SECTION REPORT
FAMILY LAW

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Message from the Chair

I am honored to welcome in our new year! This April I was sworn in as Chair of the Family Law Section at the same time we family attorneys took the national spotlight for our representation of children involved in the FLDS court cases. Our former chair, Tom Vick, asked for family lawyers to step up to the plate, and you answered the call. As those cases near resolution, it is time for all of us to reflect on the lessons to be learned. The best lesson is the simple one—get involved!! Service to the community is the greatest gift we can give, and it is a gift that will bring you satisfaction in the giving!

As we enter the long days of summer, just a reminder of what is to come. The Annual Advanced Family Law Course in San Antonio is packed with new topics and new speakers, coupled with discussions from your favorite attorneys. We can also look forward to October 15-17 in Napa Valley for the New Frontiers in Marital Property, where seasoned attorneys will host in depth discussions on hot topics in the beautiful setting of the wine country of California. It has limited enrollment, so don't wait too long to register. Due to your ongoing request, the Family Law Drafting Course is back and will be held December 4-5 in Austin. Then we can start the year with the twenty-fifth annual TAFLS trial institute, this year in Tampa, Florida, January 16-17 at the fabulous Saddleback Resort. We clearly will have a great year of fun, travel and of course, continuing legal education!

Finally, as you get more comfortable with our online format of the Section Report, don't forget to share ideas! We hope to enlarge the participation of the report with guest articles and opinions, so keep them coming! I welcome any input from any member, and encourage you to contact me or any other council member if you have any questions, ideas or comments.

I look forward to this year and will see you in San Antonio!

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

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EDITOR'S NOTE

In conjunction with this Report, the 2007 Bibliography Issue is also being distributed. Next year, I promise to get the 2008 Bibliography Issue much earlier and apologize for the delay. I must thank my new law clerks, Ian Pittman, a third year law student at the University of Texas, and Chris Gabriel, a second year law student at Southern Methodist University, for their assistance in putting together this issue. At the same time, I have had to say farewell to John H. Chase, who has now graduated and will be joining Jones Day at the end of the summer. This Report features our on-going column on psychological issues and financial issues and welcomes two new authors – Rebecca Tillery and Eric Beal. Once again, I invite all of you to contribute articles for the Report. The deadline for the next edition to submit articles will be August 31, 2008. Your comments and suggestions for other features or columns are also welcome.

TABLE OF CONTENTS

TABLE OF CASES

In the Law Reviews and Legal Publications

TEXAS ARTICLES

Raj Aujla, *Celebrating Ten Years Of Giving A Voice To The Voiceless: Comment: The Impending Health Care Crisis In Texas: The Status Of Health Care For Impoverished Texans*, 10 Scholar 397 (2008)

Emily A. Cook, *Comment: Separate, Parallel Paths--These Lines Should Never Cross: Why Texas Needs A Bright-Line Rule To Determine When A Child Protective Services Agent Acts As A Law Enforcement Agent*, 40 Tex. Tech L. Rev. 365 (2008)

Harold R. DeMoss, Jr. & Michael Coblenz, *An Unenumerated Right: Two Views On The Right Of Privacy*, 40 Tex. Tech L. Rev. 249 (2008)

Shelly George, *Celebrating Ten Years Of Giving A Voice To The Voiceless: Article: Slipping Through The Cracks And Into Schools: The Need For A Uniform Sexual-Predator Tracking System*, 10 Scholar 117 (2008)

Tonya Inman, Patricia Carter & John P. Vincent, *High-Conflict Divorce: Legal And Psychological Challenges*, 45 Hous. Law. 24 (2008)

Arshil Kabani, *Celebrating Ten Years Of Giving A Voice To The Voiceless: Comment: Separation Anxiety: Uniting The Families Of Lawful Permanent Residents*, 10 Scholar 169 (2008)

Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 Tex. L. Rev. 451 (2008)

Erin Oehler, *Celebrating Ten Years Of Giving A Voice To The Voiceless: Comment: The Door To Higher Education: Accessible To All? Whether State-Funded Merit-Aid Programs Discriminate Against Minorities And The Poor*, 10 Scholar 499 (2008)

David R. Stras, *Book Review Essay: Understanding the New Politics of Judicial Appointments*, 86 Tex. L. Rev. 1033 (2008)

Bryon Allyn Rice, *Enforceable Or Not?: Class Action Waivers In Mandatory Arbitration Clauses And The Need For A Judicial Standard*, 45 Hous. L. Rev. 215

LEAD ARTICLES

Family Law Charts. 41 Fam L.Q. 709 (2008)

Family Law in the Fifty States 2006-2007: Case Digests. 41 Fam. L.Q. 719 (2008)

Peter M. Bryniczka, *The HIPAA Hurdle*, 30 Fam. Advoc. 22 (Spring 2008)

Richard A. Crain, *Choosing the Best Custody Expert Witness*, 30 Fam. Advoc. 12 (Spring 2008)

Willard H. DaSilva, *Children, Psychologists, and the Law*, 30 Fam. Advoc. 4 (Spring 2008)

Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2006-2007: Judges Try to Find Answers to Complex Questions*, 41 Fam. L.Q. 661 (2008)
Meighan A. Harmon, *Analyzing & Attacking the Report*, 30 Fam. Advoc. 34 (Spring 2008)
Alan M. Jaffe & Diana Mandeleew, *Essentials of a Forensic Child Custody Evaluation*, 30 Fam. Advoc. 16 (Spring 2008)
Ralla Klepak, *What to Tell Your Clients -- About Mediation, the Custody Evaluator, or a Custody Evaluation*. 30 Fam. Advoc. 8 (Spring 2008)
David A. Martindale, *A Psychologist's Critique of the APA's Guidelines for Evaluating Parental Responsibility*, 30 Fam. Advoc. 30 (Spring 2008)
Arnold H. Rutkin & Sarah S. Olham, *Examining the Mental Health Expert*, 30 Fam. Advoc. 36 (Spring 2008)
Karen J. Saywitz, *The Art of Interviewing Young Children In Custody Disputes*, 30 Fam. Advoc. 26 (Spring 2008)
Nancy Ver Steegh, *Annual Survey of Periodical Literature*, 41 Fam. L.Q. 907 (2008)

IN BRIEF

Family Law From Around the Nation

by
Jimmy L. Verner, Jr.

Child support: California law does not permit a county to sue a parent for child support on behalf of her relatives even though her teenaged son has gone to live with them. *Plumas County Child Support Servs. v. Rodriguez*, 76 Cal.Rptr.3d 1 (Cal. App.—3d Dist. 2008). The Fifth Circuit affirmed a two-year sentence for violation of the Child Support Recovery Act, rejecting limitations as a defense because failure to pay child support is a continuing offense. *United States v. Edelkind*, ___ F.3d ____, 2008 WL 1726175 (5th Cir. 2008). The Eleventh Circuit allowed an award of attorney's fees in litigation against the Social Security Administration to be offset against child support owed to a county's human resources department. *Reeves v. Astrue*, ___ F.3d ____, 2008 WL 1930587 (11th Cir. 2008). Selling items at the weekend flea market constitutes underemployment in Florida when the father used to make $100,000 each year as a builder. *Bator v. Osborne*, ___ So.2d ____, 2008 WL 2065854 (Fla. App.—2d Dist. 2008).

Custody: A New York court affirmed custody to a father when "the mother engaged in a course of conduct which intentionally interfered with the relationship between the child and the father." This kind of action is "so inconsistent with the best interests of the child that it raises, by itself, a strong probability that the offending party is unfit to act as a custodial parent." *Melikishvili v. Grigolava*, ___ N.Y.S.2d ____, 2008 WL 1903522 (N.Y. App. Div. 2008). In a Hague Convention case, the Eleventh Circuit declined to order a child returned to his father in Australia because, even though the child had not been harmed, the father drank nearly every day and had abused the child's mother. *Baran v. Beaty*, ___ F.3d ____, 2008 WL 1991092 (11th Cir. 2008). A Florida trial court abused its discretion by striking a husband's pleadings for discovery abuse and excluding evidence in a divorce case in which custody was at issue because a child's best interest trumps a parent's discovery abuse. *Crossin v. Crossin*, 979 So.2d 298 (Fla. App.—4th Dist. 2008).

Death during divorce: A California court awarded a husband's estate to his estranged wife rather than to his mother because the couple's divorce had not become final when the man died, and he and his wife were trying to reconcile. *Estate of McDaniel*, 73 Cal.Rptr.3d 907 (Cal. App.—3d Dist.

2008). The Colorado Supreme Court confirmed that a spouse's death moots a suit for divorce, but the husband's death did not moot the wife's suit to declare the parties' antenuptial agreement invalid. *Schwartz v. Schwartz*, ___ P.3d ____, 2008 WL 2004230 (Colo. 2008).

Disproportionate division: The New Hampshire Supreme Court affirmed a disproportionate property division in favor of a wife when the husband lost over $1,000,000 in "risky investments," rejecting the husband's claim that a disproportionate division requires "dissipation" rather than "diminution" of assets. *Martel v. Martel*, 944 A.2d 575 (N.H. 2008). A husband fared better in the Connecticut Supreme Court even though he lost nearly $100,000 in an investment: "Poor investment decisions, without more, generally do not give rise to a finding of dissipation." *Gershman v. Gershman*, 943 A.2d 1091 (Conn. 2008). The North Dakota Supreme Court upheld a disproportionate division in favor of a husband when upon separation the wife withdrew and spent $60,000 from a joint business account and incurred some $180,000 in new debt. *Hitz v. Hitz*, 746 N.W.2d 732 (N.D. 2008). In New York, a wife received a disproportionate division when, among other things, her husband used after-tax money totaling $1,282,138 to pay off the judgment from his first divorce. *Johnson v. Chapin*, 854 N.Y.S.2d 18 (N.Y. App. Div. 2008).

Grandparent rights: An Indiana trial court erred when it awarded "visitation rights nearly equivalent to those of a non-custodial parent" to a grandmother because Indiana law contemplates only "occasional, temporary" grandparent visitation that does not substantially infringe on a parent's decision to raise her child in a particular faith – in this case, as a Jehovah's Witness. *Hoeing v. Williams*, 880 N.E.2d 1217 (Ind. App. 2008). An Alabama court should not have ordered grandparent visitation when the mother allowed informal grandparent visitation but objected to court-ordered visitation. *J.L.W. v. E.O.J.*, ___ So.2d ____, 2008 WL 1915171 (Ala. Civ. App. 2008).

Necessity for counsel: A Massachusetts appellate court refused to uphold a one-page prenuptial agreement drafted by a husband who, after reading some magazines and a book, thought he did not need a lawyer's help. *Eyster v. Pechenik*, ___ N.E.2d ____, 2008 WL 2132587 (Mass. App. Ct. 2008). A California man who declined to obtain separate counsel when signing estate planning documents found that he had transmuted his separate property to community property after his wife sued him for divorce. *In re Marriage of Holtemann*, 76 Cal.Rptr.3d 615 (Cal. App.—2d Dist. 2008).

Paternity: When a convicted sex offender moved a California court to set aside another man's voluntary acknowledgment of paternity, the court properly denied the request even though genetic testing established that the sex offender was the child's biological father. *In re William K.*, 73 Cal.Rptr.3d 737 (Cal. App.—3d Dist. 2008). The Pennsylvania Supreme Court allowed a man to assert his non-paternity when a genetic test excluded him as the child's father because, although the mother might have believed sincerely that the man was the child's father, she committed fraud by falsely assuring him that she had had no other sexual partners at the time of the child's conception. *Glover v. Severino*, 946 A.2d 710 (Pa. 2008). When a New Hampshire couple broke up, the mother asserted that her boyfriend was not their child's father and requested paternity testing, but the court refused to require it because both she and the father had acknowledged his paternity two days after the child's birth. *In re Gendron*, ___ A.2d ____, 2008 WL 2097059 (N.H. 2008).

Same-sex update: California's Supreme Court held that in light of California's comprehensive domestic partnership legislation, there is no compelling state interest in distinguishing between domestic partnerships and marriages such that "the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution." *In re Marriage Cases*, ___ Cal.Rptr.3d

____, 2008 WL 2051892 (Cal. 2008). Michigan's constitution, which defines marriage as "the union of one man and one woman," prohibits public employers from extending health insurance benefits to same-sex domestic partners. *National Pride at Work, Inc. v. Governor of Michigan*, ___ N.W.2d ____, 2008 WL 1961465 (Mich. 2008). In two cases, intermediate appellate courts considered whether former domestic partners had standing to seek custody or visitation as de facto custodians of children: *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. App. 2008) (yes); *Pickelsimer v. Mullins*, ___ S.W.3d ____, 2008 WL 820947 (Ky. Ct. App. 2008) (no). In a third case, a Maryland court declined to recognize de facto parent status as a legal basis for standing. *Janice K. v. Margaret K.*, 910 A.2d 1145 (Md. App. 2008).

Where there's smoke: Even though a husband and his secretary denied having an affair, the trial court did not err by granting the wife a divorce on the ground of adultery when the husband did not dispute that he gave his secretary money, left his office frequently when the secretary was absent, rescinded his wife's firing of the secretary, fired his wife from his company, moved the secretary into his wife's old office and gave her his wife's cell phone, rode his motorcycle around with the secretary on the back, took trips with her to Florida and to New York, hired her mother as his housekeeper and told his wife "I'm going to do more than that" when she accused him of breaking their marriage vows. *Lister v. Lister*, ___ So.2d ____, 2008 WL 1947310 (Miss. App. 2008).

Columns

Evaluating Experts' Conclusions and Opinions—Part Two

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

In our last column—Part One of three columns—we noted that mental health expert *conclusions* and expert *opinions* address two different issues. Conclusions are the social science inferences experts make from the data they gather, consider, and review. In contrast, opinions are the inferences experts make when they apply their conclusions to the legal standard the court is considering.

How should lawyers gauge the quality of experts' conclusions and opinions? Among several considerations, lawyers should bear in mind two key interacting concepts: reliability and the analytical gap test.

First, the Texas Supreme Court in *Robinson*,[2] drawing from the U.S. Supreme Court's *Daubert* case, offered six factors for a judge to consider when measuring the reliability of expert testimony. But even if those factors do not apply in a given case—and usually several won't apply to mental health testimony—the court still must deem the testimony as relevant and reliable before the testimony is admitted under Rule 702.[3] To clarify its definition of reliability, *Daubert* provided a useful synonym: trustworthiness.[4] If the notion of reliability seems too technical or "lawyer-like," "trustworthy" may be a term with which the court or a jury may more intuitively connect.

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[2] *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 556-557 (1995).

[3] *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 720-721 (Tex. 1998).

[4] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 590 n.9 (1993).

Second, the analytical gap test provides a practical gauge with which lawyers may assess the reliability of experts' conclusions and opinions—"a court may conclude that there is simply too great an *analytical gap* between the data and the opinion proffered."[5] Because experts reach their conclusions and opinions by inference—interpreting and synthesizing data—analytical gaps will always be present. There are no preset conclusions for any particular case facts. The lawyer's task, through investigation and questioning, is to gauge just how wide the gaps are. If the analytical gaps are too great between the data the expert considered and the expert's conclusion or between the expert's conclusion and opinion, the conclusion or opinion should not pass muster as reliable testimony. In such a case, the expert is left only with his assertion that he is an expert. The court should not view such testimony as trustworthy.[6] The greater the gaps between the expert's data and conclusions or between the expert's conclusions and opinions, the less legally reliable or trustworthy the testimony will be. In sum, the analytical gap between the data and the proffered opinion would be "simply too great."

In our last column, we described a case in which psychologist Dr. Jones testified that because mother was depressed and the psychological research showed that depressed mothers are less emotionally responsive to their children than mothers who are not depressed, the child's best interests would be served if the court granted father the right to establish the child's primary residence.

Using the principles of reliability and the analytical gaps test, mother's lawyer might organize her thinking about Dr. Jones testimony by considering seven steps:

1. Distinguish between Dr. Jones's conclusions and opinions;
2. Because those conclusions and opinions are linked to the data by Dr. Jones's inferences, ask Dr. Jones to articulate the inferences he used to support his statements;
3. Look for the empirical and logical gaps in Dr. Jones's reasoning and how wide the gaps are. For example, are the inferences based on misapplied research? That is, were the subjects in the research Dr. Jones invoked suffering from long-term depression while the mother in this case was experiencing minor depression from the divorce stress? Or, are the methods Dr. Jones used reliable and generally accepted? For example, did Dr. Jones arrive at his diagnosis of depression by only a cursory interview of mother and complaints by father, or did the diagnosis result from extensive interviewing and testing of mother and from interviews of collateral sources?
4. Determine, as a result, if the court should view Dr. Jones's conclusions as reliable—the greater the empirical or logical gaps between Dr. Jones's data and conclusions, the less trustworthy the testimony will be.
5. Assess Dr. Jones's understanding of the "best interest of the child" legal standard;
6. Look for the analytical gaps between Dr. Jones's conclusions and his opinions. For example, how does Dr. Jones's conclusion that mother is depressed justify his expert opinion that placing the child with mother would not be in the child's best interest?
7. Determine, as a result, if the court should view Dr. Jones's opinion as reliable or trustworthy.

Of course, other factors, including whether Dr. Jones's expertise "fits" the subject matter of his testimony, may also strengthen or compromise the reliability of his testimony. But distinguishing between conclusions and opinions, and making use of the analytical gaps test to test their reliability or trustworthiness will help lawyers better handle mental health testimony as well as focus deposition and trial questions.

In Part Three, next issue's column, we'll look at how mental health experts may hide the analytical gaps in their conclusions and opinions.

