SECTION REPORT
FAMILY LAW

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Message from the Chair

I hope everyone is having a happy and eventful summer, and that all your cases are successful. I humbly take the reins of the Section from my marvelous predecessor, Wendy Burgower, with hope I can accomplish half what Wendy did. The Section now consists of some 5,000 members and growing. Next year will be the 50th anniversary of the Section's founding. Jim Loveless is heading up the committee on History developing ways to celebrate, culminating at the 2010 Advanced Course. The 35th Annual Advanced Family Law Course is August 3-6 at the Hyatt Regency Hotel in Dallas. The Boot Camp on August 2. Lynn Kamin and Heather King will make this year's Advanced Course the best ever. There will be four days of intensive presentations and course materials, the annual Section party, the Family Law Foundation annual Live Auction, the Family Law Golf Association golf tournament, the annual Family Law Style Show, neat new outerwear to purchase, and an opportunity to meet other family law practitioners in a collegial setting. We are especially grateful to our Section's Legislative Committee and the Family Law Foundation for marshalling our legislative package and preventing enactment of bills counterproductive to the work of Family Lawyers. Highlights include the repeal of Economic Contribution, addressing the shortcomings of retirement benefits and stock options statutes, modifications of the Standard Possession Order, and help for Military Families. We are planning on having newly revised Client Handbooks ready for sale at Advanced along with our regular publications. The Pro Bono Committee will stage six free Seminars by renowned authors and presenters at sites around the State to provide attorneys for local Legal Aid providers. The dates and times will be on the website in the near future. We also hope to co-sponsor web casts of our seminars with the Bar at a nominal fee as a service to the members. Lastly, many thanks to our tireless worker bee, Georganna Simpson, for her always timely Section Report which contain a wealth of information, articles, and reported appellate cases published since the last Report. Thank you, the members, for making ours the finest Section of the State Bar.

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

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EDITOR'S NOTE

I want to welcome Judge Woodburn as our new section chair. I also want to welcome my new law clerk, Quinn Martindale, who is a third year law student at the University of Texas. Quinn will be helping be summarize the cases and put together the section reports for the next year. I also anticipate that he will be contributing one or more articles. This will be the first time that we will have two section reports coming out in June. In the past in legislative years, the summer report has been dedicated solely to the legislative changes, without the usual case law updates or articles. This report includes the case law update and articles of interest, the companion report will be devoted solely to the legislative changes and will be coming out on or about June 22, 2009. I am also introducing a new feature in the Section Report – Ask the Editor. If you have a specific question to which you need an answer, please submit via email and the best questions will be printed in the Section Report. Other questions will be answered as time allows.

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IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Agreements: The Washington Supreme Court characterized a premarital agreement as substantively unfair because it "severely restricted the creation of community property," but the court split on whether providing the first draft of the agreement to the bride eighteen days before the wedding amounted to procedural unfairness. *In re Bernard*, 204 P.3d 907 (Wash. 2009). A Virginia appellate court refused to uphold a marital agreement that purported to transfer all marital assets to the wife and all marital debts to the husband upon divorce because the husband had signed it while on a weekend furlough from a hospital's psychiatric ward where he was being treated for chronic and severe schizoaffective psychosis. *Bailey v. Bailey*, 2009 WL 1438245 (Va. App. May 26, 2009). When the parties divorced in 2005 under a settlement agreement that required the husband to pay the wife $7.5 million in 2006, but the former husband paid his ex-wife twelve days late, a divided Connecticut court of appeals upheld an award of interest from the date of the parties' 2005 settlement agreement because the settlement agreement required interest 'from the date hereof' if the ex-husband were late on the 2006 payment. *Dougan v. Dougan*, 2009 WL 1328955 (Conn. App. May 19, 2009).

Child Support: A New York appellate court upheld imputation of $750,000 in annual income to a father when an independent forensic accountant identified cash flows not reflected on tax returns and the father, a convicted felon, documented $3 million he received from his father, also a convicted felon, as a loan by signing a promissory note to his father two days before trial. *Fabrikant v. Fabrikant*, ___ N.Y.S.2d ___, 2009 WL 1444155 (App. Div. May 26, 2009). A statutory percentage could be applied to the full amount of a Mississippi father's annual income given the family's lifestyle, the child's private school tuition and the fact that the mother did not intend to work until the child reached eighteen. *Smith v. Smith*, 2009 WL 1451340 (Miss. App. May 26, 2009). A Washington trial court erred when it ordered reimbursement of child care expenses in the amount of $400 per month plus medical expenses because the obligee did not introduce any canceled checks or other documentary evidence showing that she actually paid the expenses. *In re Fairchild*, 148 Wash. App. 828, 201 P.3d 1053 (2009).

Custody: That a mother had an affair with a married man, borrowed $43,000 to buy a car and intended to enroll in law school were among the factors leading the Georgia Supreme Court to affirm a trial court's grant of primary custody to the father. *Rembert v. Rembert*, 674 S.E.2d 892 (Ga. Mar. 23, 2009). The Mississippi Supreme Court reversed a trial court's change of custody from the mother to the father when the trial court "was so combative, antagonistic, discourteous, and adversarial" toward the mother that she was denied a fair trial. *Schmidt v. Bermudez*, 5 So.3d 1064 (Miss. 2009).

Dissipating property: An Iowa appellate court found that a husband dissipated marital property when he "single-handedly spent most, if not all" of his wife's military pay earned while she served for a year and a half in Iraq. *In re: Leininger*, 2009 WL 606233 (Iowa App. Mar. 11, 2009). A New York appellate court upheld a dissipation finding when a husband who claimed physical injuries but refused to furnish medical authorizations simply closed his masonry business during the parties' divorce. *Scala v. Scala*, 59 A.D.3d 1042, 873 N.Y.S.2d 787 (2009). Evidence that a husband spent at

least $383,551.83 over a five-year period on a translator in Belarus named "Nina," who sent the husband sexually explicit emails and photos, supported a Florida court's finding that the husband had dissipated marital resources. *Rabbath v. Farid*, 4 So. 3d 778 (Fla. App. 2009).

Division: In New York, telling your husband that a child is his when it isn't does not constitute "egregious fault" to be taken into account when distributing marital property equitably upon divorce. *Howard S. v. Lillian S.*, 876 N.Y.S.2d 351 (App. Div. 2009). Neither maintenance payments to a former spouse nor payments on a spouse's student loan were considered for equitable distribution purposes when both parties had used martial funds "to pay for their own obligations or to aid other family members." *Mahoney-Buntzman v. Buntzman*, ___ N.E.2d ___, 2009 WL 1227875 (N.Y. May 7, 2009). Despite the parties' inadequate financial presentations at trial, resulting in "a Gordian knot of poorly documented and otherwise unexplained premarital and marital financial dealings," a Maine trial court nonetheless erred by applying partnership law to determine the parties' assets and liabilities upon marriage because the parties were not partners before marriage. *Ayotte v. Ayotte*, 966 A.2d 883 (Me. 2009).

Move-away cases: A Virginia appellate court allowed a wife to move the parties' children to Wisconsin, where her extended family lived, noting that the husband had "exhibited little to no interest in spending time with his sons until he learned wife was keeping a detailed log of his behavior toward the children and was planning to file for divorce." *Judd v. Judd*, 53 Va. App. 578, 673 S.E.2d 913 (2009). When divorced parents disagreed about nearly everything (*e.g.*, whether a child could "swim without adult supervision, go out on a lobster boat, help load a wood stove [or] ride a razor scooter"), and the mother displayed a more nurturing and supportive parenting style, a Connecticut court allowed the mother to move the child to Virginia when her employer transferred her there. *Lederle v. Spivey*, 113 Conn. App. 177, 965 A.2d 621 (2009). Holding "that the right to travel guaranteed by the United States Constitution includes the right to travel within Montana," the Montana Supreme Court reversed a trial court decision changing custody to the father when the mother wanted to move from Terry to Kalispell, a distance of about 700 miles. *In re Marriage of Guffin*, ___ P.3d ___, 2009 WL 1395412 (Mont. May 19, 2009).

***Troxel* update:** A New York court held that a former domestic partner lacked standing to seek joint custody of the other's child, born while the parties were together, because standing requires that one be a biological or adoptive parent of a child. *Debra H. v. Janice R.*, 877 N.Y.S.2d 259 (App. Div. 2009). The Delaware Supreme Court ruled identically when only one partner had adopted the child. *Smith v. Gordon*, 968 A.2d 1 (Del. 2009). In Arizona, a court of appeals vacated a trial court's temporary order granting a parent and her former partner equal visitation with the parent's child, holding that the trial court had "failed to employ adequate procedural and evidentiary safeguards to protect the interests of the legal parent." *Egan v. Fridlund-Horne*, ___ P.3d ___, 2009 WL 995794 (Ariz. App. Apr. 14, 2009). A couple with whom a deceased mother and her son had lived obtained custody of the son because the trial court found the father to be an unfit parent, evidenced by his lack of interest in the child, his failure to pay any child support and his lengthy criminal record. *Florio v. Clark*, 674 S.E.2d 845 (Va. 2009).

ASK THE EDITOR

Dear Editor: My client prevailed at trial and the other side filed a Request for Findings of Fact ("FOF") and Conclusions of Law ("COL"). What should I do when the trial court calls and asks me to draft FOF and COL? *Desperate in Dallas*

Dear Desperate in Dallas: Making a Request for FOF and COL is initially a two-step process. To be absolutely entitled to FOF and COL, a party must file a Notice of Past-Due FOF and COL if the trial court does not file FOF and COL within 20 days following the initial request. A party that does not file a notice of past-due FOF waives the right to complain about the trial court's failure to file findings. *Gnerer v. Johnson*, 227 S.W.3d 385, 389 (Tex. App. – Texarkana 2007, no pet.) Therefore, in order to control my client's costs, I typically do not start drafting FOF and COL until the requesting party files a Notice of Past Due FOF and COL. When the trial court calls, just advise them that, unless the court desires otherwise, you will draft and forward FOF and COL as soon as possible after a Notice of Past Due FOF and COL is filed. Since no trial court really wants FOF and COL (without them, the facts are presumed to support the judgment), the court will generally appreciate your understanding of the rules. A format for FOF and COL can be found in Chapter 20 of the Family Law Practice Manual. *G.L.S.*

Dear Editor: My client has recently remarried. My client wants to file a motion to modify conservatorship, she wants to ask for primary conservatorship. Does her remarriage constitute a material and substantial change of circumstance upon which I can base a motion to modify? *Troubled in Tyler*

Dear Troubled in Tyler: When considering whether a material change of circumstances has occurred, Texas courts have deemed the remarriage of one or both parents to be a pertinent factor. *In re C.T.Q.M.*, 25 S.W.3d 730, 734 (Tex. App. – Waco 2000, pet. denied); *Barron v. Bastow*, 601 S.W.2d 213, 214-15 (Tex. Civ. App. – Austin 1980, writ dism'd); *T.A.B. v. W.L.B.*, 598 S.W.2d 936, 939-40 (Tex. Civ. App. – El Paso), *writ ref'd n.r.e.*, 606 S.W.2d 695 (Tex.1980) (per curiam); *Wallace v. Fitch*, 533 S.W.2d 164, 167 (Tex. Civ. App. – Houston [1st Dist.] 1976, no writ) (citing *Leonard v. Leonard*, 218 S.W.2d 296, 301 (Tex. Civ. App. – San Antonio 1949, no writ)). Texas courts uniformly recognize that the parental abilities of the parent seeking custody and the stability of her home are factors to be considered in determining what is in the best interest of the child. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex.1976); *C.T.Q.M.*, 25 S.W.3d at 734; *Lowe v. Lowe*, 971 S.W.2d 720, 724 (Tex. App. – Houston [14th Dist.] 1998, pet. denied). Accordingly, evidence regarding the conduct and abilities of a step-parent can be relevant and admissible in a suit seeking modification of conservatorship. *C.T.Q.M.*, 25 S.W.3d at 734; *Wallace*, 533 S.W.2d at 167-68; *accord Barron*, 601 S.W.2d at 214-15; *T.A.B.*, 598 S.W.2d at 939-40; *Colbert v. Stokes*, 581 S.W.2d 770, 771-72 (Tex. Civ. App. – Austin 1979, no writ); *Evans v. Tarrant County Child Welfare Unit*, 550 S.W.2d 144, 145-46 (Tex. Civ. App. – Fort Worth 1977, no writ). *G.L.S.*

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

Columns

USING PSYCHOLOGICAL TESTS IN COURT: WHAT DO THE RESULTS MEAN? Part I

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

In a previous column, we noted a lawyer's muddled, pedantic direct examination of his expert psychologist who had conducted a court-appointed evaluation of the litigants. Anyone hearing that exchange would have struggled to recognize the lawyer's case theory, buried deeply in the give and take. The lawyer's sin? Entangling his expert in arcane testimony about the makeup of psychological tests and the meaning of their results.

The lawyer's remedy is twofold. First, the lawyer should recognize that testing is only one component of a competent psychological evaluation; lawyers miss valuable information about an examinee when they focus on testing to the exclusion of interviews with the examinee and review of other relevant information. Second, the lawyer should understand the nature of psychological tests: what tests are, what kinds of results they offer, and the elements of well-constructed tests. In a three column series, we will look at how lawyers and psychologists may properly use or misuse tests. In this column, we'll explore what a test is and what results they offer. In the following two columns, we'll look at markers of well-constructed tests.

