.*

ORDER FOR PSYCHIATRIC EVALUTION WAS WITHIN DISCRETION OF TRIAL COURT BECAUSE FATHER DID NOT STIPULATE TO ALL RELIEF SOUGHT BY MOTHER

¶ 09-2-09. ***In re Brown,*** ___ S.W.3d ___, 2009 WL 145456 (Tex. App.—Houston [14th Dist.] 2009) (01/16/09)

Facts: Mother and father divorced in 2001. Final decree of divorce stated that father had committed family violence and appointed mother SMC of children. Divorce decree also stated that father had intentionally inflicted emotional distress on mother and required that all of father's access to children be supervised by a third party. In 2006, an order that incorporated a mediated settlement agreement between mother and father, provided for unsupervised visitation between father and children. In 2008, mother filed for a petition for modification and temporary orders, claiming that father's actions had become increasingly violent and erratic and that father had engaged in violent and erratic conduct when he was in possession of children. Mother's petition was supported by affidavits from husband's current wife, which stated that he had committed family violence with children present. Father filed a counter-petition to modify in which he sought to be named SMC of children. On 05/21/08, trial court held a hearing on temporary orders. During hearing, trial court ordered father to take a drug test, the results of which showed positive for cocaine and zanax. Trial court further ordered that father complete a psychiatric evaluation. On 06/24/08, father filed a motion to non-suit all his claims against mother, which trial court granted. Father did not complete the psychiatric evaluation. On 07/01/08, trial court issued an order directing father to appear for an initial psychiatric evaluation on 07/11/08 at a specific time and address. Father filed a petition for writ of mandamus seeking relief from trial court's orders that he submit to psychiatric evaluation.

Held: Mandamus denied. Father's mental condition is in controversy as he did not stipulate to all relief requested by mother. Trial court did not abuse its discretion by ordering psychiatric evaluation for father.

Opinion: Father non-suited his claims for affirmative relief against mother, but he did not stipulate that mother was entitled to all relief she sought. Mother requested four points for relief in her motion to modify, however the record shows that father's counsel specifically stipulated to temporary or final orders relating to access of the children but not mother's other three points for relief. Therefore, father agreed that trial court could restrict his access to children, but did not agree as to what those restrictions would be. Father thus left it to the discretion of trial court whether his visitation should be supervised, whether a specific third party agency should be responsible for supervision, and whether overnight access should be allowed. In order to determine answers to these questions, it was within trial court's discretion to order psychiatric evaluations in order to determine father's mental condition.

Dissent (J. Guzman): Because trial court's order does not limit the scope of the psychiatric evaluation, it probably violates TRCP 204.1, which lists requirements and procedural safeguards which must be met for a trial court to compel a litigant to submit to an involuntary psychiatric evaluation.

SAPCR
Conservatorship

TEMPORARY ORDERS IN A CUSTODY MODIFICATION CANNOT EFFECTIVELY CHANGE THE PERSON WITH THE RIGHT TO DETERMINE PRIMARY RESIDENCE OF CHILD

¶ 09-2-10. ***In re Winters,*** 2008 WL 5177835 (Tex. App.—Dallas, orig. proceeding) (mem. op.) (12/11/08)

Facts: Mother and father were divorced in 2002. The divorce decree named mother and father joint managing conservators, and awarded mother the "exclusive right to designate the primary residence of [child] without regard to geographic location." In 05/08, mother obtained employment in Round Rock, Texas. On 07/07/08, mother filed a motion to modify SAPCR, requesting an increase in child support. During this time, mother relocated with child to Round Rock. On 08/23/08, associate judge entered temporary orders that increased father's child support. On 08/24/08, father filed a counter petition to modify conservatorship of child. Following a hearing on father's counter petition, associate judge entered temporary orders restricting mother's right to designate child's primary residence to Dallas County or a contiguous county. Associate judge further ordered that if mother did not return to Dallas County with child by 08/25/08, father would be appointed sole managing conservator and mother would be named possessory conservator. Mother appealed the associate judge's order to trial court. At the hearing before trial court, a minimal amount of testimony addressed the issue of whether a change in mother's right to designate child's primary residence was necessary because child's physical health or emotional development would be significantly impaired if he remained in Round Rock pending final disposition of the modification proceedings. Following the hearing, trial court affirmed associate judge's order. Mother filed a petition for writ of mandamus.

Held: Mandamus granted. A trial court cannot issue a temporary order in SAPCR modification proceeding that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child, unless is necessary to protect the child's physical health or emotional development.

Opinion: The original divorce decree gave mother the right to determine the primary residence of child without geographic limitation. The temporary orders required mother to maintain child's residence in either Dallas County or a contiguous county, and further provided that if mother did not return child to Dallas County or a contiguous county, father would be named sole managing conservator and mother would be named possessory conservator. Therefore, the temporary orders clearly had the effect of changing mother's right to designate child's primary residence and violated TFC § 156.001(b)(1).

Editor's Comment: *There was no evidence that the child's circumstances would impair his physical health or emotional development. Father claimed only that mother left the child with her live-in boyfriend who "slept a lot" which left the child unsupervised. Father also asserted that relocating the child "a significant distance" from father would significantly impair the child's emotional development. J.V.*

TRIAL COURT CAN ISSUE TEMPORARY ORDERS IN BEST INTEREST OF CHILD THAT DENY HABEAS ACTIONS TO POSSESORY PARENT, BUT THE ORDERS MUST NOT CONSTITUTE A FINAL ADJUDICATION

¶ 09-2-11. ***In re Bradshaw,*** ___ S.W.3d ___, 2008 WL 5215649 (Tex. App.—Houston [14th Dist.] 2008) (orig. proceeding) (12/16/08)

Facts: Mother and father were divorced in Tennessee in 1996. Mother and father were appointed JMC of their two children, and father was awarded the right to determine primary residence of the children. On 12/27/1996, an Oklahoma court found that it was in the children's best interest that father be appointed SMC of children, with mother as possessory conservator. Since that time, children lived with father in Virginia. On 06/17/08, mother took possession of children for summer visitation. On 08/09/08, the younger child was returned to father in Virginia, but the older child was not. Father arrived at mother's house on 08/20/08 with officers from the sheriff's office, but mother refused to release child. On 08/21/08, mother filed a SAPCR seeking to modify the Oklahoma order and to be awarded the right to determine the primary residence of older child. Trial court issued a temporary order that prohibited father from having any contact with child, directed child to remain in mother's possession, and set a hearing for 09/03/08.

On 08/25/08, father filed a petition for writ of habeas corpus, seeking the return of child. That same day, trial court issued a writ of attachment and issued an order for child to appear in court on 09/02/08. On 08/26/08, the writ of attachment was executed and child was brought to court. Associate judge conducted a hearing and interviewed child. Following the hearing, associate judge orally granted the writ of habeas corpus, rescinded the 08/21/08 temporary order, and awarded father $1,500 in attorney's fees. Child was to leave with father following the hearing, but child fled the courthouse and called mother from a nearby restaurant. Mother picked up child from the restaurant, and informed father that he could pick up child from her home. However, when father arrived at mother's home, child refused to get in the car with father, and eventually walked to a neighbor's house. On 08/27/08, father requested a second writ of attachment for child, but associate judge failed to issue the writ, stating that child would run away again if the writ was issued. On 08/29/08, trial court signed an order appointing an amicus attorney for child.

On 09/02/08, father, father's counsel, and child's amicus attorney appeared at court for the habeas proceeding, but child and mother did not appear. On 09/03/08, all parties appeared. Trial court immediately ruled that service had not been achieved on father in mother's SAPCR, because father was only in Texas to pursue a habeas action to compel the return of child. Trial court also rescinded the 08/26/08 writ of habeas corpus issued by associate judge. Following testimony by father, mother, and child, trial court orally announced he would issue a writ of habeas corpus. Trial court then met with child and amicus attorney in chambers. Following this meeting, trial court returned to the bench and announced that following an emotional outburst by child in chambers he was reopening the hearing. Following further testimony by child and mother, trial court denied the writ of habeas corpus. On 09/10/08, trial court signed temporary orders that denied habeas corpus, ordered father to pay amicus attorney's fees, directed that mother retain sole and exclusive possession of child, and ordered that father be allowed to maintain reasonable contact with child by telephone. Father subsequently brought petition for writ of mandamus, seeking to compel trial court to vacate its 09/10/08 order and issue a writ of habeas corpus for child.

Held: Mandamus denied in part, and granted in part. Trial court has wide discretion to enter temporary orders that are in best interest of child, and court of appeals will not second guess trial court in this case. However, the orders that trial court entered were final in effect rather than temporary.

Opinion: Habeas corpus is usually immediate if a trial court finds that a parent is entitled to possession under a valid custody order. However, under TFC § 157.304, a trial court may enter temporary orders if it finds that there is an immediate and serious threat to child's physical or emotional well being. Given child's history of running away from father in unfamiliar surroundings and statements on the record that he would do whatever it takes to come back to live with mother if he was returned to father's possession, trial court did not abuse its discretion by entering temporary orders that denied habeas corpus. However, since the temporary orders did not specify a date for termination of mother's custody of C.S.B. or a date set for another hearing on the matter, they were in effect a final adjudication of custody. Finally, since the "best interest" standard is not appli-

cable to a habeas corpus proceeding, trial courts order that father pay amicus attorney's fees for work performed in connection with the habeas corpus matter was an abuse of discretion.