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[5] *Gammill*, 972 S.W.2d at 726 (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).
[6] *Id.*

WHAT YOU AND YOUR CLIENT NEED TO KNOW ABOUT SOCIAL SECURITY AND DIVORCE

by
Christy Adamcik Gammill, CDFA[1]

When looking at a Client's financial picture to determine value and type of Assets, Liabilities, Expenses, and Income Sources it is important to know what resources are available. Some examples of Income Sources are as follows:

- Alimony
- Asset Depletion – Cash, Stocks, Bonds, Mutual Funds, Stock Options
- Business Income
- Business Liquidation
- Child Support
- Inheritance
- Investment Interest
- Retirement Plan Distributions – 401(k) Plans, Pensions, Annuities
- Rental Income
- Royalties
- Social Security
- Wages/Earnings

It goes without saying that the amount of money that is needed is driven by Expenses, however, the resources that are in existence to provide income will dictate whether or not there is a spending surplus or deficit. The Income Sources a client has access to will play a great role in the financial survival of your client post-divorce. Knowing and understanding what the Annuity or Pension Plan benefits are from a corporate or government sponsored plan including Social Security benefits to provide a guaranteed or lifetime income stream may have a great impact on financial security in the golden years. We are living better and living longer than ever before. The fear of running out of money is a concern of the wealthy, affluent, middle-class and poverty level of our population so whatever income can be predicted and claimed with most certainty can provide a stronger peace of mind for the outcome of retirement when working and earning wages may no longer an option.

EX-SPOUSE BENEFITS

When a person has been married for 10 Years or longer and is now divorced from that person there are Social Security Retirement and Survivors Retirement benefits that the Former Spouse may be able to file for as early as Age 62 or even Age 60 for Survivors Retirement benefits. The key components to understand are Eligibility and Benefits, Remarriage, Early Retirement and Survivors benefits.

Retirement Benefits and Eligibility of an Ex-Spouse

- Must have been married 10 Years or longer
- The Ex-Spouse must be at least 62 Years of Age

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The Benefit Amount at Full Retirement Age is the GREATER of:

- 100% of Own Benefit or
- 50% of Ex-Spouse's Benefit at the Primary Insurance Amount ("PIA"), which is the vested Full Retirement Age benefit

The Ex-Spouse's benefit will not be reduced because a Former Spouse filed for an Ex-Spouse's retirement benefit.

Early Retirement Benefit Amount or Percentage Reduction

The earliest age that one may file for retirement benefits is Age 62. At which time, there will be a permanent reduction in benefits for filing early. There are a number of things to consider when determining whether receiving a benefit prior to Full Retirement Age ("FRA") provides the most leverage. Whether the Former Spouse is working, and if so, how much money is being earned will impact the benefit that is received because if earnings are over a certain amount receiving an early retirement Social Security benefit could reduce the benefit amount up to $1 for every $2 earned. At FRA, there is no benefit reduction for working, however, the benefit could still be taxed depending upon the amount of income earned. Take a look at an example of benefit reduction for someone who has an FRA of 67 and takes an early retirement benefit on their Ex-Spouse's record.

- Age 62 is about 67.5% reduction or 32.5% of FRA Benefit
- Age 63 is about 65.0% reduction or 35.0% of FRA Benefit
- Age 64 is about 62.5% reduction or 37.5% of FRA Benefit
- Age 65 is about 59.3% reduction or 41.7% of FRA Benefit
- Age 66 is about 54.2% reduction or 45.8% of FRA Benefit
- Age 67 is 50% of FRA Benefit

Sarah Jones is Age 62, divorced and not remarried, and no longer working but did work over 40 quarters and is fully vested in her Own Social Security Retirement. Sarah has a house that is paid for, around $200k in Investment Assets and a small pension of $452/month that was awarded to her in her Divorce from her Ex-Husband's Pension Plan that she receives beginning at Age 65. Sarah spends around $2,500/month. Sarah's FRA benefit is $825/month while her Ex-Husband (married 21 years and divorced in 2003) has an FRA benefit of $2,350/month. The Ex-Husband is Age 64 now so Sarah is eligible to file on his benefit since he is over Age 62 and they have been divorced over 2 consecutive years. If Sarah were to file for an Early Retirement Benefit at Age 62, her benefit on her own record would be reduced by about 30% so her benefit would be around $577.50/month with a 30% reduction while if she files on her Ex-Husband's record the monthly benefit is about $763.75 ($2,350 x 32.5%). What Sarah must assess is whether or not receiving the $763.75 for an additional 5 Years of benefit equaling $45,825 of Social Security payments over 60 months outweighs the forgone lifetime of the $411.25/month ($2,350 x 50% = $1,175 less $763.75 = $411.25) difference in benefit if taken at her FRA. Considering only the information given, taking Social Security at Age 62 does seem to be in the best financial interest of Sarah even with the permanent reduction in benefit especially since the breakeven period of time to delay taking the income at FRA is well over 9 years.

Remarriage

If the Former Spouse is remarried, he or she will no longer be able to qualify on the Ex-Spouse's retirement benefit, however, the Former Spouse may qualify for half of the new spouse's benefit if it is greater than the person's Own benefit. If the Former Spouse remarries then the latter marriage ends, the Former Spouse can file on either Ex-Spouse's benefit so long as the marriage(s) lasted 10 Years. An Ex-Spouse's New Spouse's benefits will not be reduced because the Former Spouse filed on the Ex-Spouse's benefit.

Survivors Retirement Benefits

If the Former Spouse's Ex-Husband is deceased, the Former Spouse may file on the Deceased Ex-Spouse's record if they were married at least 10 Years as early as Age 60. The Former Spouse receives the Greater of 100% of his or her Own benefit or 100% of the Widow benefit. A benefit reduction would apply if receiving benefits earlier than the FRA. If remarriage occurs after Age 60, the Former Spouse may receive the Greater of 100% of own benefit, 100% of Widow benefit, or 50% of New Spouse's benefit.

Social Security benefits have many nuances and it is important to know which rules apply and what the benefits are to your client, yourself, or someone you know so that the maximum benefit may be received. As always recommended, please seek professional advice before deciding how the benefits or tax implications will affect your overall financial strategy. Although no one knows exactly how long the system will stay in business beyond the year 2042, taking advantage of what Social Security benefits you are eligible for may make a difference of hundreds of thousands of dollars over the years having a significant impact on one's financial future.

Articles

PREMARITAL AGREEMENTS AND PUBLIC POLICY CONCERNS

by

Rebecca Tillery[1]

Marriage is a highly regulated institution of social value, and there are many limitations on the ability of individuals to contract with respect to it.[2] These limitations can fail to maximize the satisfaction of the parties or fail to effectuate the intent of the parties, as general contract law mandates. Accordingly, the freedom of contract with respect to the marital relationship is held in check with statutory requirements and case law expressing a state's public policy with respect to marriage.[3]

Since a premarital agreement is both an agreement between prospective spouses as well as a contract, general contract requirements apply, as well as the provisions of the Uniform Premarital Agreement Act ("UPAA").[4] This article will examine the struggle between freedom of contract and public policy concerns that play out in premarital agreements, and provide guidelines as to how one could argue whether a premarital provision is in violation of Texas public policy.

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[1] Rebecca Tillery is an associate with the Dallas firm of Koons, Fuller, Vanden Eykel & Robertson.

[2] For example, it is prohibited to enter into agreements in derogation of the duty to support a child of the marriage.

[3] According to one scholar, "Marriage is not an ordinary contract. It differs from an ordinary contract in several ways. Entry into a marriage creates a legally and publicly recognized status that confers both legal and economic benefits of the contracting parties. Through the support of both parties, the State maintains an interest in the children of the marriage, and entry into a marital contract must be solemnized by an appointed official." Joline F. Sikaitis, *A New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 54 Cath. U. L. Rev. 335, 350-51 (2004). Another author notes that there are three factors that have historically motivated courts to analyze premarital agreements differently from ordinary contracts – (1) their unusual subject matter; (2) the confidential relationship of the parties to the agreement; and (3) the possibility of enforcement in the distant future. Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 Wake Forest L. Rev. 1037, 1039 (1993).

[4] The UPAA, which encourages a contract-like view of premarital agreements, has been adopted in roughly half of the States, including Texas. Sikaitis, *supra* note 2, at 348.

Introduction

Courts have historically interpreted the term "public policy" very broadly in relation to premarital agreements, greatly restricting the parties' ability to contract about matters unrelated to property and support.[5] The UPAA, however, appears to have opened the door for courts to re-examine the meaning of "public policy" and reflect the dynamic social conditions that have led to an increased focus on premarital agreements.[6]

Although the UPAA does not explicitly refer to the regulation of conduct, section 3 of the UPAA (found in TFC § 4.003(a)(8)) disallows any provision in a premarital agreement that violates public policy. However, no Texas court has addressed this provision.[7] The official comment to the UPAA stipulates that an agreement may be made regarding "choice of abode, freedom to pursue career opportunities, and so on."[8] Thus, the UPAA seemingly suggests that parties may contract about conduct in an ongoing marriage, so long as it does not violate public policy.[9] But what does "public policy" mean, both generally, and in the context of premarital agreements? And specifically, how would a Texas court handle a public policy attack on a premarital provision? For example, if a premarital agreement has a provision that the community property is to be divided equally on divorce, but there is evidence of domestic violence, can a court "trump" the premarital provision and award a disproportionate division? Conversely, if a premarital agreement has a provision awarding "damages" if one spouse is unfaithful, does a court have to enforce this provision, or would such a provision be contrary to Texas's public policy of no-fault divorce? At what point does the freedom of contract bend to the will of public policy?

Public Policy Generally

The freedom to contract is a fundamental right. However, despite the core value of freedom of contract, a court may deny enforcement of a provision if it is contrary to public policy. What constitutes "public policy" can often be a moving target.[10] However, courts will generally utilize a common law balancing test in deciding whether to void a contract provision on pubic policy grounds, weighing factors supporting enforcement against factors opposing it.[11] More specifically, a public policy defense often invokes examination of existing laws, as well as countervailing societal views regarding the specific provision at issue.[12] According to one author, there are two primary concerns that could motivate a court to invalidate an agreement on public policy grounds.[13] First, a court could find that refusing to uphold the contract would "discourage undesirable conduct by the parties or by others."[14] Second, a court may view judicial enforcement of the contract as "an inappropriate use of the judicial process."[15]

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[5] Graham, *supra* note 2, at 1038-39
[6] *Id.*
[7] Texas courts generally interpret premarital agreements like other written contracts, giving due deference to the true intentions of the parties as expressed in the instrument. *Beck v. Beck*, 814 S.W.2d 745, 748-49 (Tex. 1991). The important distinction between the construction of premarital agreements and ordinary contracts is that courts will construe premarital agreements narrowly in favor of the community estate. *Williams v. Williams*, ___S.W.3d___, 2007 WL 4195666, at *3 (Tex. App. – Houston [14th Dist.] 2007, no pet. h.).
[8] UPAA § 3 cmt., 9B U.L.A. 369, 374 (1987).
[9] Sikaitis, *supra* note 2, at 348-49.
[10] Surrogacy contracts are a prime example of contract originally found unenforceable for contravening public policy. Sikaitis, *supra* note 2, at 344-45.
[11] Sikaitis, *supra* note 2, at 360.
[12] *See Posner v. Posner*, 233 So.2d 381, 384-85 (Fla. 1970) (balancing both preexisting case law and the increase in divorce rates when enforcing prenuptial agreements made in contemplation of divorce).
[13] Sikaitis, *supra* note 2, at 344-45.
[14] *Id.*
[15] *Id.*

While Texas has never interpreted a premarital provision in relation to public policy concerns, in a recent case involving coverage under an employer's liability policy for exemplary damages, the Texas Supreme Court went through a thorough analysis of freedom of contract versus Texas public policy.[16] The Court, citing the Restatement (Second) of Contracts, noted that whether a promise or agreement will be unenforceable on public policy grounds is determined by weighing the interest in enforcing agreements versus the public policy interest against such enforcement. On one side of the balancing scale is Texas's general policy favoring freedom of contract. When courts are weighing this interest, they should consider the reasonable expectations of the parties and the value of certainty in enforcement of contracts generally. On the other side of the balancing scale is the extent to which the agreement frustrates important public policy. Per the Restatement (Second) of Contracts, when weighing a public policy against enforcement of a term, "account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term." The Legislature determines public policy through the statutes it passes, and, in fact, has passed many laws declaring certain agreements illegal, and, therefore, against public policy. In other cases, the Legislature has decided that public policy requires certain conditions be met before any agreement may be enforceable.

Public Policy in the Context of Premarital Agreements

There appear to be two types of premarital provisions that courts have uniformly found to be in violation of public policy.

a. Provisions that Encourage Divorce:

Until the mid-1970s, most courts across the United States held that premarital agreements and other contracts made "in contemplation of divorce" were unenforceable as against public policy. Courts found that the agreements were void because (1) they tried to alter the state-imposed terms of the status of marriage, which were not subject to individual alteration; or (2) they tended to encourage divorce.[17] The Restatement (Second) of Contracts provides helpful insight into this public policy determination.

Section 190 of the Restatement (Second) of Contracts provides that "[a] promise that tends unreasonably to encourage divorce or separation is unenforceable on grounds of public policy." Per the comments to the Restatement, the underlying purpose of the provision is based on the public interest in the continuation of the marriage relationship. Thus "[a]lthough the parties are free, if they choose, to terminate their relationship under the law providing for divorce or separation, a commitment that tends unreasonably in this direction will not be enforced." Similarly, section 190(1) of the Restatement provides that "[a] promise by a person contemplating marriage…is unenforceable on grounds of public policy if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship." According to the comments, section 190(1) "does not prevent persons contemplating marriage…from making contracts between themselves for the disposition of property, since this is not ordinarily regarded as an essential incident of the marital relationship." It does, however, "preclude them from changing in a way detrimental to the public interest in the relationship the duty imposed by law on one spouse to support the other."

By way of example, a California court found that the premarital agreement that required husband to give wife his house "and $500,000, or one-half [his] assets, whichever is greater, in the event of divorce" was against public policy and therefore unenforceable because it encouraged wife "to seek a dissolution, and with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract, and the wife's right to the money and property."[18] Conversely, some years later, a California appellate court reversed and remanded

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[16] *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008).

[17] Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think about Marriage*, 40 WM. & MARY L. REV. 145, 150 (1998).

[18] *In re Marriage of Noghrey*, 169 Cal.App.3d 326, 329 (Cal.App. 6 Dist., 1985).

a trial court's decision wherein it found a prenuptial agreement void because it tended to encourage divorce.[19] In that case, the premarital agreement involved the payment of $100,000 to wife in the event of divorce.[20] The appellate court held that, unlike the premarital agreement in *Noghrey*, the $100,000 payment provision did not threaten the marriage relationship and was the result of "realistic planning."[21]

b. Provisions Restricting a Child's Religious Upbringing:

In *Zummo v. Zummo*, the Pennsylvania Supreme Court refused to enforce a verbal provision of a prenuptial agreement stipulating the religious upbringing of children from the marriage.[22] It posited that enforcement would involve excessive entanglement and encroachment by the state on a fundamental right of religious freedom protected by the 1st Amendment.[23] Similarly, in *In re Marriage of Weiss*, the California Court of Appeals cited *Zummo* in holding that wife's prenuptial written promise to raise the child in husband's religion was unenforceable.[24] While it appears clear that premarital provisions encouraging divorce or restricting a child's religious instruction are void as against public policy, what other types of provisions might a Texas court find in violation of public policy?

Hypothetical #1: An Equal Division Clause but there is Domestic Violence

In the aforementioned hypothetical situation – where a premarital agreement provision provides for community property to be split equally on divorce – but at trial there is evidence of domestic violence – how would a Texas court possibly analyze an argument that to enforce the provision would be against public policy?

In making the argument that the provision should be struck down as against public policy, I would begin by reminding the court that Texas also has a clear public policy in protecting its citizens, and especially spouses, from the perils of domestic violence. The Legislature has made clear its feelings on domestic violence by a simple review of the Texas Family Code. Allegations of domestic or family violence can determine whether a spouse is able to get a restraining order, kick the other spouse out of the home, as well as have long-ranging effects on conservatorship. Additionally, Texas has expressed the policy that courts should be allowed to consider factors such as domestic violence in making a just and right division.

If I were striving to enforce the provision in the premarital agreement, I would argue that the Texas Supreme Court consistently espouses that Texas has a "strong public policy in favor of preserving the freedom of contract" and that "[c]ourts must exercise judicial restraint in deciding whether to hold arm's-length contracts void on public policy grounds."[25] Furthermore, I would argue that there is little connection between the public policy against domestic violence and the enforcement of a term that simply provides for an equal division of community property, and that the court's striking down of the provision will actually do little to further the State's policy against domestic violence.

Hypothetical #2: Damages in the Event of Adultery

What if there is a provision in the premarital agreement that provides for monetary damages if there is adultery? How would one attempt to attack this clause under public policy grounds?

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[19] *In re Marriage of Bellio*, 105 Cal.App.4th 630 (Cal.App. 2 Dist., 2003).
[20] *Id.*
[21] *Id.*
[22] 574 A.2d 1130 (Pa. Super. Ct. 1990).
[23] *Id.*; Sikaitis, *supra* note 2, at 345-46.
[24] *In re Marriage of Weiss*, 42 Cal.App.4th 106, 117-18 (Cal. App. 2 Dist., 1996).
[25] *Fairfield Ins. Co.*, 246 S.W.3d at 664.

Arguing for the court to void the provision, I would argue that Texas has a public policy interest in securing the permanence of the marital relationship and that this provision encourages divorce. After all, marriage promotes social order and other societal goals. The state regulates marriage, records marriage, and conditions numerous benefits upon the status of marriage. Thus, the state actively encourages marriage. Obviously the benefit of raising children in a stable, two-parent home means that the state will probably have better educated and perhaps more emotionally stable population in future generations.[26] This provision encourages a spouse who suspects the other spouse's infidelity to simply file for divorce in order to collect their reward.

