SECTION REPORT
FAMILY LAW

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Message from the Chair

As I sat through Docket Call in a Family District Court last week, I overheard an exchange between attorneys. Before the Bench, one attorney was commenting to the Court that the lack of an agreement was the fault of the other attorney. The other lawyer shot back a similar jab to his opponents "usual" ridiculous demands. This exchange may seem humorous to us in the Courtroom, but it was not funny to the parties represented, nor was the exchange humorous to the room filled with litigants.

Let's not forget that an attack on your opposing counsel is a reflection not just on that attorney, but the same attorney who is speaking! We have an obligation to ourselves and our Family Bar to act professionally at all times!! Sometimes we lose our tempers, but a loss of control should happen rarely, and one's elevation should never be at the cost of another's fall! Each of you is a representative of the Family Law Section. When you are in Court, or out in the hallways, be the face of our Family Law Section! The Courtroom is packed not with just our peers but their clients as well. We all need to remember our manners—not so much as a professional, but as a member of society as well.

May we make some New Year resolutions that include servicing our clients with better attitudes and appreciation for their trauma!! Let's respect each other as we would want to be respected!!! And let's all have a bit more fun!!!

See you at the Texas Academy of Family Law Specialist's annual trial skills institute in January!

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

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EDITOR'S NOTE

I want to thank all those folks that have helped make this section report a success. I am particularly thankful to Jimmy Verner and Michelle May O'Neill for acting as guest editors this year for Jimmy continuing his commitment to keep us all updated on the cases coming out in other jurisdictions. I also want to thank John Zervopolous and Christi Adamcik for their columns. Finally, last but certainly least I want to thank the attorneys that have submitted articles. I want to encourage all of you to do so or to have your associates do so. I want to have as broad a base of contributions as possible. As always I welcome your comments and suggestions as to how I can improve the report, so keep those cards, letters, and mostly emails coming.

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In the Law Reviews and Legal Publications

TEXAS ARTICLES

Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459 (2008)

LEAD ARTICLES

American Bar Association Model Act Governing Assisted Reproductive Technology (February 2008), 42 Fam. L.Q. 171 (2008)

Barbara Ann Attwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*. 42 Fam. L.Q. 63 (2008)

Mark Henaghan, *What Does a Child's Right to Be Heard in Legal Proceedings Really Mean?—ABA Custody Standards Do Not Go Far Enough*. 42 Fam. L.Q. 117 (2008)

Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*. 42 Fam L.Q. 103 (2008)

Clare Huntington, *Missing Parents*. 42 Fam. L.Q. 131 (2008)

Report and Working Draft of a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, 42 Fam. L.Q. 135

Charles P. Kindregan, Jr., & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 Fam. L.Q. 203 (2008)

J. Thomas Oldham, *What If the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses When The Divorce in the United States*, 42 Fam. L.Q. 263 (2008)

Stephen D. Sugarman, *What Is a "Family"? Conflicting Messages from Our Public Programs*, 42 Fam. L.Q. 231

Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act. 42 Fam. L.Q. 1 (2008)

IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Alimony: The Utah Supreme Court approved a divorce decree that increased alimony as each child reached majority because the reduction in child support necessarily enhanced the obligor spouse's ability to pay. *Richardson v. Richardson*, ___ P.3d ___, 2008 WL3835161 (Utah 2008). If a divorce settlement agreement does not say whether spousal support payments are to end upon death – one of the requirements for such payments to be alimony - then the tax court may look to state law to determine whether the obligation survives death. *Johanson v. Commissioner of Internal Revenue*, 541 F.3d 973 (9th Cir. Sep. 3, 2008). In a case where contractual alimony would terminate upon the former wife's cohabitation with an unrelated adult for sixty substantially consecutive days, the New York Court of Appeals found the word "cohabitation" to be ambiguous, reversed judgment for the former wife and remanded for further proceedings. *Graev v. Graev*, 11 N.Y.3d 262, ___ N.E.2d ___, 2008 WL 4620698 (N.Y. 2008).

Child support: The Indiana Supreme Court held: "First, in a claim for Parenting Time Credit under the Child Support Guidelines, the word 'overnight' means overnight and not something else. Second, business deductions taken by a spouse that may be ordinary for tax purposes are not necessarily determinative for child sup-

port purposes. Third, payments to a former spouse for division of property are not deductions for child support purposes." *Young v. Young,* 891 N.E.2d 1045 (Ind. 2008). A California trial court did not abuse its discretion when it found that the duty to pay child support survives an obligor's incarceration but reserved jurisdiction to determine the amount of support should the inmate begin receiving any income. *El Dorado County Department of Child Support Services v. Nutt,* 167 Cal. App. 4th 990 (2008). Because conviction under the Child Support Recovery Act requires a "willful" failure to pay, a defendant may present evidence and argue that he did not know he was the father and therefore could not "willfully" have failed to pay. *United States v. Kerley,* 544 F.3d 172 (2nd Cir. 2008).

Ethics: The California Supreme Court held that "structural" disqualification of a law firm based on failure to maintain ethical screens between internal units applies to cases involving simultaneous representation, not successive representation. *In re: Charlisse C.,* 45 Cal. 4th 145 (2008). In Connecticut, a contingent fee agreement for a contempt proceeding did not violate the prohibition on contingent fees in divorce cases because a contempt is not a divorce. *Gil v. Gil,* 956 A.2d 593 (Conn. App. 2008). The wide discretion exercised by family court judges does not include defaulting parties who fail to appear because incarcerated and sentencing them, in absentia, to jail for failing to appear. *In re: Jung,* ___N.E.2d ___, 2008 WL 4701028 (N.Y. 2008) (per curiam) (removal from judicial office affirmed).

Federal jurisdiction: An ex-husband failed to pay his ex-wife $40,000 as ordered by a New Jersey divorce court; the ex-wife failed to sign a deed conveying a condo to him. The ex-husband quit paying on the condo, so the bank foreclosed on it. After much convoluted maneuvering by the parties, the ex-wife sued the husband and five other defendants in federal court based on diversity of citizenship. The district court dismissed the case for lack of subject-matter jurisdiction under the "domestic relations" exception. Citing *Marshall v. Marshall,* 547 U.S. 293 (2006), and *Ankenbrandt v. Richards,* 504 U.S. 689 (1992), the Third Circuit reversed, emphasizing that the "domestic relations" exception is narrow, encompassing "only cases involving the issuance of a divorce, alimony, or child custody decree."

Property: A California appellate court held that separate property conveyed into a community property trust under a transmutation agreement remained community property upon divorce even though the transmutation agreement recited: "This agreement is not made in contemplation of a separation or marital dissolution and is made solely for the purpose of interpreting how property shall be disposed of on the deaths of the parties." *In re: Holtemann,* 83 Cal. Rptr. 3d 385 (Cal. App. 2008). The Delaware Supreme Court reversed a trial court's disproportionate property award to a wife because the trial court failed to consider the husband's contributions of premarital and inherited property to the marital estate and the payment of marital funds to the wife after separation. *Harmon v. Harmon,* 2008 WL 4946212 (Del. Supr. 2008) (not for publication). A Missouri husband's testimony that he and his wife intended her premarital home to be purchased and paid for with joint funds, that the wife bought the house in anticipation of marriage and that he improved the home by sweat equity was insufficient to classify the home as marital property. *In re: Altergott,* 259 S.W.3d 608 (Mo. App. 2008). A Massachusetts appellate court likened a limited liability company to a corporation when ruling that a husband held a membership interest in the LLC but no interest in LLC assets. *Millennium Equity Holdings, LLC v. Mahlowitz,* 895 N.E.2d 495 (Mass. App. 2008).

Life as property? An Indiana appellate court joined other jurisdictions in holding that growing crops should be included "in the marital pot" upon divorce. *Webb v. Schleutker,* 891 N.E.2d 1144 (Ind. App. 2008). Perhaps similarly, an Oregon appellate court affirmed a trial court's order that frozen embryos be destroyed, per the former wife's request, reasoning that the embryos constituted personal property that the trial court was authorized to award upon divorce. *Dahl v. Angle,* 194 P.2d 834 (Ore. 2008) (collecting frozen embryo cases).

Modification: Increased rancor between the parents proved sufficient to establish changed circumstances allowing a trial court to modify an agreed joint custody order to grant sole custody to mother, especially when the only telephone number father would give to mother was his girlfriend's cell phone, father had mother arrested for trespassing when she dropped off the children at his residence in compliance with the custody agreement, and father revoked his agreement to the children's summer vacation with mother at the last minute

to "get even" with mother. Also supporting the decision: Father had gotten the children to school late "upwards of 10 times," had moved three times in one year and planned to move again, and had not given mother the right of first refusal when he could not keep the children. *Ferguson v. Whible,* 865 N.Y.S.2d 156 (App. Div. 2008).

How many? In *Carmona v. Carmona,* 544 F.3d 988 (9th Cir. Sep. 17, 2008), the Ninth Circuit held that ERISA forbids a participant in a joint and survivor annuity plan from changing the surviving spouse as beneficiary "after the participant has retired and the annuity has become payable." The court observed: "Although Lupe had many wives, the dispute in this case only concerns wives number eight and nine. None of the previous seven wives are involved in the present litigation."

Columns

DIAGNOSES IN EXPERT TESTIMONY: USES AND CAUTIONS

by

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

Mental health experts often couch their conclusions and opinions in diagnoses and other abstract language. Father has a bipolar disorder; Mother has low self-esteem; Plaintiff suffers from Posttraumatic Stress Disorder. These types of testimony present the discerning lawyer with a challenge: they appear to capture, in professional language, the essence of a problem, yet they shed little useful light on how the problem affects the litigant in his or her daily life. Of course, mental health experts are not alone in their over-dependence on abstract language—lawyers are often advised to communicate plainly and to avoid "legalese" in their written and oral arguments. But overly abstract testimony of mental health experts presents special problems because such testimony may hide the inferences that form experts' conclusions and opinions.

Mental health experts' conclusions and opinions link data developed and gathered during evaluations, therapy, or by other methods by inferences. Caselaw graphically refers to the inferences as comprising the "analytical gap." For the trial court to admit into evidence experts' conclusions and opinions, the analytical gap must not be "too great." Mental health experts who are unable to show the links in the reasoning that supports their conclusions and opinions because they rely on abstract psychology-oriented terms may be reflecting analytical gaps between the data and conclusions or opinions that are "simply too great." The greater the analytical gap between the data and the conclusions and opinions, the more likely the court will deem the testimony as unreliable and, therefore, inadmissible. *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 726 (Tex. 1998).

Mental health experts use abstract psychology-oriented language in at least two ways: by relying on diagnoses from the *Diagnostic and Statistical Manual of Mental Disorders* (currently, DSM-IV-TR) and by invoking common psychological terms such as "low self-esteem," "co-dependency," or "emotional damage," among others. Of course, the problem does not arise just because experts use such language, but rather when experts do not further explain how the terms specifically reflect the examinee's or litigant's behaviors as related to the legal question before the court. For instance, if a litigant parent has been diagnosed as having a bipolar disorder, how does that disorder specifically affect or compromise that litigant's parenting capacities? Or if a psychological evaluation concludes that the plaintiff has been emotionally damaged from an alleged wrongful act, how does that emotional damage affect the plaintiff's daily life actions or outlook? In this col-

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umn, we will discuss experts' use of DSM-IV-TR diagnoses; in our next column, we'll focus on a helpful technique that forces experts to explain what they mean when they employ diagnoses and other abstract terms in their testimony.