TRIAL COURT CAN APPOINT A QUALIFIED THIRD PARTY TO DETERMINE WHEN UNSUPERVISED VISITIATION IS APPROPRIATE, BUT IT MUST ENSURE THAT ORDER IS SPECIFIC ENOUGH TO BE ENFORCEABLE BY CONTEMPT

¶ 09-2-12. ***In re J.S.P.,*** ___ S.W.3d ___, 2008 WL 5423036 (Tex. App.—San Antonio 2008) (12/31/08)

Facts: Father, who sustained severe head injuries in a car accident, met mother at a rehabilitation center. In February 1999, mother and father had child. In 2002, maternal grandmother filed a SAPCR seeking custody of child based on mother and father's inability to care for child due to mental handicaps. An agreed order was entered that named maternal grandmother sole managing conservator of child, with father having visitation (supervised by maternal grandmother) as agreed up by parties. In 2004, father filed a new SAPCR, seeking to be named joint managing conservator of child with the right to determine child's primary residence. On 05/10/05, temporary orders were entered that set up a schedule for supervised visitation between father and child, but authorized supervision by persons other than maternal grandmother. In 2007, a jury trial was held on the conservatorship issues. Father was named joint managing conservator along with maternal grandmother, grandmother retained the exclusive right to determine child's residence, and father was ordered to pay child support. Trial court then conducted a bench trial on the issues of possession and access. Trial court continued the scheduled supervised visitations, but ordered that father work with a clinical psychologist to develop a transitory program leading toward unsupervised visitation, with the ultimate goal of a standard possession order at a time that psychologist determined was appropriate. Trial court further ordered father to pay child support and attorney's fees. Father appealed trial court's order regarding possession and access.

Held: Affirmed in part, reversed and remanded in part. The portions of trial court's order pertaining to child support and attorney's fees were affirmed. The portions of the order relating to possession and access was reversed and remanded to the trial court for further clarification. Trial court was encouraged to enter a reporting schedule or other deadlines for psychologist to adhere to.

Opinion: Trial court did not err by allowing a qualified, neutral third party to determine any future expansions of periods of possession and access of child. In complex family situations where trial court is not in the best position to determine when a parent is capable of exercising unsupervised periods of possession, "delegating specific issues related to possession and access appears to be permissible so long as the parent maintains access to their child, and only faces the possibility of the denial of specific periods of possession." However, trial court's order is not specific enough to be enforceable by contempt. In order to meet the specificity requirements, trial court's order should establish dates by which the transitory program leading to unsupervised visitation should be developed, dates by which the standard possession order should begin, or a deadline by which psychologist must provide trial court with a written status report documenting the reasons why a transitory program leading to unsupervised visitation could not be developed, or a deadline for the commencement of a standard possession order could not be given.

FAMILY CODE SECTION 102.004(A)(2) LIMITS STANDING TO FILE SAPCR TO RELATIVES WITHIN THREE DEGREES OF CONSAGUINITY, NOT AFFINITY

¶ 09-2-13. ***In re A.M.S.,*** ___ S.W.3d ___, 2009 WL 78135 (Tex. App.—Texarkana 2008) (01/14/08)

Facts: Paternal aunt and husband filed a SAPCR seeking to be named JMC along with mother and father. The petition stated that child was suffering from malnutrition and that mother and father consented to paternal aunt and husband being named JMC. Trial court held a hearing on the SAPCR, at which mother and Father appeared pro se. The record shows that mother and father consented to paternal aunt and husband being

named as JMC in open court. Following trial court approving the agreement, mother and father retained counsel and filed a motion for appeal. Mother and father claimed that paternal aunt and husband lacked standing because there is no evidence of circumstances endangering the child's physical health, no evidence the parents consented to the petition, and that trial court's interpretation of TFC §102.004(a)(2) is unconstitutional.

Held: Affirmed as modified. Paternal aunt had standing under TFC § 102.004 to bring the original SAPCR, but husband did not.

Opinion: The record shows that both mother and father consented to the SAPCR in open court. Trial court's interpretation of TFC § 102.004(a)(2), which allowed mother and father to consent to the SAPCR after the petition was filed is constitutional, because a relative of a child has a particularized injury distinct from the general public. TFC § 102.004(a)(2) limits standing to relatives within three degrees of consanguinity. Paternal aunt is father's sister, and thus clearly falls within the statutory guideline. However, paternal aunt's husband is related to child within three degrees of affinity (by marriage) as opposed to consanguinity. As such, paternal aunt's husband did not have standing. Court of appeal modified the trial court's order to strike husband and only name paternal aunt as JMC along with mother and father.

CUSTODY ORDER ENTERED IN CHILD'S HOME STATE CONTROLS WHEN TWO VALID CUSTODY AND SUPPORT ORDERS EXIST IN SEPARATE STATES

¶ 09-2-14. ***Ellithorp v. Ellithorp,*** ___ S.W.3d ___, 2009 WL 130271 (Tex. App.—El Paso 2009) (01/15/08)

Facts: In 1980, mother and father married in Ohio. Mother and father had two children. In 1990, mother and father moved with children to West Virginia. In 1993, father joined the Army and was subsequently stationed in El Paso, TX. Mother and children remained in West Virginia. On 07/21/94, mother filed for divorce in West Virginia. Father was served through the West Virginia Secretary of State's office on the same date, however there is no record that he filed an answer in West Virginia. On 07/26/94, father filed for divorce in Texas. On 09/15/94, mother appeared in the Texas divorce proceeding by letter to trial court indicating that she had filed in West Virginia five days before the Texas proceeding was instituted. On 10/14/94, West Virginia trial court notified Texas trial court by letter that mother's divorce petition was filed five days before father's divorce petition and inquired if Texas intended to exercise jurisdiction. Texas trial court responded that it intended to pursue jurisdiction. Following Texas trial court's reply, West Virginia trial court recommended dismissing the case. On 11/14/94, mother filed an exception to West Virginia trial court's recommendation.

In 12/94, Texas trial court held a hearing on father's divorce petition. Mother failed to appear. Trial court entered a final decree of divorce effective 12/30/94 naming mother and father joint managing conservators, mother was appointed managing conservator, father was granted access to children under a standard possession order, and father was ordered to pay child support.

On 01/03/95, West Virginia trial court held a hearing on mother's divorce petition. Father did not appear. On 05/11/95, West Virginia trial court entered a final divorce order. The West Virginia order stated it was effective 12/22/94, prior to the 01/03/95 hearing. Under the West Virginia order, mother was awarded custody of the children, awarded child support in excess of the Texas award, and awarded spousal support.

On 02/03/97, mother and father entered into an agreed order in West Virginia. This was the first time in the two cases that both mother and father appeared in the same forum. Pursuant to the agreed order, the Texas decree was entered of record in West Virginia along with a Texas enforcement order dated on 05/30/96. West Virginia trial court entered a final order encompassing the agreed order on 05/11/97.

Several years later, in response to an enforcement action filed by the West Virginia Bureau for Child Support Enforcement, father filed a special appearance, contending he was not subject to personal jurisdiction in West Virginia. The West Virginia Supreme Court ultimately denied father's special appearance, holding that father submitted to jurisdiction under the agreed order. Concurrently, mother filed a special appearance

in Texas, in response to father's continued efforts to enforce the Texas support order and halt wage withholding. On 05/06/02, Texas trial court denied mother's special appearance, finding it was not timely filed.

On 09/17/04, West Virginia trial court entered a "Corrected Final Order" pursuant to West Virginia Supreme Court's ruling that father submitted to jurisdiction in West Virginia. Father did not appear. On 10/21/04, mother filed a petition to enforce the West Virginia order in Texas. Father contested the petition, arguing the 1995 Texas divorce decree was the "controlling order" under the Uniform Interstate Family Support Act (UIFSA). Texas trial court agreed with father's argument and denied mother's petition on 08/21/06. Mother appealed.

Held: Reversed and remanded. When there are multiple valid orders, the controlling order is determined by the home state of children.

Opinion: Neither the Texas nor West Virginia orders were challenged by either party as inconsistent with the laws of the respective state, therefore both orders are valid orders. As such, both states have continuing, exclusive jurisdiction under UIFSA. However, West Virginia is the home state of children affected by the orders. Under TFC § 159.207(b)(2)(A), because West Virginia is the home state of the children for whose support these orders have been issued, the West Virginia order is the controlling order.