Moreover, I would argue, similar to the argument above regarding domestic violence, that this provision is void because it violates the public policy of Texas in promoting no-fault divorce. By illustration, in *Diosdado v. Diosdado*, husband and wife entered into a contract providing for payment of liquidated damages in the event one of them was sexually unfaithful to the other.[27] The California appellate court found the agreement unenforceable as contrary to public policy underlying no-fault divorce.[28] The damages were payable over and above any property settlement or support obligations to penalize the spouse as a result of his or her "fault" during the marriage in causing the other spouse's emotional angst.[29]

If I were arguing for the court to enforce the provision, in addition to beating the "freedom of contract" drum, I would also remind the court that the State's policy towards fostering marriage has been weakened by the more pragmatic, contemporary attitudes towards marriage. As a California appellate court noted, "[i]n recent years, however, an increasing number of couples have executed antenuptial agreements in order to structure their legal relationship in a manner more suited to their needs and values. Neither the recording of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting the marriage. It is only when the terms of an agreement go further – when they promote and encourage dissolution, and thereby threaten to induce the destruction of a marriage that might otherwise endure – that such terms offend public policy."[30] In other words, public policy continues to favor and encourage marriage, but it now acknowledges that lifetime commitment is no longer the norm.

Furthermore, I would distinguish the *Diosdado* case, above, and the argument about no-fault divorce because Texas, unlike California, does allow the court to factor in fault in the breakup of the marriage when making a just and right division. I would argue that the provision does not go against the no-fault public policy in our State, but actually furthers it, while still allowing freedom of contract. Instead of enlisting the Court to "penalize" the adulterer in their just and right division, the parties provided for it in their premarital agreement, and, in light of the State's strong encouragement of freedom of contract, the Court should uphold the provision as it was drafted and agreed upon.[31]

Conclusion

While it is unclear how a Texas court would address arguments that a premarital agreement provision is void as violating public policy, I think that the issue is ripe for consideration as our society moves further towards a contract-centric view of the marital relationship. Pursuant to the guidance from the Texas Supreme Court in the non-family-law context, I believe that if a provision that provided for extreme damages in the event of adultery could very well be struck down as violating the State's policy of no-fault divorce. While

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[26] Julia Halloran McLaughlin, *Should Marital Property Rights be Inalienable? Preserving the Marriage Ante*, 82 NEB. L. REV. 460, 466 (2003).

[27] *Diosdado v. Diosdado*, 97 Cal.App.4th 470, 472 (Cal.App. 2 Dist. 2002).

[28] *Id*. at 474. It must be noted that, dissimilar to Texas law, California courts may not look to fault in dissolving the marriage, dividing property, or ordering support.

[29] *Id*.

[30] *Pendleton v. Fireman*, 5 P.3d 839, 847 (Cal. 2000).

this argument could also be made in the context of an equal division clause when there is evidence of fault, such as domestic violence, I believe that this provision might be upheld in that the term does not have a close enough connection to the policy against domestic violence. As practitioners become more creative in drafting such content-based provisions, family law attorneys should carefully read over any premarital or marital agreements to look not only for evidence of unconscionability, but whether any provisions could be against a public policy of the State.

INTENTIAL INFLICTION CLAIMS WHEN AFFECTIONS HAVE BEEN ALIENATED

by
Eric Beal[1]

So you want to practice Family Law in the post-Tort-Reform world in which we find ourselves? You say you haven't had a client come in whose life has been devastated by their spouse's adultery? Well, wait until your second week of practice, you will.

When those clients come in, the first question any creative attorney would ask himself is, "What can I do to gain an advantage and really give the other side something to lose? You want something more than just the threat of a "disproportionate division" using adultery as a fault ground – that's often not much of a threat. "I've got it, there must be a Tort that will work," you think. Maybe there is.

That brings you to the second question that you have to ask yourself. One that Clint Eastwood, in the role of Dirty Harry put best, "Do I feel lucky? Well, do ya punk?"[2]

The reality is, if you practiced in another state, for example, Mississippi, you may never need to reach the Dirty Harry question. As recently as 2003, several states, including Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah, still recognized Alienation of Affections ("Alienation").[3]

In fact, on January 7, 2008, the U.S. Supreme Court refused to hear an Alienation case in which a Mississippi businessman suffered a judgment of $750,000.00 for having an affair with a married woman.[4] The case was brought by the woman's ex-husband, post-divorce, for the "loss of society, companionship, love and affection, and sexual relations" the innocent spouse had suffered because of his ex-wife's paramour under Mississippi's Alienation of Affection statute.

Although six-digit awards against individuals for intentional torts don't raise many eyebrows in and of themselves, due to problems of enforceability and the "blood-from-a-turnip" principal, the Mississippi case is tantalizing enough to catch one's attention. There, the cheating defendant has been described as a "wealthy realtor and successful businessman,"[5] the Mississippi Supreme Court upheld the judgment,[6] and as mentioned, the U.S. Supreme court denied *cert.*, so the Mississippi plaintiff may get a nice payday.

That combination of factors leads the creative Texas practitioner to ask: Can that happen here? Can I get that type of result for my client? Since at least 1987, the answer most often given has been: probably not. A careful analysis of Texas case law, including a 2004 Houston 14th District case, however, changes the answer

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[1] Eric Beal practice family law in Tarrant County and can be contacted at www.DFWDIVORCE.com.
[2] "Dirty Harry," 1971, The Malpaso Company, with Clint Eastwood as Inspector Harry Callahan, SFPD.
[3] *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. 2003)(Dissent).
[4] Cert. Denied, U.S. Supreme Court Order 07-569, January 7, 2008.
[5] AFP Article, January 7, 2008 "750,000 dollars in damages for cuckolded husband"; See also ABC News Article, January 9, 2008 "Seducing Someone's Spouse? It may Cost You."
[6] *Fitch v. Valentine*, 959 So.2d 1012 (Miss. 2007).

to a strong maybe. And in keeping with the movie theme of this article, in the words of Lloyd Christmas, "So you're telling me there's a chance."[7]

"HEART BALM TORTS" IN TEXAS

At one point or another, in most if not all jurisdictions, the "Heart Balm Torts" were available to allow the innocent, whose heart needed the balm of judicial relief, redress. Those torts included Alienation of Affections, Criminal Conversation, Seduction, and Breach of Promise to Marry.[8] None of the four still exist in Texas, at least not as conventionally thought of. While Seduction and Breach of Promise are beyond the scope of this article, a discussion of Criminal Conversation and Alienation of Affections is useful in the examination of whether the payday discussed above is possible in Texas.[9]

It's unclear exactly when Alienation of Affections first appeared in Texas law, and it's unclear whether it ever didn't exist. A look at its genesis leads to Germanic tribal law.[10] There, men were entitled to payment from the wife's lover so that the husband could purchase a new spouse. The theory was that this would "ensure pure bloodlines and discourage adultery."[11] Following the Germanic tradition, the Anglo-Saxons established a mechanism to allow compensation for "interference with the marital relationship" that had as its justification the fact that "wives were viewed as valuable servants to their husband."[12]

Early English common law carried on the tradition of compensation for the innocent males with causes of action for seduction and enticement, which were the progeny of the Germanic and Anglo-Saxon laws. Those causes of action eventually appeared in the United States and became the torts known as Alienation of Affections and Criminal Conversation.[13]

In 1840, the Congress of the Republic of Texas enacted a statute that read: "The common law of England (so far as it is not inconsistent with the Constitution and laws of this State) shall, together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature."[14] While that 1840 law may appear to be an unambiguous statement of Texas law, 73 years later, the Texas Supreme Court was still unclear, when it said, "We must first ascertain what the Congress of the Republic intended to designate by the language: 'The common law of England.'"[15] They concluded "'the com-

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[7] Dumb and Dumber, 1994, New Line Records, with Jim Carrey as Lloyd Christmas.
[8] PROSSER AND KEETON ON TORTS, 5th Edition, § 124, p.929. ("Abolition of Actions").
[9] Reconciling the case law involved in this area is a headache causing prospect. At the outset a time-line would need to be constructed to detail the holdings of particular court vis a vis the state of related legal concepts such as interspousal immunity, rights of women to sue in their own name, etc. *See, e.g.*, *Burnett v. Cobb*, 262 S.W. 826 (Tex. Civ. App. Amarillo 1924, no writ)("At common law the husband was liable for the tort of his wife, independent of any participation therein. A number of authorities of other states hold that statutes which recognize the right of the wife to own and manage her separate property put an end to this common-law rule by implication because the reason on which the rule was founded ceased with the enactment of such laws. [cites omitted] These authorities would be directly applicable to the situation in this state after the passage of the Married Woman's Act of 1913, prior to its amendment in 1921, and if they are to be followed would in any event absolve the husband from liability in the absence of guilty participation in the wrong. Numerous authorities, however, have taken the other side of the question, holding that the common-law rule of liability was not repealed by implication by laws which provided for the ownership and control by the married women of her separate property."); *Hoy v. State*, 39 Tex. Crim. 340 (1898) (Appeal from Conviction for Adultery).
[10] *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. 2003).
[11] *Id.*
[12] *Id.*
[13] *See* PROSSER AND KEETON ON TORTS, 5th Edition § 124, p.917-9 ("Types of Interference")("[Alienation of Affections] seems to have been recognized first in New York in 1866"), *cf. Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. 2003)("Beginning with New York in 1864 . . .")
[14] *Grigsby v. Reib*, 153 S.W. 1124, 1125 (Tex. 1913).
[15] *Id.*

mon law of England' adopted by the Congress of the Republic was that which was declared by the courts of the different States of the United States."[16]

The circularity of that logic highlights the lack of clarity as to the origins of Alienation and Criminal Conversation in Texas. One thing is for certain, however, Texans were suing each other under Heart Balm theories throughout the 19th and early 20th Century.[17]

Alienation of Affections is one of those wonderful torts that make it easy for everyone, because its name says it all. Criminal Conversation, on the other hand, is the exact opposite. It leaves most attorneys that passed the bar after the mid-1970's with the same question: Huh? In short, Criminal Conversation is the tort that, pardon the pun, marries up with adultery. Although Prosser and Keeton state that the "criminal" part of the name derives from the fact that adultery was an "ecclesiastical crime,"[18] at one time in Texas it was also an actual crime.[19]

The elements of Alienation of Affections were as follows: (1) that the defendant intentionally or purposely enticed away the spouse, (2) that there has been loss of affection or consortium, and (3) that defendant's conduct was the controlling cause of the loss.[20]

The elements for criminal conversation were as follows: (1) An actual marriage between the spouses, and (2) Sexual intercourse between the defendant and the guilty spouse during the coverture [the inclusion of a woman in the legal person of her husband upon marriage under common law]."[21]

In 1987, abrogating over 1000 years of law and tradition the Texas Legislature amended the Texas Family Code to abolish the tort of Alienation of Affections, having done the same to Criminal Conversation in 1975.[22] Theoretically, at least, that would put an end to Heart Balm in the state of Texas. As the old saying goes, however, "if at first you don't succeed, try, try again." In the law, that can often be translated as: just because you can't sue someone one way, doesn't mean you can't sue them another.

ALTERNATIVES FOR INNOCENT SPOUSES

The Texas Supreme Court specifically adopted the tort of Intentional Infliction of Emotional Distress a/k/a Intentional Infliction of Mental Anguish ("Intentional Infliction") in the 1993 case of *Twyman v. Twyman*.[23] *Twyman* was a divorce case in which the wife alleged that her husband "'intentionally and cruelly'

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[16] *Id.*; *See also*, *Great Southern Life Insurance Co. v. Austin*, 243 S.W. 778, 780 (Tex. 1922).

[17] *See, e.g.*, *Ex Parte J.B. Warfield*, 40 Tex. Crim. 413 (Contempt proceeding arising out of a Dallas County civil suit "for $100,000" alleging partial alienation of the affections of plaintiff's wife); *Glasscock v. Shell*, 57 Tex. 215 (1882)(Discussing the measure of damages in suit at bar, contrasting it with that of criminal conversation); *Wright v. Wright*, 3 Tex. 168 (Tex. 1848)(referencing tort of seduction); *See also Norris v. Stoneham*, 46 S.W.2d 363 (Tex. Civ. App. Eastland 1932, no writ)(A thorough discussion of the adoption of marital rights law in Texas that concludes with the affirmation of a $3,000.00 award to a wife for the alienation of her husband's affections, while noting that it is "not a vice to be friendly, pleasing, and attractive ").

[18] PROSSER AND KEETON ON TORTS, 5th Edition, § 124, p. 917 fn. 17 ("Types of Interference").

[19] *See Halbadier v. State*, 214 S.W. 349 (Tex. Ct. Crim. App. 1919, rehearing granted)(The defendant having been convicted of adultery, moved to quash the information and complaint, in part because the complainant was an "accomplice," to wit: the woman with whom he had had sex.).

[20] *McQuarters v. Ducote*, 234 S.W.2d 433, 434 (Tex. Civ. App. San Antonio 1950, writ ref'd n.r.e.)(Wife-plaintiff filed suit for alienation of affections; lost due to inability to prove causation, finding that prevailing would "reward [her] for the misdeeds and weaknesses of her own husband").

[21] *McMillan v. Felsenthal*, 482 S.W.2d 9, 12 (Tex. Civ. App. Tyler 1972), *subsequent history*, *Felsenthal v. McMillan*, 493 S.W. 2d 729 (Tex. 1973)(cited by *Smith v. Smith*, 126 S.W.3d 660 (Tex. App. Houston [14th Dist.] 2004), as the case which "adopted" Criminal Conversation as a tort in Texas).

[22] TFC § 1.107 (2007)(former TFC. § 4.06).

[23] *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993)("Today we become the forty-seventh state to adopt the tort of intentional infliction of emotional distress as set out in § 46 (1) of the RESTATEMENT (SECOND) OF TORTS.").

attempted to engage her in 'deviate sexual acts.'"[24] Following a bench trial in which the court awarded Mrs. Twyman $15,000.00 plus interest on her "emotional distress" claim, the husband appealed.[25]

Twyman was significant for both its specific adoption of the Intentional Infliction claim, and its added recognition that there was no prohibition on bringing it in a divorce action.[26] Prior to *Twyman*, some Texas appellate courts had recognized Intentional Infliction in limited circumstances, but the Houston Fourteenth District had specifically barred its use in divorce cases.[27]

For the first 140 years or so of Texas jurisprudence, the question of one spouse's ability to sue the other for Intentional Infliction never came up. As the *Twyman* court points out, it wasn't until 1977 that the Texas Supreme Court did away with interspousal immunity for intentional torts.[28] Ten years later, they did away with interspousal immunity completely.[29]

With *Twyman* the law, the time was right for someone to bring a tort case against his or her spouse, and presumably the spouse's paramour, for Intentional Infliction. Now that it's 2008, the time has been right for fifteen years. So why do both a leading legal treatise and most recent paper on the topic presented as part of the "Family Law Torts" webcast, produced by the State Bar of Texas Continuing Legal Education department state, "Intentional infliction claims in which the outrageous behavior involved an adulterous liaison probably will not be permitted in Texas," or words to that effect?[30]

Given that both of those sources cite the same case as their only authority for that position, clearly, an examination of that case is in order. The case upon which they rely is *Truitt v. Carnley*[31].

In *Truitt*, the Fort Worth Court of Appeals considered a case in which an aggrieved spouse sued the paramour of his adulterous spouse. Mr. Truitt had apparently had an affair with Ms. Carnley. Mrs. Truitt's action alleged that Mrs. Carnley "either intentionally or negligently" caused her to "suffer mental anguish."

The plaintiff lost, both at the trial level and in the court of appeals. The Truitt court held that "Truitt's suit against Carnley was necessarily based upon either one or both" Alienation or Criminal Conversation. Since those had both been abolished, the court reasoned, the plaintiff could not appeal. That, however, was 1992, prior to *Twyman*, and in essence the court was simply refusing to adopt Intentional Infliction as an intermediate court.

Following *Twyman*, in 1994, the Fort Worth Court again examined a case in which adultery took center stage.[32] *Stites v. Gillum* involved the appeal of a sanction that was imposed upon a Fort Worth attorney who

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[24] *Id.* at 621.
[25] *Id.*
[26] While *Twyman* was pending, the Court specifically refused to adopt Negligent Infliction of Emotional Distress. *See* *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).
[27] *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App. Houston [14th Dist.] 1989, writ denied)(Overruled specifically by *Twyman* at 624, fn. 15).
[28] *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).
[29] *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987).
[30] Dorsaneo, TEXAS LITIGATION GUIDE, § 337.03, "Contexts in Which Intentional Infliction Claims Occur" (2008); "Divorce Torts: A Family Law Practitioner's Guide to Evaluating, Drafting and Prosecuting Interspousal Torts," Family Law Torts, webcast, recorded September 2007. ("One should not plead adultery as the extreme and outrageous behavior. There has been at least one case where a woman sued her husband's paramour for the intentional infliction of emotional distress and the court rejected it on the basis that it was legally just a claim based on alienation of affection and criminal conversation, both of which have been abolished by the Texas legislature. *Truitt v. Carnley*, 836 S.W.2d 786, 787 (Tex.App.Fort Worth 1992, no writ). The facts giving rise to the intentional infliction of emotional distress should be independent of any adulterous affair.").
[31] *Truitt v. Carnley*, 836 S.W.2d 786 (Tex. App. Fort Worth 1992, writ denied).
[32] *Stites v. Gillum*, 872 S.W.2d 786 (Tex. App. Fort Worth 1994,Fort Worth, writ denied).

represented the wife in a divorce.[33] As a part of his counter-petition on behalf of his client, the attorney impleaded the alleged paramour of his client's spouse. His pleading was entitled "Suit Against Third Party Counter-Respondent for Impairment and Interference with Familial Relationship."[34]

The paramour moved for and was granted a summary judgment using the same argument as the *Truitt* defendant.[35] She alleged that the claims against her were either Criminal Conversation or Alienation, and since both of those had been abolished, the pleading could not stand, as a matter of law. Apparently unlike the *Truitt* defendant, however, she was not content to stop there.