The legislature and courts have not made DSM-IV-TR diagnoses elements of most legal definitions or standards. Except for insanity or civil commitment cases, which require a diagnosis of a severe mental disease or defect as an element of a claim or defense, the law bases decisions on litigants' functional abilities, impairments, or capacities without reference to diagnoses or other psychological terms. For example, the family law court will look at whether a parent can care for his or her children and address the children's best interests, not whether a parent has a particular diagnosis or has low self-esteem. Or criminal court will look to whether a defendant is competent to stand trial, not whether he or she has a particular diagnosis. Thus, the expert's inability to explain how his or her diagnosis-oriented language relates to the question before the court is a red flag warning that the analytical gap between the expert's data and conclusions may be "simply too great."

Nevertheless, lawyers and mental health experts are more likely to grasp the power of DSM-IV-TR diagnoses in court than they are to understand or acknowledge the problems of relying primarily on those diagnoses. The power is obvious: DSM-IV-TR is a diagnostic system, developed under the auspices of the American Psychiatric Association, that has evolved over a period of more than 55 years. DSM's medical roots are obvious, and, as a result, its authority is often taken for granted. Indeed, one may argue that DSM-IV-TR is the generally-accepted diagnostic system for mental disorders in the United States.

Further, lawyers may use DSM-IV-TR diagnoses differently, depending on the case. For instance, family lawyers will more likely employ such diagnoses offensively, emphasizing, for example, that a parent with a bipolar disorder cannot adequately attend to his or her child's daily needs. In contrast, criminal defense lawyers may use a diagnosis of schizophrenia defensively to explain how the defendant's judgment was impaired during the commission of a crime.

Despite its draw to experts and lawyers, DSM-IV-TR was not developed to be used in court. Rather, DSM-IV-TR is primarily used for three non-legal purposes: to provide a basis for communication among clinicians, researchers, and educators about diagnostic issues related to mental disorders; to plan mental health treatment of patients and anticipate treatment outcomes; and to reimburse mental health treatment costs in the health care and insurance industries. In light of these uses, DSM-IV-TR is an evolving diagnostic system in which diagnostic categories are refined, added, or dropped with each succeeding edition. In addition, researchers and clinicians actively debate the reliability and validity of various diagnoses as well as DSM's structure itself.

Further, DSM-IV-TR specifically cautions about its use in legal settings, noting that "there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." In addition, DSM-IV-TR indicates that "it is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability." In other words, people sharing the same diagnosis may differ in their abilities to manage life tasks. This caution highlights the law's emphasis that litigants are judged on their capacities, not on diagnoses. *DSM-IV-TR* xxxiii (2000).

In sum, DSM-IV-TR's purposes and its cautions about its use in court make it incumbent on mental health experts who invoke DSM-IV-TR to support their conclusions and opinions by describing how those diagnoses relate to the issues about which they are offering opinions.

Our next column will offer a practical way to force mental health experts to explain the meanings they give to diagnoses and other psychology-related abstract terms in their testimony.

USING STRUCTURED SETTLEMENTS IN FAMILY LAW CASES

by

Christy Adamcik Gammill, CDFA[1]

An immediate annuity is funded with a single lump sum and provides for a series of future payments beginning within a 13-month period of time. In a Structured Settlement for a small fee the Obligor transfers or assigns the payment obligation to a Third Party Assignment Company, owned by the annuity or insurance company, who then makes payments to the Payee. Using an immediate annuity to structure a settlement in a divorce for Alimony, Property or Child Support has a myriad of reasons making the option attractive.

Motivating Factors

- Remove the emotional side of dealing with Ex-spouse on financial issues post divorce and reduces communication between parties
- Security of knowing checks will arrive on time and for exact amount
- Either one or both parties do not know how to handle money and would likely use unwisely or spend prematurely if given a lump sum
- Often a portion of lump sum monies awarded go into fixed income instruments anyway, so an annuity can be a substitute for a bond portfolio

GENERAL ISSUES: Requirements for Acceptance

For the settlement to qualify as such there are general issues required for acceptance.

- There must be a dispute of some kind
- There must be an obligation to make payments (new or existing obligation)
- Obligor is off the hook unless Annuity Company fails
- There must be a predetermined payment amount, beginning and ending time period
- Utilizes Third Party Assignment Agreement between Obligor, Assignee, Payee
- Cost of funding obligation is calculated as Present Value of Annuity Cost
- All documents should be submitted to Assignment Company prior to court order to make certain of their acceptance and to include proper language for the Non-Qualified Assignment
- Independent tax advise is recommended for each party
- Assignment Company will follow tax reporting as stipulated in settlement agreement

ASSIGNMENT COMPANY

- Assignment Company is located off shore, owned by Annuity Company.
- Carriers are highly rated by ratings agencies
- Carrier's Parent Company will typically issue guarantee letter
- Assignment Company has tax treaty with US and a tax ID number in US

FLEXIBILITY

The Annuity Company will follow court orders and modify payments to alternate payees or back to original Obligor (purchaser of annuity). Child Support or other payments can be redirected to another party with a court order. The annuity can be purchased to payout for an exact period of time stipulated in the agreement or by the court.

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The death of a child under child support payments or death of an ex-spouse under alimony payments typically results in future payments being redirected to original Obligor as the designated beneficiary of the annuity contract. The Obligor can request a Computation of remaining guaranteed payments be paid in a lump sum to Obligor in the event of death of the underlying annuitant (subject to a calculation by Insurance company equal to the Present Value of the remaining guaranteed payments less a fee).

Of the multitude of reasons a structure may be a suitable choice for a divorce settlement, one of the most prevailing reasons witnessed in divorce cases is the emotional reprieve of the Obligor writing the monthly check and the Payee being comforted the check will arrive. To determine if a Structured Settlement is right in divorce, as with any other settlement solution used for Alimony, Child Support or Property, the clients' individual emotional and financial needs and goals will come into play in assessing if the structured annuity is a good fit.

Articles

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

by

Marie E. McGrath[3]

PART I

Introduction

A recent Google search titled "egg donors" yielded 1.7 million hits for web sites, articles and advertisements covering the gamut from specialized fertility clinics, support groups, medical advice, web blogs and law firms to advertisements for donors by egg brokers. The search even yielded a private solicitation to pay $8,000 to an egg donor of a particular religious descent.[4] There have been reports of classifieds in The Stanford Daily offering $80,000 to a Caucasian donor meeting specific requirements of height, athleticism and amongst other things S.A.T. score.[5] Still another was placed offering $100,000 for an egg donor of "East Indian descent."[6]

The media has fueled the debate over the sale of gametes, oocytes in particular, and the prices they can command in the market with reports that the egg donor business is "booming" on college campuses[7] and that the price that some donors obtain for oocytes is so high that they are willing to ignore a multitude of risks associated with donation.[8]

With more women delaying childbirth later into their reproductive years, the egg donor market has become a viable, growing industry virtually unregulated in the United States. With the availability of the internet, the link between buyers and sellers knows limitless boundaries and fertility tourism[9] permits egg donors and recipients worldwide to know no real geographic or jurisdictional boundaries. The existence of these fac-

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[3] Marie McGrath graduated from the University Of Houston Law Center in May of 2008 and was admitted to the Texas State Bar in November 2008. She has an MBA from Pace University and a B.S. from the State University of New York at Buffalo.

[4] Google, http;//www.google.com (search 4/09/07, "egg donors").

[5] Radhiko Rao, *Coercion, Commercialization and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1060 n.20 (2006).

[6] Id.

[7] *Egg Donor Business Booms on Campuses*, USA TODAY, March 15, 2006, *available at* http://www.usatoday.com/money/indsustries/health/2006-03-15-egg-donors-usat_x.htm.

[8] *The High Cost of Eggs: Donors at risks*, U.S. NEWS & WORLD REPORT, Jan. 5, 2003, http://www.usnews.com/usnews/health/articles/030113/13donor.b_print.htm

[9] Fertility tourism is the idea that a couple can shop for a favorable (i.e. unregulated) forum for purchasing eggs if they live in a jurisdiction that restricts or prohibits it.

tors has even prompted a book that claims we are engaged in a market of buying and selling babies.[10] Does the existence of an unregulated industry, private advertisers, brokers, eggs that are bought and sold over the internet or otherwise, and the capability to outsource define a market in babies? Are we buying and selling babies? Should we regulate it? Deregulate it? Ban it all together?

Part I of this paper explores the aspects of the egg gamete market looking at the motivations of buyers – the egg donor recipients, and of sellers – the egg donors. It then turns to the current state of the law regarding the commerce of human oocytes. Moreover, Part II of this paper suggests that the egg gamete market could benefit from reform through specific forms of regulation in the areas of donor selection, both in terms of minimum age requirements and compensation to donors, fertility drug studies, multiple oocyte donation cycles including informed consent, and the creation of a national registry of donors and recipients.

The Egg Gamete Market

The market for fertility services is expanding as women are selecting to have children later in life.[11] In the United States alone it is estimated that the industry generated revenues in excess of $6 billion in 2004 and by 2009 it is expected to reach almost $10 billion.[12] The number of Advanced Reproductive Technology (ART) procedures performed in 1996 was 64,724.[13] An ART procedure is defined as one in which both oocytes and sperm are handled outside the body.[14] This technological capability has been in existence for over a quarter century, with the birth of the first "test tube baby" conceived outside of the womb in 1978.[15] In 2003 the CDC, reported a total of 122,872 ART procedures performed in the U.S., representing an increase of 90% over 1996, the first year the CDC began to report statistics related to ART services.[16] Similarly, the number of ART clinics performing these services has risen from 330 in 1996[17] to 437 in 2003.[18]

The market for eggs has similarly increased. While the percentage of ART procedures using donor eggs has remained relatively stable, 11% in 2001 versus 12% in 2003, the absolute number of procedures performed using donor eggs has increased due to the increased use of ART in general.[19] In 2001, donor eggs were used in approximately 12,000 procedures while in 2003 that number grew to almost 15,000. [20]

Potential buyers, the egg donor recipients, and potential sellers, the egg donors, are matched in numerous ways. Often times a woman will enter a fertility clinic with the intention of becoming pregnant using donor eggs. She may have a donor in mind, a friend or relative willing to help, or she may be shopping for a suitable donor. A clinic may keep its own database of potential donors or may use a broker. Likewise, a woman can contact a broker for a donor match to be used by her physician and clinic or be referred to another. Additionally, a woman can place private ads for donors in newspapers – typically college newspapers, over the

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[10] DEBRA SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION, Harvard Business School Press (2006).

[11] June Carbone & Paige Gottheim , *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUSTICE 509 (Spring 2006).

[12] Bus. Commc'n. Co., Human Reproductive Technologies: Products, Markets and Manufactures: Market Study, (Feb. 2005) available at http://www.biz-lib.com/ZBU80710.html.

[13] *Use of Assisted Reproductive Technology – U.S., 1996 and 1998*, MMWR Weekly (Feb. 8, 2002), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5105a2.htm (1996 is the first year that the CDC started collecting data pursuant to the Fertility Clinic Success Rate Act (FCRSA) passed by Congress in 1992).

[14] *Id.*

[15] Louise Brown became known around the world as the first test tube baby. Born in London in 1978 she was the first baby conceived through artificial means.

[16] Victoria Clay Wright, et al., *Assisted Reproductive Technology Surveillance-United States, 2003*, MORBIDITY & MORTALITY WEEKLY REVIEW,2006:55(No. SS-4), 1, May 26, 2006.

[17] CDC, *supra* note 10.

[18] Wright, *supra* note 13.

[19] Victoria Clay Wright, et al., *Assisted Reproductive Technology Surveillance-United States, 2001*, MORBIDITY & MORTALITY WEEKLY REVIEW, 2004:53(No. SS-1), 1, April 30,2004; and Wright, *supra* note 13.