VENUE TRANSFER TO COUNTY OF CHILDREN'S PRINCIPAL RESIDENCE FOR PRECEDING SIX MONTH PERIOD MANDATORY UNDER FAMILY CODE SECTION 155.201(b)

¶ 09-2-15. ***In re Nabors,*** ___ S.W.3d ___, 2009 WL 145264 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (01/16/09)

Facts: On 05/16/06, TDFPS placed children with foster parents. On 08/22/07, trial court signed an order that terminated biological parent's parental rights and named TDFPS as children's SMC. On 10/26/07, children were removed from foster parent's home on allegations of abuse. TDFPS later informed foster parents that "[b]ased on the information gathered, it was determined that you had no role and the investigation was closed." However, children were not returned to the foster parent's home. On 11/09/07, foster parents filed a petition for adoption and motion to modify SAPCR in Harris County, with an accompanying motion to transfer venue to Fort Bend County. Foster parents alleged that Fort Bend County was the children's principal place of residence during the six-month period preceding the filing of the suit. On 12/19/07 TDFPS filed an answer. On 02/04/08 TDFPS filed a response to foster parent's motion to transfer venue. Trial court subsequently orally denied foster parent's motion to transfer venue. Foster parents filed a petition for writ of mandamus, seeking to compel trial court to transfer venue to Fort Bend County.

Held: Mandamus granted. Transfer was mandatory under TFC § 155.201(b), and trial court abused its discretion by failing to grant foster parent's motion to transfer venue.

Opinion: Foster parents correctly filed in Harris County, as that court had continuing, exclusive jurisdiction. Transfer procedures under TFC are the exclusive mechanism for transfer in a SAPCR. Under TFC § 155.201(b), venue is proper in the county that has been the principal residence of children for the preceding six-months. TDFPS's argument that children's principal residence should be Harris County because TDFPS was awarded SMC of children has been rejected by at least two other courts of appeals. Therefore, under TFC § 155.201(b), transfer of venue to Fort Bend County was mandatory. As such, trial court abused its discretion by failing to grant foster parent's motion to transfer venue.

Dissent (J. Frost): Under the TFC 155.201(b), foster parents had to prove that children's principal residence was in Fort Bend County throughout the six-month period ending on the date foster parents filed suit. Because children's principal residence was in Harris County during the last 14 days of this period, foster parents did not show entitlement to a mandatory venue transfer.

Editor's Comment: *Here, the dissent carefully deconstructs the grammar used in Section 155.201 and makes a well-reasoned argument that the six-month period ends on the day of filing based upon the language used by the Legislature. G.L.S.*

TRIAL COURT MUST TRANSFER VENUE TO COUNTY OF CHILD'S PRINCIPLE RESIDENCE FOR PRECEEDING SIX MONTHS

¶ 09-2-16. ***In re Dozier,*** 2009 WL 214334 (Tex. App.—Amarillo 2009, orig. proceeding) (memo op.) (01/29/09) (mandamus pending in Texas Supreme Court)

Facts: Mother and father were married and lived in Potter County with child. On 06/27/07, mother and child moved to Cottle County. On 06/29/07, mother filed for divorce in Potter County. On 07/25/07, trial court entered temporary orders naming mother and father as temporary JMC, with mother having the temporary right to establish child's residence in Cottle County. On 08/26/08, based upon a jury verdict after a three-day trial, trial court entered a final decree of divorce naming mother and father permanent JMC, but restricted mother's right to determine the residence of child to Potter or Randall Counties. Trial court further ordered that mother establish child's residence in the specified counties by 10/15/08. On 10/10/08, mother filed a motion to modify and a motion to transfer venue to Cottle County. The motion to transfer venue was supported by an affidavit stating that mother and child had continuously resided in Cottle County, Texas, from 06/28/07 until 10/08/08, the date of the signing of the affidavit. In compliance with trial court's order, on 10/09/08, mother signed a notice of change of address indicating that, effective 10/15/08, mother and the child would reside in Randall County. Father contended in his response to the motion to transfer venue that the motion should be denied due to the fact that child did not reside in Cottle County on the date the motion was filed. Trial court convened an evidentiary hearing to consider the motion to transfer and ultimately denied it. Mother filed a petition for writ of mandamus.

Held: Mandamus granted. Trial court had a mandatory duty to transfer venue because child's principle residence was Cottle County for 6 months immediately preceding the motion.

Opinion: Under TFC § 155.201, if a SAPCR is filed in the court having continuing, exclusive jurisdiction, on the timely motion of a party the court shall transfer the proceeding to another county in this state if the child has resided in the other county for six months or longer. Under TFC § 155.203, a court may not require that the period of residence be continuous and uninterrupted but shall look to the child's principal residence during the six-month period preceding the commencement of the suit. Trial court had a mandatory duty to transfer SAPCR to Cottle County because the child's principle residence was in that county for at least six months prior to commencement of the suit, even if child was not a resident of the county on the date suit was filed.

Dissent: "Underlying trial court's determination is the question of whether or not [mother] and child had resided in Cottle County for the requisite period of time before seeking transfer. Though [mother] testified that they did, other evidence illustrated that the Cottle County house she supposedly lived in was vacant, that she periodically stayed with her boyfriend in a neighboring county, and that she told [father] that she had a new address in Randall County. Thus, trial court was obligated to consider the credibility of the parties, weigh the evidence and decide if the child had indeed lived in Cottle County for the last six months. And, because it did, I would deny mandamus because an appellate court may not grant such relief when resolution of a fact issue underlies the trial court's decision."

POSSESSION ORDER REQUIRING DRUG TESTING PRIOR TO PERIODS OF POSSESSION WAS SUFFCIENTLY SPECIFIC AND ENFORCEABLE

¶ 09-2-17. ***In re A.L.E.,*** ___ S.W.3d ___, 2009 WL 334855 (Tex. App.—Houston [14th Dist.] 2009) (02/12/09)

Facts: Mother and father had a "tumultuous, drug-filled relationship" prior to birth of child. Mother maintained a period of sobriety in 1995, prior to birth of child, but resumed her drug use following child's birth. Mother and father ended relationship in 1995. Father became sober in 1999, and expressed a desire to remain in child's life. In 2001, mother and father reached a custody agreement that was confirmed by trial court on 02/19/01. Mother and father were named JMC, mother was given right to determine child's primary residence, and father was granted a standard possession order. In 04/06, father sought modification of the 2001 order. Father filed a motion for modification seeking to be named child's SMC and for mother's visitation to be supervised due to alleged drug use in child's presence. Trial court ordered both parties to submit to drug tests. Mother tested positive for cocaine. Trial court issued an order that modified the previous custody arrangement. Father was awarded the right to determine child's primary residence, and mother was awarded a standard possession order with unsupervised visitation. Trial court's order also stated that mother must submit to drug testing at least 48-hours prior to each period of possession for three years and, if she tested positive, the standard possession order would be changed to supervised visitation. Mother appealed trial court's order.

Held: Affirmed. Trial court did not abuse its discretion by amending the 2001 order due to change in circumstances, and it entered a specific, enforceable possession order.

Opinion: Under TFC § 156.101(1), a court must find a change in circumstances to modify a custody order; however change in circumstances is not limited to parents. The record supports that child had experienced a change in circumstances since the 2001 order sufficient to warrant a modification. Thus, trial court did not abuse its discretion by modifying the original order. Further, mother's argument that trial court's order gives father the right to deny visitation, unenforceable by contempt, is erroneous. The order requires mother to submit to drug testing at a specified time and to a specified third party. The only discretion father has is to require proof of drug testing prior to periods of mother's possession. If father denied visitation unreasonably, mother can enforce the court order through contempt proceedings.

GRANDPARENTS MUST SHOW THAT DENIAL OF ACCESS WOULD SIGNIFICANTLY IMPAIR CHILD'S PHYSICAL HEALTH OR EMOTIONAL WELL BEING IN ORDER TO OBTAIN COURT ORDERED ACCESS TO CHILD

¶ 09-2-18. ***In re J.M.T.,*** ___ S.W.3d ___, 2009 WL 475118 (Tex. App.—Eastland 2009) (02/26/09)

Facts: Paternal grandparents filed a petition against biological parents of child seeking to be named joint managing conservators of child. Maternal grandparents intervened by seeking an order granting them possession or access to child. Additionally, maternal grandparents filed an amended petition seeking to terminate biological parents' parental rights and adopt child. Subsequently, biological parents executed affidavits relinquishing their parental rights. On 09/21/07, trial court held a hearing. Paternal grandparents did not oppose maternal grandparents' efforts to terminate biological parents' parental rights or their request to adopt child. Trial court granted the requested termination and adoption and named maternal grandparents as parents of child. Trial court then conducted a contested hearing on paternal grandparents' request for an order providing them access to child. Trial court granted paternal grandparents' request for grandparent access and entered an order providing possession of the child on the first weekend of each month, a portion of the Thanksgiving and Christmas holidays, and one week each summer. Maternal grandparents appealed.

Held: Reversed and rendered. Trial court abused its discretion by granting paternal grandparents access and possession of child without sufficient evidence that denial of access would significantly impair child's physical health of emotional well being.

Opinion: Maternal grandparents were named adoptive parents of child by trial court. TFC § 153.433(2) requires that a grandparent seeking court ordered access overcome the presumption that a parent acts in his or her child's best interest by proving by a preponderance of the evidence that a denial of access to the child would significantly impair the child's physical health or emotional well-being. Therefore, trial court abused its discretion by granting paternal grandparents possession and access to child because there was not sufficient evidence to overcome the statutory presumption in favor of maternal grandparents as child's parents.