Following her summary judgment victory, the paramour moved for Rule 13 sanctions against the attorney.[36] The trial court found that the pleading was "an action for 'alienation of affections' couched in other terms" and that it was "not an action seeking damages for intentional infliction of emotional distress."[37] The court found further that the attorney's filing was groundless and in bad faith, and imposed an $18,000.00 sanction against him.[38]

In his defense, the sanctioned attorney argued, *inter alia*, that he was "modifying or extending existing law on the causes of action 'Interference with Familial Relationship' and 'Intentional Infliction of Emotional Distress.'"[39] The appellate court found that, although "intentional interference with the relationship of the parent and child is actionable," no tort of "Interference with Familial Relationship existed "as applied to the factual situation" they were considering.[40] Accordingly, they dismissed Stites' "modifying or extending" argument with respect to his "familial relationship" defense.[41]

As for Intentional Infliction, the appellate court used a much more creative analysis. They discussed the *Twyman* court's recognition of the tort in 1993, but pointed out that since the attorney's counter-petition was filed in 1990, that didn't apply.[42] They then moved on, however, to talk about how in 1990 there were "intermediate appellate opinions adopting in Texas the tort of intentional infliction of emotional distress in various fact situations."[43] The Court discussed the elements of Intentional Infliction, and determined that the *sine qua non* of the tort is "extreme and outrageous" conduct.[44] Because they determined that the counter-petition contained no allegations of such conduct, they held that it could not be "reasonably inferred" that the attorney intended to plead such a tort.[45]

In its discussion, however, it is important to note that the Fort Worth Court of Appeals stated that, "It is perhaps conceivable that, notwithstanding the prohibition of TFC § 4.06 abolishing the cause of action of alienation of affections by one spouse against a third party, an argument could be made that the cause of action of intentional infliction of emotional distress was viable and should be extended to a situation involving a spouse bringing the cause of action against a third party for conduct involving the other spouse."[46] The court

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[33] *Id*.
[34] *Id*.
[35] *Id*. at 788.
[36] *Id*.; *See* TEX. R. CIV. P. 13.
[37] *Stites v. Gillum*, 872 S.W.2d at 790.
[38] *Id*. at 788 & 790.
[39] *Id*. at 789.
[40] *Id*. at 792.
[41] *Id*.
[42] *Id*. at 793.
[43] *Id*.
[44] *Id*. at 793-94.
[45] *Id*. at 794. (The sanctioned attorney apparently did himself no favors by not making his claim that he was intending to plead Intentional Infliction until some time after his response to the summary judgment in the underlying case and deposition, presumably on the issue of sanctions.)
[46] *Id*. at 793.

went on to say, that "we expressly do not decide the viability of such a cause of action in circumstances such as those in the case before us."[47]

The appellate court held that the attorney's pleadings "purport to allege only a cause of action for interference with familial relationship, and do not allege a cause of action for" Intentional Infliction.[48] The court upheld the $18,000.00 sanction and it was ten more years before another reported Texas case involved the pursuit of tort liability against a cheating spouse or paramour thereof.[49]

In 2004, the Houston 14th District Court of Appeals considered a constitutional challenge under the Open Courts provision of the Texas Constitution to the Family Code provisions that abolished Alienation and Criminal Conversation.[50] In *Smith v. Smith*, the plaintiff was presumably the former Mrs. Smith, and the defendant the latter. The defendant was alleged to have had an affair with the husband of the plaintiff.

The court outlined the analysis to be used in an Open Courts challenge as follows: "Thus, a plaintiff must satisfy two criteria: first, a well-established common law cause of action must be restricted; and second, the restriction must be unreasonable or arbitrary when balanced against the purpose and basis of the statute."[51] With respect to the second prong, the court stated that it must "consider both the general purpose of the statute and the extent to which the litigant's right of redress is affected."[52] In other words, did the legislature have a good enough reason and are there other judicial methods to right the wrong – so the two-prong test really has a third prong.

The *Smith* court held that both TFC §§ 1.106 and 1.107 were constitutional and therefore upheld the statutory abolition of Criminal Conversation and Alienation. Despite the suspect reasoning of the court on two of the three prongs, the court's commentary illuminates the path to redress for the next cheated-upon litigant.[53]

In explaining its rationale with respect to Criminal Conversation, the court states that a cheated-upon spouse "may also be able to bring a cause of action for intentional infliction of emotional distress against the offending spouse and against a third party based on interference with the marriage relationship."[54] In analyzing Alienation, the court stated that the relief available to a cheated upon spouse includes "bringing a cause of action for intentional infliction of emotional distress."[55]

HOW TO GET THERE FROM HERE

Going back to the cheated-upon client sitting in your office, and considering the first question – What can I do? – the answer is clear. Plead for Intentional Infliction of Emotional Distress. If the facts support it, implead the paramour, or consider filing a separate action against him or her. As for the obstacles you'll face, hurdle them one at a time.

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[47] *Id*. at fn. 6.
[48] *Id*. at 794.
[49] In 2008 dollars, using $18,000.00 as principal and 3% rate of return compounded annually for fourteen years, the sanction would be $27,226.62.
[50] *Smith v. Smith*, 126 S.W.3d 660 (Tex. App.Houston [14th Dist.] 2004).
[51] *Id*. at 664.
[52] *Id*.
[53] With respect to Criminal Conversation, the *Smith* court determined that it was not a "well-established common law cause of action." Given its roots in pre-Anglo-Saxon, Germanic Tribal law and its place in 19th century Texas case law, that finding seems astonishing, at best, especially in light of the analysis the court then used for Alienation. The *Smith* court states that Alienation was, in fact, "well-established" and enjoyed a sixteen year run in Texas courts. The life-span of the tort was calculated by an odd determination that its birth in Texas was 1971, coupled with its death by statute in 1987. Nevertheless, regardless of how odd the determination, given that the court found the plaintiff to have met the burden, there is no reason to quibble with how the court arrived at the answer.
[54] *Smith v. Smith*, 126 S.W.3d at 665.
[55] *Id*. at 666.

Hurdle 1: You can't bring that based upon adultery

Any case prior to *Twyman* that suggests your inability to bring an Intentional Infliction action is suspect, at best. Specifically, the *Truitt* analysis that suggests that any Intentional Infliction claim in a divorce is really Alienation or Criminal Conversation in disguise is simply outdated and wrong.

Stites illustrates that the key to having your pleading recognized as an actual pleading for Intentional Infliction rather than an attempt to "plead around" Alienation is in the facts you allege and the characterization you make. In *Twyman*, the "extreme and outrageous" conduct alleged by the plaintiff included a "continuing course of conduct" of "sadomasochistic bondage activities" that Mr. Twyman insisted Mrs. Twyman participate in, despite his knowledge that "she feared such activities because she had been raped at knife-point before their marriage."[56] Therefore, make sure your pleading alleges specifically that the conduct was "extreme and outrageous" and have facts to back it up.

Hurdle 2: You can't prove that the intent of the action was to cause the plaintiff distress

Twyman makes clear that the "factfinder should be permitted to consider whether [the defendant] knew with substantial certainty that [his/her] actions would probably cause [the plaintiff] emotional harm."[57] Additionally, the Court expressly approves the language of the Restatement to the effect that the tort "includes situations in which the actor recklessly inflicts emotional distress," and describes that as being when the tortfeasor "knows or has reason to know . . . of facts which create a high degree of risk of . . . harm to another, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to that risk."[58] Therefore, include in your allegations that the emotional distress and mental anguish was inflicted recklessly.

Hurdle 3: Some of the case law that suggests this as a viable cause of action speaks in terms of a claim that "may be" available

The *Smith* court recognized that an important element to consider in the constitutional analysis of a statute that eliminates an established cause of action is the availability of another method to right the wrong. With respect to Criminal Conversation, the Court stated that Intentional Infliction *may* be available to protect the aggrieved; with respect to Alienation, the court removed the word "may." Therefore to take the position that that relief is not available is really to argue against the abolition of Criminal Conversation and Alienation of Affections. Offering to plead those two old torts in the alternative to your Intentional Infliction claim and challenge the constitutionality of TFC §§ 1.106 and 1.107, should go a long way in negotiating this hurdle. It seems unlikely that any defendant would invite such a complication.

Hurdle 4: One of the last lawyers that attempted to impose tort liability on a cheating spouse and paramour got sanctioned

That's where the second question we began with comes in to play. The law available now was not on the books in 1990 when that lawyer filed his pleading, and your pleading will specifically allege the elements of Intentional Infliction. You will plead facts specifically supporting a finding of "extreme and outrageous" conduct that "intentionally or recklessly" caused your client emotional distress.[59]

At the end of the day, all that's standing between your cheated-upon client and a Mississippi-like payday is a carefully crafted petition, and your advocacy skills in explaining to a district judge how the law and your

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[56] *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993).
[57] *Id.* at 624.
[58] *Id*. quoting Restatement (Second) § 500, cmt. a.
[59] *Cautionary Note: Twyman* makes clear that the same conduct cannot be used for both disproportionate division and a tort recovery.

pleadings differ from those of the sanctioned attorney. Now that you're ready, just ask yourself one question: Do I feel lucky? Well, do you?

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

DIVORCE
Grounds and Procedure

AGREEMENT INCIDENT TO DIVORCE THAT IS INCORPORATED IN FINAL DECREE OF DIVORCE CAN ONLY BE TERMINATED FOR CAUSE UNDER CONTRACT LAW

¶ 08-2-01. ***Schwartz v Schwartz*,** 247 S.W.3d 804 (Tex. App.—Dallas 2008) (03/19/08).

Facts: Husband and wife were divorced in 2003. They executed an agreement incident to divorce that the trial judge approved and incorporated into the divorce decree. Pursuant to the agreement, husband was to make monthly alimony payments to wife, make monthly payments for medications required by wife, and pay for health insurance premiums for wife. In 2006, husband filed a motion to modify the final decree of divorce. Asserting change in his financial position, he requested termination of the payments to wife stipulated in the agreement and incorporated into the divorce decree. Wife moved for summary judgment, arguing that no provisions of the agreement had occurred entitling husband to termination of the agreed spousal support. The trial judge granted the summary judgment and denied all claims and causes of action asserted by husband in his motion to modify the final decree of divorce. Husband appealed.

Held: Affirmed. The agreement incident to divorce that was incorporated into the final decree of divorce is enforceable under general contract law and can only be terminated or modified for fraud, accident or mutual mistake of fact.

Opinion: "The agreement between [husband] and [wife] incorporated in the final decree of the court became a part of the final judgment of the court. When such an agreement is executed by the parties and incorporated into the judgment of divorce, it is binding on the parties, and is interpreted under general contract law… As with any other contract, absent consent of the parties, the provisions of the agreement will not be modified or set aside except for fraud, accident or mutual mistake of fact."

Editor's Comment: *Contract law also includes defenses to performance. Could a former spouse invoke frustration of purpose to extinguish a contractual alimony obligation if the other ex-spouse experienced a financial windfall after divorce? J.V.*

A JUDGE CANNOT ISSUE ORDERS IN A CASE WHEN A RECUSAL MOTION IS PENDING ABSENT AN EXPLICITLY STATED FINDING OF GOOD CAUSE

¶ 08-2-02. ***In re* Stearman,** ___S.W.3d___, 2008 WL 2043065 (Tex. App.—Waco 2008, orig. proceeding) (04/30/08)

Facts: Mother filed petition for divorce in Walker County contending that Walker County had exclusive jurisdiction because their child was born there and it was the child's sole place of residence. Father filed for divorce in Navarro County. Mother sought to quash citation from Navarro County contending it was invalid because it was served on a Sunday, and she sought a transfer of venue based on contention that Walker County was proper venue because it is the child's principal residence. The trial court set a hearing for February 25,

2008, which was rescheduled without notice to mother, who was re-served upon arriving for the hearing at its original date. While there, mother's counsel saw father's counsel sitting on bench as an associate judge, hearing cases on the trial court's docket. Mother filed a motion to recuse the trial judge because his impartiality might reasonably be questioned due to the dual roles played by father's counsel. In response, Father filed an application for an ex parte stay and restraining order staying all further proceedings in Walker County and restraining Mother from obtaining further settings in Walker County until the recusal matter was determined, and the jurisdiction issue settled. The trial judge granted Father's application. Mother then filed a petition for writ of mandamus, in which she contended that the stay and restraining order were void because the trial judge issued them while the recusal motion was pending.

Held: Mandamus granted. Trial judge abused his discretion by issuing stay and restraining order while the recusal motion was pending.

Opinion: A trial judge has two options when a recusal motion is filed against him/her: (1) recuse himself/herself; (2) forward the motion to the presiding judge and request another judge to hear the motion. However, a judge may make further orders while the recusal motion is pending for "good cause stated in the order." The trial judge's order stated that there was good cause for issuing the stay and restraining, but did not state what that good cause was. It is not for the trial judge to decide whether a properly filed recusal motion is groundless or filed in bad faith, thus the trial judge abused his discretion by issuing the order while the recusal was pending.

A DILATORY REQUEST FOR MANDAMUS REVIEW IN A DIVORCE SUIT IS ESPECIALLY TROUBLING WHEN THE NEEDS AND STABILITY OF A CHILD ARE IMPLICATED

¶ 08-2-03. ***In re* Barton,** 2008 WL 1903483 (Tex. App.—Amarillo 2008, orig. proceeding) (memo op.) (04/30/08)

Facts: In December 2006, trial court granted mother and father a divorce naming them JMCs of their child and gave mother, who lived in Upshur County, the right to determine child's residence within either Potter or Randall Counties. Father filed a motion for new trial requesting that primary custody be modified to give father the right to determine the residence of the child until mother gave notice of change of residence to Potter or Randall County; father believed a change in custody was needed because mother had not taken sufficient steps to move within these counties. Trial court granted a new trial. Mother asked the trial court to include whether child's home should be geographically limited to Randall or Potter counties in the new trial; this motion was denied and mother petitioned for a writ of mandamus to compel the trial court to consider the issue.

Held: Mandamus denied. Courts of Appeals generally will not review an order granting new trial by mandamus, and mother's request was dilatory.

Opinion: Mother waited almost three months to seek mandamus; in addition, she waited a month between the time the trial court ordered a partial new trial and the date she asked it to reconsider its opinion. "Why she so delayed in either situation went unexplained. And, this is troublesome given that the needs and stability of a child are implicated."

MERE ALLEGATIONS OF UNETHICAL CONDUCT OR EVIDENCE SHOWING A REMOTE POSSIBILITY OF A VIOLATION OF THE DSICIPLINARY RULES DO NOT MERIT DISQUALIFICATION

¶ 08-2-04. ***In re* Frost**, 2008 WL 2122597 (Tex. App.—Tyler 2008, orig. proceeding) (memo op.) (05/21/08)

Facts: Husband and Wife filed for divorce in 2007, during discovery Husband inquired whether any documents described in a request for production had been lost or destroyed; Wife stated that all financial and tax information dated prior to 1/1/2000 had been destroyed in early 2006. Husband, however, believed that files containing financial documents dated earlier than 1/1/2000 were located at their Tyler residence, which Wife occupied. When Wife was out of state, Husband hired a locksmith and entered Wife's residence, Husband was accompanied by his attorney and his attorney's legal assistant; while they were inside Wife's residence husband took photos and the legal assistant videotaped the contents of the residence. Husband was able to locate documents that Wife claimed were destroyed, and removed some documents and personal items from the residence. Some days later, Husband filed a motion requesting sanctions for Wife's failure to produce the documents he had found; Wife then filed a motion to disqualify Husband's attorney alleging that he could not continue to represent Husband because his and his legal assistant's entry into Wife's residence made them "material witnesses" since Husband's pleadings "assert fraud and concealment of assets." Wife further alleged that Husband's attorney should be disqualified because he had previously represented Husband and Wife in a civil matter and "did not secure Wife's prior consent to represent Husband in a matter adverse to her interest." The trial court ruled that Husband's attorney was disqualified, but declined to state a reason for its ruling; on the same date, trial court signed an order granting the motion to disqualify without specifying the reason for its ruling. Husband then filed a petition for writ of mandamus and a motion for emergency relief in the court of appeals.

Held: Mandamus granted, attorney disqualification is a drastic measure, and wife did not meet her burden of proof to have Husband's attorney disqualified.

Opinion: Wife, as the party moving for disqualification, has the burden to establish that Husbands' attorney violated one or more of the disciplinary rules, mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules does not suffice to merit disqualification. Under Rule 3.08, the fact that an attorney serves as both advocate and witness does not in itself compel disqualification, and Wife must show that the attorney's testimony would cause her actual prejudice; however Wife made no showing of actual prejudice. Likewise, Rule 1.09 does not absolutely prohibit an attorney from representing a client in a matter adverse to a former client, and Wife did not show that the matters was substantially related or that Husband's attorney would reveal confidential information.