Psychological tests offer several benefits. They may provide useful research-based data to support clinical diagnoses and resulting treatment plans. Appropriately used, tests may also offer important information in forensic mental examinations.

Countless numbers of psychological tests have been published to assess emotional problems, relationship styles, and personality assets. In general, structured tests present examinees with questions that must be answered true or false or by ratings along a continuum, say, for example, one to five. Less structured tests offer examinees more ambiguous stimuli, like inkblots or pictures, to which examinees fashion their own responses.

The most commonly used psychological tests in forensic examinations that address emotional and personality concerns are structured, self-report inventories such as the Minnesota Multiphasic Personality Inventory–2 (MMPI-2), the Millon Clinical Multiaxial Inventory–III (MCMI-III) or the Personality Assessment Inventory (PAI). These inventories are standardized questionnaires that compare the answers and profiles of examinees against the answers and profiles of other people who served as reference samples in the tests' development. For example, if an examinee's profile is similar to people in the reference sample who were independently diagnosed as depressed, the psychologist might assume that the examinee is similar to those depressed people; such results from a well-constructed test may provide the psychologist with useful hypotheses to consider about the examinee's emotional functioning or relationship style.

But comparing the examinee with a test's reference group begs a number of questions. To begin, this comparison, at best, offers only inferences about the examinee. Lawyers should keep in mind that even inferences from the best constructed tests are only inferences. These inferences do not, by themselves, define the

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psychological makeup of examinees—a psychological test is not a personality x-ray of the examinee. Inferences from an examinee's test profile, based on comparisons with the reference group, still must be applied to the individual examinee and life situation. For example, while an examinee's MMPI-2 depression scale score may be elevated, not every depressed person in the test's reference group was depressed in the same way, and many of those depressed people differed in their abilities to manage their lives. In addition, the examinee may have produced the depression profile because he or she actually was depressed, or because he or she wanted falsely to convey such an impression. Further, some truly depressed examinees might purposely have tried to "look good" in their responses to the test questions and, consequently, not produce a profile reflecting depression. These are some reasons why companies who publish the major psychological tests emphasize that test results should only be interpreted in light of additional clinical data including the examinee's life circumstances.

In court, these issues are particularly crucial because legal decisions may be influenced by experts who fail to recognize that test results are inferences and, thus, misuse test results to support their opinions. Our next two columns will identify markers that distinguish well-constructed tests from tests with questionable reliability.

WHAT YOU NEED TO KNOW ABOUT SPECIAL IRA RULES IN 2009 AND 2010

by

Christy Adamcik Gammill, CDFA[1]

There are many different types of Individual Retirement Accounts or "IRAs."

- **Traditional IRAs (pre-tax and after-tax) or Rollover IRAs**
- **SEP IRAs and SIMPLE IRAs**
- **Inherited IRAs or "Stretch IRAs"**
- **Roth IRAs**

In 2009 or this year only, there are no Required Minimum Distributions on IRAs. This includes all non-Roth IRAs which normally must begin taking distributions by April 1 following the age in which age 70 ½ is attained and are based on life expectancy. Therefore, if income is not needed from an IRA account this year, no distribution has to be taken from the IRA and no tax has to be paid.

For those who have non-Roth IRAs there will be a more enticing option that taxpayers will have next year with regards to a Roth IRA. In 2010, there will be no income limit on converting non-Roth IRAs to a Roth IRA. Currently if adjusted gross income is $100k or more, you cannot convert to a Roth. With the special exception of 2010's tax provision, someone who has an AGI over the limit may convert to a Roth IRA regardless of income. For 2010 only, the ordinary income tax that is owed due to full taxation on the Roth conversion amount can be divided equally and paid out over two tax years. This is an attractive option for those who do not need the income from their IRAs now or do not expect to need the income since the Roth IRA does not have the Required Minimum Distribution rules and the funds will remain tax-deferred leaving unspent funds from the Roth IRA asset for the next generation. Another concept making the conversion attractive is that we may be in the lowest tax bracket of our lifetime and paying tax in a 30% bracket now for a conversion may be better than an unknown IRA tax rate in the future, or better yet, zero with the Roth.

Being educated on what options there are for conversions in 2010 may impact how a property settlement is negotiated and the IRA may become a more appealing asset. For example, if there are divorcing parties and

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the Husband does not anticipate needing or wanting to use his retirement plan assets, it may be worth more to him to keep the qualified plan asset knowing he has another option next year. Furthermore, since the husband's 401(k) with a previous employer has not been already been rolled over, he may want to roll the 401(k) over to an existing IRA now or open a Rollover IRA in preparation for a 2010 conversion.

Depending on the situation and need for income or liquidity now or later it is important to evaluate all the options amongst the existing retirement plans before dividing property to maximize your client's financial outcome. As "Creative Options for Accessing Retirement Plan Assets Before Age 59 ½," which appeared in the Spring 2008 Section Report discusses, the distribution rules and options for Qualified Plans and IRAs are different and the client's individual situation will dictate which type of asset or plan is best to allocate to each party.

Key points of being pro-active in 2009 for converting to a Roth IRA in 2010:

1. Fund 2008 and 2009 contributory IRAs to the maximum extent
2. Rollover old Employer sponsored plans into an IRA
3. Consolidate IRA accounts
4. Check with current employer to see if they offer an in-service Non-Hardship Withdrawal that you can rollover into an IRA
5. Do a comprehensive evaluation of your situation with your advisor(s) about certain rules and restrictions that apply to Roth IRA conversions – including the IRA rules that requires investors to aggregate all of their traditional IRAs when calculating the taxes due. The IRS requires investors to prorate both the taxable and nontaxable portions

	Traditional IRA	**Roth IRA**
Who is Eligible?	Any person who has earned income under age 70 ½ A nonworking spouse under age 70-1/2 who files a joint return that includes earned income.	**Single Filer** - Modified AGI of $105k or less: full contribution; Phased out at $120k and no contribution **Joint filers** - Modified AGI of $166k or less: full contribution; Phased out at $176k and no contribution
		Married filing separately - Modified AGI of $0 to $9,999 partial contribution; $10,000 or more not eligible
Maximum Annual Contribution	up to 100% of earned income or $5,000 whichever is less; if age 50 or older an additional catch-up contribution of $1,000.	Same as Traditional IRA subject to the phase-out limits.
Federal Income Tax Treatment on Contributions	Taxes are deferred until distributions are made; taxable distributions are treated as ordinary income.	Contributions are made with after-tax money; therefore, withdrawals from the contribution amount (basis amount) are always tax-free.
	If nondeductible contributions have been made, each withdrawal is taxed proportionately.	
Federal Income Tax Treatment on Distributions	Earnings grow tax-deferred until distributions begin. Distributions are taxed as ordinary income.	**Qualified distributions:** tax free; **Nonqualified distributions:** earnings are taxed as ordinary income. **Conversions:** earnings are tax-free after the conversion amount satisfies the five-year investment period.

Conversions:	**Conversion to a Roth IRA*:** allowed, if modified adjusted gross income (MAGI) is $100,000 or less (single or joint) and, if married, taxpayers file jointly. The converted amount is taxed as income, but no penalty applies.	**Recharacterizations:** a Roth conversion can be undone (recharacterized) for any reason, including if investors' income for the tax year in which they converted exceeds the $100,000 MAGI limit. Investors have until their tax filing deadlines (including extensions) of the year they converted to a Roth IRA to undo their conversions.

* Beginning with the 2010 tax year, a new tax law allows investors with MAGIs greater than $100,000 to also convert in 2011 and the other half in 2012.
to a Roth IRA. Investors who convert in 2010 only can spread their tax payment over two years by including half the conversion amount as income in 2011 and the other half in 2012.

**For full IRA details and qualifications and rules go to www.IRS.gov for more information;
This article is for information purposes only and is not a substitute for professional tax advice.

Articles

E-MAIL AGREEMENTS: CAN THEY SATISFY RULE 11 REQUIREMENTS?

By: Jennifer Stanton Hargrave[3]

Agreements are frequently entered into by the attorneys, on behalf of their clients. These agreements are enforceable if they comply with the requirements set forth in Texas Civil Rules of Procedure, Rule 11, and are commonly known as "Rule 11 Agreements."
Texas Rules of Civil Procedure, Rule 11, states: "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record…"
In order for a court to enforce an agreement of the parties, the court must first find that the agreement was: 1) in writing; 2) signed; and 3) filed with the court.

As technology changes the practice of law, e-mail correspondence between attorneys has replaced formal letters sent via the postal service, or even by facsimile. The question arises, is it possible for lawyers to enter into Rule 11 agreements via e-mail correspondence? There is no argument that an agreement of the parties written in the text of the e-mail correspondence can constitute a "writing" that can be printed and filed with the court. The only issue is whether the agreement was "signed" in accordance with the requirements of Rule 11.

A. The Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act (UETA) was enacted by the Texas Legislature in 2001, and the provisions are set forth in the Texas Business and Commerce Code. *See* TEX. BUS. & COMM. CODE §§ 43.001, et seq. (2001). Specifically, UETA states that, effective January 1, 2002, a record or signature may not be denied legal effect or enforceability solely because it is in electronic form. TEX. BUS. & COM. CODE § 43.007(a). If a law requires a record to be in writing, an electronic record satisfies the law. *Id.* at § 43.007(c). If a law requires a signature, an electronic signature satisfies the law. *Id.* at § 43.007(d). UETA defines "electronic record" to mean a record created, generated, sent, communicated, received, or stored by electronic

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means. Id. at §43.002(7). UETA further defines "electronic signature" to mean an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. *Id.* at § 43.002(8). UETA was adopted with the intent of facilitating electronic transactions consistent with other applicable law, and to be consistent with reasonable practices concerning electronic transactions.

Therefore, the statutory framework of UETA clearly provides that an agreement transmitted electronically can comply with the requirements of Rule 11 if the parties intended such a result. It should be clear from the correspondence between the parties that they intended to create an enforceable Rule 11 agreement electronically. Therefore, the court can not find that a Rule 11 agreement does not exist merely because it was contained in electronic correspondence.

B. Common Law Analysis

In interpreting the requirements of Rule 11, the Texas courts have analogized the requirements of Rule 11 to the requirements set forth in the statute of frauds. TEX. BUS. & COMM. CODE § 26.01. Specifically, the Texas Supreme Court held that the principles governing the statute of frauds apply equally to Rule 11 agreements. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995).

Like Rule 11, the Statute of Fraud states: "A promise or agreement… of this section is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him. TEX. BUS & COM CODE § 26.01(a). The definition of "signed" includes using any symbol with present intention to authenticate a writing. *Id.* at § 1.201(39). In adopting the definition of "signed," the Texas Legislature stated that the court "must use common sense and commercial experience in passing upon these matters." *See Id.* at § 1.20(39), comment 39 (Vernon 1994 & Supp. 2001). Specifically, the Texas Legislature recognized that "authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete…" The question for the Court, as stated by the Texas Legislature, is always whether the symbol was executed or adopted by the party with present intention to authenticate the writing.

Moreover, the courts have held that in determining whether the statute of frauds was satisfied, the prevailing rule in Texas is to follow the Restatement of Contracts: "The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." RESTATEMENT (SECOND) OF CONTRACTS §134(1981); *see Mondragon v. Mondragon*, 113 Tex. 404 (1923).

With such a broad mandate, Texas courts have been very liberal in their application of the law requiring that a document be "signed." If it is clear the person took some act to authenticate the document as reliable evidence of that person's agreement to the transaction, then the document will be found to have been signed. *Capital Bank v. American Eyewear, Inc.* 597 S.W.2d 17 (Tex. Civ.App.—Dallas 1980, no writ), Whether the "signature requirement" has been satisfied turns on the question's of the signer's intent. *See Bocchi Americas Assocs. Inc. v. Commerce Fresh Marketing Inc.*, 515 F3d 383 (Tex. – 5th Cir, 2008) (court held that although fax lacked a "formal signature", it nevertheless satisfied the statute of fraud because the fax contained the written name of the party to the agreement in the "from" field); *see also Fulshear v. Randon*, 18 Tex. 275, 277 (1857) (court held that "If he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature); *Cox Engineering v. Funston*, 749 S.W.2d 508, 511 (Tex. App. – Fort Worth 1988, no writ) (court held that invoice printed on company's letterhead, including its address, was "signed" because it provided authentication that identified the parties to be charged); *Foster v. Mutual Savings*, 602 S.W.2d 98 (Tex. App. – Fort Worth 1980, no writ) (although court did not find that agreement was signed, court stated that a typewritten signature would satisfy the requirement if it was "made or adopted with the declared or parent intent of authenticating the memorandum.").