[20] *Id.*

internet or even on a billboard. There are no comprehensive federal or state regulations regarding the solicitation of donors for the intention of conceiving a child in the United States.[21]

The Buyers: Egg Donor Recipients

Conventional wisdom is that a woman is born with all the eggs that she will produce during her lifetime.[22] The number and quality of those eggs can start to diminish in her twenty's, spiraling downward after a woman reaches thirty-five and by the time she is forty, the supply is nearly gone.[23] The motivation of a woman looking to be an egg donor recipient seems obvious: the desire to have a baby. Many women ignore, forego, or don't have the maternal desire until later in life after they have spent their reproductive years pursuing an education, an advanced education, and ultimately a career. When they are ready it is not always easy to do what they have tried responsibly to avoid doing during those fertile years. Other factors may require a woman to pursue the use of donor eggs to achieve pregnancy including early menopause, genetic abnormalities, illness or previous medical treatment.[24] For them, the only opportunity to experience pregnancy and childbirth is through help from younger women and donor eggs.

The average age of a donor-egg recipient is forty-two or forty-three.[25] The rate of a successful pregnancy and resulting baby using donated eggs is between 40% and 45% compared to that of a 5.3% birth rate to a woman who at this age uses her own eggs and IVF.[26] By using younger, donated eggs an older woman not only increases her chance of conceiving, but also reduces her risk of miscarriage and birth defects.[27] This difference in birth rates using donor eggs is startling and it is clear to see why the motivation to pursue them is intense.

Buyers, however, are not limited to women. Homosexual male couples looking to raise a child will engage in the same practice, the only difference being that they would need to find a surrogate carrier as well. Specialized brokers and clinics have emerged catering specifically to gay and lesbian couples who may be turned down by more traditional clinicians unwilling to help them achieve their dreams to parent a child.[28]

There is yet another class of buyers for human egg gametes. They are the scientists and researchers of the world. In our quest for knowledge and advancements in the area of human disease we are increasingly turning to the very material that creates life. To some it makes sense to turn to gametes and the egg in particular, the essence of human life, to generate cures that sustain life and treat disease. To others, to tinker with the essence of life and our genetic material amounts to murder and we are at the apex of that apocalyptic slope that defines the destruction of man.

A donor recipient may choose her donor. A visit to the website of any number of egg donor organizations reveals the profiles of their available egg donors.[29] Donors are typically medically and genetically screened, tested, selected and categorized based upon characteristics which include but are not limited to age, weight, height, ethnicity, religious affiliation, participation in sports, hobbies, interests, hair color, hair texture, skin tone, eye color, S.A.T. score, college attendance, and GPA.[30] These profiles can be kept in databases on the internet or available for review at the physician's clinic or the broker's office. Baby pictures, sometimes current pictures, of available donors may also be available for review. Often times a couple will select those donors with characteristics that are most important to them. Perhaps they want a brunette, hazel eyed donor because that would most resemble an offspring of their union. Perhaps they are very bright and insist on a certain college attendance, GPA or S.A.T. score. There are no limits or restrictions as to whom

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[21] *See generally* PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES, (2004) [hereinafter BIOETHICS COUNCIL REPORT].
[22] The American Fertility Ass'n., *The Elusive Egg: Making the Transition to Ovum Donation*, *available at* www.theafa.org/faqs/afa_elusiveegg.html.
[23] Id.
[24] Id.
[25] *Id.*
[26] *Id.*
[27] *Id*.
[28] *See e.g*., Surrogacy Alternatives Inc., *available at* http://surro.com (specializing in assisting gay couples interested in donation and surrogacy).
[29] *See e.g.,* http://www.fertility–docs.com/egg_donors.phtml (listing donor profiles available for recipients to review).
[30] *Id.*

may be chosen and a donor is free to choose any suitable donor, if she is available. Donors may become unavailable for consanguity reasons. A general restriction is placed on the number of eggs that any one donor can procreate with a given population. These restrictions are based upon guidelines set by the American Society for Reproductive Medicine (ASRM), the industry oversight group, and the more reputable clinics adhere to these requirements.

Donor recipients and their spouses sign a consent form indicating that they understand and agree to receive donor eggs, that there are no guarantees that an embryo transferred to a recipient's uterus will result in the birth of a child, that they have either selected a particular donor or they will rely on the medical staff of the clinic to do so, that there are risks of infection, that attempts are made to prescreen the eggs for various illnesses but there are no guarantees, that they will be financial responsible for payment to the donor and for the procedures, and finally that any child born as a result of their participation in assisted reproductive technology procedures is their legal and legitimate child with all the rights and privileges that accompany such.[31]

The emotional cost to women who must forego the dream of a genetic link to their child cannot be ignored. A woman who is considering egg donation may feel tremendous guilt, grief and failure. Typically, counseling is available to couples who are considering this type of treatment but it is not mandatory. A physician is the person who will make the decision of whether or not to accept a patient or couple, or to refer them for further counseling. This is usually done if after the initial interview a physician has some concerns over the patient's motivations or current ability of the couple to parent a child. A fertility clinic will usually have professional mental health providers on staff or be associated with one that is available for consultation.

Finally, consider the financial implications to a donor recipient. It can cost anywhere from $15,000 - $25,000 on average for donor eggs.[32] This includes compensation to the donor, payment for drugs and medical procedures, and payment to the physician and the laboratory. There are a few states that have passed statutes that make insurance coverage for the IVF procedure mandatory, but most couples are often left to bear the financial burden themselves.[33] In addition, in those states that mandate insurance coverage for ART procedures, the compensation to egg donors is not typically covered.[34]

The Sellers: Egg Donors

Egg donors are solicited on the internet, in college newspapers and on city trains.[35] Who are the women that answer these ads? A donor does not intend to become a parent now and may be a friend, a sibling or a stranger. What motivates them to undergo weeks of painful injections with powerful drugs posing risks to their own health, an invasive medical procedure, and to give up their genetic material and parental rights to any embryo that is created or any resulting children born? What makes them do it for a stranger?

Some women donate their eggs to help friends and relative. Some donate out of a sense of altruism, the good feeling they get from helping an infertile couple achieve their dreams of a child. However, the term egg "donor" is a misnomer. With the exception of cases where a friend or sibling may act altruistically as the donor, egg donors do not donate anything, they are compensated. Presumably and justifiably, compensation is for the time, trouble and risk imposed upon the egg donor of going through the donation procedure and not for the egg itself.

Egg donation involves a complicated series of both physiological and psychological testing. While practices vary according to provider, the more legitimate ones follow the guidelines set by the ASRM. In its 2006 guidelines for gamete and embryo donation the ASRM recommends minimum standards of practice for the evaluation of potential sperm, oocyte, and embryo donors.[36] Therefore, a woman who wishes to become an egg donor will generally have to meet some minimum standards before proceeding. The ASRM guidelines

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[31] *See e.g.*, http://www.chicago-ivf.com/donoregg/consenttodonateeggs.pdf (posting donor consent forms required by the Advanced Reproductive Health Center in Chicago).
[32] American Fertility Ass'n., *supra* note 19.
[33] *See* JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 275, Lexis Nexis, 2005.
[34] *Id.*
[35] Martha Irvine, *Increase in Egg Donors Raises Concerns: Some women admit they do it for money*, Houston Chronicle, Feb. 19, 2007 at A4.
[36] *See* American Society for Reproductive Medicine, *2006 Guidelines for gamete and embryo donation*, 86 Fertility & Sterility Suppl. 4, Jun. 2006, S38-50.

suggest that an egg donor be of legal age, preferably between twenty-one and thirty-four.[37] It also suggests that proven fertility in a donor is desired but not mandatory and that a donor should provide a complete medical, personal and sexual history.[38] Fertility clinics and egg brokers may have their own criteria for selection and set standards including but not limited to age, height and weight, as well as college attendance.[39]

Prospective donors are prescreened, provide a detailed and complete physical, mental, genetic and family history and are tested for various illnesses and known genetic risks. A donor is required to sign a consent form indicating that she agrees to undergo the injection of fertility drugs, medical testing, frequent ultrasounds, and ultimately follicle aspiration of the eggs. She may designate that she prefers to remain anonymous or be a known donor and also consents to the relinquishment of any rights to future embryos created with her eggs and any child born as a result or any embryo frozen and not used.[40]

Once accepted into a donor program the donor then engages in a process that lasts several weeks. She is required to undergo daily injections of super-ovulatory drugs, frequent blood tests to monitor the effectiveness of the drugs and estimate the time of ovulation, as well as several vaginal ultrasounds to evaluate her ovaries and the number of eggs they are producing. This culminates in minor surgery where an ultrasonically guided needle inserted vaginally will be used to retrieve the eggs from her ovaries usually under some form of anesthesia to reduce or eliminate pain and discomfort.

What motivates women to go through this arduous process? Is it that they want to help a childless couple become parents and that the money is an added bonus? Or is it that they can make a significant amount of money, especially if they are smart, athletic and attractive, and helping someone else seems to make them feel better about it? The answer that question is hard to discern and likely varies amongst women. However, it cannot be ignored that money may play a large factor in deciding to become an egg donor.

There is considerable debate over the ethics of payment for egg donation. A recent article in the Houston Chronicle reported that women used the money that they earned from donor fees for savings accounts, down payments on property, tuition, car payments and even to pay credit card debt.[41] One woman published a book about how her decision to donate eggs twelve times was completely motivated by money.[42] With solicitations sometimes in the tens of thousands, the temptation can be quite high. A donor should and will be compensated for her time, expense, inconvenience and risk. While the ASRM recommends a range for compensation from $5,000 with a cap of $10,000,[43] there are no regulations that govern donor fees.[44]

The State of the law regarding Egg Donor Market: Self Regulation

Ethical and health safety concerns are legitimately raised over the donation of human gametes. The human gamete industry like other areas in the practice of medicine, is highly unregulated but not without its own professional standards of conduct and oversight committees, some state regulation and limited federal oversight. Shy of some FDA requirements for the efficacy and safety of the drugs used to stimulate ovarian production, laboratory certification requirements, and screening of donors for communicable diseases the legislative protection offered is tantamount to a buyer beware scenario.

Under President Bush's direction the President's Council on Biotechnology conducted a review of the Assisted Reproduction and Biotechnology industry.[45] In 2004,it released its report whose purpose "is to describe and critically access the various oversight and regulatory measures that now govern the biotechnologies and practices at the intersection of assisted reproduction, human genetics and human embryo research."[46] The council's report adequately describes the regulatory status quo of the industry but does not recommend any

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[37] *Id.* at 44.
[38] *Id.*
[39] *See e.g., supra* note 27, The Fertility Institute (advertising the maximum age they accept for egg donors is 27 and that all donors are college students with at least a B+ average).
[40] *See e.g.,* Egg Donor consent forms, *supra* note 26.
[41] *Supra* note 32.
[42] *See* JULIA DEREK, CONFESSIONS OF A SERIAL EGG DONOR, Adrenaline Books (2004).
[43] American Society for Reproductive Medicine, *Financial incentives in recruitment of oocyte donors*, 74 Fertility & Sterility 2, Aug. 2000 at 219.
[44] BIOETHICS COUNCIL REPORT at 151.
[45] *See* BIOETHICS COUNCIL REPORT.
[46] *Id.* at xl.

new regulatory institutions or advocate increased responsibility for the current regulatory institutions that may be involved.[47]

"There is no comprehensive mechanism for regulation of commerce in gametes."[48] Nor are there any federal laws directly regulating the sale of gametes.[49] We prohibit the sale of human organs in this country but we have yet to define an organ to include sperm, ova or embryos.[50] State treatment of human gametes for sale varies but to date Louisiana is the only state that expressly prohibits the sale of ova while Virginia is the only state that expressly exempts ova from the prohibition against selling human body parts.[51]

The ASRM issues guidelines touching on many aspects of the commerce of gametes and embryos. These include recommendations for gamete donation, financial incentives in recruitment of oocyte donors, family members as gamete donors and surrogate, access to fertility treatment by gays, lesbians and unmarried persons, and child rearing ability in the provision of fertility services, amongst others. These guidelines are standards of practice for practitioners in the field of assisted reproduction and as stated previously, the more reputable practitioners will voluntarily adhere to these guidelines. However, there is no viable mechanism to compel compliance or punish those who do not comply.