DIVORCE
Division of Property

★★★★★ **TEXAS SUPREME COURT** ★★★★★

SINCE THERE IS NO INDEPENDENT TORT CAUSE OF ACTION FOR WRONGFUL DISPOSITION OF COMMUNITY PROPERTY BY A SPOUSE, A THIRD PARTY CANNOT BE HELD LIABLE FOR CONSPIRACY TO CONVERT COMMUNITY PROPERTY

¶ 08-2-05. ***Chu v. Hong*,** 249 S.W.3d 441 (Tex. 2008) (03/28/08)

Facts: Husband and wife married in 1996 and bought a donut shop in 1997. In 1998, they agreed to sell the shop to buyers for $180,000. At the closing of the sale of the shop, Husband appeared alone and represented that he was the "lawful owner in every respect" of the shop and had full authority to sell it; the buyers paid

husband $90,000 cash and an additional $90,000 by promissory notes based on a contract drawn up by their attorney. Sometime after closing, Husband wired the money from the sale of the shop to his parents in Korea, and filed for divorce from wife. Wife filed a counterclaim for defrauding the community for proceeds from the sale, and filed a suit against the buyers and their attorney for conversion and conspiracy. The trial court granted a divorce, declared the shop sale void and ordered the buyers to turn the shop over to Wife, allowed Wife and Husband to each keep the marital property currently in their possession, and assessed no damages against Husband other than attorney's fees. The trial court assessed the same attorney's fees jointly against the other defendants, along with $247,000 for lost profits and interest, and punitive damages against the buyers for $20,000 and against their attorney for $1,500,000. The buyers filed for bankruptcy, so only the buyer's attorney appealed. In a divided opinion, the court of appeals affirmed.

Held: Reversed and rendered. The buyer's attorney did not convert Wife's property, and a third party cannot be liable for conversion of community property when the property is taken by one of the spouses.

Opinion: The only direct liability finding against the buyer's attorney was that he converted Wife's property; but because he received nothing but a legal fee that was paid by his own clients, there is no evidence to support this finding. Furthermore, there is no independent tort cause of action for wrongful disposition by a spouse of community assets, the just-and-right division is the "sole method" for adjudicating such claims, and "no independent cause of action exists in Texas ... when the [spouse's] wrongful act defrauded the community estate." Since Husband defrauded the community estate the trial court could take this into account in making a just-and-right division, but it could not be pleaded as an independent cause of action against the buyer's attorney.

Editor's Comment: *This case points out a huge hole in the state of Texas family law. A spouse commits fraud against the community estate and the proceeds of the fraud are gone (at least as to the community). The "just and right" division standard may not be adequate to compensate the community estate for the fraud, especially where the bad-acting spouse is judgment proof. M.M.O.*

Editor's Comment: *The court also resolved an issue not reached in Schlueter v. Schlueter, 975 S.W.2d 584, 590 (Tex. 1998): Either or both spouses may sue a third party for torts committed against the community estate. J.V.*

TESTIMONY FROM SPOUSE'S PARENT THAT PROPERTY WAS A GIFT TO ONE SPOUSE ALONE IS SUFFICENT TO ESTABLISH SEPARATE PROPERTY BECAUSE NO TRACING INVOLVED

¶ 08-2-06. ***Wells v. Wells,*** ___ S.W.3d ___, 2008 WL 801458 (Tex. App.—Eastland 2008) (03/27/08)

Facts: Wife filed for divorce and requested an unequal distribution in her favor based on allegations of husband's threats to kill her and fraud committed on the community property by husband. Trial court granted divorce awarding wife a disproportionate share of the marital assets, and awarded wife 12 items of farming equipment as her separate property based on testimony from wife's mother that the equipment was a gift from wife's parents to wife alone. Husband appealed challenging trial court's division of property and the characterization of twelve items of farming equipment as wife's separate property.

Held: Affirmed. Wife's mother's testimony was sufficient to determine the character of the property because no tracing involved.

Opinion: A disproportionate division must have a reasonable basis; in a fault-based divorce a trial court may consider the conduct of the errant spouse in making a disproportionate distribution of the marital estate. Here there was sufficient evidence from which a trial court could conclude that a disproportionate division was just and right; therefore, the court did not abuse its discretion. With regards to the farming equipment, wife's mother testimony that the gift was not to husband and wife but to wife alone was sufficient to avoid tracing.

The fact that this equipment may have been used to help facilitate the production of crops whose proceeds were community property would not alter the character of the equipment.

Editor's Comment: *Wife's mother testified that Wife's (apparently deceased) father intended to give the farming equipment to Wife, not to Husband and Wife. What would the evidentiary predicate be for this testimony? J.V.*

A PARTY'S CONSENT TO AN AGREED FINAL DECREE OF DIVORCE WAIVES ANY ERROR ABSENT FRAUD, COLLUSION, OR MISREPRESENTATION

¶ 08-2-07. ***Boufaissal v. Boufaissal,*** ___ S.W.3d ___, 2008 WL 963064 (Tex. App.—Dallas 2008) (04/09/08)

Facts: Wife contested trial court's division of property in final decree of divorce. The trial court approved an agreed final decree of divorce which both Husband and Wife signed, and divided property accordingly, however Wife claimed on appeal that the terms of the agreed decree of divorce vary from the parties' Rule 11 settlement agreement.

Held: Affirmed. Wife signed the agreed final decree of divorce so she waived any error.

Opinion: Absent an allegation and proof of fraud, collusion, or misrepresentation a party cannot appeal judgment to which it consented or agreed; and a party's consent to trial court's entry of judgment waives any error.

Dissent: The trial court found a just and right division based on Husband and Wife's Rule 11 settlement agreement, but the final decree awards property not covered by that agreement. A final judgment based on a settlement agreement must be in strict compliance with the agreement, and a trial court has no power to supply terms, provisions, or conditions not previously agreed to by the parties.

Editor's Comment: *The majority and dissent framed the issue differently: The majority asked whether Wife had consented to the judgment, while the dissent asked whether sufficient evidence supported the judgment. J.V.*

TRIAL COURT MUST HAVE EVIDENCE REGARDING THE EXISTENCE OF UNVESTED STOCK OPTIONS DURING MARRIAGE TO DIVIDE COMMUNITY ASSETS

¶ 08-2-08. ***Parrish v. Parrish,*** ___ S.W.3d ___, 2008 WL 1722455 (Tex. App.—Eastland 2008) (04/10/08)

Facts: Husband and Wife's final divorce decree awarded ½ of all stock options in existence on 12/16/03 to Husband and ½ of all stock options in existence on 12/16/03 to Wife. In 2006, Husband filed a motion for clarification regarding the stock options. Wife then filed a petition for enforcement, claiming Husband had exercised stock options but not turned over after-tax proceeds to her. During the trial court's evidentiary hearing, there was no testimony about stock options, but there was discussion of a $124,000 payment to Husband, which was equivalent to the contested net proceeds from the stock option sale. Four months later, without hearing further evidence, trial court signed a clarification and enforcement order awarding Wife one-half of a 5/8/01 grant of stock options and one-half of a 6/3/02 grant of stock options. Trial court ordered Husband to exercise the vested portion of the options on or before 4/15/06, and provided specific instructions for dividends, taxes, notices, and distribution of proceeds. Husband appealed.

Held: Reversed and remanded. Trial court did not have sufficient evidence to enter its clarification and enforcement order.

Opinion: Unvested stock options that were in existence during marriage constitute a contingent interest in property and are thus a community asset; however, trial court did not have sufficient evidence to enter an enforcement or clarification order specifically addressing the 5/8/01 and 6/3/02 grants of stock options because Wife failed to present any evidence on the record regarding what stock options were in existence at the time of the decree.

DIVORCE
Post-Decree Enforcement

★★★★★ Texas Supreme Court ★★★★★

COURTS OF APPEALS SHOULD NOT HAVE PRESUMED THAT SOMETHING WAS OMITTED FROM THE RECORD IN ORDER TO FIND SUBJECT-MATTER JURISDICTION

¶ 08-2-09. ***Alfonso v. Skadden,*** ___ S.W.3d ___, 2008 WL 821033 (Tex. 2008) (03/12/08)

Facts: In 1991, Mother and father married in Houston. In 1999, Mother filed for divorce in Spain, one month later Father filed for divorce in Harris County. Mother failed to appear in Texas and the trial court granted Father a default judgment, named parents JMC, and ordered father to pay CS. Father appeared by attorney in Spain, and the Spanish court granted sole custody to mother and ordered father to pay child support.. Four years and 3 months after the Texas decree was signed, Father sought to enforce the Texas judgment. Mother answered and argued that the 1999 Texas judgment was invalid for lack of personal jurisdiction because she had not been served, and lack of subject matter jurisdiction because the child was not a resident of Texas. The trial court agreed with mother and dismissed for lack of jurisdiction. Father appealed, and the court of appeals reversed, finding both personal and subject matter jurisdiction. With regards to personal jurisdiction, the court of appeals held that a default judgment could not be set aside for lack of service after 4 years. With regards to subject matter jurisdiction, the court of appeals held that despite father's statement that the child was born in Spain and had always lived there except for a 25-day visit to Texas in 1998, it would indulge a presumption that something omitted from the record might have proved jurisdiction. Mother sought a petition for review.

Held: Reversed and rendered. There was no subject matter jurisdiction, and the court of appeals erred by presuming facts that were not in the record in order to find subject matter jurisdiction.

Opinion: "We disagree with the court of appeals that it should have presumed something that the record in the underlying proceeding repeatedly showed was not true. The presumption supporting judgments does not apply when the record affirmatively reveals a jurisdictional defect… Because [father's] affidavit and testimony affirmatively revealed a jurisdictional defect, the court of appeals should not have presumed otherwise."

ARBITRATION OF TEMPORARY ORDERS DURING PENDING DIVORCE AND SAPCR NOT SUBJECT TO INTERLOCUTORY APPEAL.

¶ 08-2-10. ***Mason v. Mason,*** ___ S.W.3d ___, 2008 WL 2065924 (Tex. App.—Houston [14th Dist.] 2008) (05/15/08)

Facts: Husband and wife entered into an MSA with regards to temporary orders during a pending divorce and SAPCR which provided that if any dispute arose as to the entry of the temporary orders the dispute would be resolved through binding arbitration. A dispute arose and parties went to arbitration, and husband was ordered

to pay attorney's fees for the arbitration of the temporary orders. Husband appealed the order under TCPRC § 171.098(a), which generally allows for an appeal of an order confirming an arbitration award.

Held: Appeal dismissed, absent statutory authorization for interlocutory appeal, appellate court lacks jurisdiction over husband's appeal.

Opinion: TFC § 6.507 specifically precludes interlocutory appeal of temporary orders arising under the TFC § 105.001(e), which states that temporary orders in a SAPCR are not subject to interlocutory appeal. Texas Gov't Code § 311.026 provides that, when 2 statutes are in conflict the specific statute will prevail over the general one; therefore, because TFC § 6.507 and § 105.001(e) apply specifically to divorce and SAPCR proceedings, they prevail over TCPRC § 171.098(a) and the appeal of the arbitration order is precluded.

SAPCR
Conservatorship

★★★★★ Texas Supreme Court ★★★★★

TDFPS AND TRIAL COURTS HAVE POWERS SHORT OF REMOVAL OF CHILDREN FROM THEIR PARENTS TO PROTECT CHILDREN IN NON-EMERGENCY SITUATIONS

¶ 08-2-11. ***In re* Texas Dept. of Family and Protective Services,** S.W.3d , 2008 WL 2212383 (Tex. 2008) (orig. proceeding) (05/29/08)

¶ 08-2-12. ***In re* Steed,** 2008 WL 2132014 (Tex. App.—Austin 2008, orig. proceeding) (memo op.) (05/22/08)

Facts: TDFPS removed 468 children from the Yearning for Zion ranch outside Eldorado, TX; the ranch is associated with the FLDS church and a number of families live there. 38 women who live at the ranch and had children taken into custody on an emergency basis by the TDFPS based on allegations that there was immediate danger to the physical health or safety of the children filed a petition for a writ of mandamus with the court of appeals requesting that the trial court vacate its temporary order in which it named TDFPS as SMC of the children. The 38 women complained that TDFPS failed to meet its burden of proof under TFC § 262.201 (namely that there was no immediate danger to the physical health and safety of the children, and that TDFPS did not make any reasonable effort to ascertain if some measure short of removal would have eliminated the perceived risk to the children); and that absent such proof trial court was required to return the children to their parents and abused its discretion by failing to do so. The court of appeals granted mandamus, finding that TDFPS had failed to meet its burden of proof under TFC § 262.201, and directed the trial court to vacate its temporary orders granting TDFPS SMC. TDFPS petitioned for a mandamus review of the court of appeal's decision.

Held: Mandamus denied. The court of appeals decision did not leave TDFPS unable to protect the children.

Opinion: TDFPS can still seek, and the trial court can still issue and modify, temporary orders short of separating the children from their parents and placing them in foster care. The Family Code allows orders "for the safety and welfare of the child" (TFC § 105.001), including an order "restraining a party from removing the child beyond a geographical area defined by the court" (TFC §105.001(a)(4)). The court can also order the removal of an alleged perpetrator from the child's home (TFC § 262.1015), issue orders to assist TDFPS in its investigation (TFC § 261.303(b)-(c)), and punish a person who interferes with an investigation or relocates a residence or conceals a child with the intent to interfere with an investigation (TFC § 261.303(a)).

Dissent: While TDFPS did not meet its burden with respect to infants, pre-pubescent male and female children, and pubescent male children; it did present evidence that indicated a pattern or practice of sexual abuse of pubescent females, and that evidence supports the trial court's finding that there was a danger to the physical safety or health of pubescent girls on the ranch.

Editor's Comment: *One reason this case is procedurally difficult is that our court system is designed to adjudicate cases involving individuals, not classes of persons. J.V.*

GRANDPARENTS LACKED STANDING TO FILE A MOTION FOR NEW TRIAL

¶ 08-2-13. ***In re* M.J.G.** 248 S.W.3d 753, (Tex. App.—Ft. Worth 2008) (02/07/08)

Facts: Mother and father separated and filed for divorce, trial court appointed parents JMC pending final disposition. Grandparents filed a petition in intervention in divorce proceedings, requesting that the trial court appoint them SMC of children, claiming that the parents had voluntarily relinquished control of the children to the grandparents for at least one year. The trial court held hearings on the grandparents' petition, at which neither mother or father were represented by counsel, and appointed grandparents temporary SMC until the next hearing, which the trial court said was to give mother and father an opportunity to obtain counsel. During the 2nd hearing, trial court heard testimony that the parents resided with the children at grandparents home for the period that the grandparents claimed the parents had relinquished control. At the conclusion of the 2nd hearing, at which father was represented by counsel, the trial court stated that grandparents had not met the burden of proof of a SAPCR and appointed mother and father JMC, with father as parent with exclusive right to designate the children's residence. Grandparents filed a motion for new trial, which was overruled for lack of standing. Grandparents appealed.

Held: Affirmed. The grandparents did not have standing to file a motion for new trial.

Opinion: The grandparents did not have standing to file a motion for a new trial based on being appointed temporary SMC during the proceedings. The record shows that trial court was taking action to allow mother and father to obtain legal counsel, and was not awarding custody until a full evidentiary hearing was held. Furthermore, the evidence showed that at the times grandparents claimed that parents relinquished control of children at least one parent was living with grandparents and children, with the exception of one 5-day period.

TRIAL COURT CANNOT IMPOSE SANCTIONS THAT MAY TEND TO PREJUDICE ONE PARTY IN THE EYES OF THE JURY.

¶ 08-2-14. ***Taylor v. Taylor,*** ___ S.W.3d ___, 2008 WL 746655 (Tex. App.—Houston [1st Dist.] 2008) (03/20/08).

Facts: Grandparents brought a SAPCR action to be appointed managing conservators of their son's 3 children. Father contested the action, but one month before trial his attorney withdrew due to father's inability to pay. Father retained another attorney the day before the pretrial hearing, but due to the timing the attorney was not able to be present at the pretrial hearing. Father asked for a continuance to allow attorney to be brought up to speed, but trial judge did not allow it. During the pretrial hearing, trial judge informed father that if he did not tender evidence or a witness list he would not be allowed to introduce these items during trial. Father said that he understood. Prior to trial, Father's attorney brought a motion in limine to introduce evidence and enter a witness list, but the trial judge did not entertain the motion, stating that all pretrial motions were to have been introduced at the pretrial hearing. Father was not able to call any witnesses except for himself or introduce any evidence during the trial. The jury found for the Grandparents. Father filed a motion for a new trial, objecting to the sufficiency of the evidence to support the jury's verdict, and complaining that the trial court's ruling that he could not present witnesses or exhibits at trial was "manifestly unjust."

Held: Reversed and Remanded. The trial court abused its discretion and applied an unreasonable sanction, and it is reasonable to assume that Father suffered prejudice in the eyes of the jury due to his inability to present witnesses or evidence.

Opinion: "Here, the jury's conservatorship decision could not have been well-informed, and thus in the best interest of the children, without the jury first considering [Father]'s evidence. We conclude that the trial court's sanction imposed in this case was excessive. Accordingly, we hold that the trial court abused its discretion by prohibiting [Father] from presenting non-party witnesses and tangible evidence at trial... It is reasonable to assume that, without fact or expert witnesses to corroborate his own testimony, [Father] suffered prejudice in the eyes of jury."

Editor's Note: *This ruling upholds the general notion that the best interest of a child outweighs all other procedural considerations in a family law case. In order for a trial judge to make rulings about the best interest of a child, it makes sense that he or she would need to hear evidence from both sides. But, this poses a problem where a lawyer frequently ignores deadlines and orders. Taken to the extreme, does this case stand for the proposition that a party could fail to answer discovery, fail to comply with pretrial deadlines, and wholly fail to participate in the pretrial process, yet still present a case at trial? Are death penalty sanctions sucking their last breath in family law cases with kid issues? M.M.O.*

A PRO SE BRIEF MUST COMPLY WITH THE RULES OF APPELLATE PROCEDURE, BARE ASSERTIONS OF ERROR WITHOUT ARGUMENT OR AUTHORTY WAIVE REVIEW OF ERROR

¶ 08-2-15. ***In re* N.E.B.,** ___ S.W.3d ___, 2008 WL 1081510 (Tex. App.—Dallas 2008) (04/11/08)

Facts: Mother failed to appear at custody hearing, during the hearing trial court determined mother did not attend court-ordered drug testing and awarded SMC of the children to Father. Mother filed a pro se brief with the court of appeals that did not apply with the rules of appellate procedure, court of appeals ordered Mother to file an amended brief that complied with Rule 38.1. Mother's amended brief similarly failed to comply with the rules of appellate procedure.