C. Public Policy Analysis

Moreover, the underlying purpose of Rule 11 is to facilitate agreements between parties, while requiring that such agreements be in writing in order to avoid the pitfalls of oral agreements – namely, the fallibility of human recollection. In *Kennedy vs. Hyde*, the Texas Supreme Court held that an agreement between the parties was not enforceable because it was not memorialized in writing. 682 S.W.2d 525 (Tex. 1984). In reaching its conclusion, the court analyzed the purpose of Rule 11. The Court affirmed its prior findings, citing its decision in *Birdwell v. Cox*, "oral agreements concerning suits are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies." *Birdwell v. Cox*, 18 Tex. 535, 537 (1857). Rule 11 is intended to contribute to efficient court administration by encouraging parties to limit matters in controversy and expedite trial proceedings. "The requirements of Rule 11 are not onerous; the benefits are substantial." *Kennedy*, 682 S.W.2d at 530. Rule 11 should not be interpreted as requiring "slavish adherence" to the literal language of the rule in all cases. *Id.* at 529.

Although e-mail was not in existence in 1941, when Rule 11 was promulgated in its current form, the court has demonstrated a clear willingness to adapt to new technologies over the past 67 years. The requirements of Rule 11 are intended to facilitate settlement, not impede it. E-mail correspondence is a widely accepted form of communication between attorneys. If the parties to the agreement have expressed their consent to transact business via e-mail, then the rules of contract and interpretations governing the formation of agreements allow for Rule 11 agreements to be entered into electronically.

If attorneys are seeking to enter into enforceable agreements via e-mail that comply with the requirements of Rule 11, the attorneys should clearly express their intent in the e-mail correspondence. For example, the attorney making the proposal should identify his intent that the proposal is a writing intended to comply with the requirements of Rule 11, and the proposal should include his written name and signature line. The attorney accepting the terms of the proposal via e-mail should reply via to the proposal with an expressed statement, "My client and I accept the proposal below. Please accept this email as our Rule 11 Agreement," as well as her written name and signature line. Under this circumstance, any ambiguity regarding the parties' intent is removed, and the court should enforce the agreement of the parties.

The courts should apply the law set forth in the Uniform Electronic Transaction Act, consistent with the holdings in *Padilla* and *Kennedy*, and enforce the Rule 11 agreements entered into via e-mail correspondence.

MANDAMUS AFTER *MCALLEN*: HAVE THE SANDS REALLY SHIFTED?

By Michelle May O'Neil[4]

The Texas Supreme Court recently reexamined the standards for granting mandamus, seeming to ease the standards for seeking a pre-trial ruling on such matters as discovery objections, expert witness reports, or jurisdictional disputes. In 1992, the Court set out the standards for mandamus relief in the case of *Walker v. Packer*. *Walker v. Packer*, 827 S.W.2d 833, 839-43 (Tex. 1992). *Walker*'s standard for mandamus relief required a showing that the trial court (1) committed a clear abuse of discretion; (2) which could not be adequately remedied by appeal. The first prong of the *Walker* test remains relatively absolute: an abuse of discretion is shown when the trial court could have reached only one decision in determining what the law is or applying the law to the facts. *Id.* at 840.

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After a hiatus of twelve years, the Court took another look at the second prong of the *Walker* elements, providing a balancing test to determine when appeal is inadequate. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004). Under this balancing test, remedy by direct appeal is adequate when the "detriments of mandamus review outweigh the benefits". The Court noted that these considerations implicate both public and private interests. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.

Despite the efforts of the *Prudential* opinion, the developments of mandamus review remained unclear because the Court employed a case-specific, generalized analysis. So, in August 2008, the Court clarified the *Prudential* balancing test in a way that seems to make the remedy more available. *In re McAllen Medical Center, Inc.*, 2008 WL 4051053, *6 (Tex. Aug. 29, 2008). "The problem with defining inadequate appeals as each situation 'comes to mind' [under the *Prudential* opinion] was that it was hard to tell when mandamus was appropriate until this court said so . . . ." *McAllen* at *6. The Legislature has recognized that the traditional rules of litigation have increased the cost to the litigants and responded by passing more laws requiring pre-trial standards for maintaining the suit. This influenced the Court to examine the standards for seeking "instant replay", because some calls are so important and so likely to change the outcome of the litigation that they require quicker review. "Insisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance, not that the courts are doing justice, but that they don't know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded." *McAllen* at *5-6.

"Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review. The comparison requires an analysis of whether mandamus relief will safeguard important substantive and procedural rights from impairment or loss, and also whether mandamus will allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgment. *McAllen* at *6; *see also In re Global SantaFe Corp.*, 2008 WL 5105257 *3-4 (Tex. Dec. 5, 2008).

While some commentators assert that *Prudential* and *McAllen* represent a dramatic shift in the mandamus standards, the cases decided by the various courts of appeals since the *McAllen* opinion suggest a dismissal of the *Prudential* and *McAllen* opinions and continued reliance on *Walker's* more rigid standard. For example, in the case of *Pilgrim's Pride Corp.*, the Texarkana Court limited *McAllen* to only situations involving health care liability claims, without extending the holding to other mandamus situations. The Dallas Court of Appeals denied mandamus relief when its review of the trial court's denial of a motion to enforce a forum selection clause was not an abuse of discretion. *In re Wilmer Cutler Pickerling Hale & Door, LLP*, 2008 WL 5413097, *2 (Tex. App. – Dallas Dec. 31, 2008). And, the Corpus Christi Court denied review of an arbitration clause, despite prior cases saying mandamus review is appropriate in those situations. *SCI Texas Funeral Svcs., Inc. v. Leal*, 2009 WL 332043 (Tex. App. – Corpus Christi Feb. 12, 2009).

So, where do we stand in the shadow of *McAllen*? The Texas Supreme Court has clearly set out the opportunity for broader utilization of mandamus as a remedy to correct important, case-defining pre-trial rulings. However, the various courts of appeals have continued to allow use of the remedy conservatively. Where the Texas Supreme Court may be viewing broader policy considerations such as the negative view of the judicial process and the Legislature's increasing interference into providing for specific re-

view of certain types of cases, the courts of appeals may be examining their individual dockets to control overuse of the pre-trial "instant replay". Interpretation of the availability of the remedy seems at odds, leaving litigants to wonder whether review of important pre-trial rulings is more available in light of *McAllen*, or whether the recent expansions are only an empty nod to the Legislature's public policy considerations. Without an increase in the number of cases provided pre-trial review in order to avoid costly, unnecessary trials, the judicial system may continue to be viewed negatively as the *McAllen* opinion fears.

"The Decider" — A Case for Texas-Style Child Custody Arbitration

By Ian Pittman[5]

I. Introduction

Arbitration has existed in the family law contexts for several decades. When a married couple decides to divorce, it is generally accepted that they can agree to enter into a binding arbitration agreement to dissolve the marital estate and divide property amongst the former spouses. The idea that two adults can contract to have a third party arbitrator divide their property is not controversial. However, this general acceptance does not follow into the area of child custody disputes. Some states, such as Texas, have statutes and case law that effectively allow parents to agree to be bound by an arbitrator's decision regarding child custody, subject to minimal court supervision so long as the award is in the child's best interest. Other states allow arbitration of child custody disputes, but require a court to subsequently ensure that the award conforms to various standards to protect the child. And still other states ban arbitration of child custody disputes outright, claiming that the courts alone are able to sufficiently protect children when matters of child custody are involved.

II. WHY CHOOSE CHILD CUSTODY ARBITRATION?

Arbitration has a myriad of advantages over traditional forms of litigation. The most obvious advantage is that the parties to a dispute can choose an arbitrator who is an expert in the field. It is generally accepted that "a dispute processed through arbitration will be disposed of more quickly than if the parties had made their way through the court system to a final judgment."[6] Parties that choose arbitration are not at the mercy of scheduling of a crowded court docket, and an arbitrator is better situated to focus on one particular case than a judge who has to juggle several cases. Therefore, "since the arbitrator's attention focuses solely upon the parties' case, his or her decision will be reached more quickly than in typical court proceedings."[7]

Furthermore, and especially applicable to sensitive matters such as child custody disputes, arbitration has been shown to lead to less contentiousness, hostility, and confrontation.[8] This aspect of arbitration can potentially lead to a greater chance of a cooperative relationship between the parties in the future. With regards to child custody disputes, where the parents must continue to make joint

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[6] Alan Scott Rau, Edward F. Sherman, Scott R. Peppet; *Arbitration (Second Edition)*, Foundation Press, 2002; 4.
[7] Christine Albano, *Binding Arbitration: A Proper Forum for Child Custody?*, 14 J. of the Amer. Acad. of Matrimonial L. 419 (1997) at 425.
[8] Rau, Sherman, Peppet at 5.

decisions regarding religious upbringing, medical choices, education, and other issues, the potential for better relationships between the parties following the conclusion of the proceedings is extremely important. Additionally, there is an "empirical consensus that ongoing conflict is harmful to children."[9] A prominent work on the subject of the effect of divorce on children noted that a "successful" divorce which involves custody issues is one where "the adults are able to work through their anger, disappointment, and loss in a timely manner and terminate the spousal relations with each other (legally and emotionally), while at the same time retaining or rebuilding their parental alliance with and commitment to the children."[10] Thus, the potential touched on above for arbitration to lead to better post-dispute relationships between parties is doubly important in child custody cases.

Additionally, arbitration may be particularly advantageous in situations where there is a power imbalance between the parties. In cases that involve domestic abuse, for example, mediation is generally not advocated because the power imbalance does not allow for the parties to effectively reach agreements. However, arbitration vests the decision making power in a third party that is not susceptible to the same forms of intimidation and coercion. Therefore, in cases where an attorney suspects a power imbalance between his client, arbitration may be preferable to mediation.

However, child custody arbitration should not be treated the same as standard commercial arbitration. At least one organization promulgates specific rules for arbitration of child custody issues.[11] These additional rules include appointment of a Guardian ad Litem to represent the child's interest in the proceedings, requirement that a stenographic record be kept of any arbitration proceeding involving child custody, and that the form of the award must follow substantive state law pertaining to child custody and the best interest standard.[12] If arbitrators are required to follow additional rules such as these, child custody disputes could gain access to the myriad advantages of arbitration while also being subject to more stringent requirements to ensure the best interest of the child.

III. CHILD CUSTODY ARBITRATION – THREE MODELS

Arbitration of child custody disputes is far from settled law in the United States. The majority rule in American law is that family law arbitration, including arbitration that affects child custody, is valid if it is subject to court review. [13] However, the practice of child custody arbitration seems to run along a spectrum, from states that are more permissive with regard to allowing child custody arbitration and respecting arbitrator's awards, to states that do not allow child custody arbitration at all.

A. Texas-Style Child Custody Arbitration

Texas is on the leading edge of arbitration with regard to child custody disputes. While many states allow child custody arbitration, the Lone Star State is unique in just how committed its courts

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[9] Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 Fam. L.Q. 659 (2008) at 660.

[10] Janet R. Johnston and Vivian Roseby, *In the Name of the Child: A developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, (1997) at 3.

[11] Additional Rules For Domestic Relations Arbitrations Involving Children, The Center for Legal Solutions, Inc., available at http://www.cobbmediation.com/downloads/CLS_Additional_Rules_for_Arbitration_with_Children.pdf, last accessed on 4/2/2009.

[12] *Id.*

[13] John J. Sampson, Harry L. Tindall, Angela G. Pence, Stephanie Stephens, *Sampson and Tindall's Texas Family Code Annotated August 2008 Ed.* comment at 611.

are to allowing (and perhaps even encouraging) its citizens to avail themselves of the private adjudicative process that arbitration allows. The statutory skeleton that allows for arbitration in child custody disputes is relatively sparse considering the amount of flesh Texas courts have filled the process out with. In fact, it consists of only eight lines in the Texas Family Code:

> (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding
> (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.[14]

From that modest statutory grant from the Texas Legislature, Texas has developed one of the most permissive child custody arbitration systems in the country.

Just how permissive is Texas-style child custody arbitration? For one, the fact that the statute places the burden of proof in the statute "on the party seeking to avoid rendition of an order based on the arbitrator's award" is probably the most pro-arbitration statutory language in the United States when dealing with child custody disputes. In effect, unless one party challenges the arbitrator's award, Texas courts will essentially approve the award with only a cursory review to ensure that the child custody arrangement contained in the award is in the child's best interest. As the following sections on other state's procedures for confirming arbitration awards will show, this is an extraordinarily pro-arbitration facet of Texas-style child custody arbitrations.