[47] *Id.* at xxxi.
[48] *Id.* at 178.
[49] *Id.* 151
[50] *Id.* 151
[51] BIOETHICS COUNCIL REPORT at 151.

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

DIVORCE
Grounds and Procedure

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE AND FAILING TO AWARD SPOUSAL MAINTENANCE IN A DIVORCE ACTION

¶ 08-4-01. ***Greco v. Greco,*** ___ S.W.3d ___, 2008 WL 4056328 (Tex. App.—San Antonio 2008) (08/29/08)

Facts: In 1985, husband and wife married. Wife filed a petition for divorce on 08/21/06. Husband and wife were able to enter into an agreement regarding conservatorship, possession and child support of their 3 children. Husband and wife went to a jury trial regarding the issues of fault in the dissolution of the marriage, fraud on the community, and the value of personal property. Wife also asked the trial court for spousal maintenance. On 06/14/07, jury returned a verdict in favor of husband. Trial court denied wife's subsequent request for maintenance and filed findings of fact and conclusions of law in support of its ruling. Wife appealed.

Held: Affirmed. Evidence and testimony was properly excluded, the record supported the jury's findings, and trial court did not abuse its discretion by not awarding spousal maintenance.

Opinion: Evidence of pornography on a computer was properly excluded because teenage children also had access to the computer, and thus, wife was without personal knowledge of the origin of the pornographic image. Trial court has broad discretion to exclude testimony, and mother's counsel failed to object to exclusion of son's testimony, thereby failing to preserve the issue for appeal.

Despite wife's testimony about various unsavory actions by husband (name calling, teasing, refusing to spend time with family, and a lack of concern for wife's welfare after the divorce) the record showed more than a scintilla of evidence that would support the jury's findings with regard to wife's fault in dissolution of the marriage.

Evidence was sufficient at trial that husband did not commit fraud on the community, regardless of wife's testimony that husband "diverted part of his salary and proceeds of his side business into a bank account that [wife] did not know existed and that he transferred the title to [a house] to his mother during the course of their marriage without [wife's] knowledge or consent." Husband's testimony that wife was aware of the transactions, the money was used for living expenses and that his mother purchased the house and put both their names on the title was sufficient to support the jury's findings.

Trial court did not abuse its discretion by declining to award spousal maintenance. Wife was not lacking skills that would preclude her from finding employment, and trial court awarded wife $1,000 per month for child support and community property assets such as retirement and bank accounts. Furthermore, wife's adultery during the marriage could be weighed, among other factors, in the jury's denial of spousal maintenance. Additionally, the statutory presumption that spousal maintenance is not warranted supported trial court's action.

A TEMPORARY PROTECTIVE ORDER DURING PENDENCY OF DIVORCE IS NOT INTERLOCUTORY IF IT DISPOSES OF ALL PARTIES AND ISSUES

¶ 08-4-02. ***In re Meiwes,*** 2008 WL 4107978 (Tex. App.—Amarillo 2008, orig. proceeding) (09/05/08)

Facts: Husband was held in contempt for violating a protective order entered by trial court while he and wife were being divorced. Husband filed an application for writ of habeas corpus, claiming that the protective or-

der was interlocutory, and therefore nothing allegedly existed upon which to base the contempt action (since the protective order would have merged into the final decree of divorce).

Held: Habeas denied. Protective orders are final orders if they dispose of all parties and issues.

Opinion: The majority of courts that have considered whether protective orders are final or interlocutory have likened them to permanent injunctions and deemed them to be final if they disposed of all issues and parties. This concept follows that found in TFC § 81.009. Protective orders are appealable but must await appeal until a final judgment is executed in the primary suit. If one must wait until after the judgment becomes final to appeal, then the protective order must survive entry of the judgment; if this were not so, then there would be nothing to appeal.

Editor's Comment: *This case is one of a long line of cases that disagree regarding the finality of a protective order filed during a divorce. This case has been filed in the Texas Supreme Court. Maybe we'll get a final pronouncement on this question. M.M.O.*

HUSBAND NOT JOINED IN DIVORCE ACTION IN HIS CAPACITY AS TRUSTEE, THUS JUDGMENT OF ATTORNEY'S FEES AGAINST TRUST WAS AN ABUSE OF DISCRETION

¶ 08-4-03. ***In re Ashton,*** ___ S.W.3d ___, 2008 WL 4355348 (Tex. App.—Dallas 2008, orig. proceeding) (09/25/08)

Facts: Wife filed an Amended Motion to Resolve Interim Attorney and Expert Fee Issues in trial court. Wife cited inability to pay her attorneys and experts because of lack of access to community funds. Wife claimed that husband siphoned money into an out-of-state family trust over which husband was the trustee. Wife asked trial court to equalize the parties' fees, appoint a fee master, and appoint a successor trustee to manage the trust. Wife also requested that necessary funds be taken from the trust. Trial court granted the motion, appointing a fee master who trial court also appointed to serve as successor trustee over the trust, with all rights afforded the trustee by the trust as well as whatever rights trial court deems necessary. Trial court's order specified that fee master/trustee "shall pay his expenses and attorney fees from trust funds." Husband filed a petition for writ of mandamus, claiming trial court abused its discretion by awarding relief against the trust or its trustee when neither had been joined as parties to the divorce proceeding.

Held: Mandamus granted. Trial court did not have jurisdiction over the trust or trustee.

Opinion: The trust was not joined as a party in the divorce action when wife sought relief against it in the form of payment of attorney fees and expenses for the fee master/successor trustee. Although husband was before the court in his individual capacity, he was not sued in his capacity as trustee of the trust. Therefore, the trial court erroneously granted relief against the trust in that circumstance.

Editor's Comment: *Another reminder that you have to join parties in the right capacity to get relief against that party, whether it is trustee of a trust or a corporation by and through its registered agent. Even if a spouse is the representative of the entity, service upon the spouse in his personal capacity is not sufficient to involve the spouse as the representative of the separate entity. M.M.O.*

DIVORCE
Division of Property

IMPROVEMENTS MADE TO SEPARATE PROPERTY RESIDENCE PRIOR TO MARRIAGE ARE NOT ENHANCEMENT OF THE COMMUNITY ESTATE SUBJECT TO REIMBURSEMENT AT DIVORCE

¶ 08-4-04. ***Chavez v. Chavez,*** ___ S.W.3d ___, 2008 WL 4868344 (Tex. App.—Dallas 2008) (11/12/08)

Facts: Husband purchased a house in 1999. In 2001, husband and wife were married, and separated in 2006. In wife's petition for divorce, she claimed "an interest in the residential property," based on selling her separate property residence and "rolling" the proceeds from that sale into improvements on husband's house in 2000 and 2001. Husband filed an answer that denied these claims. Trial court entered a divorce decree that characterized the house as husband's separate property and did not reimburse wife's separate property estate for the improvements.

Held: Affirmed. Trial court did not abuse its discretion by characterizing the house as husband's separate property and declining to award reimbursement to wife's estate.

Opinion: Husband's testimony that he purchased the house in 1999 was sufficient proof to establish the separate character of that property. The record contains no proof for wife's claims for reimbursement for economic contribution. Wife did not provide evidence about the amount of improvements made, nor how much the improvements increased the value of the property. Furthermore, wife testified that the improvements were made in 2000 and 2001, before the parties were married. As such, any improvements would not be an enhancement of the community estate subject to reimbursement.

DIVORCE
Post-Decree Enforcement

CLARIFICATION ORDER SPECIFYING THE TIME, PLACE, AND MANNER OF PAYMENT FOR FEDERAL INCOME TAX LIABILITY IS NOT AN ABUSE OF DISCRETION

¶ 08-4-05. ***Hollingsworth v. Hollingsworth,*** ___ S.W.3d ___, 2008 WL 4891363 (Tex. App.—Dallas 2008) (11/14/08)

Facts: Husband and wife were divorced in 2004. The divorce decree stipulated that husband would pay any income taxes for wife for the years 2000 through 2003. In 2007, wife filed a motion to enforce the decree alleging husband failed to pay wife's 2003 federal income tax liability, penalties, and interest. At the hearing, wife testified that she did not file a tax return for 2003 because she did not work, had no taxable income, and did not receive a Form 1099 reporting any income. She subsequently learned that husband's roofing corporation had filed a Form 1099 with the IRS reporting it paid her wages of $31,000. Wife testified that she contacted husband via letter and telephone when she learned of the delinquency. Because wife did not file a tax return for 2003 or pay the taxes owed, the IRS imposed interest and penalties. To collect the taxes, penalties, and interest owed for 2003, the IRS levied wife's tax refund for 2005 and levied her bank account. At the time of the hearing, there was still $7,672.76 outstanding to the IRS. Furthermore, due to the levy on her bank account, appellee incurred overdraft charges of $425.

At the conclusion of the hearing, the trial court signed an order that granted judgment against husband and clarified the divorce decree. The order granted judgment against husband for $14,598.21 in damages for

wife's 2003 income tax liability, tax refund and bank levies, and overdraft fees. The judgment also awarded wife $7,000 in attorney's fees. Finally, the clarification order required husband to pay the damages and attorney's fees portion of the judgment by 4:30 p.m. on 12/28/07 at wife's attorney's office. Husband appealed.

Held: Affirmed. The evidence was legally and factually sufficient to support trial court's award of actual damages and attorney's fees, and trial court did not abuse its discretion by issuing a clarification order.

Opinion: The evidence was legally and factually sufficient to support trial court's finding that husband was responsible for wife's 2003 taxes due to husband's roofing company filing a Form 1099 with the IRS without sending a copy to wife. Furthermore, the record shows that husband should have had notice of this delinquency based on wife's letter and phone call. Therefore the evidence is legally and factually sufficient to support trial court's award of actual damages.

Trial court did not abuse its discretion by issuing a clarification order. The original decree was ambiguous about the method, time, and place of payment of tax liability. The decree imposed on husband the responsibility to pay the taxes. The decree did not specify whether he was to pay wife the amount she owed for her taxes, indemnify her for amounts she had already paid toward the taxes, or if he was to pay the IRS directly. Trial court's order clarified that issue.

TAX EXEMPTION SHARING PROVISION IN A DIVORCE DECREE WAS A CONSENT AGREEMENT, NOT A COURT ORDER, AND DID NOT VIOLATE FEDERAL TAX LAW

¶ 08-4-06. ***Durden v. McClure,*** ___ S.W.3d ___, 2008 WL 4960545 (Tex. App.—San Antonio 2008) (11/19/08)

Facts: Mother and father divorced in 2005. Trial court signed an Agreed Final Decree of Divorce which contained a "tax exemption sharing provision" whereby the parties would trade tax exemptions in even (father) and odd (mother) numbered tax years. In 2007, father received a $5,518 refund from the IRS for overpayment of taxes in tax year 2004. Father deposited the refund amount with trial court's registry and asked that it be distributed equally. In response, mother filed a motion for enforcement of property division and claimed the full amount of the refund should be applied to her 2005 tax liability.

Father subsequently filed a motion for summary judgment, claiming that the divorce decree constituted a written agreement concerning the division of property and liabilities, agreements regarding tax exemptions are not barred by federal law, and such agreements are binding on the parties. Mother filed an answer that argued the divorce decree was an order, not an agreement. Mother claimed federal law allows parties to enter into *agreements* where the parent entitled to an exemption voluntarily releases it as part of a binding agreement to the other parent; however, federal law does not allow a trial court to *order* such a relinquishment. Therefore, mother argued the divorce decree was void to the extent it violated federal tax law by *ordering* her to relinquish her entitlement to the tax exemptions.