Held: Affirmed. Mother's brief did not conform to the Texas Rules of Appellate Procedure, and Mother thereby waived review of her complaints by failing to brief adequately.

Opinion: COA will construe pro se briefs liberally, but holds pro se litigants to the same standards as licensed attorneys and requires them to comply with applicable laws and rules of procedure. A party's brief must contain a concise, nonargumentative statement of the facts of the case, supported by record references, and a clear and concise argument for the contention made with appropriate citations to authorities and the record. Bare assertions of error, without argument or authority, waive error.

Editor's Comments: Does this holding seem ironic in light of the Houston court's holding above (in Taylor)? So the appellate court will enforce its procedural rules, even when the best interest of a child is an issue, but a trial court cannot. Hmmm….. M.M.O.

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

¶ 08-2-16. ***In re* H.G.,** ___ S.W.3d ___, 2008 WL 1805516 (Tex. App.—San Antonio 2008) (04/23/08)

Facts: Grandparents were named managing conservators of children after biological parent's parental rights were terminated. Adoptive mother and adoptive father later adopted children with grandparent's consent after

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

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

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

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

TEXAS FAMILY CODE § 153.134(b) DOES NOT INFRINGE ON THE RIGHT TO MAKE DECISCIONS CONCERNING THE CARE, CUSTODY, AND CONTROL OF CHILDREN

¶ 08-2-17. ***Morgan v. Morgan,*** ___ S.W.3d ___, 2007 WL 5160497 (Tex. App.—Beaumont 2008) (05/08/08)

Facts: Mother filed for divorce in 2006, all of the issues except whether the residence of mother and two children would be geographically restricted were settled by a Rule 11 agreement. The trial court ruled that mother and father were JMC of the children, and that mother would have the exclusive right to designate the primary residence of the children within the Kirbyville ISD. Mother, having trouble finding work and paying bills in Kirbyville, wanted to relocate to the Lafayette, Louisiana area because she had job offers there and a new boyfriend who lived in the area. The trial court found that the children were settled in Kirbyville, that they had other family in the area, that they were doing well in school, that they were involved in social activities and church. The trial court also found that father had exercised all of his visitation and father's family is actively involved with the children. Mother appealed the trial court's geographic restriction, arguing that such geographic restrictions as applied to her, created an unconstitutional infringement on her fundamental rights to make decisions concerning the care, custody, and control of her children.

Held: Affirmed. The trial court's geographic restriction conforms with TFC § 153.134(b), and the statute is constitutional.

Opinion: Texas courts, when faced with a constitutionality question on TFC § 153.134(b), have consistently found that the statute does not violate a mother's right to travel; therefore the trial court's order does not prohibit mother's right to travel to Louisiana or any other state. Mother also argued the geographical restriction infringed on her right to make educational decisions because if her children's residence is restricted to Kir-

byville I.S.D., there are no choices for education; however, there is no authority for mother's argument that a geographical restriction that gives no choices for education is unconstitutional.

TEXAS FAMILY CODE § 152.102(3) DOES NOT CLASSIFY A MODIFICATION OF A DIVORCE DECREE FROM A DIFFERENT STATE AS AN ORIGINAL PROCEEDING IN TEXAS

¶ 08-2-18. ***In re* Lester,** ___ S.W.3d ___, 2008 WL 2057833 (Tex. App.—Beaumont 2008, orig. proceeding) (05/15/08)

Facts: Mother and Father divorced in Maryland in 2005, their divorce decree approved and incorporated a written agreement about child custody arrangement (parents shared custody with visitation alternating on a weekly basis); however, both the divorce decree and the written agreement provided that the agreement's terms did not merge into the divorce decree. After the divorce, Mother, Father, and child moved to Texas; mother purchased a home in Jefferson County, and Father purchased a home in Fort Bend County. In July 2007, mother filed a "Motion To Register Foreign Judgment And Modify Same" in the District Court of Jefferson County, the motion requested that Mother and Father be named JMC, and that Mother be designated "as the person who has the exclusive right to designate the primary residency of the child." Father moved to transfer venue to Fort Bend County, stating that the Maryland divorce decree did not "name either parent as the managing conservator, custodian or guardian" of the child, and that Father and child resided in Fort Bend County on the date Mother filed her suit. Father argued that TFC § 103.001 required the trial court to transfer the case to the county in which the parent having actual care, custody, and control of the child resided on the date the suit was filed; Mother did not dispute that the child was in Father's care on the date she filed her motion, but Mother argued that the this was a modification proceeding, making TFC §103.001 inapplicable. Trial court entered judgment registering the Maryland divorce decree and denied Father's motion to transfer venue. Father filed a motion requesting that the trial court reconsider its ruling, pointing out for the first time that mother failed to file a controverting affidavit in response to his motion to transfer, and claiming that the trial court's duty to transfer was mandatory. Without entering any findings after conducting a 2nd hearing, the trial court denied Father's motion to reconsider. Father filed a petition for a writ of mandamus to order the trial court to transfer the proceeding to Fort Bend County.

Held: Mandamus denied. The proceeding qualified as a modification proceeding under the Family Code.

Opinion: The Maryland divorce decree qualified as a "child custody determination" under TFC § 152.102(3), and if Mother was granted the relief she sought in her original suit it would modify that order; therefore the suit was a modification proceeding and not an original proceeding.

MODIFICATION OF POSSESSION AND VISITATION ORDER MUST BE IN THE BEST INTEREST OF THE CHILD, NOT THE PARENTS

¶ 08-2-19. ***In re* M.M.S.**, ___ S.W.3d ___, 2008 WL 2190980 (Tex. App.—Dallas 2008) (05/28/08)

Facts: Divorce decree named Mother and Father JMC of their 2 children and incorporated a standard possession order on 02/14/05. At the time, Father was a resident of Oklahoma, and Mother lived in Collin Co., TX. Father filed a motion to modify possession and access and to place children on his health insurance. Testimony showed that father had failed to make the children available for designated periods of mother's possession, incurring travel expenses to mother; as a result, trial court modified the possession and visitation portions of the divorce decree, and ordered that all of father's periods of possession must be exercised in Texas and that his weekend possession be limited to one weekend per month. Trial court denied father's request to modify the decree to allow him to place the children on his health insurance. Father appealed.

Held: Reversed and rendered in part, affirmed in part. Trial court did not make a finding that the modification of possession and visitation order was in the child's best interest; with regards the health insurance to trial court is not required by the Family Code to modify an existing order.

Opinion: Modifications to a possession and visitation order must be in the best interest of the children, not the parents; the original decree did not limit father's possession of children to Texas and there was no evidence that periods of possession in Oklahoma were detrimental to children in any way. Trial court's only finding was that mother was inconvenienced by traveling to Oklahoma on one occasion; there was no evidence that children were adversely affected; further, there was no evidence that limiting father's weekend possession rights to one weekend a month was in the best interest of children. With regards to health insurance children were already insured under mother's health insurance, nothing in TFC § 154.182 requires a trial court to modify an existing order to place children on father's health insurance simply because he obtained health care coverage through employer after the decree.

SAPCR
Child Support

TEXAS FAMILY CODE § 105.001(a)(5) DOES NOT ALLOW TRIAL COURT TO ORDER INTERIM ATTORNEY'S FEES FOR A SAPCR AFTER A NON-EVIDENTIARY HEARING

¶ 08-2-20. ***In re* Sartain,** 2008 WL 920664 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding) (memo op.) (04/03/08)

Facts: Mother originally filed a motion to modify divorce decree. In response, Father filed a motion for interim attorney's fees; Mother argued that the award would be improper absent a finding that the fees were for the safety and welfare of the child. Trial court held a non-evidentiary hearing and issued temporary order awarding Father $20,000 in interim attorney's fees "to conduct discovery and properly prepare for trial and to protect the best interest of the child." Mother filed a petition for writ of mandamus asserting that there were no pleadings and no court findings that the attorney's fees were for the safety and welfare of the child.

Held: Mandamus granted. Trial court cannot order interim attorney's fees to protect the best interest of the child in a non-evidentiary hearing.

Opinion: TFC § 105.001(a)(5) requires that a temporary order for attorney's fees in a SAPCR be made for the purpose of the safety and welfare of the child; however, because this was a non-evidentiary hearing, trial court had no evidence as to the need of the attorney's fees for the safety and welfare of the child.

TRIAL COURT HAS THE DESCRETION TO AVERAGE ANNUAL SELF-EMPLOYMENT INCOME TO DETERMINE APPROXIMATE NET MONTHLY RESOURCES FOR CHILD SUPPORT CALCULATION

¶ 08-2-21**.** ***Swaab v. Swaab,*** ___ S.W.3d ___, 2008 WL 1838023 (Tex. App.—Houston [14th Dist.] 2008) (4/24/08)

Facts: Mother and father divorced and signed a Rule 11 property settlement agreement, which was approved by trial court. In the decree, the trial court ordered father to pay mother $125,657 by securing a loan on the primary residence, pay all loans owed to grandmother (father's mother), assume all federal income tax liabilities, and ordered father and mother to attempt to mediate any dispute prior to filing suit for modification of

the divorce decree. Father appealed the child support calculation and the order that he repay the entirety of the loans to grandmother.

Held: Affirmed.

Opinion: Given the dramatic fluctuation in father's annual self-employment income over the past 10 years (from a high of $500,000 to a low of $10,000), the trial court had the discretion to average father's past income to determine approximate net monthly resources; since the average was in excess of $6,000 per month the statutory formula computed father's child support obligation to be $1,200. With regards to the repayment of loans to grandmother, no evidence in the record suggests that mother agreed to repay 1/2 of loans, and grandmother testified that if the loans were not repaid the debt would be taken out of father's inheritance; trial court reasonably concluded that the loans from grandmother were made solely to father and only he was obligated to repay them.

Editor's Comment: *Dennis v. Smith, 962 S.W.2d 67 (Tex. App. - Houston [1st Dist.] 1997, pet. denied), holds that a court may not require the parties to mediate before filing a modification suit. In this case, the court upheld a clause requiring only that the parties attempt to mediate, rather than actually mediate, before filing suit. J.V.*

TRIAL COURT MUST BE PRESENTED WITH EVIDENCE OF A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES TO INCREASE CHILD SUPPORT

¶ 08-2-22. ***In re* E.V.,** ___ S.W.3d ___, 2008 WL 1914255 (Tex. App.—El Paso 2008) (05/01/08)

Facts: In August, 2006, the AG filed suit to modify a July, 2000 child support order, alleging substantial changes since the order was issued. An associate judge issued an order that increased child support from $128 per month to $390 per month, and required Father to provide health insurance for the child. Father appealed the increase in child support to the district court on the basis that his income had not increased since the original order, and that he was entitled to credit for other child support obligations. The trial court held hearing on appeal in which Father testified that he owned a business repairing tires and welding, that he supported three other children, and that he had a net income of $7,255 per year. Father also gave testimony that was impeached by the AG's counsel during trial as to his ownership of property, vehicles, and income. The trial judge stated that he was familiar with father's business and referred to it as a "huge welding shop," he also stated that father "commingles all his expenses" and that there was reason to doubt father's testimony; the trial court subsequently entered an order adopting the associate judge's order. Father appealed the trial court's ruling, arguing that the court erred because there was no evidence of a substantial change in F's circumstances.

Held: Reversed and rendered. The trial court was not presented with sufficient evidence to increase in child support.

Opinion: Although AG impeached some of Father's testimony, he did not show any evidence or present witnesses as to father's finances at the time of the initial order or at the time of the trial. Thus, there was no evidence concerning a material and substantial change in the circumstances of Father and the trial court did not have sufficient information to exercise its discretion.

Editor's Comment: *Shouldn't this case have been remanded instead of rendered? Under Tex. Fam. Code § 156.401(a)(2), an alternative to proving a change of circumstances is proving a 20% or $100 difference in guideline support. Father admitted to grossing $900 to $1,400 per month. The trial court could have disbelieved the amounts of Father's tax deductions and Father's undocumented claim that he had other child support obligations. J.V.*

EVIDENCE SUFFICIENT TO SUPPORT FINDING OF INTENTIONAL UNDEREMPLOYMENT

¶ 08-2-23. ***McLane v. McLane,*** ___S.W.3d___, 2008 WL 1917293 (Tex. App.—Houston [1st. Dist.] 2008) (05/01/08)

Facts: Mother and Father divorced after being married for 10 years in July 2003. Mother was awarded primary conservatorship of their adopted child. Licensed to practice law, father agreed to pay $800 per month in child support, Father later sought a reduction in child support. TC reduced his payments to $628.55 per month beginning December 2005 and denied father's request for retroactive reduction. Father testified that he was nearly bankrupt and that he did not know the state of his finances when he agreed to the $800 per month payment, and father reported personal income in an amount less than what was found by the court which found a yearly income in excess of $50,000. Father testified that he owed money on back taxes, and that he had lost both of the jobs he had gotten over the last few years and had been self-employed since; trial court questioned the accuracy of father's testimony and documents. Trial court found that father had an annual earning potential of $48,000, and found probative evidence that father was intentionally underemployed. Father appealed.

Held: Affirmed. A trial court has discretion to base an award of child support on the credibility of a witness.

Opinion: A trial court is accorded broad discretion in setting and modifying child support payments, and its order will not be disturbed on appeal absent a clear abuse of discretion. If the earning potential of the obligor is greater than the actual income, because the obligor is intentionally underemployed in order to avoid child support payments, a trial court can apply the support guidelines to the earning potential. Here it was reasonable that testimony by mother that father had become intentionally underemployed after the divorce in order to reduce child support payments was accepted as true by the trial court given the caustic nature of the divorce proceedings and trial court's knowledge of the case history.

THE REQUIREMENT IN TEXAS FAMILY CODE § 233.0271(a) THAT A COURT SIGN AN ORDER CONFIRMING A NON-AGREED CHILD SUPPORT REVIEW ORDER WITHIN 30 DAYS IS NOT A JURISDICTIONAL LIMITATION

¶ 08-2-24. ***In re* Office of Attorney General of Texas,** ___S.W.3d___, 2008 WL 2186190 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding) (05/22/08)

Facts: On 04/17/00, trial court signed an agreed order that established the parent-child relationship between father and 2 children who were the subject of the SAPCR, and ordered father to pay $344 per month in child support to mother. In early 2007, AG sought to modify father's obligation, pursuant to TFC Chapter 233. AG notified the parties of the conference to be held on 02/28/07, however trial court found that father did not receive notice of the conference, even though he was served; consequently, father did not attend the conference. AG adopted a non-agreed child support review order ("CSRO") increasing father's child support obligations at the conference pursuant to TFC Chapter 233, which allows the AG to file a CSRO according to available information when a party does not attend a negotiation conference. On 03/17/07, AG filed a petition confirming the non-agreed CSRO with the trial court that heard the SAPCR. Trial court found that father was served with the petition to confirm the non-agreed CSRO on 04/11/07. Father failed to file an objection or request a hearing. On 06/18/07 associate judge signed an order confirming the non-agreed CSRO. On 08/20/07, father filed a motion for associate judge to vacate the 06/18/07 confirmation order based on Family Code § 233.0271(a) (which requires that a trial court sign an order confirming a non-agreed CSRO not later than 30 days after the petition was delivered to the last party entitled to service); father argued that the order was void because it had not been signed within 30 days of delivery to him. Associate judge agreed, and issued an order to vacate on 10/17/07. AG appealed to trial court, which held a de novo hearing and affirmed the associate

judge's ruling, and issued an order reflecting this ruling on 11/19/07. On 12/18/07, AG filed a motion to vacate the 11/19/07 and 10/17/07 rulings with trial court. On 01/17/08, trial court entered findings of fact and conclusions of law affirming its prior decision. On 01/30/08, trial court heard AG's motion to vacate; trial court did not expressly rule on it, but granted father's motion for new trial. AG then filed a petition for writ of mandamus.

Held: Mandamus granted. Texas Family Code § 233.0271(a) is mandatory but not jurisdictional, therefore the orders to vacate and order for a new trial issued after the 06/18/07 confirmation order were entered outside trial court's plenary power.

Opinion: The 30-day deadline of § 233.0271 is mandatory but *not* jurisdictional since the legislature did not provide a consequence for failure to do so. The purpose of Family Code chapter 233 is to allow agencies like the AG to take expedited administrative action to modify child support obligations, therefore AG had the right to seek mandamus to compel the judge to observe the 30 -day requirement, but AG was also entitled to acquiesce in the later ruling without trial court losing subject-matter jurisdiction. Accordingly, the orders to vacate and order for a new trial were void, and associate judge's June 18 order confirming the non-agreed CSRO was the final judgment in this case.

WRITTEN NOTICE OF A MOTION TO REVOKE A SUSPENSION OF SENTENCE IS REQUIRED TO APPRAISE PARTY OF THE ALLEGATIONS AGAINST HIM AND ALLOW HIM TIME TO RESPOND

¶ 08-2-25. ***In re* Zandi,** ___ S.W.3d ___, 2008 WL 2223206 (Tex. 2008) (05/30/08)

Facts: Trial court held Father in contempt for 23 violations of a child support order, assessed a criminal punishment of 175 days per violation to run concurrently, and ordered civil commitment until he had paid $90,000 arrearage plus interest to mother. Trial court suspended the commitment on 4 conditions: (1) father pay mother a $25,000 lump sum towards the arrearage, (2) father make monthly payments of $1,091 on the arrearage, (3) father continue to pay monthly child support payments of $1,627, and (4) father appear in court every 6 months "for review and status hearing." Prior to the 1st status hearing, Father moved to modify the contempt order, contending that his financial situation had worsened and his child support payments should be reduced, and that the children were living with him and therefore he should not have been liable for future child support payments. In response, Mother moved to revoke father's commitment suspension, because Father had paid only $700 in child support for the 6 months since the contempt order; Father objected that Mother had not filed a written motion to revoke suspension, but trial court revoked Father's suspension and ordered him incarcerated. The court of appeals denied Father's petition for habeas corpus, and Father subsequently petitioned the Supreme Court for habeas corpus.