Next, not only is Texas-style child custody enabled by Family Code Section 153.0071, arbitration awards in Texas are also broadly governed by the Texas General Arbitration Act (TGAA), which was incorporated in 1965 into Texas Civil Practices and Remedies Code Section 171.[15] In *Killroy v. Killroy*, the Houston Court of Appeals [1st Dist.], held that both the TGAA and Family Code Section 153.0071 govern child custody arbitration in the state, noting that suits affecting the parent-child relationship are "conspicuously absent" from the listed exceptions from the TGAA.[16] The court went on to state that where the TGAA and the Family Code conflict with regards to arbitration of child custody disputes, the Family Code's greater specificity controls.[17] Finally, the court stated that reading the two statutes in concert, the procedure for a trial court to review the best interest of an arbitrator's award that deals with child custody "gives parties the freedom to resolve controversies involving children without the expense and time of litigation, while at the same time preserving the ability of the court to ensure that the best interest of the child are protected."[18]

Furthermore, Texas courts have held that a parent can expressly waive even the statutory "best interest" review of a child custody award in an arbitration agreement. The San Antonio Court of Appeals, when faced with the question of whether a party could waive the judicial review of child custody arbitration awards, found that under Texas Law, a party's express renunciation of a known right

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[14] VERNON'S TEXAS FAMILY CODE ANNOTATED (2007), § 153.0071.
[15] VERNON'S TEXAS CIVIL PRACTICES & REMEDIES CODE (2007), § 171 *et seq.*
[16] 137 S.W.3d 780, 786 (Tex. App.—Houston [1st Dist.] 2004, no pet.)
[17] *Id.*
[18] *Id*. at 789.

can establish a waiver.[19] The court considered language in an arbitration agreement that stated: "Both parties renounce and waive and estop themselves from asserting that the arbitrator's decisions made pursuant to this Agreement are not in the best interest of the child, and each party ***waives the right to a judicial determination*** that the arbitrator's award is not in the best interest of the child." [emphasis added by the court][20] The mother in this case was attempting to assert that the express waiver of the best interest hearing with regard to child custody determinations was against public policy. However, the court stated that it expressly disagreed that it was against public policy for a parent to contract away the right to a best interest hearing. "It is the state's policy to encourage peaceful resolution of disputes, particularly those involving the parent-child relationship, including … issues involving conservatorship, possession, and child support."[21] The *C.A.K* decision is a striking example of how far Texas courts will go to allow a party to contract away a court's ability to review the best interest of a child custody determination.

While *C.A.K.* may be an outlier and distinguishable, Texas courts have shown a historic practice of deference to arbitrator's awards, and respect the established tradition of waiver by failure to act. The Waco Court of Appeals stated the Texas policy of deference to arbitrator's awards in child custody disputes extends to cases where a party only waives the right to a best interest review by actions, and not express agreement.[22] In a case where a mother failed to either file a motion to vacate the award or to present evidence concerning the child's best interest, the court held that the mother waived the right to a best interest hearing.[23] The Waco Court state that "[b]ecause the policy in Texas is to accord great deference to arbitration awards, scrutiny of these awards should focus on the integrity of the arbitration, not the propriety of the result."[24] This case should illustrate Texas court's willingness to follow well settled Texas precedent with regard to review of arbitration awards—focusing on the integrity of the arbitration itself, and not the propriety of the award—even in matters regarding child custody.

Taken together, the Texas statutes authorizing arbitration in child custody disputes combined with the case law that shows extraordinary deference to an arbitrator's award, Texas seems to encourage parents to enter into binding arbitration of custody disputes. However, there is some anecdotal evidence that, even in spite of what could be perceived as inducements on the part of the legislature and courts to encourage this method of dispute resolution, arbitration of child custody disputes is not common in Texas. In an interview, Michael C. McCurley, a Texas attorney and former First Vice-President of the American Academy of Matrimonial Lawyers, indicated that, in his experience, child custody arbitration was not regularly practiced in Texas.[25] According to McCurley, Texas courts are very timely in accommodating family issues, and as such, arbitration is rarely sought as an option in Texas for child custody disputes.[26]

This anecdotal evidence does seem to present some interesting questions. Is Texas so willing to accommodate arbitration of child custody disputes because they are so rare? Or does the Texas example prove that the concerns of states on the opposite end of the spectrum regarding the concern of

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[19] *In re C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.—San Antonio 2004, no pet.)
[20] *Id.*
[21] *Id.*
[22] *In re T.B.H.-H.*, 188 S.W.3d 312 (Tex.App.—Waco 2006, no pet.)
[23] *Id.* at 315.
[24] *Id.* at 314.
[25] Albano, 14 J. of the Amer. Acad. of Matrimonial L. 419 (1997) at 443.
[26] *Id.*

allowing a private arbitrator to usurp the *parens patrie* role generally reserved for the courts is an unfounded fear? Regardless of the interpretation of the evidence, it is no doubt surprising that a state with such wide open laws governing child custody arbitration actually sees so few instances of arbitrations of child custody disputes.

In summary, Texas-style child custody arbitration is characterized by both statutes expressly authorizing arbitration of child custody disputes, and courts that are willing to liberally construe the rights of parties to enter into arbitration agreements that touch on child custody issues. Even where such agreements waive the state's role in reviewing the best interest finding that is traditionally required of determinations in suits affecting the parent-child relationship have been upheld in Texas, effectively removing the courts of the state completely from the traditional *parens patrie* role in cases of child custody arbitration. Despite this seemingly wide open system, the number of child custody disputes subject to arbitration has not exploded. Perhaps such a system fosters a sort of "legal, safe, and rare" attitude amongst both the citizens and the family law practitioners of the Lone Star State, who know that the option is there, even if they choose not to use it in most cases.

B. Pennsylvania-Style Child Custody Arbitration

If Texas-style child custody arbitration is on the permissive end of the child custody arbitration spectrum, Pennsylvania-style child custody arbitration is planted firmly in the middle. While states that follow this model of child custody arbitration allow parents to consent to arbitration that deals with child custody, the state does not give the arbitrator's award the same leeway as Texas-style child custody arbitration. In contrast, these states seem to tolerate arbitration based only on the court's ability to come in and "fix" an improper award that may not be in the best interest of the child.

The seminal case in Pennsylvania-style child custody arbitrations comes, not surprisingly, from a Pennsylvania appellate court. In *Miller v. Miller*, a mother attempted to have an arbitrator's award regarding child custody entered in a trial court, however the trial court declined to enter the award, stating that it would be against public policy.[27] The court of appeals reversed the trial court's ruling that arbitration in child custody disputes was against public policy, but hedged its bets by stating that an arbitration award regarding child custody could never be binding on a court because a court retains the ability to ensure that custody awards are in the child's best interest. The court opined:

> We acknowledge that arbitration has been used more frequently in other jurisdictions as a viable means of resolving domestic disputes that arise under separation agreements. We agree that parties should be able to settle their domestic disputes out of court, and if the parties choose to arbitrate their domestic differences they should be permitted to do so. … However and most importantly, we do not agree that in the matter of child custody an arbitration award shall be binding on the court if such an award is challenged by one of the parties as not being in the best interests of the child. As such, we decline to hold that the trial court is bound by the narrow scope of review set out in the Uniform Arbitration Act. An arbitrations award on the issue of custody is subject to review by a court of competent jurisdiction based upon its responsibility to look to the best interests of the child.[28]

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[27] 620 A.2d 1161 (Pa. App. Div. 1993).
[28] *Id*. at 1163-64.

Therefore, in *Miller*, although the court held that parties can enter into arbitration agreements for child custody, if one of the parties feels that the arbitrator's award is unfair, he or she must only file a motion arguing that the award was not in the best interest of the child, and the award is not binding on the court. This stands in stark contrast to Texas-style child custody arbitration, and the keen deference to arbitrator's awards exhibited in the previous section.

Pennsylvania is not the only state to take this middle ground of allowing arbitration, but not making the arbitrator's award binding on the court if a party complains that the award is not in the best interest of the child. North Carolina and Ohio are other examples of states that apply this method of judicial waffling when it comes to arbitration awards and their binding affect (or lack thereof) on courts of the state.[29]

The positives of this Pennsylvania-style child custody arbitration is that it gives parents the option of pursing arbitration if they feel that it will help them most effectively settle their child custody dispute, and that option has the ability to take some cases out of the court system in some manner. However, these types of systems seem ripe for abuse. It is not hard to imagine that a parent who doesn't agree with an arbitrator's award of child custody and visitation, but does not truly believe that the award is clearly not in the child's best interest could nonetheless bring a proceeding claiming just that. Not only would a scenario such as that prolong the process, it would also serve to add in duplicate costs that arbitration normally avoids. So while Pennsylvania-style child custody determinations could be considered to give parents the option of "the best of both worlds" when it comes to choosing to arbitrate a child custody proceeding or take it through the normal adversarial process, it also undoubtedly runs the risk of offering "the worst of both worlds" as well.

C. New York-Style Child Custody Arbitration

Finally, we come to the complete opposite end of the spectrum from Texas-style child custody arbitration. If Texas-style child custody arbitration is on the permissive end of the child custody arbitration spectrum and Pennsylvania-style child custody arbitration is planted firmly in the middle, New York-style child custody arbitration is obviously not arbitration at all. And that is exactly the case. States that adhere to the New York-style jealously guard their courts' power of child custody determinations. This lack of regard for arbitration in child custody disputes does not stem solely from judicial inertia or a desire to be a figurative "stick in the mud" of the legal world. New York and these other states simply give greater deference to the *parens patrie* doctrine with regard to child custody determinations. As such, based on this doctrine, these states hold that arbitration of child custody disputes is not allowed as a matter of law.

In *Glauber v. Glauber,* the court held that custody and visitation are not subject for arbitration because these issues are "so interlaced with strong public policy considerations" as to be beyond the reach of an arbitrator's discretion.[30] The *Glauber* decision stands as binding precedent in New York, and indeed has been cited by courts in other states as justification for similar prohibitions against child custody arbitration.

Some New York-style states, such as Florida, rely not only on case law, but also have statutory prohibitions against arbitration in child custody disputes.[31] At least on Florida appellate court has

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[29] See *Kelm v. Kelm*, 68 Ohio St.3d 26 (Sup. Ct. 1993) and *Crutchley v. Crutchley*, 293 S.E.2d 793 (N.C. 1982).
[30] 192 A.D. 94 (App. Div. 1993).
[31] Florida Statutes (2006), § 44.104(1), (14)

gone so far as to hold that this statute precludes arbitration of any dispute that involves child custody, even if the arbitration specifically precludes the issues of child custody, visitation, or child support.[32] The Florida courts' reasoning being that the Florida Legislature's use of the term "dispute" was sufficiently broad to encompass "an entire legal action involving issues of child custody, visitation, and child support" and make that action no subject to arbitration.[33]

However, not every New York-style state seems complacent to stay in this category. New Jersey has traditionally fallen into the New York-style category of not allowing arbitration in child custody disputes. At least one court in New Jersey has recently suggested that arbitration might be a suitable method of adjudication in child support cases. Citing another case, in *Fawzy v. Fawzy*, a New Jersey court wrote:

> We do not reach the question of whether arbitration of child custody and visitation rights is enforceable since that issue is not before us. However, we note that the development of a fair and workable mediation or arbitration process to resolve these issues may be more beneficial to the children of this state than the present system of courtroom confrontation. … As we gain experience in the arbitration of child support and custody disputes, it may become evident that a child's best interests are as well protected by an arbitrator as by a judge. However, because of the Court's *parens patriae* tradition, at this time we prefer to err in favor of the child's best interest.[34]

The reasoning in the *Fawzy* court's opinion shows that at least one state on the New York-style end of the spectrum may be willing to eschew its *parens patriae* tradition, and move towards the other end of the child custody arbitration spectrum.

IV. CONCLUSION

On the whole, the majority rule in the United States is in favor of allowing some form of arbitration of child custody disputes if both parents consent to an arbitration agreement.[35] While not all states are likely to be willing to go as far as Texas has in terms of deference to arbitrator's awards regarding child custody, there are definite advantages to arbitration as a method of alternative dispute resolution, even in matters regarding children. While not all parents are likely to feel comfortable with arbitration of delicate family law matters such as child custody, the rationale—such as efficiency and privacy—are reasons that should be available to parents if they so choose. So long as the children's interest are protected during the arbitration proceedings by the appointment of guardians and/or attorneys ad litem, and the courts have an avenue to review the award to ensure that it is in the child's best interest, arbitration of child custody disputes should be available to those parents who so choose.

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[32] *Toiberman v. Tisera*, 998 So.2d 4 (Fla.App. 2008)
[33] *Id.*
[34] 400 N.J.Super. 567, 948 A.2d 709, 712 (N.J. Super. A.D. 2008)
[35] Sampson et al, supra note 23.

Paralegal or Legal Assistant?

"You say to-may-to, I say to-mah-to; you say po-tay-to, I say po-tah-to"
(apologies to the Gershwins)

By Kay Redburn[36]

Until 2005 in Texas there was no difference between the terms "Legal Assistant" and "Paralegal." The two terms were synonymous and interchangeable, as are "lawyer" and "attorney." However, that has changed.

Brief Historical Perspective:

2003 - The American Bar Association House of Delegates voted to change the name of its Standing Committee on Legal Assistants to the Standing Committee on Paralegals

2005 - Legal Assistants Division changed its name to Paralegal Division.

The State Bar of Texas' Standing Committee on Legal Assistants changed its name to Standing Committee on Paralegals

SBOT Board of Directors revised the definition of Legal Assistant to Paralegal to reflect the distinction between a clerical administrative assistant and the term paralegal.

2006 - BOT Board of Directors amended Paralegal definition to include voluntary standards for the application of this definition to non-lawyer employees, by including suggested educational and experience qualifications.

2009 - The Family Law Council of the Family Law Section of the SBOT resolved to support the application of the definition of "Paralegal" to non-lawyer personnel who met the voluntary standards set out in the definition.

It is currently still true that in the State of Texas, any licensed attorney can "anoint" an employee as a Legal Assistant or Paralegal. There are no restrictions, educational or experience requirements, or constraints on who may be employed as a Legal Assistant. There are even some disbarred attorneys making a living as paralegals/legal assistants.