Editor's Comment: *The paternal grandmother testified that denial of possession and access to the paternal grandparents would significantly impair the child's emotional development. The maternal grandparents, who had just adopted the child, said they not intend to deny access but disagreed that there should be a "fixed, court-mandated schedule." This case is indistinguishable from Troxel v. Granville, 530 U.S. 57 (2000). The court also cited In re Mays-Hooper, 189 S.W.3d 777 (Tex. 2006), which might be summarized, "Allowing some grandparent possession prevents more." J.V.*

SAPCR
Child Support

OBLIGOR'S CHILD SUPPORT OBLIGATION SHOULD BE REDUCED IF CHILDREN RECEIVE SOCIAL SECURITY BENEFITS ON HIS BEHALF

¶ 09-2-19. ***In re K.N.C.,*** ___ S.W.3d ___, 2008 WL 5235698 (Tex. App.—Dallas 2008) (12/17/08)

Facts: Mother and father married in 1990. Two children were born of the marriage. During the marriage, the parties lived in a house father purchased prior to marriage. Mother and father both worked full time, until father was injured in a car accident in 1996. Father was disabled as a result, and at the time of the divorce was still receiving monthly social security disability benefits. Mother filed for divorce in 2006. Following a trial, trial court appointed mother and father joint managing conservators with father having weekend visits supervised by a competent adult "as agreed to by the parties", ordered that father pay child support of $230 a month, and divided the community estate. Father filed this appeal, challenging the final divorce decree entered by trial court. Father claimed that trial court abused its discretion by ordering him to pay child support when children receive social security benefits because of his disability; ordering possession terms that are so vague as to be unenforceable by contempt; and ordering a division of property where mother received one-hundred percent of the community estate.

Held: Affirmed as modified. Father's child support should be modified because of the amount children received in disability benefits as a result of father's injury, and the supervised visitation language is modified to name specific individuals. Trial court's division of the community property estate was not an abuse of discretion.

Opinion: Both children receive $322 of social security benefits as a result of father's disability. Under TFC § 154.132, guidelines are set out for how much support an obligor who is receiving disability benefits should pay, and the $322 per child already paid each month exceeds those guidelines. Although trial court explained that the extra $230 per month was due to father's intentional underemployment, there is insufficient evidence in the record to support this finding. The wording of the supervised visitation operated to give mother veto power over visitation if she does not agree upon a supervisor, and as such she could limit father's visits without recourse. That portion of the decree should be modified to name specific agreed upon parties. Trial court has wide discretion to divide the community estate. The record supports trial court's finding that father wast-

ed community property during the marriage and disposed of community property vehicles during the pendency of the divorce with no benefit to mother. As such, trial court did not abuse its discretion with regard to the division of the community estate.

Editor's Comment: *That the obligor applied for a city job two years earlier constituted insufficient evidence to show intentional unemployment when the parties did not dispute that the obligor previously had been seriously injured in an automobile accident and unemployed since that time. J.V.*

A CHILD SUPPORT ORDER IS NOT EVIDENCE OF AN OBLIGOR'S ABILITY TO PAY SUPPORT FOR TWELVE CONSECUTIVE MONTHS AS REQUIRED BY FAMILY CODE SECTION 161.001(1)(F)

¶ 09-2-20. ***In re N.A.F.,*** ___ S.W.3d ___, 2009 WL 333801 (Tex. App.—Waco 2009) (02/11/09)

Facts: On 11/15/07, mother filed a petition to terminate father's parental rights of asserting two statutory grounds. After a bench trial at which father did not appear due to incarceration, trial court terminated father's parental rights on the sole ground that he failed to support child in accordance with his ability. Father appealed, claiming that trial court erred in terminating his parental rights because the evidence was legally insufficient to establish his ability to pay child support for each month that he failed to pay child support during one year ending within six months of the filing of the petition seeking termination as required by TFC § 161.001(1)(F).

Held: Reversed and remanded. The evidence was factually insufficient to support trial court's ruling.

Opinion: The party seeking termination under TFC §161.001(1)(F) has the burden to prove by clear and convincing evidence that the offending party had the ability to pay during each of the months it is claimed he failed to support child in accordance with his ability. Mother's testimony at trial did not reach father's ability to pay or his employment history nor did mother testify as to when father's incarceration began. Accordingly, the evidence was legally insufficient for a reasonable factfinder to form a "firm belief or conviction" that father failed to support child in accordance with his ability for twelve consecutive months as required by statute. Finally, mother asserts that a child support order includes with an implied finding that on obligor has the ability to pay. Court of appeals overturned an earlier ruling (*In re J.M.T.*, 39 S.W.3d 234, 239 (Tex. App.—Waco 1999, no pet.), stating that a child-support order is no evidence of father's ability to pay support for twelve consecutive months required by subsection 161.001(1)(F).

TRIAL COURT ABUSED ITS DISCRETION BY DISSOLVING A VALID ADMINISTRATIVE WRIT USED TO ENFORCE MODIFIED CHILD SUPPORT AWARD

¶ 09-2-21. ***In re B.N.A.,*** ___ S.W.3d ___, 2009 WL 445610 (Tex. App.—Dallas 2009) (02/24/09)

Facts: In 1991, AG filed petition to establish paternity of father, which father did not contest. Additionally, father agreed to pay $800 a month in child support. In 2001, father fell behind in his child support payments due to a change in employment. In 07/06, father filed a motion to modify his support obligation based on a material change in income. Father requested that trial court reduce and recalculate the amount of his monthly payment on any arrears and that the reduction be effective retroactively to the earlier of time of service on mother or her appearance in the modification action. AG did not file a response, counterclaim, or cross-claim to father's motion to modify. However, AG appeared at a pretrial hearing and signed the pretrial order, which set the case for 04/23/07. Mother and father appeared at the 04/23/07 hearing, but AG did not. At hearing, father testified that he was a former NFL football player, that he was injured in 1999, and cut after the 2000-01 season, after which time his income dropped substantially. Father also had two daughters with current girlfriend and another son he was supporting. Father also testified that he was self employed, but that he was coaching football at a college in exchange for tuition and fees for classes towards a degree. In an order dated

04/24/07, trial court reduced father's child support to $540 a month and determined that father owed over $18,000 in arrearages. Father agreed to contribute $50 a month to the arrearage. Trial court ordered that father should make payment's payable to GAL for processing, and that AG should forward all payments received to GAL. On 04/25/07, AG filed motion for rehearing. AG alleged that it failed to appear at the 04/23/07 hearing due to a calendar mistake and that father actually owed over $60,000 in child support arrearages. At the hearing on the motion for rehearing, the AG stated on the record, "Being that [mother's] not here, we're not going to pursue a recalculation of the arrears. So we just basically have some issues with the order." Trial court denied AG's motion for rehearing. While AG's motion for rehearing was pending, AG filed an administrative writ of withholding with the college where father coached. Father filed a motion to dissolve the writ and requested an award of attorneys' fees against AG claiming the writ was frivolous. Trial court found that AG's action was frivolous and in direct violation of trial court's order. Trial court dissolved the writ and awarded father's attorney an award of $1,000 against AG.

Held: Vacated in part, reversed and rendered in part. Trial court lacked jurisdiction to compel AG to remit child support payments to GAL. Trial court abused its discretion by dissolving AG's administrative writ and awarding father attorney's fees.

Opinion: The portion of trial court's order directing AG to remit child support payments to GAL is void under Texas Government Code § 22.002. Only Texas Supreme Court can compel AG to act, as such trial court lacked jurisdiction to order AG to remit child support payments to GAL. Under TFC § 158.502(a), AG is authorized to issue an administrative writ of withholding at any time until all current child support and arrearages have been paid. The writ in this case was based on the modified monthly child support required by trial court's modification order. Therefore, trial court abused its discretion in imposing costs against OAG.

SAPCR
Termination of Parental Rights

★★★★★ Texas Supreme Court ★★★★★

UNDER FORMER FAMILY CODE § 263.401, IF MOTION FOR NEW TRIAL IS GRANTED AFTER FINAL JUDGMENT, A TRIAL COURT MUST ENTER FINAL ORDERS OR EXTENSION IN NEW TRIAL WITHIN ONE YEAR OF INITIAL REMOVAL OF CHILD

¶ 09-2-22. ***In re Department of Family & Protective Services,*** ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 277, 2009 WL 51579 (Tex. 2009, orig. proceeding) (01/09/09)

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

Held: Mandamus denied. Court of appeals reached the correct decision in ordering trial court to dismiss case.

Opinion: Statutory dismissal dates setting forth time limits for which trial court may retain case on its docket are not jurisdictional. Due to the fact that mother met the statutory guidelines for filing a motion to dismiss, she did not waive her right to dismissal. Therefore, trial court was required under TFC §263.401 to grant the motion. Finally, mother did not have an adequate remedy by appeal. As such, court of appeal decision to grant mandamus was proper.

Regarding the dissents – the invited error doctrine does not apply because mother did not assert error for the trial court granting new trial as she requested, she only asserted error for the trial court failing to grant her motion to dismiss. Further, mother was not estopped from seeking mandamus because she did not argue any points on appeal other than those that she argued in trial court. Further, TFC § 263.402(a) provides that parties cannot waive the statutory dismissal date by agreement or otherwise. Allowing the parties agreement for a continuance absent a court order granting an extension is contrary to the legislature's intent to not let termination cases linger on the docket.