Held: Habeas granted. Father did not receive proper notice.

Opinion: The requirement that Father appear at a status hearing every 6 months was not sufficient notice to Father that allegations of non-compliance would be made or what they would be, therefore Mother was required to file a written motion to revoke suspension prior to the hearing. The purpose of notice is to appraise the respondent of the allegations against him and to provide him with time to respond, because Father did not receive notice, trial court's order revoking suspension must be set aside.
Editor's Comment: *Couldn't the trial court have revoked Father's suspension of commitment sua sponte if Father failed to comply with the court's order? If not, what's the point of having a status hearing? J.V.*

SAPCR
Termination of Parental Rights

★★★★★ Texas Supreme Court ★★★★★

A SAPCR CASE THAT IS RIPE FOR DETERMINATION ON THE MERITS SHOULD NOT BE DISMISSED ON A PROCEDURAL TECHNICALITY THAT CAN BE EASILY CORRECTED

¶ 08-2-26. ***In re* K.C.B.,** ___ S.W.3d ___, 2008 WL 1765554 (Tex. 2008) (04/18/08)

Facts: An associate judge terminated mother's parental rights to her child, K.C.B. Mother appealed that decision to the trial court and timely filed a statement of points upon which she intended to rely. After a trial de novo, the trial court signed a final order terminating mother's parental rights. Mother timely filed a 2nd statement of points on which she intended to appeal the trial court's final order and requested that it be included in the clerk's record. However, only the 1st statement of points was included in the record filed with the court of appeals. Unaware that a 2nd statement of points had been filed in the trial court but omitted from the record, the court of appeals held that mother had failed to comply with TFC § 263.405 and affirmed the trial court's judgment without reaching the merits. Mother filed a motion for rehearing contending the court of appeals should have found her 1st statement of points sufficient and, alternatively, that she had in fact properly filed a 2nd statement of points in the trial court and designated its inclusion in the record. M attached the 2nd statement of points with the trial court clerk's file stamp as an appendix to her motion and requested leave to supplement the clerk's record. The court of appeals denied both mother's supplementation request and her motion for rehearing. Mother appealed.

Held: Reversed and remanded. Mother did not have notice that the court clerk did not include the 2nd statement of points, and the case was ripe for decision.

Opinion: The record shows that opposing counsel's indications of which statement of points it was answering were less than clear and not adequate to show notice. Furthermore, given the constitutional dimensions of the "fundamental liberty interest of natural parents in the care, custody, and management of their child," justice is not served when a case like this, ripe for determination on the merits, is decided on "a procedural technicality" that can easily be corrected.

★★★★★ Texas Supreme Court ★★★★★

TDFPS DOES NOT HAVE EXCLUSIVE JURISDICTION TO DETERMINE CHILD ABUSE CASES, AND IT MUST GRANT ARIF HEARING ONCE A PARTY REQUESTS IT.

¶ 08-2-27. ***Gates v. Texas Dept. of Family and Protective Services,*** ___ S.W.3d ___, 2008 WL 1753589 (Tex. App.—Austin 2008) (04/18/08)

Facts: In Feb. 2000, allegation of emotional abuse of child by parents was made by an employee of the school district where mother and father's children were enrolled. TDFPS took emergency custody of the children and filed a petition to terminate mother and father's parental rights and appoint TDFPS as MC; a hearing was held and the trial ordered all children immediately returned to mother and father. In Sept. 2000, TDFPS non-suited its parental-termination action against mother and father. Prior to Sept. 2000, however, TDFPS had continued to investigate the emotional abuse claim, and in April 2000 TDFPS staff made "administrative summary findings" of "reason to believe" that mother was a "designated perpetrator of child abuse." As a result, mother's name was entered into the TDFPS central registry of reported child abuse and neglect cases. In

April 2000, mother requested an ARIF hearing, a step that would normally trigger a 45-day deadline for review; however TDFPS claimed a "pending litigation" exception to the deadline and the ARIF was not scheduled. In Aug. 2001, mother filed a lawsuit against TDFPS seeking declarations that her designation and continued placement in the registry violates her due process rights, as well as a mandatory injunction and mandamus compelling TDFPS to purge its registry of all information relating to her. Trial in mother's suit was set for 10/2/2006; in June 2006, TDFPS notified mother that the ARIF hearing she had requested 6 years earlier would finally be set. However mother and TDFPS could not agree on a date, and on 09/25/2006, TDFPS informed mother that it was waiving her ARIF and forcing mother to go through a SOAH instead; the same day TDFPS filed a plea seeking to have mother's lawsuit dismissed, the basis for the plea was that mother had failed to exhaust her administrative remedies. Trial court granted the plea and dismissed Mother's lawsuit for lack of subject matter jurisdiction.

Held: Reversed and rendered. TDFPS does not have exclusive jurisdiction to determine child abuse cases, the judiciary retains jurisdiction based on statute. Furthermore, the Family Code does not allow TDFPS to unilaterally waive an ARIF hearing once a party has requested one.

Opinion: Exclusive jurisdiction in an agency exists only when and if the legislature divest the judiciary of subject matter jurisdiction, TFC § 236.309(e) expressly mandates an ARIF if the party requests one, and explicitly makes it non-exclusive of any judicial remedy; the SOAH is a creature entirely of TDFPS's own making and is not required by law.

TRIAL COURT MUST MAKE SPECIFIC FINDINGS UNDER TEXAS FAMILY CODE § 153.131 FOR THE STATUTE TO BE IN EFFECT – A REQUEST FOR A FINDING IS INSUFFICIENT

¶ 08-2-28. ***In re* D.S.**, ___ S.W.3d ___, 2008 WL 563690 (Tex. App.—Houston [14th Dist.] 2008) (03/04/08).

Facts: Parents had young minor children taken from them by DFPS when mother and newborn child tested positive for marijuana the day after delivery. DFPS became emergency temporary managing conservators of four children. In a previous relationship mother suffered spousal abuse, spent time at a woman's shelter, and obtained domestic violence counseling. Parents had several CPS referrals (collective allegations of neglect, over-discipline, and physical abuse) prior to termination but there were no court proceedings. At various times, mother went to a shelter due to over-discipline, by spanking, of child. There were two incidents of father pulling mother's hair but the children did not witness these incidents. After the children were removed from the home, the parents were indicted on charges of aggravated robbery. DFPS then placed the children in foster homes. During a later bench trial, a home study was ordered for a relative but this was never completed. There were no home studies done on other relatives that DFPS had rejected as potential placement for the children. The trial court later terminated the parental rights of both parents and appointed DFPS as SMC of the children. Parents appealed and challenged the legal and factual sufficiency of the evidence underlying the findings in the termination order and the appointment of DFPS as SMC.

Held: Reversed and rendered. Reversed that portion of the decree appointing DFPS as SMC and remanded so that trial court could determine whether to deny the petition for termination or to render some other order in the best interest of the child.

Opinion: The appellate court used a clear and convincing evidence standard to review the termination of parental rights in this case. The court reviewed termination under TFC §161.001(1) (D), (E), and (N). The court found most of TDFPS arguments unpersuasive. The domestic violence from mother's first marriage occurred before the children at issue were born and did not show a current unsafe environment. The domestic violence between the parents was not witnessed by the children and mother sought help so this evidence did not show unsafe environment. In regards to criminal activity the appellate court noted that neither parent was imprisoned at the time of termination. Incarceration was simply speculative when it came to the Mother and "[i]n the absence of other endangering conduct, [Father's] incarceration while awaiting trial is insufficient to

support termination under subsection (D)." For subsection (E) the appellate court again looked at previously evidence of domestic violence and criminality and determined again that this did not justify termination. In addition, the court noted that one incident of drug use did not show a pattern of behavior and that the positive drug test did not justify termination because there was no conscious course of conduct. In regards to Father's spanking the court noted that the spankings did not leave marks or bruises and were not evidence of wrongful conduct justifying termination. For (N) the court noted that DFPS never did an ordered home study and that the parents had submitted a list of potential relative placements. "[DFPS] had the burden to satisfy all of the elements under subsection (N) by clear and convincing evidence. We conclude that it has not done so." In addition, "[DFPS] asserts that [Father] "did not suggest that he could do anything to provide the children with a safe environment." However, as the party seeking the termination of parental rights, the [DFPS] bears the burden of proof under TFC §161.001(1)(N) to show that he was unable to do so."

Finally, in regards to the appointment of DFPS as SMC, the court looked at two recent Texas Supreme Court cases and applied the ruling to this case. In the first case cited (*In re* J.A.J.) the parent appealed the termination ruling but not the assignment of DFPS as SMC. The Supreme Court found that the trial court had found specific findings necessary to justify the DFPS's appointment under TFC §153.131 and that while the termination could be revoked, that did not automatically invalidate the appointment of DFPS as SMC under TFC §153.131. The parent would have had to appeal the SMC as well as the termination. In a different case, *In re* D.N.C., the TDFPS had achieved termination under TFC §161.207 and was made SMC as a consequence of termination alone and without any finding under TFC §153.131. The parent, as in J.A.J., appealed the termination but not appointment of DFPS as SMC. Supreme Court found that the appellate court's reversal of the termination meant there was no statutory grounds for DFPS to remain SMC after termination was reversed and that the parent did not need to appeal the SMC appointment because that claim was subsumed by the claim against termination. DFPS argued that in D.N.C. the DFPS had not requested conservatorship under TFC §153.131 but that in the present case they had requested consevatorship under TFC §153.131. The court noted that, despite the request, the trial court had not specified the statutory basis for appointing DFPS as SMC (TFC §161.207 or §153.131) or issue any findings of facts. The DFPS argued that the court could infer that the trial court made the necessary findings to support the appointment of DFPS as SMC under TFC §153.131. The court disagreed and stated that the trial court must demonstrate specific findings under TFC §153.131 for it to be in effect.

THE 15-DAY FILING REQUIREMENT FOR A STATEMENT OF POINTS IN TEXAS FAMILY CODE § 263.405(i) VIOLATES SEPARATION OF POWERS PROVISION OF THE TEXAS CONSTITUTION

¶ 08-2-29. ***In re* M.C.T.,** 250 S.W.3d 161 (Tex. App.—Fort Worth 2008) (3/6/08)

Facts: On 1/25/06, police discovered child wandering the streets alone after 11:00 p.m. Mother was in Florida and refused to return for a few days to pick up child. DFPS removed child from Mother's home and placed him with a foster family. In Aug. 2006, DFPS returned child to mother's care, but he was removed again and placed with a 2nd foster family on 11/09/06. Child was admitted twice to a psychiatric unit of local children's hospital between Nov. 2006 and April 2007, the time of the trial. During trial a psychotherapist, a family therapist, child's 2nd foster mother, and a CASA worker all testified that mother's home was unsafe for child and that he had improved greatly in foster care; testimony was also offered that child, a sixth-grader, read at a first-grade level, and did math at a second-grade level, and that it was in child's best interest to terminate parental rights. Police reports were admitted into evidence which showed that within a 6-month period the police had been called to mother's home 13 times. Mother testified during the trial, but failed to recall problems such as the oldest son stabbing a teacher and child's sexual abuse allegations against the oldest brother. Trial court terminated mother's parental rights. Mother appealed trial court's determination, but DFPS contended in its answer that mother failed to preserve her complaints for review because she did not file a SOP within the 15-day period allowed by TFC § 263.405(i).

Held: Affirmed. Although mother did preserve her complaints for review, the evidence supported trial court's decision to terminate mother's parental rights.

Opinion: Despite the State's claim that the assertion mother's appeal should not be heard due to the requirement that a sufficiency argument must be in timely filed statement of points as required by TFC § 263.405(i), a court of appeals should consider the merits of the sufficiency arguments based on the recent precedent of *In re D.W.*, 249 S.W.3d 625 (Tex. App.—Ft. Worth 2008), in which the court found this requirement void as a violation of the separation of powers provision of the Texas Constitution. However, viewing all the evidence in the case, a fact-finder could reasonable have formed a firm belief that mother knowingly placed or allowed child to remain in conditions or surroundings that endangered his physical and emotional well-being, and that termination of parental rights was appropriate.

WHEN DFPS NONSUITED THEIR CLAIMS, FOSTER PARENT'S PLEA IN INTERVENTION HAD TO BE DISMISSED BECAUSE NO AFFIRMATIVE PLEADINGS ON FILE

¶ 08-2-30. ***In re* Roxsane R.,** 249 S.W.3d 764 (Tex. App.—Fort Worth 2008, orig. proceeding) (03/28/08)

Facts: DFPS obtained a temporary order removing child from mother, and child was placed with a foster family. DFPS sought termination of the parent-child relationship, but at trial the jury found that Mother's parental rights should not be terminated. After the jury trial but before the trial court entered judgment on the verdict, the foster parents filed a plea in intervention under TFC § 102.003(12), which allows foster parents to file an original SAPCR, alleging that it was in child's best interest that DFPS continue to be MC or, in the alternative, that the trial court appoint the foster parents as child's MCs. The trial court found that the foster parents had standing and held a hearing. At the hearing, the trial court issued a monitored return order stating that it was in child's best interest to place him back in mother's home to remain in effect until the end of the six month period. During the six month period, DFPS was to provide counseling for mother and child with interim visitation rights for the foster parents. The case was transferred to Tarrant County, and the transfer order stated that the child was to be returned to Mother on May 31, 2005 to remain in effect for a six month period. On October 21, 2005, 4 days before the suit was to be dismissed in accordance with TFC § 263.401, the District Court signed an order granting DFPS's motion for nonsuit of its "Movant's Petition Seeking Termination of the Parent-Child Relationship" and removed DFPS as child's temporary MC. Following this order, the foster parents filed for SMC. Mother challenged their standing and that the trial court failed to follow the first court's order setting the final dismissal date as October 25, 2005. On November 14, 2007, Mother filed a petition for writ of mandamus to order the trial court to dismiss the underlying suit or strike the plea in intervention.

Held: Mandamus granted. Foster parent's lacked standing for their plea in intervention.

Opinion: The foster parents' plea in intervention was contingent upon DFPS's allegations in the previously tried termination suit; thus when DFPS nonsuited its claims, the foster parents had no claims for affirmative relief. The trial court abused its discretion by failing to dismiss the plea in intervention and enter a final order in mother's favor.

INEFFECTIVE ASSITANCE OF COUNSEL CLAIMS FOR FAILURE TO FILE A STATEMENT OF POINTS DOESN'T REQUIRE REVERSAL BECAUSE MOTHER COULD NOT HAVE PREVAILED ON HER LEGAL AND FACTUAL SUFFICIENCY CLAIMS

¶ 08-2-31. ***Bermea v. Tex. Dept. Of Family And Protective Servs.,*** S.W.3d , 2008 WL 920591 (Tex. App.—Houston [1st Dist.] 2008) (04/03/08)

Facts: Mother had 3 minor children between the ages of 3 and 9 years old. In July 2005, DFPS received a report that Mother was negligently supervising her children., DFPS met with Mother and conducted a drug test which revealed cocaine use. In August of 2005, Mother again tested positive for drug use and admitted to abusing alcohol as well. Mother agreed to place the children with a friend and signed a safety plan stipulating that she must have only supervised contact with the children, submit to random drug testing, and follow all DFPS recommendations; however Mother violated the safety plan by being alone with the children and failed to submit to recommended treatment. DFPS subsequently made a finding of neglect and sought removal of the children. In 2006, Mother made progress, successfully completing rehab and parenting classes, and DFPS decided to let Mother maintain custody of the child with whom she was pregnant, and to work toward reunification with the other three children. The trial court held a hearing in June 2006 and granted mother weekend visitation as long as she passed drug tests; however DFPS retained care of the three older children after mother admitted to subsequent cocaine use. Her youngest child was also put under DFPS care when mother admitted to drug use. The trial court found termination of parent-child relationship in children's best interest. Mother filed an appeal, but her court-appointed counsel failed to file either a statement of points or a motion for a new trial.

Held: Affirmed. Although mother had a constitutional right to effective assistance of counsel, mother's counsel's failure to file a statement of points for appeal did not constitute ineffective assistance warranting reversal of judgment in this case because Mother could not have prevailed on her legal and factual sufficiency arguments.

Opinion: Ineffective assistance claims do not fall within the scope of TFC § 263.405(i) which requires a "statement of points on which the party intends to appeal." Here, the claim of ineffective assistance of counsel consists of the failure to file a statement of points for appeal, and "it is not logical to claim that an ineffective assistance claim based on failure to file a statement of points must be included in a statement of points in order to be preserved for appellate review." The interpretation of TFC § 263.405(i) as precluding the right to appeal ineffective assistance claims not set out in a timely filed statement of points for appeal is unjust, unconstitutional, violates statutory construction, and was not the legislature's intent.

TEXAS COURTS HAVE JURISDICTION TO MAKE AN INTITIAL CUSTODY DECISCION ON A CHILD UNDER 6-MONTHS OF AGE WHEN THE CHILD IS ABSENT FROM TEXAS BUT A PARENT CONTINUES TO LIVE IN TEXAS

¶ 08-2-32. ***In re* Burk,** ___ S.W.3d ___, 2008 WL 962885 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (04/10/08)

Facts: Mother and Father were married in Colorado in July 2004 and resided there until they moved to Texas in May 2006. On 04/30/07, Mother and Father had a child in Texas. On 07/27 or 07/28/07, Mother moved with child to Colorado, and Father stayed in Texas, on 09/29/07 mother filed a "Petition for Allocation of Parental Responsibilities" in Colorado. On 10/12/07 father filed a petition for divorce which included a SAPCR in Texas. Mother filed a plea to the jurisdiction in the Texas suit on 11/26/07; the trial court found there was no basis for which the Colorado court could exercise jurisdiction under UCCJEA. Mother filed a petition for writ of mandamus.