With the adoption of this definition and its voluntary standards, the State Bar of Texas and the Family Law Section encourage attorneys to make the distinction between Paralegal and Legal Assistant, and apply the definition and the voluntary standards when hiring and designating job titles, duties and responsibilities within the attorney's firm.

Here is the definition:

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NEW PARALEGAL DEFINITION AND STANDARDS
ADOPTED BY THE STATE BAR OF TEXAS

In 2005, the State Bar of Texas Board of Directors, the State Bar of Texas Standing Committee on Paralegals, and the Paralegal Division of the State Bar of Texas, adopted a new definition for "Paralegal":

A paralegal is a person, qualified through various combinations of education, training, or work experience, who is employed or engaged by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of a licensed attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal principles and procedures that, absent such person, an attorney would be required to perform the task.

On April 21, 2006, the State Bar of Texas Board of Directors approved amending this definition by including the following standards, which are intended to assist the public in obtaining quality legal services, assist attorneys in their utilization of paralegals, and assist judges in determining whether paralegal work is a reimbursable cost when granting attorney fees:

A. Support for Education, Training, and Work Experience:

1. Attorneys are encouraged to promote:

   a. paralegal attendance at continuing legal education programs;
   b. paralegal board certification through the Texas Board of Legal Specialization (TBLS);
   c. certification through a national paralegal organization such as the National Association of Legal Assistants (NALA) or the National Federation of Paralegal Associations (NFPA); and
   d. membership in the Paralegal Division of the State Bar and/or local paralegal organizations.

2. In hiring paralegals and determining whether they possess the requisite education, attorneys are encouraged to consider the following:

   a. A specialty certification conferred by TBLS; or
   b. A CLA/CP certification conferred by NALA.; or
   c. A PACE certification conferred by NFPA; or
   d. A bachelor's or higher degree in any field together with a minimum of one (1) year of emloyment experience performing substantive legal work under the direct supervision of a duly licensed attorney AND completion of 15 hours of Continuing Legal Education within that year; or
   e. A certificate of completion from an ABA-approved program of education and training for paralegals; or
   f. A certificate of completion from a paralegal program administered by any college or university accredited or approved by the Texas Higher Education Coordinating Board or its equivalent in another state.

3. Although it is desirable that an employer hire a paralegal who has received legal instruction from a formal education program, the State Bar recognizes that some paralegals are nevertheless qualified if they received their training through previous work experience. In the event an applicant does not meet

the educational criteria, it is suggested that only those applicants who have obtained a minimum of four (4) years previous work experience in performing substantive legal work, as that term is defined below, be considered a paralegal.

B. Delegation of Substantive Legal Work:

"Substantive legal work" includes, but is not limited to, the following: conducting client interviews and maintaining general contact with the client; locating and interviewing witnesses; conducting investigations and statistical and documentary research; drafting documents, correspondence, and pleadings; summarizing depositions, interrogatories, and testimony; and attending executions of wills, real estate closings, depositions, court or administrative hearings, and trials with an attorney.

"Substantive legal work" does not include clerical or administrative work. Accordingly, a court may refuse to provide recovery of paralegal time for such nonsubstantive work. *Gill Sav. Ass'n v. Int'l Supply Co., Inc.*, 759 S.W.2d 697, 705 (Tex. App. Dallas 1988, writ denied).

C. Consideration of Ethical Obligations (See Note* below):

1. Attorney. The employing attorney has the responsibility for ensuring that the conduct of the paralegal performing the services is compatible with the professional obligations of the attorney. It also remains the obligation of the employing or supervising attorney to fully inform a client as to whether a paralegal will work on the legal matter, what the paralegal's fee will be, and whether the client will be billed for any nonsubstantive work performed by the paralegal.

2. Paralegal. A paralegal is prohibited from engaging in the practice of law, providing legal advice, signing pleadings, negotiating settlement agreements, soliciting legal business on behalf of an attorney, setting a legal fee, accepting a case, or advertising or contracting with members of the general public for the performance of legal functions.

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*Note: a more expansive list is included in the "General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys" approved by the Board of Directors of the State Bar of Texas, May, 1993.

U.S. District Judge Xavier Rodriguez wrote in a article in the October 2006 Texas Bar Journal that the voluntary standards are "intended to assist the public in obtaining quality legal services, assist attorneys in their utilization of paralegals, and assist judges in determining whether paralegal work is a reimbursable cost when granting attorney fees." You are encouraged to consider applying the definition and voluntary standards to your law practice.

For additional information, please see the SBOT's Standing Committee's web site at: www.texasbar.com and the Paralegal Division of the State Bar of Texas at www.txpd.org/

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

DIVORCE
Grounds and Procedure

TRIAL COURT ERRED IN DENYING A MOTION FOR NEW TRIAL WITHOUT HEARING WHEN THE FACTS ALLEGED BY THE MOVANT ENTITLED HIM TO A NEW TRIAL.

¶ 09-3-01. ***Anderson v Anderson,*** __ S.W.3d __, 2009 WL 622631 (Tex. App.—El Paso 2009, no pet. h.) (03/12/09)

Facts: Wife sued husband for divorce. Trial court held final hearing on 02/15/07. Neither husband nor his attorney appeared at hearing and trial court rendered default judgment. Husband filed a Motion for New Trial on 03/12/07, which the trial court set for 06/04/07, a date after the 75th day following the entry of Default Judgment, but still within the trial court's thirty days of plenary power. At the 06/04/07 hearing, the trial court ruled that husband's motion had been overruled by operation of law without hearing any evidence. Husband filed a Motion to Reconsider and a second Motion for New Trial. On 06/20/07, trial court denied husband's motions. Husband appealed

Held: Reversed and remanded.

Opinion: When a motion for new trial presents a question of fact upon which evidence must be heard, the trial court is obligated to hear such evidence if the facts alleged by the movant would entitle him to a new trial. The trial court abused its discretion in denying the first Motion for New Trial on the grounds that the motion had already been overruled by operation of law and in failing to conduct a hearing at the June 4 setting when the court had plenary power to grant the motion.

TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN WIFE HAD PRODUCED SOME EVIDENCE THAT SHE HAD NOT VOLUNTARILY SIGNED THE AGREEMENT AND HUSBAND'S STATUTE OF LIMITATIONS AND LACHES DEFENSE NOT RIPE UNTIL DIVORCE FILED

¶09-3-02. ***Martin v. Martin,*** ___ S.W.3d ___, 2009 WL 988651 (Tex. App.—Dallas 2009, no pet. h.) (4/13/09)

Facts: Husband and wife married in12/70. Husband founded a business in 1984. Wife had no knowledge of the business's details. In 1988, potential litigation threatened husband's business. Husband told wife they needed a marital property agreement to protect the family. They signed an agreement in 1988. After learning wife's "lawyer" was not licensed, they negotiated another agreement in 1990. Wife's counsel asked husband for a financial audit of the business, which husband refused. He also refused to produce business and personal income tax returns, and he did not want to "make any written representation regarding value [or] swear to an inventory. When wife's counsel threatened to withdraw, husband produced a sworn inventory and appraisement containing his opinion of the estimated value of the community property estate, including the values of his shareholder positions in the businesses. Wife's counsel told wife she was not satisfied with these financial disclosures and advised wife not to sign. Husband presented the agreement as "insurance for our family" and told wife that it did not matter what the agreement stated because he would never assert it against her. Husband constantly threatened that the family would be financially ruined and would have nothing if wife did not sign the agreement. When wife tried to discuss her attorney's concerns with husband, he became outraged and called wife's attorney "incapable," "unqualified," and insisted that wife ignore her attorney's advice. Wife said that she had no choice but to sign the agreement because her sole concern was the welfare of the family. On 7/10/90, wife signed after pressure from husband. A day or two later, husband called wife

and told her that his attorney recommended that she sign a document stating that she was satisfied with the financial disclosures and backdate it to July 9, 1990. Husband filed for divorce in 2003 and sought to enforce the agreement. Wife attacked the agreement, claiming she had not voluntarily signed the agreement. Husband asserted defenses and filed a traditional and no-evidence motion for summary judgment. Husband claimed the wife provided no evidence of her defenses to the agreement and asserted statute of limitation claims and laches to support his traditional summary judgment motion. Trial court granted motion and declared the agreement valid and enforceable. Wife appealed

Held: Reversed and remanded.

Opinion: Trial court erred in granting no-evidence motion for summary judgment because wife produced evidence that she had not voluntarily signed the agreement. Husband's statute of limitations and laches defenses not ripe as to Wife's fraud against the community claim because Wife could not make her claim until divorce proceedings.

Editor's Comment: *This case could be inconsistent with Sheshunoff v. Sheshunoff, 172 S.W.3d 686 (Tex. App. - Austin 2005, pet. denied), in which the Austin court held that a husband had voluntarily signed a marital property agreement even though his wife threatened to withdraw her guarantee of his bank loan, which would ruin the husband's business by causing the bank to call its line of credit, if the husband refused to sign; and Nesmith v. Berger, 64 S.W.3d 110 (Tex. App. - Austin 2001, pet denied), in which the same court upheld a marital property agreement where a husband refused to go on the couple's honeymoon unless the wife signed the agreement. The Martin court cited, but did not distinguish, Sheshunoff; the court neither cited nor distinguished Nesmith. J.V.*

THERE IS NO RIGHT TO COUNSEL IN A DIVORCE CASE

¶09-3-03. ***Chrisman v. Chrisman*** ___ S.W.3d ___, 2009 WL 1233691 (Tex. App.—El Paso 2009, no pet. h.) (5/6/09)

Facts: Husband filed a petition for divorce on 3/5/03. Wife, with representation by counsel, filed a counter-petition for divorce. Trial court entered a final decree of divorce on the grounds of insupportability. Wife appealed, claiming that she was denied effective assistance of counsel.

Held: Affirmed.

Opinion: Although Texas courts have extended the right to counsel to parental termination and involuntary civil commitment proceedings, no court has ever determined that a party to a divorce proceeding has a constitutional right to counsel.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REVERSING SANCTION IMPOSED BY ASSOCIATE JUDGE

¶09-3-04. ***In Re F.A.V.,*** ___ S.W.3d ___, 2009 WL 1314165 (Tex. App.—Dallas 2009, no pet. h.) (5/13/09)

Facts: Father and mother filed for divorce. On 6/23/06, associate judge appointed a parenting coordinator and ordered father and mother to pay part of his fee. On 8/24/06, associate ordered father and mother to pay for 12 more hours of work. On 10/4/06, associate judge ordered mother to pay $375 by 10/6/06 or face sanctions, including striking her pleadings under TRCP §215.2(b)(5). On 10/12/06, father moved for sanctions for mother's failure to pay. On 11/15/06, associate judge granted father's motions and struck mother's pleadings. Mother requested a de novo hearing before trial court on the sanctions. At the de novo hearing, the district

court found that mother had paid the coordinator and reversed the associate judge's ruling. Father appealed the final ruling on the sole issue that trial court abused its discretion by reversing the associate judge's order.

Held: Affirmed.

Opinion: District courts review associate judge's orders de novo. A district court's decision to grant or not grant sanctions is reviewed on an abuse of discretion basis. There are no cases where an appellate court found a trial court abused its discretion by not striking a party's pleadings. Striking pleadings is an extreme measure and rarely appropriate in suits affecting the parent-child relationship. Therefore, trial court did not abuse its discretion.

Editor's Comment: *In a SAPCR, the best interest of the child is the overriding concern. This requires the trial court to prioritize the child's best interest over sanctionable conduct of the parties. To limit a party's proof at trial as a sanction also necessitates a limitation on the evidence to be presented regarding the child's best interest. For the trial court to make a fair determination on the best interest of the child, both parties must be allowed to present evidence. Thus, a trial court must weigh the best interest of the child in a fair trial when considering sanctions against a party. M.M.O.*

DIVORCE
Division of Property

TRIAL COURT CAN REIMBURSE A PARTY TO A DIVORCE IF THEIR SEPARATE PROPERTY IS USED TO PAY DOWN A DEBT.

¶09-3-05. ***Bigelow v. Stephens***, ___ S W.3d ___, 2009 WL 1474735 (Tex. App.—Beaumont 2009, no pet. h.) (5/28/09)

Facts: During marriage, wife received $25,834.11 for selling a house owned prior to marriage. Wife deposited money into husband's separate account. Wife received $4,100 from her insurance company for damage to her separate property. Wife wrote a check to husband who deposited money in his separate account. Husband used the funds to pay down a debt on his separate property. During the divorce proceedings, wife submitted a claim for reimbursement for enhancing husband's separate property. Trial court awards wife $29,934 for her reimbursement claim. Husband appealed.

Held: Affirmed.

Opinion: TFC 3.408(b) provides that reimbursement claims include those for payments of unsecured liabilities of another's marital estate and those for the inadequate compensation of a spouse's "time, toil, talent, and effort[.]" Husband contended that because wife's separate property was used to pay a secured note, her claim would not qualify as a claim under the statutory provisions for reimbursement. Although the Dallas and Houston 14th District courts of appeal have held that reimbursement claims are limited to just these two instances, here the court held that TFC 3.408(b) necessarily excludes a reimbursement claim that is premised on the payment of a secured debt.. Quoting the San Antonio court of appeals, this court held that "[t]he definition of reimbursement in TFC 3.408[(b)] is simply a non-exhaustive list of two potential reimbursement claims." "The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as the discretion exercised by a trial court in making a just and proper division of the community estate."