Following a hearing on the motions, trial court granted father's motion on the tax refund issue and ordered that the refund be distributed equally. However, trial court's final order found that the tax exemption sharing provision of the divorce decree violated federal tax law and was therefore void. Trial court issued a clarification order that declared the tax exemption sharing provision was void because trial court lacked jurisdiction to make such an order. Father appealed trial court's order to the extent that it voided the tax exemption sharing provision.

Held: Reversed and rendered. The tax exemption sharing provision of the divorce decree was an agreement between the parties, not a court order. Such agreements are allowed under federal tax law.

Opinion: The Tax Code allows a parent who is entitled to an exemption to voluntarily relinquish that exemption. Therefore, if the tax exemption sharing provision of the divorce decree was a consent agreement, the divorce decree does not violate federal tax law. The tax provision is contained in a separate paragraph in the decree entitled "Tax Provisions Relative to the Children," and begins with the words "*The parties agree* and

IT IS ORDERED....” (emphasis added). This language about the parties’ agreement reappears throughout the tax provision of the divorce decree. Thus, mother’s agreement to voluntarily relinquish her right to claim the exemption in odd-numbered years did not violate federal tax law and was binding on both parties.

Editor’s comment: *Mother relied on a single sentence in the divorce decree: “The parties stipulate that the provisions contained herein are part of a Court Order, and are not contractual.” The court responded: “We are not convinced this single sentence, contained in a paragraph entitled ‘Jurisdiction and Domicile,’ controls the interpretation of the entire decree.” J.V.*

SAPCR **Conservatorship**

GRANPARENT HAS STANDING TO MODIFY CONSERVATORSHIP FOLLOWING DEATH OF PARENT MANAGING CONSERVATOR UNDER TFC § 102.004

¶ 08-4-07. ***In re Vogel,*** 261 S.W.3d 917 (Tex. App.—Houston [14th Dist.] 2008) (09/09/08)

Facts: Mother was managing conservator of child, and father was possessory conservator. In 03/08 mother died suddenly, and maternal grandmother filed a petition for managing conservatorship. Father moved to dismiss grandmother’s petition for lack of standing. Trial court denied father’s motion to dismiss, and conducted hearings over two days. Following the hearings, trial court entered temporary orders appointing father and grandmother joint managing conservators. Subsequently, trial court conducted an unrecorded hearing including an in-chambers interview of child. Following the interview, the trial court issued supplemental temporary orders suspending father’s possession and access to the child except in the discretion of the amicus attorney. Father filed a mandamus action, arguing that grandmother lacked legal standing to request managing conservatorship, and that trial court abused its discretion in naming grandmother as a joint managing conservator because she failed to overcome the parental presumption.

Held: Mandamus denied. Grandmother had standing to file the petition, and, since grandmother’s petition sought to modify the original custody order,the parental presumption did does not apply.

Opinion: Grandmother proved that living with father (an alcoholic) would significantly impair child’s physical health or emotional development, and thus she had standing to file the petition under TFC § 102.004. The parental presumption does not apply to modifications suits. Grandmother’s petition, which was filed in the same court and bore the same cause number as the original conservatorship order, sought to modify the original order. As such, the parental presumption did not apply to grandmother’s petition.

GRANDPARENTS LACKED STANDING TO FILE SAPCR UNDER TFC § 102.003(a)(9)

¶ 08-4-08. ***In re Kelso,*** ___ S.W.3d ___, 2008 WL 4355265 (Tex. App.—Fort Worth 2008) (orig. proceeding) (09/19/08)

Facts: On 02/29/08, the paternal grandparents filed an Original SAPCR, seeking to be named sole managing conservators of mother’s child. Grandparents pleaded that they had standing to bring the suit because mother had voluntarily relinquished child to them and because they had had “actual care, control and possession” of child for at least six months, ending no more than ninety days preceding the filing of the petition. On 03/12/08, mother filed a Motion for Change of Venue, in which she contended that child’s residence is in Nueces County, where he has lived since he was born in March 2006. She also alleged that child “has never resided in Hood County, Texas as interpreted by the Family Code” and requested that trial court order grandparents to “hand the child over to his mother forthwith.”

Trial court held a hearing on temporary orders on 03/13/08. At the hearing, grandmother testified that she had had actual care, custody, and control of child for the past six months. According to grandmother, child began living with the grandparents permanently in March 2007. Grandmother admitted that child had been with mother at Thanksgiving for a week to two weeks, and that child returned to grandparents home for the Christmas holidays but only because grandmother agreed to take his older brother too. Child and his brother left grandparent's the day after Christmas, but child returned sometime in January 2008. Mother testified that she "never let [child] live" in Hood County. Mother said that the longest period of time child had spent in Hood County was about a month and a half around Easter 2007, a couple of weeks at Thanksgiving, one week at Christmas, and then from the end of January 2008 until the hearing. Additionally, mother testified that child has a doctor that he sees in Nueces County.

At the conclusion of the hearing, trial court entered temporary orders that appointed grandparents joint managing conservators of child along with mother; gave grandparents the right to have the primary custody of child and to establish child's domicile (which trial court restricted to Hood County); granted mother visitation on the third weekend of each month; and ordered mother to pay $192.85 per month to grandparents in child support. Mother filed this petition for writ of mandamus. Mother challenged trial court's determination grandparents had standing to bring suit.

Held: Mandamus granted. Grandparents did not have standing under TFC §102.003 to bring suit.

Opinion: Grandparents petition alleged, and trial court specifically found, standing under TFC § 102.003(a)(9) rather than the more specific grandparent-standing provisions of section 102.004. To show standing under section 102.003(a)(9), grandparents had to prove that they had had actual care, control, and possession of [child] for at least six months, ending not more than ninety days before 02/29/08, the date they filed their suit. Here, even considering the evidence in the light most favorable to grandparents, the evidence does not show that mother voluntarily relinquished permanent care, control, and possession of child to grandparents for the six months preceding their filing of the suit. There is no evidence that child's abode in Hood County was fixed or permanent; rather, the evidence is that it was temporary, sometimes up to several months at a time, but always depending on mother's consent. Grandparents did not meet their burden of proving standing to bring an original suit seeking joint managing conservatorship of child.

Editor's comment: *Depending upon the facts, grandparents may rely upon the general standing statute to file suit for conservatorship (as they attempted to do in this case); they may seek conservatorship by intervention in a pending SAPCR (TEX. FAM. CODE § 102.004); or they may seek possession and access in their capacity as grandparents (TEX. FAM. CODE § 153.432). J.V.*

TEMPORARY GUARDIANS OF A MINOR AS DEFINED BY PROBATE CODE HAVE STANDING TO BRING AN ORIGINAL SAPCR UNDER TFC § 102.003

¶ 08-4-09. ***In re A.D.P.,*** ___ S.W.3d ___, 2008 WL 4684351 (Tex. App.—El Paso 2008) (10/23/08)

Facts: Great-grandmother was the biological mother of grandmother, who was the biological mother of mother. Sometime prior to the birth of child, grandmother's parental rights were terminated and great-grandmother adopted mother. In 1999, child was born to mother. In 2001, mother's parental rights to child were terminated, and great-grandmother adopted child. By virtue of these terminations and adoptions, grandmother and mother were technically child's sisters. Child resided with great-grandmother in Ward County until great-grandmother's death in 2005. Six months prior to great-grandmother's death, she began receiving cancer treatment, and grandmother withdrew child from school in Ward County and took him to her home in Limestone County. In great-grandmother's will she left her entire estate to child and appointed mother as the guardian of the person and estate of child. Great-grandmother's will alternatively appointed grandmother as guardian if mother failed or ceased to act as child's guardian. The will authorized the executor, grandmother, to distribute all or part of her estate to child's guardian or the person or persons with whom child resided.

Following great-grandmother's death, grandmother placed child in the care of married couple who were not related to child. Married couple enrolled child in school in Ward County on 01/23/06. On 03/06/06, grandmother notified married couple of her intention to remove child from Ward County. Married couple immediately filed an application for temporary guardianship in Ward County Court, and on 03/09/06, county court awarded married couple temporary guardianship until 05/08/06. That same day, married couple filed a SAPCR seeking to be appointed non-parent SMCs of child in district (trial) court. Trial court issued a TRO prohibiting grandmother, acting directly or in concert with others, from removing child from district court's jurisdiction or visiting child at school without the advance knowledge and permission of married couple. On 03/12/06 or 03/13/06, mother tried to pick child up from school in Ward County.

On 04/28/06, grandmother and mother filed a counter-petition seeking to be appointed child's SMCs and a motion to transfer venue of the SAPCR to Limestone County. They also filed a motion in county court to transfer the guardianship proceeding to trial court and a motion to transfer venue of the guardianship proceeding to Limestone County. Finally, they filed an application to be appointed child's temporary guardians. On 04/28/06, county court extended married couple's temporary guardianship until 06/26/06 or until entry of an order establishing conservatorship in the district court, whichever occurred first. On 05/01/06 county court entered an order that transferred guardianship proceeding to trial court. Trial court then filed the guardianship proceeding in the SAPCR cause.

On 06/01/06, trial court held a hearing on the SAPCR cause. Following the hearing, trial court denied grandmother and mother's motion to transfer the case to Limestone County because at the time of great-grandmother's death both she and child lived in Ward County. Trial court also found that married couple had standing to file application seeking temporary guardianship of child. Trial court then appointed married couple child's SMCs and granted grandmother's request for reasonable access. Grandmother and mother appealed trial court's order.

Held: Affirmed.

Opinion: A county court has general jurisdiction as a probate court to appoint guardians of minors, as such the county court's order appointing married couple as temporary guardians was proper. As temporary guardians, married couple had standing to file an original SAPCR in trial court. Trial court entered findings that although child was in possession of grandmother in Limestone County at the time of great-grandmother's death, for the purposes of Texas Probate Code § 610(b)(4) child was a resident of Ward County along with great-grandmother. As such, trial court did not err by declining to transfer to Limestone County.

Additionally, grandmother and mother argued that trial court erred by not ruling on the conservatorship issue prior to ruling on the SAPCR. However, their counsel did not object to trial court hearing these matters together or otherwise indicate that they wished for the court to hear the guardianship first. Therefore, grandmother and mother waived this complaint on appeal.

Because married couple was properly appointed temporary guardians by county court under the Probate Code, they had standing under TFC § 102.003(a)(4) to file an original SAPCR. Furthermore, trial court had jurisdiction to rule on the SAPCR because child was a resident of Ward County on the date of great-grandmother's death.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING SUPERVISED VISITS WHEN ONE PARENT POSES A RISK OF INTERANTIONAL ABDUCTION OF CHILD

¶ 08-4-10. ***In re Sigmar,*** ___ S.W.3d ___, 2008 WL 4816557 (Tex. App.—Waco 2008) (11/05/08)

Facts: Mother and Father filed a "friendly divorce" in 12/07 that was signed by trial court in 02/08. Father had international business interests in the petroleum industry, travelled to Mexico frequently for work, and spoke several foreign languages fluently. In 06/08, mother filed a motion to modify divorce decree that included a request for TOs and a TRO. Trial court appointed mother temporary SMC and father temporary PC. Furthermore, trial court found that there was a threat to child of international abduction by father and ordered that father not have possession of or access to child without supervision. Finally, trial court issued a tempo-

rary injunction prohibiting father from selling, alienating, or liquidating any assets until an evidentiary hearing. Father filed a petition for writ of mandamus.

Held: Mandamus denied. Trial court complied with the provisions of the UCAPA.