Held: Mandamus denied. Even though the child was under 6-months old, TFC § 152.201 applies and Texas has jurisdiction.

Opinion: Child lived in Texas from its birth until 07/27 or 07/28/07 when it was 3-months old; there is no indication the legislature intended "the home state … within six months" language in §152.201 to apply only to children 6-months of age or older. Texas has jurisdiction to make an initial child custody determination if it was the home state within six months before commencement of the proceeding, and the child is absent from

Texas but a parent continues to live in Texas. Under UCCJEA, Colorado may exercise jurisdiction only if Texas *does not* have jurisdiction.

A PARENT DOES NOT HAVE AN ABSOLUTE RIGHT TO APPEAR PERSONALLY IN A TERMINATION PROCEEDING

¶ 08-2-33. ***In re* R.S.,** ___ S.W.3d ___, 2008 WL 926556 (Tex. App.—Texarkana 2008) (04/23/08)

Facts: Father was incarcerated on a 22-year jail sentence when TDFPS filed petition for termination. Trial court denied father's application for a bench warrant to attend the termination hearings, but father was represented by legal counsel at the hearings. Trial court ordered Father's parental rights terminated. Father appealed.

Held: Affirmed.

Opinion: A litigant in a civil proceeding does not have an absolute right to appear personally in a court proceeding. Father was represented at all hearings by legal counsel, and he made no objection to the trial court's denial of his request for a bench warrant.

IMPROPER ADMISSION OF DRUG TEST RESULTS IS NOT REVERSIBLE ERROR WHEN OTHER EVIDENCE AT TRIAL ESTABLISHES DRUG USE

¶ 08-2-34. ***In re* C.R.,** ___ S.W.3d ___, 2008 WL 1960816 (Tex. App.—Dallas 2008) (05/07/08)

Facts: Mother and child began living with maternal grandmother, who is legally blind and has cancer, in 2001 when Mother and Father separated. In March 2006, DFPS responded to a complaint that Mother had left child alone with grandmother, and that child was under inadequate supervision; although child was not removed, DFPS requested that Mother submit to drug testing. Later that month, DFPS removed child when Mother failed a drug test. Trial court ordered Mother to participate in parenting classes, visit child weekly, undergo evaluation, counseling, drug assessment, and random drug testing. When Mother failed to comply with the order, the trial court terminated Mothers's parental rights under TFC § 161.001 (1)(E) and (O), and named DFPS as child's SMC. Mother appealed the trial court's ruling, claiming that the drug test results were admitted in error because the witness was not qualified to give expert testimony, and that this was a reversible error.

Held: Affirmed. The trial court did not err because it admitted the testimony to show that DFPS and Mother believed that Mother failed a drug test, not that she actually did fail the drug test.

Opinion: The trial court admitted the drug test results for the limited purpose of establishing the states of mind of Mother and DFPS. Accordingly, the evidence showed only that Mother and DFPS were working on the premise that Mother failed a drug test. The record does not reflect the trial court relied on the test results to establish Mother failed the test or was using illegal drugs. Furthermore, there was extensive evidence of Mother's drug use admitted at trial; because the actual drug test results were cumulative of other evidence that Mother used illegal drugs, any error by the trial court in admitting the results was harmless.

SHOWING THAT A MOTION WAS FILED WITH THE COURT CLERK DOES NOT CONSTITUTE PROOF THAT THE MOTION WAS BROUGHT TO THE COURT'S ATTENTION

¶ 08-2-35. ***In re* Blakeney,** ___ S.W.3d ___, 2008 WL 2050819 (Tex. App.—Texarkana 2008, orig. proceeding) (05/15/08)

Facts: In connection with a proceeding to terminate his parental rights, Father filed a petition for writ of mandamus pro se asking the court of appeals to order the trial court to rule on two motions Father filed against Mother and the Mother's attorney. Father's motions sought an order of contempt against Mother and sanctions against Mother's attorney, based on Mother's alleged statements about Father made to the trial court and the attorney's purportedly outrageous contentions made in pleadings seeking to terminate Father's parental rights.

Held: Mandamus denied. Father's record is insufficient due to form, and there is no record that the motions were brought to the attention of the trial court.

Opinion: Father's record is insufficient due to its form; rather than attaching file-marked copies of the motions, Father retyped the documents (including typed purported file-stamps), and Father did not state in his petition that the facts stated in the "duplicate copy" attachments were true. Furthermore, the trial court named as respondent in Father's petition filed a response indicating that the court which should have been referenced in Father's petition is the County Court of Law of Rusk County, Texas, not the 4th Dist. Ct. There is also no record that Father's motions were brought to the attention of the trial court, and a trial court is not required to consider a motion unless it is called to the court's attention; showing that a motion was filed with the court clerk does not constitute proof that the motion was brought to the court's attention or presented to the court with a request for a ruling.

STATEMENT OF POINTS NOT TOO GENERAL TO SATISFY TEXAS FAMILY CODE § 263.405(i)

¶ 08-2-36. ***In re* S.T.,** ___ S.W.3d ___, 2008 WL 2210071 (Tex. App.—Waco 2008) (05/28/08)

Facts: Following a bench trial in which trial court found that father had violated TFC § 161.001 because he (1) knowingly placed or allowed child to remain in dangerous conditions or surroundings, (2) engaged in conduct that endangered child, (3) failed to support child in accordance with his ability, and (4) failed to comply with a court order that established actions necessary for return of child, trial court terminated father's parental rights and awarded SMC to TDFPS. Father filed a statement of points that alleged the evidence and findings of law were factually and legally insufficient to support termination of parental rights based on each of the 4 findings. TDFPS claimed father's statement of points was too general to satisfy TFC § 263.405(i); trial court reviewed father's statement of points and determined that his appeal was frivolous. Father appealed.

Held: Affirmed. Father's statement of points was sufficient to preserve the issues for appeal; however the record supported the trial court's termination of parental rights.

Opinion: Because father addressed each particular predicate finding for termination of his parental rights, the statement of points was sufficiently specific to preserve the issues for appeal. The evidence of father's criminal conduct and drug use is such that trial court could have reasonably formed a firm belief or conviction that the father engaged in conduct which endangered child's physical and emotional well being; a trial court only needs to make an affirmative finding on at least 1 predicate ground for termination under TFC § 161.001, therefore trial court did not abuse its discretion.

SAPCR
Parentage

ABSENT STATUTORY EXCEPTIONS, COURT CANNOT ORDER GENETIC TESTING TO DETERMINE PARENTAGE OUTSIDE THE 4-YEAR STATUTE OF LIMITATIONS IN TEXAS FAMILY CODE § 160.607

¶ 08-2-37. ***In re* Rodriguez,** 248 S.W.3d 444 (Tex. App.—Dallas 2008) (3/12/08)

Facts: In July 2007, AG filed a child support in regards to 2 children born during mother and father's marriage, both of whom were over 4 years old. In Sept. 2007, mother filed for divorce from father. The two cases were consolidated on 10/25/07. On 01/14/08, because father alleged in his answer that he "did not live or engage in sexual relations with mother during the probable period of conception and never represented to others that the child was his own." The associate judge ordered genetic testing which order the AG appealed on the same day. On 01/15/08 the district judge affirmed the order, stating that "the court's position is that the truth does not know a statute of limitations," and reduced the time frame for testing from 5 days to an *instanter* order that the testing take place by noon on 01/15/08. Mother and AG filed a petition for writ of mandamus since father had failed to challenge paternity within the 4-year period allowed by TFC § 160.607(a) and an emergency stay of the trial court's ruling that afternoon, and the Court of Appeals issued an order on the afternoon of 01/15/08, staying all activity with regards to the genetic testing. In response to the petition for writ of mandamus, father asserted that the 4-year limitation should be tolled for M's alleged fraud. On 01/25/08, mother informed the Court of Appeals that the genetic testing facility had processed the samples and issued reports to the parties and the district court in violation of the stay; the Court then issued an order directing the trial court, the parties, and the testing facility to seal all copies of the reports and file them with the Court of Appeals.

Held: Mandamus granted. The trial court did not have the authority to order genetic testing outside of the 4-year statute of limitations.

Opinion: To challenge paternity outside of the 4-year statute of limitations, a father must meet the exceptions under TFC § 160.607(b) and prove that (1) father and mother did not live together or engage in sexual intercourse with each other during the probable time of conception and (2) that father never represented to others that the child was his own. In the response to the petition for mandamus, father only asserted that mother's "fraud" should toll the statute of limitations, and did not address the exceptions set out by statute, and the trial court should not have ordered the genetic testing outside of the statutory limit. Despite the trial court's statement that "the truth does not know a statute of limitations," a trial court has no discretion in determining what the law is, nor does it have discretion in applying the law to the facts. Furthermore, the trial court abused his discretion by ordering an *instanter* order when there was no demonstrated emergency. The purpose behind the time limitation for bringing a proceeding to determine parentage is to protect the family unit; once genetic testing has been conducted and the results released and resulting harm cannot be undone by appeal.

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IT IS ABUSE OF DISCRETION FOR TRIAL COURT TO NOT CONSIDER CHILD'S BEST INTEREST WHEN EQUITABLY ESTOPPING MOTHER FROM DENYING NON-BIOLOGICAL FATHER'S PARENTAGE

¶ 08-2-38. ***Stamper v. Knox,*** ___ S.W.3d ___, 2008 WL 746592 (Tex. App.—Houston [1st Dist.] 2008) (03/20/08).

Facts: Father and mother were married in June 1998, and child was born in June 1999. During September 1998, Mother was also having a sexual relationship with a third party. Father and mother were divorced in 2001, and named JMCs of child. Father received an anonymous phone call after filing for divorce informing him that he might not be the biological father of child. Father had paternity testing administered, which showed he was not child's biological father. In 2002, child made outcry that she was being sexually abused by father. Mother obtained a protective order that prohibited father from having contact with child based on the court's finding that Father had committed family violence in the past and that family violence was likely to occur in the future; the order was later extended to stay in force until 2009. During the paternity suit in question here, the trial court did not allow mother to introduce evidence regarding father's abuse of child and other evidence that mother attempted to introduce to prove child's best interest. The court also declined to take judicial notice of the protective order against father. The trial court issued an order establishing father's paternity of child, holding that although father was not the biological father of child, mother was equitably estopped from denying Father's parentage. Additionally, the trial court issued a final decree of divorce naming both parents JMCs of Child. Mother appealed, arguing that father failed to prove by clear and convincing evidence that he should be adjudicated as child's father and that the trial court abused its discretion by failing to consider child's best interest.

Held: Reversed and Rendered. Under the common law doctrine of equitable estoppel, father bore the burden of proof to show that 1) mother was equitably estopped from denying his parentage, and 2) that it was in child's best interest that he is declared child's parent even though it had been conclusively established that he was not child's biological father. Father failed to do this, and Court of Appeals reversed the trial court and rendered judgment that father was adjudicated to not be the father of child.

Opinion: "In an attempt to establish paternity in spite of the trial court's finding that he was not [child]'s biological father, [father] relied on the common law doctrine of estoppel. Estoppel in paternity actions is "the legal determination that because of a person's conduct, that person will not be permitted to litigate parentage." In order to succeed on this claim, [father] had to establish that a parent-child relationship between [child] and himself was in [child]'s best interest and that the elements of common law equitable estoppel were met… [father] failed to establish his equitable estoppel claim as a matter of law and the trial court abused its discretion in holding that [mother] was equitably estopped to deny [father]'s paternity of [child]."

DOMESTIC VIOLENCE

TEXAS FAMILY CODE §153.004(f) REQUIRES FACT FINDER TO CONSIDER A PROTECTIVE ORDER WHEN DETERMINING CONSERVATORSHIP BUT THE ISSUANCE OF A PROTECTIVE ORDER IS NOT DISPOSITIVE ON THE ISSUE

¶ 08-2-39. ***Anderson v. Rogers***, 247 S.W.3d 757 (Tex. App.—Dallas 2008) (03/3/08).

Facts: Mother and Father married and had two children at time of divorce. Mother claimed verbal and physical abuse, father claimed there was "name-calling and swearing" by both sides but not physical abuse. Prior to the divorce "[Mother] began making postings on a website named Verbalabuse.com. In her numerous postings, [Mother] discussed leaving [Father] and gave and received advice on a number of topics, including protective orders and the effect of a finding of abuse on custody determinations." Mother claimed several

incidents of physical abuse but had no physical evidence of injuries and no witnesses. Father denied all allegations. Mother took children to a women's shelter, filed criminal charges against Father for assault, and he was arrested. Mother filed for a protective order, which judge granted after finding Father committed family violence. Father then filed for divorce and sought access to the children.

Mother filed two complaints with DFPS alleging abuse and neglect of children but nothing was substantiated. Mother alleged violation of protective order but father found not guilty. Mother received counseling and was found to have suffered PTSD and counselor felt Mother was victim of family violence. Trial court ordered social study and the doctor concluded that allegations by Mother were "not strongly supported by the documents [Mother] submitted to [doctor]." Trial court also ordered parties to undergo psychological evaluation and that doctor found no PTSD and noted discrepancies and changes in description of abuse that doctor felt affected mother's credibility. "The jury found [Father] should be SMC and [Mother] should be PC. The trial court entered a final divorce decree, adopting the jury's findings. "On appeal, [Mother] asserts in two issues that the evidence is legally and factually insufficient to support the jury's finding [Father] should be appointed SMC because she presented credible evidence of a history or pattern of physical abuse by [Father] against a spouse and [Father] failed to rebut the statutory presumption in TFC §153.004(b) that naming him SMC was not in the best interest of the children."

Held: Affirmed. Appellate court overruled both of Mother's issues and affirmed trial court's judgment.

Opinion: Appellate court noted that it could not contravene jury's decision on issue of appointment of managing conservator but that the jury's findings underlying its conservatorship decision was subject to legal and factual sufficiency review. Court also noted that "[o]ne incident of physical violence can constitute a history of physical abuse" and that Father's admitted shoving of previous wife "could support a finding of a history of physical abuse by [Father] against a spouse. However, the jury could also consider [Father's] explanation for the conduct and the amount of time that had passed since the conduct in determining the weight to be given to the evidence.

"[Mother] relies heavily on the protective order… that found [Father] had committed family violence. However, while [TFC §]153.004(f) requires the fact finder to consider the entry of a protective order within the two-year period preceding the filing of the suit or during the pendency of the suit in determining whether one of the parties has been physically abusive, it does not make the entry of the protective order dispositive on the issue of conservatorship. *See* TFC §153.004(f). Further, although [Father] attended the hearing on [Mother's] request for a protective order, neither he nor the associate judge who entered the order had access to [Mother's] internet postings that tend to show a reason for manufacturing the claims of physical abuse. The jury was allowed to consider all of the evidence in determining the weight to be given to the entry of the protective order.

AN ORDER FOR ONE PARTY TO PAY ATTORNEY'S FEES IS NOT A DEBT, THEREFORE ENFORCEMENT THROUGH CONTEMPT DOES NOT VIOLATE THE TEXAS CONSTITUTION

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¶ 08-2-40. ***In re* Skero,** ___S.W.3d___, 2008 WL 1903337 (Tex. App.—Beaumont 2008, orig. proceeding) (05/01/08)

Facts: Trial court issued a family violence protective order, gave Husband sixty days to file an affidavit confirming he had started counseling for anger management, and ordered Husband to pay $1,750 to Wife's attorney. Husband violated the family protective order by failing to start counseling and by refusing to pay the $1,750 to Wife's attorney. Husband was found in contempt of court and committed to serve thirty days in jail. Husband filed a petition for habeas corpus challenging the contempt order based on the claim that he was imprisoned for a debt, in violation of the Texas Constitution.

Held: Habeas denied. An order to pay attorney's fees is not a debt.

Opinion: TFC §81.003(a) permits a trial court to assess attorney's fees as costs, and allows a trial court to enforce its order through contempt because the legislature intended for payment of those fees to be enforceable. "A family violence protective order, including assessment of attorney's fees, enforces a legal duty, not a private agreement or contract between the parties." Therefore, the costs are part of the order necessary to protect the spouse and minors from family violence and do not constitute a debt.

MISCELLANEOUS

TRIAL COURT'S ORDER FORBIDING PARTIES' COUNSEL TO INTERVIEW DISCHARGED JURORS FOLLOWING A MISTRIAL IS PRESUMPTIVELY UNCONSTITUTIONAL

¶ 08-2-41. ***In re* State Farm Lloyds,** ___ S.W.3d ___, 2008 WL 1960834 (Tex. App.—Dallas 2008, orig. proceeding) (05/07/08)

Facts: Insureds sued insurer for breach of contract, breach of duty of good faith and fair dealing, violations of the DTPA and Insurance Code, and fraud. The trial court declared a mistrial when the jury was unable to agree on a verdict, and subsequently issued a gag order instructing parties' counsel not to interview discharged jurors. The court denied insurer's motion for reconsideration of the gag order, and insurer filed a petition for writ of mandamus, asserting that trial court abused its discretion in prohibiting counsel from interviewing discharged jurors.

Held: Mandamus granted. The trial court's gag order is a presumptively unconstitutional prior restraint on speech.

Opinion: Under the Texas Constitution, prior restraints on speech are unconstitutional, and a judicial order forbidding certain communications before they occur is a prior restraint. The trial court abused its discretion by failing to make specific findings regarding any imminent and irreparable harm to the judicial process and no findings that the least restrictive means to prevent that harms that TC's prohibition. Furthermore, discussions with discharged jurors is beneficial to the judicial process, as it may help counsel to better serve future clients.