Editor's Comment: *As noted above the Dallas and Houston 14th courts of appeal conflict with San Antonio and now Beaumont in their interpretation of TFC 3.408(b). The prior cases have not sought a petition for discretionary review. Hopefully the husband in this matter will seek review by the Texas Supreme Court so that we can get this conflict resolved. G.L.S.*

DIVORCE
Post-Decree Enforcement

★★★★★ Texas Supreme Court ★★★★★

"ALL MILITARY RETIREMENT PAY AS RECEIVED" DOES NOT INCLUDE VA DISABILITY BENEFITS.

¶09-3-06. ***Hagen v. Hagen,*** ___ S.W.3d ___, 2009 WL 1165304, 52 Tex. Sup. Ct. J. 698 (Tex. 2009) (5/1/09)

Facts: Husband and wife divorced in 1976. Divorce decree awarded a share of "All … Military Retirement Pay, IF, AS AND WHEN RECEIVED." Husband retired in 1992. In 2003, VA decided husband had a service-connected disability allowing him to receive tax-free VA disability pay in place of his taxable military retirement play. Husband chose to do so and reduced his payments to only the share of the lower military payment he received as a result. Wife sued for contempt and to clarify the decree. Trial court ordered that the retirement pay husband received be divided according to the original decree and found that the retirement pay did not include the disability benefits. Wife appealed, and the Appeals Court reversed. Husband appealed.

Held: Reversed and rendered.

Opinion: Courts should construe divorce decrees to harmonize and give effect to the entire decree. Courts must follow literal language if it is unambiguous. The divorce decree reference to "as received" indicates that it is net pay that is to be divided which distinguished this case from *Berry v. Berry* 780 S.W.2d (Tex. 1980) in which wife was awarded a share of the amount of the entire retirement pay before the VA benefits were subtracted from husband's retirement pay. The trial court permissibly clarified the original decree.

Dissent (Brister, J.)**:** *Berry* did, in effect, divide VA disability benefits and we should not distinguish this case from it. Parsing between "all retirement pay" and "gross retirement pay" is disingenuous. The majority should have overruled *Berry* because VA benefits should not be divided in a divorce decree and remanded the case to be decided on other grounds.

TRIAL COURT SHOULD NOT HAVE CLARIFIED UNAMBIGUOUS PROVISION IN DIVORCE DECREE

¶09-3-07. ***In re R.F.G.,*** ___ S.W.3d ___, 2009 WL 901935 (Tex. App.—Dallas 2009, no pet. h) (4/3/09)

Facts: Trial court issued divorce on 4/24/07. Mother filed a motion to clarify that father was responsible for one half of the mortgage payments. Father filed a motion to clarify that his direct payments to Mother while the divorce was pending applied to his child support obligations. Trial court ruled that father was not responsible for mortgage payments and that his direct payments of child support went to his obligations under the divorce decree.

Held: Reversed and remanded.

Opinion: Under TFC §157.421, a trial court may clarify a child support order, but it may not make substantive changes. Courts should only clarify orders when there is an ambiguous provision. The divorce decree already made clear that mother was exclusively responsible for mortgage payments, so trial court should not have clarified the provision. Since the plain language of the divorce decree stated that the direct payments

only applied to obligations accruing under the temporary order, trial court erred in assigning the direct payments to his obligations under the decree.

A CONTEMPT ORDER ORDERING IMPRISONMENT FOR FAILURE TO MAKE CAR PAYMENTS REQUIRED BY A DIVORE DECREE IS VOID AS IMPRISONMENT FOR DEBT. ALSO CONTEMPT ORDER MAY NOT BE USED TO MAKE SUBSTANTIVE CHANGES TO DIVORCE DECREE

¶09-3-08. ***In re White,*** ___ S.W.3d ___, 2009 WL 1153396 (Tex. App.—Tyler 2009, orig. proceeding) (4/30/09)

Facts: Father and mother divorced on 12/29/05. Trial court appointed both JMC but gave father exclusive right to choose child's primary residence. Trial court required both parties to give 60 days' notice of intended residence change and father to make payments on wife's car. Trial court ordered that the father make child available at his residence for mother to pick up. In 2006, mother filed a motion for enforcement. Trial court found that father had fraudulently notified mother that he was moving, had not surrendered child to mother at court-scheduled times and had failed to make car payments. Trial court held father in contempt and ordered him confined for 30 days. It suspended based on father paying attorney's fees and mother's loss resulting from repossession of car. It also required that the delivery of the child be limited to Anderson County. Father paid funds into trial court's registry and petitioned for mandamus for district court to vacate contempt finding.

Held: Mandamus granted as to the car payments and methods of access to child and denied for the other findings of contempt.

Opinion: A court cannot order confinement on the basis of a debt. The car payments are part of a division of property; they are not assets held in trust. Therefore, the obligation to make payments is a debt even though a divorce decree created it. Since it is not enforceable by confinement, the trial court abused its discretion in the contempt order. The only way to make substantive changes to a divorce decree is under TFC §156.001. As limiting delivery to Anderson County was a substantive change, trial court abused its discretion in its probation order. The contempt finding for husband fraudulently claiming a change of address was justified.

Editor's Comment: *The trial court did not abuse its discretion when holding father in contempt for fraudulently notifying mother and the court that his residence had changed. The trial court granted father the right to determine the child's residence. The parties lived in Palestine, in East Texas. Father claimed to have moved to El Paso, a distance of some 750 miles from Palestine. On mother's weekends, father had been driving to El Paso from Palestine on the day before mother's possession began. Mother or her husband would then pick up the child from El Paso for weekend possession in Palestine. J.V.*

Editor's Comment: *Our country was formed based on the concept that a party could not be imprisoned for failure to pay a debt. Just because a debt obligation is listed in a divorce decree makes it no less a debt. Family law attorneys should counsel their clients about the seeming lack of enforceability of the division of debts and structure the settlement of the estate in such a way that protects the enforceability of the court's orders. For example, if the decree had left the car payment as wife's obligation and ordered husband to pay maintenance in the amount of the car payment to wife, the wife would have had better enforceability options. Or, the car payment could have been awarded as additional child support. But, simply putting a debt payment in the division of assets is insufficient to protect the client on whose behalf the payment is to be made. M.M.O.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONTEMPT ORDER BY IMPROPERLY EXLUDING BANKRUPTCY ORDER

¶09-3-09. ***In re Small,*** ___ S.W.3d ___, 2009 WL 1312076 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (5/07/09)

Facts: On 5/17/05, trial court entered an order adopting jury's finding that husband and wife had been in a common law marriage. On 11/1/05, trial court ordered husband to pay wife monthly temporary support. On 4/20/06, trial court found husband in contempt for failing to pay that support. 5/1/06, husband filed a mandamus petition requesting trial court be ordered to deny any motion to enforce the temporary support. Appellate court denied writ on 6/1/06. In 10/07, trial court held a second jury trial on the issue of community property. Jury found husband had committed fraud. On 10/26/07, trial court appointed joint receivers. On 11/8/07, husband filed for bankruptcy. On 2/15/08, bankruptcy court granted partial relief from the bankruptcy stay allowing trial court to determine the amount of any monetary damages that husband owed wife and to allocate community property between husband and wife. On 10/31/08, court found that husband had been able to pay temporary support and was $124,000 in arrears. It found husband in contempt and assessed confinement in jail, but it probated the sentence on the condition that husband paid the arrearage over the next four months. Appeals court stayed this contempt order. Husband filed a petition of mandamus to overturn the finding that he is able to pay support. Appeals court denied the petition. Husband filed a petition for rehearing, arguing that the 10/31/08 order violated the bankruptcy stay.

Held: Mandamus conditionally granted.

Opinion: The filing of a bankruptcy petition creates an automatic stay depriving state courts of jurisdiction over a debtor except in criminal actions or proceeding. The automatic stay bars civil contempt orders designed to satisfy a judgment but not criminal contempt orders. Criminal contempt orders are unconditional while civil contempt orders are conditional. Since husband could avoid jail time by making the payments, the order was conditional. It, therefore, was a civil contempt order even though trial court entitled the order "Criminal Contempt." Bankruptcy court's order partially lifting the stay did not allow trial court to issue contempt order because it only allowed trial court to determine the amount of any money damages claim. Since judgments entered in conflict with a bankruptcy stay are void for lack of jurisdiction, entering such judgments is fundamental error. Husband, therefore, can raise the issue for the first time in his motion for rehearing.

Wife argued that husband could pay the temporary spousal support from his offshore bank accounts since the automatic stay does not prevent the collection of a domestic support obligation from property that is not the property of the estate. Jury, however, found that those accounts were community property, and bankruptcy court's 2/15/08 order expressly declared that all community property was property of the bankruptcy estate. Therefore, the offshore accounts were covered by the bankruptcy stay.

Editor's Comment: *The court rejected wife's argument that husband could pay temporary support from community funds in offshore bank accounts because all community property was covered by the bankruptcy stay. J.V.*

ANY DISTRICT COURT HAS JURISDICTION TO HEAR BREACH OF CONTRACT ACTIONS BASED ON PROVISIONS IN A DIVORCE DECREE

¶09-3-10. ***Chavez v. McNeely*** ___ S.W.3d ___, 2009 WL 1331854 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) (5/14/09)

Facts: In 6/01, husband and wife divorced. On 6/29/01, district court entered an "Agreed Final Decree of Divorce." That agreement required wife to provide as much "as possible" for her husband's needs, "limited only by her personal financial situation." In 7/03, husband sued wife for breaching that provision in same district

court. In 4/09, husband nonsuited his case and re-filed in Waller County. Trial court rendered judgment for husband on breach of contract. Wife appealed, claiming that trial court lacked jurisdiction and that the agreement was unenforceable.

Held: Reversed and rendered.

Opinion: Trial court is a court of general jurisdiction under Art. 5, § 8 of Texas Constitution. Therefore, there is a presumption that it has jurisdiction unless exclusive jurisdiction had been conferred to the district court that rendered the decree. Under TFC § 9.001, a party "may request enforcement" of a divorce by filing suit in the court that rendered the decree. "May" is permissive, not mandatory. Therefore, the original district court did not have exclusive jurisdiction. Contracts are enforceable only if they are definite enough that a court can understand the parties' obligations. Courts have held terms such as "as much as needed" and "fair market value" to be too indefinite to enforce. A requirement that wife provide as much as possible is also too indefinite to enforce. Accordingly, trial court erred in rendering judgment for husband.

Editor's comment: *This case is similar to In re Silverman (infra) in which the court appears to have acknowledged that non-Family Code remedies are subject only to the civil law. J.V.*

Editor's comment: *Interesting distinction in Chapter 9 – that you can file a breach of contract action for enforcement of the divorce decree in a court other than the court that rendered the decree. I wonder if this case will have the effect of encouraging forum shopping? M.M.O.*

SAPCR
Conservatorship

TRIAL COURT ERRED IN DISMISSING SUIT FOR LACK OF STANDING WHEN THERE WAS CONFLICTING TESTIMONY.

¶09-3-11. ***In re Y.B.,*** ___ S.W.3d ___, 2009 WL 1405166 (Tex. App.—San Antonio 2009, no pet. h.) (5/20/09)

Facts: Wife adopted children in 12/04. On 4/22/07, husband and wife married. On1/21/08, husband moved out of wife's house. Husband filed a SAPCR seeking to be appointed MC on 3/10/08. Wife filed a motion to dismiss and a plea to the jurisdiction. Trial court held a hearing with conflicting testimony about the extent of husband's involvement with the children and granted the motion to dismiss. Trial court also awarded attorney's fees to wife under T.R.C.P. 13.

Held: Reversed and remanded.

Opinion: TFC §102.003(a)(9) grants standing to any person who cares, controls and possesses a child for at least six months prior to and not more than 90 days before the date of filing of a petition. Witnesses gave conflicting evidence as to husband's involvement with the children. Since there was a question of fact regarding husband's standing, trial court erred in dismissing husband's petition. Therefore, husband's pleadings were not groundless, and trial court erred in awarding attorney's fees.

Editor's Comment: *Although the court's ruling technically is correct, it seems pointless. The court remanded the case to be heard by "the trier of fact." But unless husband paid a jury fee, the trier of fact would be the same judge who had, after a hearing, found the facts in favor of wife. Moreover, Troxel v. Granville and its Texas progeny would prevent husband from obtaining any possession of or access to the children: Although the parties were married, wife adopted the children prior to marriage; husband never adopted them. J.V.*

Editor's Comment: *Section 102.003(a)(9) is probably THE most litigated section of the code right now. I currently have several cases in my office which are testing the limits of this section and know of several other attorneys with the same issues in their office. Look for more cases to come out on how far the courts of appeals, and maybe ultimately the Texas Supreme Court, will extend this vague section. M.M.O.*

FUTURE RELINQUISHMENTS DO NOT MEET THE REQUIREMENT OF TFC §156.006(b)

¶09-3-12. ***In re Rampy***, 03-09-00208-CV (Tex. App. -- Austin 2009, orig. proceeding) (5/26/09)

Facts: Father and mother divorced in 2000. Trial appointed them as JMC, granted mother the right to choose child's residence and father possession in accordance with the standard possession order. In 12/08, father filed a SAPCR to give him the right to establish child's primary residence. At a hearing on 1/6/09, husband introduced evidence that the Army ordered mother to deploy to Iraq starting in the latter half of 1/09. Mother intended to leave child with new husband, who was child's step father starting in 8/04. Trial court granted father the right to establish residence effective at the end of the school year. Mother petitioned for mandamus.