Dissent (J. Hecht): "The question that really matters is the one the Court refuses to answer: after a suit by the Department to terminate parental rights is dismissed due to a failure to meet the deadlines in TFC § 263.401, can [TDFPS] simply refile the same suit, retain custody of the child, and continue on as before, essentially unaffected? … I would hold that even if this suit is dismissed, the Department can refile the same action as long as there are factual and legal grounds to do so."

Dissent (J. Brister): "Surely no one-not even a mother fighting to keep her kids-can ask for a new trial and then demand dismissal because she got it. There *was* a final order before the statutory one-year deadline in this case, but the mother asked the trial court to set it aside and give her a new trial and later a resetting after the deadline had passed. Having gotten what she wanted, she is not entitled to complain that the trial court should have turned her down. Because the Court holds otherwise, I respectfully dissent."

Editor's Comment: *The mother demanded dismissal because TFC § 263.401 requires it, not because the court granted her motion for a new trial, notwithstanding Justice Brister's description of the mother's position in his dissent. J.V.*

ALLEDGED FATHER WHO ADMITS PATERNITY IS ENTITLED TO REQUIRE THAT TDFPS PROOVE ONE OF THE GROUNDS UNDER FAMILY CODE §161.001 BEFORE HIS PARENTAL RIGHTS ARE TERMINATED

¶ 09-2-23. ***In re D.M.F.,*** ___ S.W.3d ___, 2008 WL 5194296 (Tex. App.—Fort Worth 2008) (12/11/08)

Facts: Mother and father lived together in Tennessee. Mother broke off their relationship and moved to Texas. Unbeknownst to either mother or father, at the time mother moved to Texas she was pregnant with father's child. Child was born in Texas in 2006. Due to mother's past history with TDFPS and her history of mental illness, TDFPS removed child the day after he was born and placed him in a foster home. Mother filed an Affidavit of Status naming father the alleged father, but father was not served until after temporary orders had been entered following the initial hearing. After service and completion of DNA testing identifying him as the biological father, father and grandfather filed a motion asking trial court to place child with them. They also asked that foster parents be struck from the suit. In response, foster parents challenged father and grandfather's standing to bring suit. Trial court denied both motions. TDFPS set up a service plan for father, which he completed from Tennessee for the next four months. On 03/12/08, trial court concluded permanency hearing after TDFPS caseworker testified without allowing either father or foster parents to testify. On 04/02/08, trial court conducted final hearing. TDFPS recommended that child be placed with father if he completed counseling. Hearing was suspended to let father complete counseling, and resumed on 04/25/08 after father successfully completed counseling. After the resumption of the final hearing, trial court terminated father's paternal rights under TFC §§ 161.001(H) and (O) and appointed foster parents managing conservators. Father appealed TC's ruling.

Held: Reversed and remanded. TDFPS must prove at least one ground for termination under TFC § 161.001 prior to terminating the parental rights of father who acknowledges paternity.

Opinion: TFC § 161.001(H) only applies to a parent. At the time of the suit, father was only an alleged father. As such, father could not have knowingly abandoned mother during her pregnancy continuing through the birth of child as required by TFC. Likewise, TFC § 161.001(O) did not apply to father, the requirement that a parent comply with a court ordered service plan applies only to a parent whose actions cause a child to be removed from his or her care. At the time of the initial hearing when the orders were issued, father was only an alleged parent and had yet to be served.

INTERLOCUTORY ORDER TERMINATING PARENTAL RIGHTS IS NOT A FINAL ORDER UNDER FAMILY CODE SECTION 263.405, NOR IS QUESTIONING THE CONSTITITONALITY OF SECTION 263.405 A FRIVILOUS BASIS FOR APPEAL – EXAMPLE I

¶ 09-2-24. ***M.C. v. Texas Department of Family Protective Services,*** ___ S.W.3d ___, 2008 WL 5175879 (Tex. App.—El Paso) (12/11/08)

Facts: On 01/11/07, TDFPS filed a petition to terminate the parental rights of mother and father. On 12/05/07, associate judge announced in open court that TDFPS had proved its allegations by clear and convincing evidence and that termination of Mother's parental rights was in child's best interest. On 12/11/07, mother filed a premature notice of appeal, as no order had yet been entered. On 12/18/07, associate judge entered an interlocutory order terminating mother's parental rights. On 01/14/08 associate judge entered an order terminating father's parental rights, which was adopted by trial court on 01/15/08. On 01/28/08, mother filed an amended notice of appeal and SOP. Mother's SOP challenged the constitutionality of TFC § 263.405. Trial court held a hearing on mothers SOP and determined that an appeal would be frivolous. Mother appealed trial court's finding of frivolousness. In its answer, TDFPS claimed that the order terminating mother's parental rights on 12/18/07 was a final order under former TFC § 263.401(d) and mothers failed to meet the statutory 20 day requirement for filing a SOP.

Held: Reversed and remanded. The interlocutory order was not the final order in the case, and therefore mother's SOP was timely filed. Mother's appeal is not frivolous because at least one appellate court has held that TFC § 263.405 is unconstitutional.

Opinion: The language of former TFC § 263.401(d) limited its application to proceedings under that section, and does not apply to father's SOP filed under TFC § 263.405. Accordingly, mother's SOP was timely filed within 20 days of the final order in this case. Since at least one court of appeals has held TFC § 263.405 to be unconstitutional, mother's appeal raises substantial issues and deserves to proceed on the merits.

Editor's Comment: *In re D.W., 249 S.W.3d 625 (Tex. App. - Fort Worth), pet. denied, 260 S.W.3d 462 (Tex. 2008), held TFC § 263.405 unconstitutional. In denying petition for review, the Texas Supreme Court neither approved nor disapproved the court of appeals' holding regarding TFC § 263.405's constitutionality. J.V.*

ALLEDGED FATHER WHO ADMITS PATERNITY IS ENTITLED TO REQUIRE THAT TDFPS PROVE ONE OF THE GROUNDS UNDER FAMILY CODE §161.001 BEFORE HIS PARENTAL RIGHTS ARE TERMINATED

¶ 09-2-25. ***In re C.M.C.,*** ___ S.W.3d ___, 2008 WL 5244929 (Tex. App.—Houston [14th Dist.] 2008) (op. on rehearing) (12/18/08)

Facts: On 02/27/06 police responded to a report of a disturbance at mother's residence, at which time mother was threatening to kill "someone." Mother was taken into custody and TDFPS placed them with a maternal

aunt under a FBSS case. Mother was subsequently admitted to a psychiatric hospital on 02/28/06. After receiving treatment, mother was released on 03/08/06. Maternal aunt took children to live with maternal grandmother in Louisiana, however when a case worker from Louisiana attempted to interview grandmother it was discovered that grandmother had sent children back to live with mother. On 03/29/06, police were again called to mother's house. Police found mother "acting crazy" and again took her into custody. On 03/30/06, mother was admitted for treatment at a mental health facility. On the same date, TDFPS took emergency custody of children and placed them with a foster family. Following a permanency hearing on 06/28/06, trial court issued an order that approved the family-service plan established by TDFPS for parents to regain custody of children. During the course of the case, mother had sporadic contact with the children and failed to comply with the TDFPS family-service plan. On 05/25/06 mother identified father to TDFPS, who issued an affidavit of status. Five days later, on 05/30/06, father contacted TDFPS. Father received a copy of the family-service plan from TDFPS and returned a signed copy to TDFPS. Father was served with TDFPS's second amended petition on 01/26/07. On 07/24/07, father's court-appointed attorney filed an answer in which father was identified as father of children.

Trial was held on 09/18/07. Prior to trial, father's attorney informed trial court that father could not attend in person and requested that father be allowed to participate by telephone; trial court denied the request. During trial father's attorney informed the court that Charles had executed a sworn statement attesting that he was the father of the children in the case, and that the statement had been filed with the court. The statement was subsequently admitted into evidence without objection. Following the bench trial, trial court terminated both mother and father's parental rights. Trial court found that mother had constructively abandoned children under TFC §161.001(N) and that mother had failed to comply with a court order establishing the actions necessary to regain custody of children under TFC §161.001(O). Trial court also found that termination of mother's parental rights would be in the best interest of children. Trial court found that father was the alleged biological father of children, and terminated his parental rights under TFC §§ 161.002(b)(1). Mother and father appealed the termination of parental rights.

Held: Affirmed in part, reversed and remanded in part. Termination of mother's parental rights was affirmed, but father's actions caused a higher evidentiary standard to be required before his parental rights could be terminated.

Opinion: The evidence supported trial court's finding of termination of mother's parental rights under TFC §161.001(N), as such trial court did not abuse its discretion when it terminated mother's parental rights. However, trial court erred when it terminated father's rights under §161.002(b)(1). Father's actions were sufficient to put TDFPS and trial court on notice that he admitted his paternity and wanted to oppose termination of parental rights. By admitting paternity, father is entitled to proceed to trial and require TDFPS to prove by clear and convincing evidence that he engaged in one of the types of conduct listed in TFC § 161.001(1) and that termination of his parental rights is in the children's best interests.