Opinion: With regards to the temporary injunction prohibiting father from selling any assets, mandamus review is not appropriate because a temporary injunction is an interlocutory order, and therefore appealable. The order requiring supervised visits is appropriate under UCAPA, codified at TFC §§ 153.501-503. The record showed that father had recently sold an office building worth several hundred thousand dollars which trial court could believe indicated that father had engaged in activities that would facilitate child's abduction. Father had family in Austria, made frequent trips to Mexico, and was fluent in German and Spanish; this evidence supports a finding that father had strong ties to another country. The record also contains evidence that, if father were to abduct child and transport child internationally, there would be significant obstacles to obtaining child's return. This cumulative evidence supports trial court's finding that there was a threat to child of international abduction by father. It is therefore in child's best interest that an abduction prevention measure be imposed on father, and trial court did not abuse its discretion by ordering supervised visits.

Editor's comment: *This case extensively discusses what Sampson & Tindall have called "red flag" indicators for parental abduction. It reviews Texas' statutes and cites to many secondary sources. J.V.*

TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ENTER A FINAL ORDER FOR ALMOST A YEAR FOLLOWING A TRIAL ON THE MERITS

¶ 08-4-12. ***In re Maasoumi,*** 2008 WL 4881328 (Tex. App.—Dallas 2008) (memo op.) (11/13/08)

Facts: Mother and father were divorced in 2005. They were appointed joint managing conservators of child, and father was awarded the exclusive right to determine child's residence within Dallas county and the contiguous counties. In 09/06, father filed a motion to modify, which he later amended, requesting to be appointed sole managing conservator and asking for the right to determine child's residency outside of Dallas and its contiguous counties. Alternatively, Father sought to be appointed joint managing conservator with the sole right to determine educational matters and to be allowed to relocate with M.A.M. to Atlanta, Georgia to pursue a job opportunity. Following a continuance in 02/08, the case went to trial on 07/24/08. During trial, there was conflicting evidence about mother's psychological state, but there was general consensus that father and child should be able to relocate to Atlanta. Following the conclusion of the trial, the trial court did not render a final judgment because it "determined that the current status of the parents does not allow the Court to make a final order." Thereafter, trial court declined to render judgment and reset the trial for almost a year later. Trial court then, among other things, temporarily established child's domicile in Dallas County until after the completion of the trial in June 2009, and further prohibited any discovery or court action prior to that date. Father filed a motion objecting to the interim temporary order and seeking rendition of a final judgment. Following a hearing, trial court denied father's objections and rendered a second temporary order that reiterated the first order and set the trial for continuation in June 2009. Father filed a petition for writ of mandamus.

Held: Mandamus granted. Trial court's refusal to render a final order either granting or denying Father's motion to modify was an abuse of discretion.

Opinion: Trial court's a temporary order establishing child's domicile in Dallas County had the effect of changing the designation of the person who has the exclusive right to designate the primary residence of child under a prior final order, and refused Father's request to relocate with child to Atlanta. Father objected and requested rendition of a final judgment. A trial court is required to consider and rule on a properly filed and pending motion within a reasonable amount of time. Trial court's refusal to rule on a father's motion to modify for almost a year after completion of the trial on the merits is not reasonable.

UNDER THE UCCJEA A COURT CANNOT HAVE JURISDICTION OVER UNBORN CHILD IN ORDER TO MAKE AN INITIAL CHILD CUSTODY DETERMINATION

¶ 08-4-13. ***Waltenburg v. Waltenburg,*** ___ S.W.3d ___, 2008 WL 4891342 (Tex. App.—Dallas 2008, no pet.) (11/14/08)

Facts: Mother and father married in 2005 and lived together in Arizona until 02/06. On 03/17/06, mother moved to Texas. Mother was pregnant when she moved to Texas. On 03/21/06, father filed for divorce in Arizona. His suit included a request for custody of the unborn child. Child was born in Texas in 04/06, approximately 3 weeks after mother moved. On 08/23/06, mother filed an original petition for divorce in Texas. Mother requested a division of the parties' estate, custody of child, and child support and medical support. Father responded by filing a plea in abatement based on the previously-filed Arizona suit. Trial court subsequently held a telephone conference with Arizona court. On 12/08/06, trial court signed its Order on Respondent's Plea in Abatement and Order of Dismissal. The order stated that trial court had considered the plea in abatement and determined that Arizona had continuing, exclusive jurisdiction of this case as provided for by TFC § 155.002 of the Texas Family Code. Trial court dismissed mother's case without prejudice, and later denied mother's motion for new trial. Mother appealed.

Held: Reversed and remanded in part, affirmed in part. Trial court erred by dismissing mother's child custody portions of her original petition for divorce in Texas.

Opinion: Under TFC § 152.102(7), in the case of a child less than six months of age, "home state" means "the state in which the child lived from birth with a parent." Mother and father do not dispute that child lived in Texas from birth until mother filed her petition on 08/23/06. As such, Texas was the child's home state and the Texas court had jurisdiction to make an initial child custody determination under TFC § 152.201. Because Arizona could not have jurisdiction under the UCCJEA over an unborn child at the time father filed his divorce in Arizona, the portions of the Arizona order pertaining to child custody are void.

Editor's comment: *The father argued that because the UCCJEA does not apply to an unborn child, the UCCJEA did not prevent Arizona from granting him a divorce (which it did) and that Texas courts were obliged to respect that divorce decree based on comity. J.V.*

A TEXAS TRIAL COURT HAS JURISDICTION TO MODIFY A CHILD CUSTODY DETERMINATION UNDER THE UCCJEA IF CHILDREN DO NOT HAVE A HOME STATE AT THE TIME SUIT IS FILED IN TEXAS

¶ 08-4-14. ***In re S.J.A.,*** ___ S.W.3d ___, 2008 WL 4938440 (Tex. App.—Dallas 2008) (11/20/08)

Facts: Mother and father were married in Louisiana in 1992. In 1995, mother and father separated, and children continued to live in Louisiana with mother. In 1997, father and children moved to Florida. In 2001, mother and father were divorced in Louisiana. The divorce decree named mother and father joint managing conservators of children with father having the right to determine the primary residence of the children. The children continued to live with Father in Florida. In 2002, father married stepmother in Florida. In 2003, mother moved to Florida. In 2003, father filed a motion in Florida regarding a dispute over comments made to children. In 2004, Florida trial court entered an order requiring mother to pay child support and addressing health insurance for the children. On 11/06/06, father died of cancer. That same day, mother discussed with children the possibility of living with her, but children indicated they did not wish to do so. In 12/06, mother filed a motion in Florida court requesting immediate custody of children. Florida trial court did not enter a written ruling on mother's request, but stated from the bench children should be given time to grieve father's death and the parties should seek counseling. The children spent a week with mother during Christmas, but Mother did not see children in 01/07. On 02/03/07, mother picked up children for a weekend visitation.

However, instead of a weekend visit, mother relocated children to Texas where mother's fiancé and her other children were living. On 03/08/07, stepmother filed suit in Texas, seeking custody of children. On 10/25/07, Texas trial court named stepmother sole managing conservator and mother possessory conservator of the children without consulting Florida. Mother appealed, claiming that Texas trial court did not have subject matter jurisdiction.

Held: Affirmed. There was no home state of the children on the date stepmother filed suit in Texas, therefore Texas trial court could make an initial child custody determination under the UCCJEA.

Opinion: In order to modify the child custody determination of another state, Texas trial court must have jurisdiction to make an initial determination under TFC § 152.201(a) and § 152.203. Stepmother was not a person acting as a parent under Florida's interpretation of the UCCJEA, therefore no child, parent, or person acting as a parent remained in Florida at the time stepmother filed suit in Texas. Therefore, TFC § 152.203 was met. Additionally, the children did not live in Florida with a parent or a person acting as a parent for six consecutive months immediately preceding the filing of this suit, and Florida was not the children's home state on the date suit was filed. As such, the children did not have a home state on 03/08/07. Even though the children were only in Texas five weeks at the time suit was filed, the Court found that Texas had significant connections with Mother and children sufficient to make and initial child custody determination under TFC § 152.201(a)(2). Specifically, the court of appeals found that Mother's fiancé and the children's 3 half-siblings all lived in Texas prior to Mother's move, and Mother's plans for the children's future care, education, protection, and training were all available in Texas from Mother and other family members.

SAPCR **Child Support**

TRIAL COURT LACKED JURISDICTION TO ORDER ATTORNEY GENERAL TO REMIT CHILD SUPPORT PAYMENTS TO PRIVATE THIRD PARTY COMPANY FOR DISBURSEMENT

¶ 08-4-15. ***In re A.B.,*** ___ S.W.3d ___, 2008 WL 4531556 (Tex. App.—Dallas 2008) (10/10/08)

Facts: In 09/06, TDFPS filed a motion to modify and petition for termination. Following a hearing, trial court signed a final order of modification that appointed child's aunt managing conservator, appointed mother and father possessory conservators, and ordered father to pay child support. In the child support order, trial court ordered father to pay $155 in monthly child support to AG's child support disbursement unit, and also ordered AG to remit all child support to "Guardian ad Litem" (GAL) at a specified address. GAL is a private company that collects, disburses, and enforces child-support payments for its clients in exchange for a fee. AG appealed.

Held: Reversed and remanded. Trial court did not have jurisdiction to order AG to remit payment to GAL.

Opinion: AG is an officer of the executive department of this state, and is authorized to enforce, collect, and distribute child support. Thus, the supreme court alone has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process or otherwise compel the AG to perform a judicial, ministerial, or discretionary act or duty. Trial court ordered AG to remit all child support payments received from father to GAL. Trial court's action constitutes issuing a writ of mandamus or injunction, or any other mandatory or compulsory writ or process against or compelling the performance of a judicial, ministerial, or discretionary act or duty by an officer of the executive department of this state. Because trial court did not have jurisdiction to compel AG to act, those portions of the final order ordering AG to remit all child support payments to the GAL are void.

Editor's comment: *One might inquire, "Why would the AG care whether the GAL is involved?" The AG*

contends, in this and in related litigation (such as In re C.J.M.S., infra), that federal funding for child support collection is jeopardized by utilizing the GAL because the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 forbids that practice. J.V.

HOME SCHOOL PROGRAMS QUALIFY AS "PRIVATE SECONDARY SCHOOLS" UNDER FAMILY CODE SECTION 154.002 FOR THE PURPOSES OF CHILD SUPPORT PAYMENTS PAST A CHILD'S EIGHTEENTH BIRTHDAY

¶ 08-4-16. ***In re J.H.,*** 264 S.W.3d 919 (Tex. App.—Dallas 2008) (09/10/08)

Facts: At the time child was conceived, mother was married but separated and living apart from husband. Mother was divorced when she was 4-months pregnant, and the divorce decree stated that there were no children of the marriage and none were expected. During her pregnancy, mother told father that she was pregnant and that he was the only person that she had sexual relations with during the probable time of conception. Father denied paternity. Child was born on 12/31/87. Mother claimed that she attempted to contact father several times following child's birth. On 09/26/05, AG filed a Petition to Establish the Parent-Child relationship which sought to establish father's paternity. Father denied paternity and requested DNA testing. The DNA tests showed a 99.99% probability that father was the biological father of child. Father subsequently signed a "Temporary Agreed Order Establishing the Parent-Child Relationship" in which trial court found father was child's biological father. AG amended its petition to join the presumed father, (mother's ex-husband), as a party. Ex-husband denied paternity, and mother filed a cross-petition to adjudicate parentage. In response, father filed an amended answer raising the defense of limitations. Trial court held an evidentiary hearing. At the time of the hearing, child was 19 years old. Mother testified that child was enrolled in an internet home-schooling program through an accredited school, and leads toward a high-school diploma. Trial court ruled the statute of limitations found in TFC § 160.607 did not apply to an action brought by the AG, and father has a statutory obligation to pay child support. Trial court signed an order adjudicating parentage finding father is child's father and ordering the payment of 4-years worth of retroactive child support and current child support until child "reaches the age of eighteen years or graduates from high school." Father appealed.