Held: Mandamus conditionally granted.

Opinion: To issue a temporary order changing the person with the power to designate the primary residence of the trial, pursuant to TFC 156.006(b) 1 of 3 conditions must be met: 1) the child's present circumstances would significantly impair the child's physical health or emotional development; 2) the caregiver has voluntarily relinquished primary care and possession of the child for more than six months; or 3) the child has requested to have the residence change. In (b)(2), the legislature used the present perfect tense of "relinquish"--"*has relinquished* the primary care and possession of the child"--modified by the prepositional phrase "for more than six months." C. Edward Good, *A Grammar Book* 63-64 (2002) (discussing present perfect verb tense). This usage denotes an act of relinquishment or giving up of the child's primary care and possession that started in the past and has continued for more than six months leading up to the present. *Id.* at 64. ("The perfect tenses show an accomplished fact in relation to a particular point in time in the present, the past, or the future."). Consistent with these observations, our sister courts have construed this type of language to require a past relinquishment of care and possession that has already occurred for a specified period, not one that is anticipated to extend for the specified period to some date in the future. *See* Leighton, 773 S.W.3d at 64-65 (construing parallel language in predecessor to family code section 156.101); Bolden, 751 S.W.2d at 676-77; *see also* 2-4 John D. Montgomery et al., *Texas Family Law: Practice and Procedure* § H4.02[5] (2006) (suggesting that, under section 156.101, "[e]ven if the time during which the conservator has relinquished the child has *not yet totaled six months*, the conservatorship may be modified . . . if the relinquishment constitutes a material and substantial change of circumstances.") (emphasis added). If the legislature intended for subsection (2) to apply to a relinquishment of care and possession that will exceed six months sometime in the future, it presumably would have used "is voluntarily relinquishing . . . for more than six months," "will voluntarily relinquish . . . for more than six months," or some other formulation that would reflect that intent. The father's construction of (b)(2) would imply that the person could "voluntarily relinquish" a child's primary care and possession "for more than six months" by giving up care and possession to another person for a period less than six months--or not at all--if it could be alleged and proven that the person at some point had agreed or intended to relinquish care and possession for more than six months. Such a construction would render (b)(2)'s six-month requirement meaningless. TFC 156.006(b)(2) does not apply to this situation because the relinquishment was anticipated, not in the past.

Editor's comment: *In short, there is no such thing as anticipatory relinquishment even though "equitable or practical considerations . . . might have informed the district court's ruling." J.V.*

SAPCR
Child Support

TRIAL COURT ERRED IN FAILING TO AWARD INTEREST ON UNPAID CHILD SUPPORT

¶ 09-3-13. ***Herzfeld v Herzfeld,*** ___ S.W.3d ___, 2009 WL 692650 (Tex. App.—Dallas 2009, no pet. h.) (03/18/09)

Facts: Husband and wife divorced in 1991. Divorce decree required husband to pay child support until children turned 18 or graduated high school. Husband stopped payment in 09/94 before youngest child graduated in 05/97. AG informed husband he owed $11,835 in 09/96. Husband wrote check for that amount to wife through AG in 10/04. Wife filed a child support lien in 09/05 and claimed husband still owed $13,910.61 in principal and $765.08 interest. After a hearing, trial court ruled that husband owed $3000 in principal and no interest.

Held: Reversed and remanded.

Opinion: TFC §157.312(d) states that a Child Support Lien arises regardless of whether the amounts have been adjudicated as long as the obligee meets the requirements for perfection of the lien that TFC §§ 157.313 and 157.314 lay out. Thus, "[t]he plain language of these sections indicates a lien arises without action by a court, as long as the notice complies with the statutory requirements." Furthermore, TFC § 157.265 states that child support arrearages that had not been judicially confirmed by 01/01/2002 accrued 12% interest until that date and 6% interest thereafter. This interest is statutorily mandated, and trial court does not have discretion to alter the amount of interest. Therefore, trial court erred in failing to award interest.

TRIAL COURT ERRED IN AWARDING RETROACTICE CHILD SUPPORT WITHOUT EVIDENCE OF FATHER'S INCOME FOR PART OF THE TIME PERIOD

¶09-3-14. ***In Re J.A.J.,*** ___ S.W.3d ___, 2008 WL 5780819 (Tex. App.—Beaumont 2009, no pet. h.) (4/2/09)

Facts: Child born in 1996. Trial court declared father a legal parent in 2001, made him and mother JMC while allowing her to determine where child lived, and ordered him to pay $475 in monthly child support starting 3/1/01. On 9/2/04, AG sued to increase father's child support obligations. On 9/16/04, father filed a motion to allow him to choose where child lived. In 5/07, after a jury trial, trial court entered judgment giving father the exclusive right to choose child's residence and ordering mother to pay $252 a month in child support starting 6/07. On 5/30/07, trial court heard evidence on AG's motion to retroactively increase child support. AG gave, in the prior 18 months, father's average monthly gross wage was $11,000 and that because father's net monthly income was over $6,000, his child support payment would be $1,200 a month. The AG gave no evidence on prior income or what lump sum should be owed for back child support. On 7/13/07, trial court ordered that father owed $27,000 in back child support. The trial court calculated the amount by taking the difference between $1,200 and $475 and multiplying it for every month from 10/04 to 5/07. It ordered father to pay $252 per month until the amount was paid off. Father appealed.

Held: Reversed and remanded. Trial court erred in not following statutory guidelines.

Opinion: TFC § 156.401(a) authorizes modification of child support payments in the event of a material and substantial change in circumstances or three years after an order if the new amount differs by either 20% or $100. TFC § 154.131 instructs courts to consider the net resources of the obligor for the time period when calculating retroactive payments. Since the record contained no direct evidence of father's wages in 2004 and

2005, it could not have considered father's income for that time period. Courts "shall" require parties to produce income information under TFC § 154.063. Trial court did not so. Therefore, the court erred in inferring father's monthly income yielded a child support obligation of $1,200 for 2004 and 2005. The trial court should hold further hearings to establish father's income for that time in order to determine what amount of retroactive child support he does owe.

RETROACTIVE CHILD SUPPORT IS NOT "PAST-DUE SUPPORT" PERMITTING COLLECTION OF A FEDERAL INCOME-TAX REFUND.

¶09-3-15. ***In re R.C.T.,*** ___ S.W.3d ___, 2009 WL 909583 (Tex. App.—Houston [14th Dist.] 2009, no pet. h.) (4/7/09)

Facts: Father and mother divorced in 9/00. Trial court appointed mother SMC and father PC, and ordered to pay $828 per month. In 4/05, trial court sued to increase father's child support and requested retroactive modification to the date of service pursuant to TFC § 156.401. Trial court entered an agreed order with an increase to $1,340 per month and calculated retroactive damages of $ 9,024. Trial court scheduled monthly payments of $150 until the damages were paid in full. AG filed a child-support lien for the retroactive support and notified the USDOT that father owed past-due support. USDOT then informed father his income tax refund would be intercepted and paid to AG. John filed a motion to vacate, arguing that he was not past-due since he had not missed a monthly payment. Trial court granted motion, reasoning that the retroactive child support was not an arrearage or delinquency.

Held: Affirmed as modified. Trial court erred in saying lien was invalid, but was correct to vacate the seizure of tax refund.

Opinion: Child support liens arise for all amounts of child support due and owing pursuant to TFC § 157.312(d). Retroactive child support meets the plain meaning of due and owing even though it was not an arrearage. Therefore, trial court erred in declaring the lien invalid. 42 U.S.C. §664(a)(2)(A) allows state agencies to collect 'past-due' support from federal income-tax refunds. The section defines past-due support as the amount of a delinquency. Therefore, AG may not use the federal intercept program unless the parent fails to comply with a court order.

Editor's comment: *The court's analysis depends on the difference between retroactive child support being "due and owing" under state law but not "past due" under federal law. Query: Obligor and obligee agreed that obligor would pay the retroactive child support at $150 per month. Obligor was current on his payments. Under these circumstances, why did the AG attempt to collect the retroactive child support? J.V.*

A PETITION TO ENFORCE THE AWARD OF ATTORNEY'S FEES IS SUBJECT TO TFC § 155.201(b)'s MANDATORY TRANSFER SECTION

¶09-3-16. ***In re Silverman,*** ___ S.W.3d ___, 2009 WL 1099197 (Tex. App.—Austin 2009, orig. proceeding) (4/24/09)

Facts: In 2006, trial court issued a final decree of divorce. In 1/08, trial court issued a contempt order against father for failing to comply with child custody decree. Mother filed a second petition for contempt seeking to enforce an award of attorney's fees from the contempt order by jailing father if he did not pay fees. Father filed a motion to transfer the case to Harris County, which mother opposed. Motion is pending in trial court. Father petitioned for mandamus.

Held: Mandamus conditionally granted. Underlying suit to be transferred to Harris County.

Opinion: TFC § 155.201(b) provides that a court shall transfer a suit affecting the parent-child relationship to the county if the child has lived there more than six months. A contempt order can be enforced through jailing an obligor if he owes child support payments, but not if he owes an ordinary debt. Because the petition filed by mother was in the same cause number as a suit affecting the parent-child relationship, the mandatory transfer provision in TFC § 155.201(b) applies.

Editor's Comment: *The court left open the possibility of debt collection under the civil law in the original county (although that might well prove pointless when a debtor has moved): Mother's "argument that she could have sought this relief in a separate petition outside the realm of child support is irrelevant because she did not do so." This case is consistent with Chavez v. McNeely (supra) in which the court allowed enforcement of a contract included in a divorce decree outside the Family Code. J.V.*

TRIAL COURT'S FAILURE TO ADMONISH FATHER OF RIGHT TO COUNSEL ENTITLED HIM TO RELEASE FROM COMMITMENT ORDER.

¶09-3-17. ***In Re Casey*** ___ S.W.3d ___, 2009 WL 1162282 (Tex. App.—Houston [1st Dist.] 2009, original proceeding) (4/30/09)

Facts: On 2/25/08, associate judge of trial court issued report finding husband had violated divorce decree by failing to pay child support and medical support. Report ordered husband to serve concurrent 90 day sentences for each of 8 violations, commitment to start on 6/23/08. On 2/26/08, trial court adopted report. On 6/23/08, trial court recessed commitment to 7/21/08. On 7/21/08, trial court reset the commitment for 11/17/08. At the 7/21 hearing, trial court reduced arrearages to judgments and required that husband pay $50 on each judgment on the first of each month until judgments were paid. Trial court also required husband to pay $1000 in wife's attorney's fees by 11/17/08. On 11/17/08, husband appeared without consul and trial court did not admonish husband of his right. Husband could not produce funds, so trial court remanded husband into custody and sentenced husband to 180 days concurrently for each failure to pay. Husband filed a writ of habeas corpus.

Held: Granted. Appellate court released husband from confinement but did not discharge his obligations.

Opinion: The 11/17/08 hearing was similar to a hearing on a motion to revoke a probated sentence because incarceration was a possible outcome. Therefore, relator had a right to counsel and trial court should have admonished him of that right pursuant to TFC §157.163(b). Because trial court did not admonish him, husband is entitled to release.

Editor's Comment: *No matter what the hearing is called, if a party's incarceration is "one of its possible outcomes," that party is entitled to counsel. J.V.*

SAPCR
Termination of Parental Rights

★★★★★ Texas Supreme Court ★★★★★

TFC 263.405(i) IS UNCONSTITUTIONAL AS APPLIED WHEN IT BARS PARENTS FROM RAISING AN INFEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON APPEAL

¶09-3-18. ***In Re J.O.A.,*** S.W.3d , 2009 WL 1165303, 52 Tex. Sup. Ct. J. 714 (Tex. 2009) (5/1/09)

Facts: Mother, with one child already, gave birth to twins in 2005. At that time, mother and children tested positive for cocaine. Court appointed TDFPS as SMC of all three children. TDFPS created a service plan that parents did not adequately follow. In 2/07, case proceeded to bench trial. Trial court terminated both parents' rights to the twins and appointed mother's mother as SMC of older child. On 2/21/27, mother's counsel filed notice of appeal and motion to withdraw. On 2/22/07 father's counsel did same. Neither filed a statement of points as required by TFC § 263.405. Trial court appointed replacement counsel after the fifteen day deadline set out in TFC § 263.405(b). Parents appealed, claiming ineffective assistance of counsel and insufficiency of the evidence. Appellate court reversed and remanded on the termination of father's parental rights, declaring TFC § 263.405 unconstitutional for blocking consideration of parent's ineffective assistance claims. TDFPS appealed appellate court's ruling.

Held: Modified and remanded to trial court.