INTERLOCUTORY ORDER TERMINATING PARENTAL RIGHTS IS NOT A FINAL ORDER UNDER FAMILY CODE SECTION 263.405, NOR IS QUESTIONING THE CONSTITITONALITY OF SECTION 263.405 A FRIVILOUS BASIS FOR APPEAL – EXAMPLE II

¶ 09-2-26. ***In re D.R.,*** ___ S.W.3d ___, 2008 WL 5256431 (Tex. App.—El Paso 2008) (12/18/08)

Facts: Father was incarcerated during a proceeding initiated by TDFPS to terminate his parental rights. On 09/24/07, trial court terminated father's parental rights in an interlocutory order following a jury trial and appointed TDFPS as managing conservator of children. On 11/14/07, trial court entered an "Order of Termination" addressing additional parties and children involved in the case. The 11/14/07 order recited that father did not appear. On 11/27/07, father's counsel entered a SOP for appeal in trial court. Father's SOP challenged the constitutionality of TFC § 263.405(b), (d) and (i). On 12/10/07, trial court determined that father's SOP was frivolous. Father appealed trial court's ruling. TDFPS's answer contends that the interlocutory or-

der entered on 09/24/07 was a final order under former TFC § 263.401(d) and father's appeal fell outside the statutory 20 day requirement for filing a SOP.

Held: Reversed and remanded. In this case, the interlocutory order was not the final order with regards to father, and therefore his SOP was timely filed. Father's appeal is not frivolous because at least one appellate court has held that TFC § 263.405 is unconstitutional.

Opinion: The language of former TFC § 263.401(d) limited its application to proceedings under that section, and does not apply to father's SOP filed under TFC § 263.405. As such, father's SOP was timely filed within 20 days of the final order in this case. Since at least one court of appeals has held TFC § 263.405 to be unconstitutional, father's appeal raises substantial issues and deserves to proceed on the merits.

POSSIBILITY OF PAROLE IS NOT SUFFICIENT EVIDENCE TO SHOW TRIAL COURT ABUSED DISCRETION FOR TERMINATION UNDER FAMILY CODE SECTION 161.001(1)(Q)

¶ 09-2-27. ***In re Z.C.,*** ___ S.W.3d ___, 2009 WL 385380 (Tex. App.—Fort Worth 2009) (02/12/09)

Facts: Mother and father had three children upon their divorce in 2003. Mother and father's divorce decree named both parents JMC of children. Following divorce, mother married stepfather and had another child. In 2007, TDFPS petitioned to terminate mother, father, and step father's parental rights due to alleged child abuse. Trial court terminated father's, mother's, and stepfather's parental rights under TFC § 161.001(1)(D) and (E). Additionally, trial court terminated stepfather's parental rights under TFC § 161.001(1)(Q). Father and step father appealed.

Held: Affirmed. The evidence was legally and factually sufficient to terminate father and stepfather's parental rights, and termination was shown to be in children's best interest.

Opinion: Father and stepfather's statement of points were timely filed and the state did not challenge trial court's granting of an extension of time to file. Therefore, complaints that TFC § 263.405(i) are moot. Evidence at trial was sufficient to show that father and stepfather had knowingly endangered children to satisfy TFC § 161.001(1)(D) and (E). Evidence further showed that children were benefiting from stability in foster care and that termination was in children's best interest. Finally, with regards to stepfather's termination under TFC § 161.001(1)(Q), evidence was sufficient to show that stepfather, knowing that mother was pregnant, engaged in conduct that led to his current incarceration, and that stepfather would be incarcerated for more than two years following the date petition was filed. Although stepfather presented evidence that he was eligible for parole, no evidence showed that he would be released before completing the full term.

VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS UNDER FAMILY CODE SECTION 161.001(1) IS SUFFICIENT EVIDENCE THAT TERMINATION OF PARENTAL RELATIONSHIP IS IN BEST INTEREST OF CHILD

¶ 09-2-28. ***In re A.G.C.,*** ___ S.W.3d ___, 2009 WL 396271 (Tex. App.—Houston [14th Dist.] 2009) (02/19/09)

Facts: On 02/05/06, child was born to mother. Mother and father never married, however it is undisputed that father is the biological parent of child. Mother subsequently sued to terminate father's parental rights. On 07/10/07, mother and father participated in mediation and signed a MSA. MSA provided that father would execute a voluntary relinquishment of his parental rights to child, that father would have limited post-termination visitation with child pursuant to TFC § 161.2062, and that father agreed to take drug tests before visits. Finally, the MSA stipulated that for any disagreements arising under the MSA, the mediator would serve as final arbiter. That same day, father signed and notarized a document entitled "Father's Affidavit for

Voluntary Relinquishment of Parental Rights." MSA and father's affidavit were filed with trial court on 07/11/07. On 09/07/07, mother, her attorney, father's attorney, and child's amicus attorney appeared before trial court for a hearing on the termination order. Attorneys for mother and father each presented proposed termination orders which were similar except that father's proposed order contained additional details concerning notice, visitation, and drug testing. Trial court signed mother's proposed order. Mother's order stated that the trial court found by clear and convincing evidence that father voluntarily and after advice of counsel, executed an affidavit of relinquishment of parental rights and that termination of the parent-child relationship was in the best interest of child. Additionally, the order stated that father's supervised access to child would be immediately and finally terminated if father failed a drug test. On 09/09/07, father filed an "Affidavit to Revoke the Father's Affidavit for Voluntary Relinquishment of Parental Rights." Father filed a motion for new trial, contending that the evidence was legally and factually insufficient to support the judgment, he did not voluntarily sign the affidavit of relinquishment, and trial court's order did not comply with mediator's rulings. Father also argued that the trial court failed to consider the report prepared by the court-appointed psychologist, who had determined that there was no evidence that termination of father's parental rights was in child's best interest. Trial court denied father's motion for new trial. Father appealed.

Held: Affirmed in part, reversed and remanded in part. Father's relinquishment of parental rights is sufficient to show that termination is in best interest of child. However, trial court should have referred mother and father back to mediator when they presented proposed orders with differing details concerning notice, visitation, and drug testing.

Opinion: Father's argument that an affidavit of voluntary relinquishment of parental rights executed pursuant to TFC 161.001(1) is only applicable when there will be a subsequent adoption is without merit. In an agreement where relinquishment is a private agreement between two parties where on parent is to retain conservatorship, no designation of adoptive parents is necessary. Further, there is no evidence that the legislature intended to limit the use of an affidavit of voluntary relinquishment only when adoption was contemplated. With regard to the best interest of the child, a signed affidavit of voluntary relinquishment is sufficient evidence that termination of parental rights is in the best interest of the party. Father also failed to show that the evidence regarding the testimony of the court-ordered psychologist was either discovered after trial court's final ruling, or that the nature of the evidence was so extreme that trial court's refusal to hear it constitutes an abuse of discretion. Father's argument that the trial court did not comply with mediator's rulings was sustained, because the differences between father and mother's proposed court order should have been submitted to the mediator as arbiter before trial court entered a final order in this case.

EVIDENCE OF FATHER'S PARANOIA AND OTHER MENTAL PROBLEMS WAS SUFFICIENT EVIDENCE TO SHOW THAT TERMINATION OF PARENTAL RIGHTS WAS IN CHILD'S BEST INTEREST

¶ 09-2-29. ***In re M.R.J.M.,*** ___ S.W.3d ___, 2009 WL 485719 (Tex. App.—Fort Worth 2009) (op. on rehearing) (02/26/09)

Facts: Child was born in 1999. Mother and father ceased to live together sometime in 2000, and child resided with mother. In 2004, DFPS removed child from mother based on allegations of drug use in child's presence. From the time child was removed until trial, father only saw child twice. In 10/05, jury trial commenced on DFPS's petition to terminate mother and father's parental rights to child. Mother voluntarily relinquished her parental rights to child prior to closing arguments. During trial, father gave extensive testimony detailing paranoid delusions which he felt showed that the State of Texas was conspiring to keep him from working, steal other children that he claimed to have fathered as well, and various other claims. Following closing arguments, jury found that father's parental rights should be terminated on TFC 161.001(D), (E), and (N) grounds. Trial court entered an order terminating father's parental rights in accordance with jury's findings. Father subsequently filed a motion for new trial and statement of points for appeal. Trial court denied father's motion for new trial, found him indigent, and found his appeal frivolous. Father appealed.

Held: Affirmed. Although father's appeal was not frivolous, the evidence was sufficient to terminate father's rights based on TFC 161.001(D), (E), and (N), and that termination was in child's best interest.

Opinion: Trial court erred by finding father's appeal frivolous. The evidence was sufficient to show that father's actions— such as knowingly allowing mother to use drugs in child's presence, failing to provide adequate financial support for child, and at least one episode of family violence in child's presence— showed that he knowingly endangered and/or allowed child to remain in an environment that endangered child's physical health or emotional well being. The evidence was also sufficient to show that father constructively abandoned child while child was in DFPS's care. Further, the evidence was sufficient to show that father had significant mental and paranoia problems and that he would be unable to adequately provide for child. Therefore, termination of his parental rights was in child's best interest.