Held: Affirmed. Home-school programs qualify as "private secondary" schools under TFC § 154.002 and therefore trial court did not abuse its discretion by awarding child support past the age of 18.

Opinion: The exceptions to the 4-year SOL for a suit adjudicating parentage contained in TFC § 160.607(b) were met in this case. There is a statutory presumption that an award of 4-years of retroactive child support is reasonable contained in TFC § 154.131(c), therefore TC's award of retroactive child support was not an abuse of discretion. Finally, case law shows that a home-study program qualifies as a "private secondary" school under TFC § 154.002. As such, trial court's order for continuing child support until child graduates from high school was not an abuse of discretion.

Editor's comment: *This case has the potential for many abuses of the system without a defined standard for proof. M.M.O.*

Editor's comment: *The father argued that the trial court's order, in effect, required him to "pay monthly support indefinitely. The mother testified that the child's Internet-based school required him to finish the program within three years. She estimated that the child had completed one-third to one-half the program at the time of trial. J.V.*

TRANSFER IS MANDATORY UNDER FAMILY CODE SECTION 155.204(c) IF OPPOSING PARTY DOES NOT TIMELY FILE A CONTROVERTING AFFIDAVIT

¶ 08-4-17. ***In re Etemadi,*** 2008 WL 4164116 (Tex. App.—Beaumont 2008) (memo op.) (09/11/08)

Facts: Trial court entered the initial SAPCR order in 2005. Mother filed a motion to increase child support in 2006 which alleged that the children were residents of Jasper County. Mother filed another motion to modify child support in 2007 which also alleged the children were residing in Jasper County. The order signed April 5, 2007, provides a Houston address for mother. On 03/07/08, father filed a petition for modification which alleged that the children resided in Harris County. Father filed a motion to transfer with his petition for modification, the stated grounds for transfer are that the principal residence of the children is Harris County and neither party resides in Jasper County. Mother received service of citation on 03/10/08. Mother timely filed an answer, but did not file a response to the motion to transfer until 08/01/08. The controverting affidavit filed with the answer to the motion to transfer states that mother and the children moved to Florida on June 5, 2008, and that none of the parties currently reside in Harris County. Father submitted a proposed transfer order on 04/15/08, but trial court did not sign the order of transfer. Father subsequently filed a petition for writ of mandamus to compel trial court to transfer the case to Harris County.

Held: Mandamus granted, since mother did not controvert the statement that the children resided in Harris County, trial court is required by TFC § 155.204 to transfer the case.

Opinion: Mother contends that the phrase "initial pleadings" refers to the first post-judgment action filed by any party. Therefore, father waived his right to seek a transfer by failing to file a motion to transfer when mother filed motions to modify in Jasper County in 2006 and 2007. There is no support in the mandamus record for mother's assertion that the children were residing in Jasper County when mother filed her 2006 and 2007 motions to modify. Furthermore, mother's construction of TFC § 155.204(b) ignores the fact that the legislature statutorily designated a motion to modify a SAPCR as a new suit. Father pleaded in his motion to transfer that the children had resided in Harris County for the six months preceding the filing of the petition to modify and that no party presently resides in Jasper County. Mother did not file a controverting affidavit on or before the first Monday after the 20th day after the date of service. Because mother failed to deny that grounds for a transfer exist in a timely filed controverting affidavit, transfer is mandatory under TFC § 155.204(c).

TRIAL COURT AWARD OF INCREASED CHILD SUPPORT APPROPRIATE DUE TO FATHER'S INTENTIONAL UNDEREMPLOYMENT

¶ 08-4-18. ***In re A.B.A.T.W.***, ___ S.W.3d ___, 2008 WL 4277377 (Tex. App.—Dallas 2008) (09/19/08)

Facts: Mother and father were divorced on 01/10/01. The divorce decree suspended father's child support obligation while father was incarcerated, but ordered that on the 30th day after his release or parole from any federal/state penitentiary and halfway house, he was to begin making monthly child support payments of 30% of his net monthly income or of the federal minimum wage for a 40-hour week, whichever was greater. Father was released from the federal penitentiary in 1999 and from the state penitentiary in either Aug. or Sept. of 2002. In Nov. 2002, mother filed a petition to modify child support, claiming a change in father's circumstances. Father filed his answer in Dec. 2002, and in 2002 father was issued 20% of the shares in a company owned in partnership between himself and his mother. In 2003 father began to work full time for the company he and his mother owned. The partnership owned and operated a roofing company, restaurants, and a bowling alley among other business – the company paid father $500 a week from 2003 until trial in mid 2007. At trial, mother testified that father often picked the children up in luxury cars and introduced evidence of charges on the company's credit card and checks written on the company's checking account that she believed were not business expenses. Mother also testified that father carried a large amount of cash and used the company's funds to pay personal expenses. Father stated that the cars were owned by the company or his girlfriend, and that all of the charges were business expenses or donations to schools on his children's behalf. Trial court granted the petition to modify and ordered father to pay child support of $1,500 per month. Father appealed.

Held: Affirmed. Father was intentionally underemployed and the trial court's child support award was appropriate given the facts of the case.

Opinion: Under TFC § 154.066 if a parent's actual income is significantly less than what he could earn because of intentional underemployment, trial court may apply the child support guidelines to the parent's earning potential. Father has a college degree in economics and a MBA. Although father claimed he could not earn more than $500 per week due to his criminal convictions, he earned more than $500 per week when working a roofing company prior to working for the company owned in partnership with his mother. Although the testimony was conflicting, trial court was in position to evaluate father's credibility and was not required to accept father's testimony about the reasons for his underemployment, his income, and his net resources as true. As to the award of $1,500 per month in child support, the evidence supports a finding that father's net monthly resources exceed $6,000, therefore the amount was within the child support guidelines under TFC § 154.129.

TRIAL COURT LACKED JURISDICTION TO ORDER ATTORNEY GENERAL TO REMIT CHILD SUPPORT PAYMENTS TO PRIVATE THIRD PARTY COMPANY FOR DISBURSEMENT

¶ 08-4-19. ***In re C.J.M.S.,*** ___ S.W.3d ___, 2008 WL 4648413 (Tex. App.—Dallas 2008) (10/22/08)

Facts: In 2000, AG filed a SAPCR seeking to establish paternity of child. Trial court found that father was biological father of child and ordered him to pay monthly child support to mother. In 2006, TDFPS filed a petition seeking a new managing conservator for child. Following mediation, mother voluntarily relinquished managing conservatorship and all parties, except AG, entered into a MSA concerning conservatorship and child support. Trial court subsequently entered an order naming another couple as permanent SMC of child and both mother and father as PCs. Trial court's order also required mother and father to pay monthly child support, which was required to be remitted to AG's Child Support Disbursement Unit, and thereafter AG was ordered to remit the child support payments to a private entity named "Guardian ad Litem" (GAL). AG appealed trial court's order requiring it to remit the child support payments to GAL.

Held: Reversed and remanded. Trial court lacked jurisdiction to order AG to remit child support payments to GAL.

Opinion: Like *In re A.B.,* ___ S.W.3d ___, 2008 WL 4531556 (Tex. App.—Dallas 2008), trial court lacks jurisdiction to compel an officer of the executive department of this state to perform a judicial, ministerial, or discretionary act or duty. Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process or otherwise compel the AG to perform such actions. Because trial court did not have jurisdiction to compel AG to act, those portions of the final order ordering AG to remit all child support payments to the GAL are void.

Editor's comment: *I've never been a fan of the mandatory GAL program in Dallas, on which this case is based. I'm not convinced that the AG should be the only option for collection and disbursement of child support in Texas, but the mandatory GAL program was not the answer. M.M.O.*

FAILURE TO PROVIDE HUSBAND WITH PROPER SERVICE OF PROCESS REVERSES DEFAULT JUDGMENT FOR CHILD SUPPORT AND SPOUSAL SUPPORT ARREARAGES

¶ 08-4-20. ***Arnell v. Arnell,*** ___ S.W.3d ___, 2008 WL 4684356 (Tex. App.—El Paso 2008) (10/23/08)

Facts: Husband and wife were divorced in Switzerland. On 11/02/05, wife filed suit in Texas, claiming that husband owed over $500,000 in back child and spousal support. Husband did not file an answer and did not appear. The only evidence entered at the hearing was wife's sworn affidavit. Trial court entered a default judgment and awarded wife the amount of arrearages plus attorney's fees. Husband timely filed a restricted appeal challenging the default judgment, challenging trial court's jurisdiction and claiming that he was not provided service of process. The only evidence of notice in the trial record was a letter dated 04/03/06, written by husband's second wife, returning a hearing notice sent to husband at his previous address in California. The letter indicated that husband had returned to Switzerland, and stated that mail would not be accepted on his behalf at the California address. Husband's appeal states that the judgment must be reversed because the record fails to establish he was served with process in strict compliance with the rules.

Held: Reversed and remanded. Husband was not properly provided service of process.

Opinion: The record shows no evidence that husband was properly served with process as required by the TRCP. This constitutes an error on the face of the record, and the default judgment must be overturned.

UNDER TFC § 156.401(b), A PARENT MAY NOT REDUCE SUPPORT OBLIGATIONS WITHOUT COURT INTERVENTION

¶ 08-4-21. ***In re L.A.F.,*** ___ S.W.3d ___, 2008 WL 4838417 (Tex. App.—Dallas 2008) (11/10/08)

Facts: Mother and father were divorced in Arkansas in 2003. Their mediated settlement agreement, which was incorporated into the final divorce decree, stipulated that father would pay mother $3,000 in child support and $2,550 in spousal support per month. The agreement also stated the support amount could be adjusted if mother and father moved to Texas and father had to restructure his business. Mother informed father she was moving to Texas in 2003, and father decided to also move to Texas to be near children. In 12/04, Mother filed suit to modify the Arkansas divorce decree and requested that father be cited for contempt of court for failing to pay his monthly support obligations from the time the parties had moved to Texas. Father claimed that when he moved to Texas he had to restart his business, and his income declined. As such, father argued that his support obligations also decreased under the terms of the mediated settlement agreement. Trial court awarded mother a judgment of $18,200.00 plus interest for past-due spousal support and $36,855.60 plus interest for past due child support. Trial court also awarded mother a judgment of $53,567.50 plus interest for attorney's fees, expenses and costs. Father appealed.

Held: Affirmed. A parent must obtain a court order to reduce support obligations stipulated in a divorce decree.

Opinion: Although the mediated settlement agreement incorporated in the Arkansas divorce decree contemplates the reduction of father's support obligations with a concurrent reduction in income, under TFC § 156.401(b) a parent may not unilaterally reduce support obligations without court intervention.

SAPCR
Termination of Parental Rights

SUFFICIENT EVIDENCE EXISITED TO SHOW THAT TERMINATION OF PARENTAL RIGHTS WAS IN CHILD'S BEST INTEREST

¶ 08-4-22. ***In re S.N.,*** ___ S.W.3d ___, 2008 WL 4306375 (Tex. App.—Waco 2008) (09/17/08)

Facts: Child was removed from parents, and parental rights were eventually terminated. Mother appealed trial court's order, claiming that the factual sufficiency of the evidence for termination under subsection 161.001 (D) and (E), and that the evidence was factually insufficient to support a finding that termination of parental rights was in child's best interest. Father also appealed, but only challenged the legal sufficiency of the evidence for subsections (D) and (E).

Held: Affirmed. The evidence was legally and factually sufficient to support trial court's findings that termination of parental rights was in child's best interest.