Opinion: TFC § 107.013(a)(1) grants a right to counsel in parental termination cases. The right to counsel is the right to effective counsel. Trial counsel's failure to preserve error is examined under the procedural due process standard. *Matthews v. Eldridge*, 424 US 319, 335 (1976). The court weighs 1) private interests; 2) governmental interests and; 3) the risk of erroneous deprivation of parental rights. The court then balances the result against a presumption of constitutionality. Pursuant to *In re M.S.*, 115 S.W.3d 534, this analysis heavily favors allowing review in parental termination cases. Due process consideration prohibit waiver of a complaint due to error by counsel. Since father's counsel's failure to file a statement of points fell below an objective standard of reasonableness, and since TFC § 263.405(i) requires waiver as a result of counsel's error, TFC § 263.405(i) is unconstitutional.

Concurrence (Willett, J.): Trial courts should take steps to prevent intentional ineffective assistance of counsel. Possible steps include 1) issuing unambiguous instructions after trial setting out steps to preserve appeal; 2) reminding trial counsel that they still have duties after trial and; 3) punishing attorneys who commit ineffective assistance of counsel.

Editor's Comment: *The constitutionality of the statement of points requirement in government termination cases has been questioned thoroughly over the past couple of years. The courts of appeals have conflicting determinations on the issue. The Texas Supreme Court has multiple cases pending on the issue as well. JOA does nothing to resolve the issue with any permanency. JOA declares the SOP statute unconstitutional as applied in this case. Here father's trial attorney failed to timely file the SOP and since father actually had a meritorious appellate issue on insufficiency of the evidence to support termination of his rights, the trial attorney was found to be ineffective for the failure, thus causing reversal of the termination. An ineffective assistance of counsel claim has two prongs, not only that the attorney failed in some duty owed, but also that the underlying claim would have been meritorious but for the attorney's failure. M.M.O.*

FAILURE TO INCLUDE IMPROPER ADMISSION OF EVIDENCE IN A STATEMENT OF POINTS FOR APPEAL CONSTITUTES WAIVER

¶ 09-3-19. ***In Re K.C.B.,*** ___ S.W.3d ___, 2009 WL 638187 (Tex. App.—Amarillo 2009, no pet. h.) (03/12/09)

Facts: TDPRS took custody of child on 12/09/04. Associate judge terminated parental rights on 03/31/06. Mother filed a Notice Of Appeal to Referring Court on 04/03/06 and a Statement Of Points Of Error to be Relied Upon on 04/19/06. On 05/02/06, trial court conducted a trial *de novo* and found that mother kept child in dangerous surroundings and had failed to comply with a court-ordered safety plan for child. Trial court also found that termination of the parent-child relationship would be in the best interests of the child. Trial court signed an Order of Termination on 12/18/06 which was filed of record 12/21/06. Mother filed a Notice of Appeal and another Statement of Points of Error on 01/02/07. Appellate court originally ruled that mother failed to preserve her appeal, but that ruling was reversed by the Texas Supreme Court and remanded to appellate court for consideration of mother's points of error. Mother alleged in her appeal that trial court: 1) denied her right to a jury trial; 2) erred in using Associate Judge's record; 3) improperly admitted drug testing evidence. Mother also claimed that insufficient evidence existed to support a finding that she fell under T.F.C. §161.001(1)(D),(E) and (O).

Held: Affirmed.

Opinion: TFC §263.405(b) requires that an appellant file a Statement of Points of Error within 15 days of trial court's final order, and TFC §263.405(i) forbids an appellate court considering issues in that statement. Since mother failed to include the admission of drug testing and the denial of a jury trial in her statement of points, the appellate court cannot consider those issues. Mother failed to preserve the issue of the use of the Associate Judge's record by failing to object to it when it was discussed at the trial de novo. There was evidence to support trial court's findings and no substantive evidence to contradict them; therefore, the evidence was factually and legally sufficient.

FINDINGS IMPROPERLY INCLUDED IN A JUDGEMENT INSTEAD OF A SEPARATE STATEMENT OF FACTS ARE STILL VALID.

¶09-3-20. ***In Re C.A.B.,*** ___ S.W.3d ___, NO. 14-08-00360-CV (Tex. App.—Houston [14th Dist.] 2009, no pet. h.) (4/2/09)

Facts: On 3/30/07 TDFPS removed child from parent's custody. On 4/12/07, trial court appointed TDFPS as temporary SMC and ordered parents to comply with a service plan. Trial court ordered additional service plans in 5/07 and 9/07. Mother stopped complying with the service plan in 9/07. Father broke the conditions of the plan in 11/07. TDFPS petitioned to terminate their parental rights and appoint great-grandparents as JMC. Trial court granted the petition. In its ruling, trial court found that mother had endangered child in father's presence and that terminating parental rights and appointing great-grandparents as JMC was in child's best interest. Trial court failed to issue separate findings of fact. Parents appealed, challenging the legal and factual sufficiency of the evidence.

Held: Affirmed.

Opinion: TRCP § 299(a) says that a trial court should put findings of fact in a separate document, not in the judgment. If a trial court puts finding in the judgment in addition to the separate document, the separate document controls on appeal. If a trial court issues no separate findings of fact, findings in the judgment are still valid as findings. The findings of fact in the judgment were factually and legally sufficient to support an order of termination.

Editor's comment: *Rule 299a begins: "Findings of fact shall not be recited in a judgment." Would it not make more sense to repeal this rule than to require that courts engage in mental gymnastics to find a way around it? J.V.*

ASSOCIATE JUDGE'S REPORT CONSTITUTES RENDERING A FINAL ORDER UNDER TFC § 263.401

¶09-3-21. ***In re T.D.S.T.,*** ___ S.W.3d ___, 2009 WL 1099197 (Tex. App.—Amarillo 2009, no pet. h.) (4/15/09)

Facts: On 12/2/05, TDFPS filed a petition to terminate parental rights, and trial court appointed TDFPS temporary SMC. On 8/28/06, trial court set the final hearing date for 11/28/06 and date for dismissal as 12/4/06. At final hearing, associate judge orally ordered the termination of parental right. On 12/1/06, parents filed a notice of appeal to district court. Associate judge signed a written version of oral order on 12/12/06. On 2/20/07, District court conducted a trial de novo in which it would base its judgment on the record of the 11/28/06 pursuant to parties' agreement. On 3/7/08, parents filed a motion to dismiss under TFC § 263.501(a). District court denied the notion on 6/3/08 and terminated parental rights on 8/6/08. Parents appealed.

Held: Affirmed.

Opinion: 'Render' means the pronouncement by a judge of a court's ruling. TFC § 101.026. A final order is a order that: 1) returns child to parent; 2) names another person as child's MC; 3)Appoints department as managing conservator without termination; or 4) terminates the parent-child relationship and appoints a MC. The orders of associate judge remain in effect during the appeal to district court. TFC § 201.013(a). The orders of an associate judge are a final order for the purposes of TFC §263.401. Therefore, district could was correct in not dismissing the case.

TRIAL COURT ABUSED ITS DISCRETION BY DENYING A MOTION TO DISMISS AFTER THE STATUTORY DEADLINE WITHOUT A PROPER EXTENSION.

¶09-3-22. ***In Re J.H.G.,*** ___ S.W.3d ___, 2009 WL 1335156 (Tex. App.—Dallas 2009, no pet. h.). (5/14/09)

Facts: Child born 3/14/07. After referral from hospital social worker, court gave TDFPS temporary orders of possession on 3/19/07. Under TFC § 263.401(a), the dismissal date was 3/24/08. TDFPS sought to bring mother and child back together until 12/12/07 when it began to seek termination of parental rights. In 2/08, TDFPS moved for an extension of the dismissal date. Mother objected and trial court held a hearing on 2/27/08. Trial court ordered a 3-month extension but failed to say whether it was from the date of the order of the previous dismissal date. Mother filed a motion to dismiss and argued that the extension did not meet the requirements of TFC § 263.401.

Held: Reversed and rendered.

Opinion: TFC § 161.0011 provides that termination suits must be dismissed on the first Monday one year after TDFPS is appointed SMC unless a final order is issued or an extension is granted. In order to grant an extension, the court must find extraordinary circumstances. Since trial court did not find extraordinary circumstances, the extension was improper. In the order granting an extension, the trial court must (1) State the new date for dismissal; (2) Make further orders for the safety of the child to avoid delay, and; (3) Set a final hearing for trial on the merits. TFC § 263.401. Therefore, no extension was granted. Since there was no proper extension, trial court had to dismiss after 3/24/08. Failure to do so was an abuse of discretion.

PERMANENT INJUNCTIONS AND PROTECTIVE ORDERS ARE DISTINCT REMEDIES

¶09-3-23. ***In re Ada***, ___ S W.3d ___, 2009 WL 1470590 (Tex. App.—Texarkana 2009, no pet. h.) (5/28/09)

Facts: Mother filed for divorce and petitioned to have father' parental rights terminated. Father was incarcerated. On 11/7/07, trial court held hearing where father alleged mother used drugs and abused children. Father, proceeding pro se, failed to proffer any evidence supporting this allegation. Trial court orally declared it was going to sever the termination proceeding from the divorce, granted the divorce and announced it was going to temporarily appoint mother SMC and grandmother as possessory conservator. On 10/9/08, original trial court granted a decree of divorce appointing mother and grandmother JMC. It also entered a permanent injunction prohibiting father from contacting mother or children. Father appealed.

Held: Affirmed.

Opinion: Father argued that the court could not issue a protective order without making a finding of family violence. The decree, however, contained a permanent injunction, not a protective order, which is a separate and distinct remedy. Although the family code does not speak to permanent injunctions, there is no bar to incorporating language of injunction into a divorce decree.

Editor's Comment: *Tasked with reviewing proceedings in two different courts, the court of appeals characterized the case as a "procedural disaster," observing that "the entirety of the two cases are weighed down in a procedural and substantive morass which almost defies explanation" J.V.*

MISCELLANEOUS

★★★★★ Texas Supreme Court ★★★★★

EVIDENCE MAY BE EXCLUDED AS UNTIMELY PURSUANT TO TRCP § 193.6 IN A SUMMARY JUDGMENT PROCEEDING

¶09-3-24. ***Fort Brown Villas III Condominium Association, Inc. v Gillenwater,*** ___ S.W.3d ___, 2009 WL 1028047, 52 Tex. Sup. Ct. J. 632 (Tex. 2009) (4/17/09)

Facts: Business invitee sued business for premises liability. Trial court approved an "Agreed Level III Scheduling Order" setting 8/19/05 as deadline for expert disclosure. Business agreed to two extensions of the deadline, extending it to 9/22/05. On 2/10/06, business filed a no-evidence motion for summary judgment. Invitee responded to motion with an affidavit from an undisclosed expert. Business objected to the expert report as untimely and moved for it to be excluded pursuant to TRCP § 193.6. Invitee argued that TRCP § 193.6 did not apply and that the inclusion of the expert report would not surprise or prejudice the business. Trial court excluded the affidavit and granted summary judgment. Appeals court reversed, ruling that TRCP § 193.6 does not apply in summary judgment proceedings and the evidence was sufficient to defeat a summary judgment ruling. Business appealed.

Held: Reversed and rendered. TRCP § 193.6 applies in summary judgment proceedings.

Opinion: Under TRCP § 193.6, untimely witnesses are inadmissible as evidence. A party who fails to identify an expert has to show good cause or prove a lack of unfair surprise or prejudice. A trial court's exclusion of an improperly designated expert is reviewed under an abuse of discretion standard. Evidentiary exclusions did not use to apply in summary judgment proceedings, but there have been two changes: the introduction of the no-evidence summary judgment motion and pre-trial discovery evidentiary exclusions. After this, most courts applied TRCP § 193.6 to summary judgment proceedings. Since evidentiary rules apply equally in trial and

summary judgment proceedings, evidentiary exclusion under TRCP § 193.6 applies in summary judgment proceedings.

Editor's Comment: *Although this is not a family law case, we are seeing more summary judgments filed in the context of family law cases. The applicability of this case may differ slightly in the family law context. Under the civil rules, the discovery period is determined based upon the length of time the case has been pending; however, in the family law context, the discovery period is open until 30 days prior to trial. Fort Bend Villas says that the closing of the discovery period closes evidence even for summary judgment proceedings filed after the close of the discovery period. In family law, this case would only apply to summary judgments that are heard in the short time between the close of the discovery period and trial. However, this is a good case to keep in mind on either side of the argument. M.M.O.*

THE SAME REQUIREMENTS APPLY TO "RESTORING" A NAME AS ANY OTHER TYPE OF NAME CHANGE

¶ 09-3-25. ***In Re Barnes,*** ___ S.W.3d ___, 2009 WL 1107913 (Tex. App.—Amarillo 2009, no pet. h.) (April 24, 2009)

Facts: Petitioner requested a name change from "Robert Thomas Barnes" to "Robert Lincoln Jones, Jr.," the name he had before he was adopted. Barnes is currently incarcerated in the Institutional Division of the TDCJ. Trial court denied the name change.

Held: Affirmed.

Opinion: Although petitioner characterized petition as a request to "restore his name," it was simply a request for a name change. Courts look to the substance of relief requested, not the name applied. TFC § 45.103(b) bars name changes for petitioners with final felony convictions unless 2 years have passed since the date of their discharge or the end of their probation. Trial court noted petitioner was an incarcerated person when it denied the name change.