SAPCR
Parentage

MANDAMUS IS APPROPRIATE TO STAY GENTICS TESTING WHEN A VALID ACKNOWLEDGMENT OF PATERNITY HAS BEEN ON FILE FOR MORE THAN FOUR YEARS

¶ 09-2-30. ***In re The Office of the Attorney General,*** 272 S.W.3d 773 (Tex. App.—Dallas, orig. proceeding) (12/03/08)

Facts: On 05/18/02, child was born. On 05/20/02, father executed an AOP which was subsequently filed with the Bureau of Vital Statistics on 06/24/02. In 05/08, AG filed a motion for child support against father. Associate judge issued an order for genetic testing prior to issuing an order for child support. AG appealed to trial court, which confirmed associate judge's order requiring genetics testing. AG filed a petition for writ of mandamus and an emergency stay of genetics testing.

Held: Mandamus granted. Trial court abused its discretion by ordering genetic testing because the AOP had been on file with the Bureau of Vital Statistics for more than 4 years.

Opinion: Under TFC § 160.308(a), a father has 4 years to challenge and AOP once it is filed with the Bureau of Vital Statistics. Father did not challenge AOP in the required time frame. Because father had been legally established as child's father and that determination had not been set aside, trial court abused its discretion by ordering genetic testing.

MANDAMUS APPROPRIATE TO STAY GENTICS TESTING IN A PATERNITY SUIT WHEN A VALID DEFAULT JUDGMENT ADJUDICATING PATERNITY HAS NOT BEEN SET ASIDE

¶ 09-2-31. ***In re The Office of the Attorney General,*** S.W.3d , 2008 WL 5177170 (Tex. App.—Houston [1st Dist] 2008, orig. proceeding) (12/11/08)

Facts: Child was born to mother on 10/24/04. On 08/10/07, AG filed a SAPCR to establish paternity between father and child. Father was served on 09/10/07, but did not file an answer or appear at the hearing on 11/15/07 of which father had received notice. Following the 11/15/07 hearing, trial court issued a default judgment naming father as biological father of child and ordered father to pay retroactive and prospective child support. Father contends he was not notified of trial court's default judgment, but on 12/03/07, he received notice of garnishment of his wages to satisfy his child support obligation. Father did not file a motion for new trial or appeal the default judgment. On 12/21/07, father administered a DNA test to himself and child and sent the samples off for testing. On 12/28/07, the paternity test results precluded father as biological father of child.

On 03/25/08, after securing representation, father filed a petition for bill of review to set aside the default judgment and to vacate the wage garnishment. Father also sought attorney's fees and exemplary damages against mother for falsely holding him out to be the only person with whom she was engaged in sexual activity with during the time of child's conception. Father's petition stated that he was unable to attend the 09/15/07 hearing due to weather conditions out of his control and that father notified AG that he would not be able to attend and asked that the hearing be rescheduled. On 05/01/08, associate judge denied father's bill of review. Father asked for a de novo hearing the following day in the referring court. AG filed a motion objecting to the de novo hearing. On 05/21/08, trial court held a hearing without evidence. At that hearing, trial court orally adopted associate judge's denial of father's bill of review.

On 06/18/08, father filed a motion for new trial of the 05/21/08 ruling, and AG responded. On 08/01/08, trial court held a hearing on the motion for new trial. At the close of hearing, trial court orally granted the motion for new trial, ordered paternity testing, set trial on 10/13/08, and set the entry of the new-trial order for 08/08/08. On 08/07/08, AG filed a motion for reconsideration and to stay genetic testing. On 08/08, trial court heard AG's motions and considered the entry of the new-trial order. Trial court stated during the hearing that it had granted father's *bill of review* on 08/01/08. AG did not object, argued the merits of father's bill of review, as if it had been granted on August 1. As such, trial court's 08/01/08 order granting a new trial became an order granting father's bill of review. During the hearing, trial court verbally denied the AG's motions. Following the hearing, trial court entered orders vacating the 09/15/07 default judgment against father, and set trial for paternity on 10/13/08. On the same day, trial court signed a separate *instanter* order requiring that genetic testing be completed before 5:00 p.m. that day. On 08/14/08 AG filed a petition for writ of mandamus. Court of appeal stayed the order for genetic testing pending mandamus review, however since the 08/08/08 genetic testing order was *instanter,* the results had already been returned to father's counsel. As such, court of appeals ordered trial court to seal the results to comply with the stay of the genetics testing order.

Held: Mandamus granted. Trial court's order granting the bill of review was interlocutory, thus no adequate appellate remedy exists for the entry of genetic testing results, and the potential for serious emotional harm to child is sufficient to require mandamus.

Opinion: Father's petition did not meet the burden required for the granting of a bill of review, as such trial court abused its discretion by issuing the order vacating the 09/15/07 default judgment. Because trial court erred in issuing the bill of review, the default judgment adjudicating father as the biological father of child is still in effect. As such, mandamus is appropriate to review an order for paternity testing that is erroneously entered before a parentage determination has been set aside. The reason for this is because once a paternity test is entered it cannot be undone, and revealing the results of genetic testing may cause permanent, irreparable emotional harm to the child.

Editor's Comment: *The court acknowledged that there is a split of authority in the courts of appeals whether mandamus will lie "to review the interlocutory granting of a bill of review." The court further observed that in the context of paternity suits, the three courts that have addressed this issue held mandamus an appropriate remedy. J.V.*

CHALLENGE TO AN ACKNOWLEDGMENT OF PATERNITY AND GENETIC TESTING WITHIN FOUR YEAR STATUTE OF LIMITATIONS DOES NOT RESULT IN IRREPARALBE HARM

¶ 09-2-32. ***In re C.S.,*** ___ S.W.3d ___, 2009 WL 57048 (Tex. App.—Amarillo, orig. proceeding) (01/09/09)

Facts: In 05/07, child was born to mother. The next day, mother and father signed an AOP, which was recorded in the Bureau of Vital Statistics on 06/13/07. On 05/14/08, father challenged the AOP on the ground of fraud, duress, or material mistake of fact. Trial court held an evidentiary hearing, and found that father signed the AOP under a material mistake of fact. Trial court set aside the AOP and ordered genetic testing of

child and father 19 days from the order date. Mother filed a petition for writ of mandamus, claiming that trial court abused its discretion by setting aside AOP and ordering genetic testing.

Held: Mandamus denied. Trial court did not abuse its discretion by setting aside the AOP and ordering genetic testing.

Opinion: The record shows that a trier of fact could reasonably conclude that father signed the AOP under a material mistake of fact. The order for genetic testing is not an abuse of discretion because father challenged the AOP within the statutory 4 year limit, as such, no irreparable harm will result if genetic testing proceeds.

Editor's Comment: *Because the mother told the real party in interest that he was the father, and the real party in interest believed her, the real party in interest "labored under a material mistake of fact when he executed the acknowledgment of paternity." J.V.*

MISCELLANEOUS

★★★★★ United States Supreme Court ★★★★★

DISBURSEMENT OF RETIREMENT PLAN PROCEEDS TO EX-WIFE UPON HUSBAND'S DEATH PROPER ABSENT A PROPERLY FILED CHANGE IN BENEFICARY FORM

¶ 09-2-33. ***Estate of Kennedy,*** 129 S.Ct. 865 (U.S. 2009) (01/26/09)

Facts: In 1971, husband and wife were married. At that time, husband was already employed by employer. In 1974, husband named wife beneficiary of his savings and investment plan (SIP) governed by ERISA. In 1994, husband and wife divorced. The divorce decree contained a waiver by wife that claimed to divest wife of her interest in the SIP benefits, but husband did not execute a document removing wife as the SIP beneficiary as required by ERISA. Husband retired from employer in 1998, and died in 2002. Following husband's death, the executrix of husband's estate asked for the SIP funds to be distributed to estate. However, employer, relying on husband's designation form, paid the $400,000 in proceeds from SIP to wife. Estate filed suit, alleging that wife waived her interest in any SIP benefits in the divorce decree, and thus employer violated ERISA by paying her. Federal District Court for the Eastern District of Texas entered summary judgment for estate, ordering employer to pay the benefits to the estate. Fifth Circuit reversed, holding that wife's waiver was an assignment or alienation of her interest to the estate, which is not allowed under ERISA. Estate appealed to the U.S. Supreme Court, who granted certiorari.

Held: Affirmed. Wife did not attempt to direct her interest in the SIP benefits to estate or any other potential beneficiary. Therefore, absent a properly filed change in beneficiary form, employer was required to distribute the proceeds to wife.

Opinion: While it is true that the anti-alienation provisions of ERISA do not apply to a QDRO, husband and wife's divorce decree did not meet the standards to be considered a QDRO. In the absence of a QDRO, an ERISA plan administrator is required by statute to look to the terms of the plan in order to determine to whom distributions should be made. This is not to say that a beneficiary cannot waive his or her rights to payments. However, the SIP terms required a contemporaneous direction to another beneficiary in order for a waiver to be valid. Since wife's waiver in the divorce decree did not direct that the benefits be paid to estate or any other potential beneficiary, it failed under the terms of the SIP. As such, employer was required to distribute proceeds to wife, the only properly named beneficiary under the terms of the SIP.

Editor's Comment: *Husband's estate is not necessarily without remedy. In note 10 of its opinion, the Court declined to "express any view" whether the estate might sue the wife "to obtain the benefits after they were distributed." J.V.*

★★★★★ Fifth Circuit Court of Appeals ★★★★★

A SPOUSE IS LIABLE FOR HALF OF COMMUNITY INCOME ON FEDERAL TAX RETURNS, NOT SIMPLY ON WAGES THE SPOUSE PERSONALLY EARNED

¶ 09-2-34. ***Gray v. U.S.,*** 553 F.3d 410 (5th Cir. 2008) (12/17/08)

Facts: Husband and wife filed joint personal income tax returns for the years 1994 through 1997. The tax liability for these years was litigated in the U.S. Tax Court. Following the tax court litigation, husband was found liable for tax deficiencies, but wife was found to be an innocent spouse. Husband and wife continued to file joint personal income tax returns for the years 1998 through 2003, and reported overpayments on these tax returns to correct husband's deficiency. In 2005, wife filed a claim with the IRS seeking a repayment of her interest in the overpayments. The IRS conceded that it should not have applied wife's overpayments to husband's deficiency and refunded a portion of the overpayments to wife. Wife believed that the IRS failed to properly account for Texas community property when calculating the amount of the overpayment which resulted from wife's sole management community property, and filed suit against the IRS in Federal District Court. Wife and IRS filed cross-motions for summary judgment. The single disputed issue before trial court was how wife's separate tax liability should be calculated. Wife argued that it should be calculated based on the wages she personally earned, and the IRS argued that it should be calculated based on 50% of all community income. Trial court agreed with the IRS, and entered judgment for wife in the amount of $401.84 plus prejudgment and post-judgment interest. Wife appealed trial court's decision.

Held: Affirmed. Trial court's calculations were consistent with both established legal precedent and IRS Revenue Rulings for calculating a hypothetical separate tax return for a spouse in a community property situation.

Opinion: Trial court assumed in its calculations that if wife had filed separate tax returns for the relevant tax years, she would have had to pay taxes on 50% of the community's income in each year. This is consistent with firmly established legal precedent that "[u]nder the laws of Texas each spouse has a vested interest and is owner of half of the community property and is therefore liable for federal income taxes on such a share. There is therefore the obligation, not merely the right, to report half the community income." *Bowling v. United States*, 510 F.2d 112, 113 (5th Cir.1975). Furthermore, trial court's ruling was consistent with IRS Revenue Ruling 2004-74.

Editor's Comment: *Sometimes it is useful to partition the income of the parties for the year of divorce to avoid the problem raised here. Have your client consult a tax professional to determine the best way to handle tax issues during the divorce. M.M.O.*

★★★★★ Texas Supreme Court ★★★★★

A FORM "PRE-TRIAL SCHEDULING ORDER" DOES NOT MEET TEXAS RULE OF CIVIL PROCEDURE 329b(c)'S REQUIREMENT FOR A WRITTEN AND SIGNED ORDER GRANTING A NEW TRIAL

¶ 09-2-35. ***In re Lovito-Nelson,*** ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 405, 2009 WL 490067 (Tex. 2009) (per curiam) (02/27/09)

Facts: On 09/17/07, trial court signed a final order in a SAPCR affecting mother, father, and grandmother. The order incorporated an agreement that mother, father, and grandmother reached prior to conclusion of trial. Mother, father, and grandmother were appointed JMC, with grandmother having the right to determine children's primary residence. Further, mother and father were ordered to pay grandmother monthly child support. On 10/17/07, mother and father filed a motion for new trial. Their motion asserted that father was only the biological father of 1 of the 3 children, that the two children not fathered by father had never been subject to the original action, and that mother and father never agreed to the judgment. Trial court heard mother and father's motion on 11/06/07. Following the hearing, trial court initialed a handwritten entry on the docket sheet that stated "New trial granted." On the same date, trial court and counsel for all parties signed an agreed "Pre-Trial Scheduling Order," which is a form order with spaces for handwritten dates. Trial court's order set a final trial date and time—"6/2/08 @ 9:30." Trial court's order stated: "Trial on the merits is hereby set on this date." By letter dated 01/31/08, grandmother's counsel wrote to trial judge that "[trial court] never signed a written order granting" a new trial, and that since "[m]ore than 105 days have passed since the Final Order ... was signed by the Court ... it appears to me that (1) this judgment is now final and (2) the Pre-Trial Scheduling Order in this matter is now moot." On 04/16/08, trial court signed an order which stated that trial court determined that the agreed scheduling order "set aside the Final Order" and "satisfied the requirements of TRCP 329b(c). Grandmother filed a petition for writ of mandamus.

Held: Mandamus granted. Only a written, signed order granting a new trial satisfies TRCP 329b(c).

Opinion: TRCP 329b(c) states that a motion for a new trial can be granted only by a written, signed order. A form order such as a trial scheduling order does not meet this requirement. "It is important that the requirement of a written order granting a motion for new trial be a bright-line rule. Otherwise, one might argue that all sorts of conduct should be given the same effect—a trial setting or other setting, a status conference, a hearing on a discovery motion, a request for discovery—the list is endless."

TRIAL COURT CAN CONFIRM AN EARLIER RULING AFTER VACATING THAT SAME RULING AND GRANTING A NEW TRIAL

¶ 09-2-36. ***In re Hidalgo,*** ___ S.W.3d ___, 2009 WL 456581 (Tex. App.—Dallas 2009) (op. on rehearing) (02/25/09)

Facts: In 2002, husband and wife divorced in California. Husband and wife's divorce decree incorporated a marriage settlement agreement that husband would pay wife alimony and pay premiums on a life insurance policy on husband for wife's benefit. In 2003, wife filed California divorce decree in Texas as a foreign judgment. Wife also filed a motion to enforce for husband's failure to pay spousal support. Husband and wife later signed an agreed order that modified the original marriage settlement agreement. Several months later, wife filed a second motion to enforce, claiming that husband had failed to pay life insurance premiums as required by agreement incorporated in husband and wife's divorce decree. Wife also sought reimbursement for premiums she had paid to keep husband's life insurance policy current. Husband argued that because he retired in 2005, he was no longer required to pay the premiums. On 01/03/06, trial court signed an order denying wife's motion to enforce, stating that husband's obligation to pay life insurance premiums terminated as of 01/01/05.

On 01/09/06, wife filed a motion for rehearing, asking trial court to modify its order to state that in the event husband returns to work before age 65, his obligation to pay spousal support and life insurance premiums would be reinstated. On 04/04/06 (91 days after 01/03/06 ruling), trial court signed a written "ruling" in favor of wife. Trial court's order stated that trial court had jurisdiction under rule 329b, and "vacate[d] its prior ruling." Trial court found that husband was obligated to pay spousal support and maintain the life insurance policy until wife's death, that husband owed wife all the premiums she had paid on the life insurance policy, and awarded wife $1,150 against husband for attorneys' fees.

Within thirty days of the 04/04/06 ruling, husband filed a motion for new trial and a motion to confirm trial court's 01/03/06 order. On 07/05/06, trial court signed an order granting husband's motion. Trial court

ordered that the 01/03/06 ruling in favor of husband be confirmed, and that the 04/04/06 ruling in favor of wife be set aside. Wife filed a notice of appeal and filed a petition for writ of mandamus, which were consolidated by court of appeals.

Court of appeals originally held that trial court's 07/05/06 order fell outside of trial court's 75-day window to "ungrant" a new trial and reinstate a prior ruling based on Texas Supreme court ruling in *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994) (per curiam) and granted wife's petition for writ of mandamus. However, shortly after court of appeals' original ruling, Texas Supreme Court overturned *Porter* in *In re Baylor Med. Ctr. at Garland*, No. 06-0491, 2008 WL 3991132 (Tex. 2008). Husband subsequently filed a motion for rehearing of wife's petition for writ of mandamus.

Held: Mandamus denied, and trial court's 07/05/06 ruling is affirmed. Following supreme court's ruling in *In re Baylor Medical Center*, trial court's 07/05/08 is a final ruling subject to appeal and mandamus is not appropriate.

Opinion: Because trial court's 04/04/06 order vacated its 01/03/06 order, it effectively granted a new trial. Therefore, trial court's 04/04/06 order returned wife's motion to enforce to trial court's docket. Based on supreme court's holding in *Baylor Medical Center* overruling *Porter*, after trial court vacated its 01/03/06 final order on 04/04/06, there was no longer a 75-day time limit on trial court's power to vacate the 04/04/06 order and reinstate the 01/03/06 final order. Thus, trial court's 07/05/06 order reinstating its 01/03/06 judgment was not void. Furthermore, because trial court confirmed its 01/03/06 order, its 07/05/06 order effectively incorporated the terms of its 01/03/06 order and constituted a final order subject to appeal. Because trial court's 07/05/06 ruling is a final order subject to appeal, wife has an adequate remedy by appeal and mandamus is not appropriate.