Opinion: While mother and father proved that some of the nine *Holley* factors did not show that termination was in child's best interest, enough of the factors were satisfied to support termination. Evaluation of whether the evidence supports a best-interest finding does not involve a precise mathematical calculation despite the listing of relevant factors.

TFC SECTION 161.001(1)(O) REQUIRES A COURT ORDER FOR A PARENT TO COMPLY WITH A SERVICE PLAN PRIOR TO TERMINATION OF PARENTAL RIGHTS

¶ 08-4-23. ***In re B.L.R.P.,*** ___ S.W.3d ___, 2008 WL 4601805 (Tex. App.—Amarillo 2008) (10/16/08)

Facts: On 06/21/06, TDFPS filed a petition for termination of parental rights for an alleged father who is not party to this case. A paternity test on 10/30/06 showed father was actually child's biological father. Father signed a service plan on 01/05/07. There was no written court order, however, that required father to comply with the service plan. On 09/10/07, TDFPS amended its petition to add father as a party to the suit. TDFPS sought, and trial court ordered, termination of father's parental rights for his failure to comply with the provisions of a court order that specifically established the actions necessary to obtain the return of child who had been in the permanent or temporary managing conservatorship of TDFPS for not less than nine months as a result of the child's removal from the parent under TFC Ch. 262. Father appealed.

Held: Reversed and remanded. The record does not establish that there was a written court order that specifically established the actions necessary for father to obtain the return of child.

Opinion: Although father did sign a service plan provided by TDFPS, there was never a written order that was issued by trial court requiring father to comply with the service plan in order to obtain the return of child. TFC section 161.001(1)(O) states that trial court can terminate parental rights if it finds by clear and convincing evidence that a parent has failed to comply with a *court order* that specifically establishes the actions necessary for a parent to obtain the return of a child that is in the temporary managing conservatorship of TDFPS. Because there was no court order specifically establishing the actions necessary for father to obtain the return of child, TDFPS failed to establish by clear and convincing evidence any grounds enumerated under TFC § 161.001 to support termination of father's parental rights.

TERMINATION OF A PARTY'S PARENTAL RIGHTS IS PERMISSIBLE EVEN IF CHILDREN WERE ORIGINALLY REMOVED BASED ON ABUSE OR NEGLECT OF ANOTHER PARTY

¶ 08-4-24. ***In re S.N.,*** ___ S.W.3d ___, 2008 WL 4547442 (Tex. App.—Houston [14th Dist.] 2008) (10/14/08)

Facts: On 11/25/05, police responded to a report of neglectful supervision and found three young children home alone. TDFPS subsequently removed children from the home. On 11/28/05, TDFPS filed a SAPCR

and placed children in a foster home. At the time TDFPS took children into custody, father was incarcerated and serving a 75-day sentence for driving on a suspended license. Father was released from jail on 12/08/05, and on 01/19/06 trial court signed an order that included a family service plan that detailed the steps necessary to obtain reunification with children. On 01/17/08, a bench trial was held and trial court terminated mother and father's parental rights. Trial court's order terminated mother's parental rights based on her voluntary relinquishment and terminated father's parental rights based on TFC §161.001(1)(N) (constructive abandonment) and TFC §161.001(1)(O) (failure to comply with the court-ordered family service plan). Trial court further found termination was in children's best interest. Father appealed.

Held: Affirmed. Termination of father's parental rights was permissible even though he was incarcerated when children were originally removed.

Opinion: TFC § 161.001(1)(O) does not require that the parent who failed to comply with a court order be the same parent whose abuse or neglect of the child warranted the child's removal. Therefore, although children were removed based on mother's neglect, termination of father's parental rights is permissible. The evidence supports a finding that a reasonable trier of fact could have formed a firm belief that children's best interest would be served by terminating father's parental rights.

HISTORY OF EXPOSING CHILD TO A HOME WHERE ABUSIVE RELATIONSHIPS ARE PRESENT IS SUFFICIENT TO SHOW TERMINATION OF PARENTAL RIGHTS IS IN CHILD'S BEST INTEREST

¶ 08-4-25. ***In re J.J.S.,*** ___ S.W.3d ___, 2008 WL 4665553 (Tex. App.—Waco 2008) (10/22/08)

Facts: Trial court entered an order terminating mother's parental rights after affirmative findings under TFC §§ 161.001(1)(D), (E), and (O). Mother filed a SOP for appeal that challenged the legal and factual sufficiency of the evidence, that termination of parental rights was not in child's best interest, and that TDFPS did not make sufficient efforts to reunite her with child. Trial court ruled that mother's arguments in her SOP were frivolous. Mother appealed, arguing that trial court abused its discretion by finding that her SOP was frivolous.

Held: Affirmed. Mother did not show that trial court's finding was an abuse of discretion.

Opinion: The trial record contains evidence that mother was involved in an abusive relationship and exposed child to a home where family violence was present and that mother had been convicted of child endangerment. Trial court did not abuse its discretion by finding this was clear and convincing evidence that mother had knowingly engaged in conduct that endangered the physical and emotional well being of child. With regard to termination being in the child's best interest, evidence was presented of mother's instability and history of abusive relationships. TDFPS put mother on a family service plan that would lead to reunification, but testimony at trial showed that mother made insufficient progress on the plan. As such, TDFPS made reasonable efforts to reunite mother and child, and therefore trial court did not abuse its discretion.

Editor's comment: *Under Tex. Fam. Code § 263.405, an indigent parent whose rights have been terminated is entitled to preparation of the appellate record at no cost if the parent can persuade the trial judge to find that the proposed appeal is not frivolous. In this case, the trial court found that an appeal would be frivolous but allowed the parent a free record anyway. J.V.*

PARENT'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY ACCELERATED APPEAL PROVISIONS OF TFC § 263.405 IF APPEAL IS DEMONSTRABLY FRIVOLOUS

¶ 08-4-26. ***In re M.L.B.,*** ___ S.W.3d ___, 2008 WL 4735546 (Tex. App.—Beaumont 2008) (10/30/08)

Facts: Trial court terminated mother's parental rights. Mother's court-appointed counsel filed a SOP for appeal and a motion for new trial. Trial court found that an appeal would be frivolous, thus denying mother a free copy of the trial record, and appointed new counsel to represent mother on appeal. On appeal, mother argued that TFC 263.405(b) and (i) deprived her of due process. First, mother argued that denial of a free transcript to an indigent appellant prevents the appellant from pursuing a meaningful appeal. Second, mother argued that it violates due process for a trial transcript to be unavailable for the appellant and the appellate court in reviewing the trial court's finding that an appeal would be frivolous.

Held: Affirmed. Because trial court determined that mother's appeal was frivolous, her due process rights were not violated.

Opinion: Mother was not denied a record due to indigency; she was denied a record because trial court determined that appeal would be frivolous. The state's interest in promoting the welfare of children and providing a child with a permanent home as quickly as possible outweigh mother's private liberty interest in the care, custody, and control of child. As such, the accelerated appeal framework set out in TFC § 263.405 does not violate due process when an appeal is demonstrably frivolous.

Dissent: "When a trial court finds a factual sufficiency challenge would be frivolous, this Court determines whether to order a record of the trial evidence based on a review of the record of the post-trial hearing…The summaries presented by the parties at the post-trial hearing in this case reflect disagreement over the evidence supporting termination of appellant's parental rights. We should require the record of the evidence transcribed and filed."

Editor's comment: *In other words, in termination cases an appellate court may affirm a trial court's finding that an appeal from its own ruling would be frivolous, based on an appellate record consisting of the state's recitation of what it said the trial evidence had been and even though the parties' summaries of the trial evidence "reflect disagreement over the evidence." (Gaultney, Justice, dissenting). J.V.*

EVIDENCE OF DRUG USE IS LEGALLY SUFFICENT EVIDENCE THAT PARENT ENGAGED IN CONDUCT WHICH ENDANGERED CHILD

¶ 08-4-27. ***In re S.N.,*** ___ S.W.3d ___, 2008 WL 4816619 (Tex. App.—Waco 2008) (11/05/08)

Facts: Court of appeals originally affirmed trial court's order terminating mother's parental rights on several predicate grounds, but did not specifically rule on trial court's findings with regards to TFC § 161.001(1)(D) and (E). Because an affirmative finding on these grounds can be used to support termination of parental rights with respect to any future child she may have, court of appeals granted a rehearing.

Held: Affirmed. Evidence of mother's drug abuse was legally sufficient to terminate mother's parental rights.

Opinion: TDFPS argued that mother's parental rights should be terminated based on TFC § 161.001(1)(D) (that she knowingly placed or allowed child to remain in dangerous conditions or surroundings) based on mother's drug and alcohol abuse. Since this ground is concerned with "conditions and surroundings" rather than mother's conduct, and the record does not contain any evidence that mother used drugs or alcohol in child's presence, the evidence is legally and factually insufficient to sustain a finding for termination based on TFC § 161.001(1)(D). However, evidence of mother's drug and alcohol abuse and the fact that she refused to seek treatment is legally sufficient evidence that mother engaged in conduct with endangered child under TFC § 161.001(1)(E).

Editor's comment: *Chief Justice Gray concurred with the court's judgment but provided a "note" in lieu of a concurring opinion. The note states that the majority failed to exercise judicial restraint by ruling on grounds for termination that potentially would be relevant only in an "as yet un-filed case to terminate the parental*

rights to an as yet unborn or even conceived child." J.V.

TDFPS CAN REFILE TERMINATION SUIT THAT IS DISMISSED WITHOUT PREJUDICE ON SAME GROUNDS, BUT MUST ALLEGE NEW FACTS

¶ 08-4-28. ***In re K.Y.***, ___ S.W.3d ___, 2008 WL 4809548 (Tex. App.—Houston [14th Dist.] 2008) (11/06/08)

Facts: Father was accused of murdering stepdaughter, who's cause of death was massive blunt force trauma compounded by chronic child abuse. On 12/30/03, TDFPS filed a SPACR seeking the termination of mother and father's parental rights, removed remaining children from home, and placed them with foster family. Mother voluntarily relinquished her parental rights, but father did not. On 06/21/05, trial court dismissed the SAPCR suit against father without prejudice. TDFPS refiled the SAPCR suit to terminate father's parental rights. In 10/05, father was convicted of murdering stepdaughter and sentenced to life in prison. On 06/14/06, the second termination suit against father was dismissed without prejudice. On 06/15/06, TDFPS filed the SAPCR seeking termination for the third time. The case went to trial in 02/07, and a jury determined that termination would be in children's best interest. Father appealed.

Held: Affirmed. TDFPS alleged new facts to support termination between the second and third suits.

Opinion: Trial court had subject matter jurisdiction to hear the third suit, despite the fact that children moved to Oklahoma with foster family in 05/06. A Texas court has jurisdiction in an initial child custody determination if Texas was the home state of a child within six months of the commencement of the proceeding. Since TDFPS filed the third suit less than two months after the children moved to Oklahoma, trial court had subject matter jurisdiction. If a suit is dismissed without prejudice, TDFPS can refile the suit and assert the same grounds for termination. However, in order to maintain temporary conservatorship TDFPS must allege new facts for termination. In the second suit, TDFPS alleged father was incarcerated on charges of murdering stepdaughter. In the third suit TDFPS alleged that father had been convicted of murdering stepdaughter. As such, trial court did not err by appointing TDFPS temporary managing conservator. Pictures from stepdaughter's autopsy were not improperly admitted, as their probative value in demonstrating the cause of death and long term physical abuse outweighed any potential risk of unfairly prejudicing the jury.

Editor's comment: *The mere pendency of father's interlocutory appeal of temporary orders did not deprive the trial court of jurisdiction to proceed to trial. J.V.*

A PARENT'S PARENTAL RIGHTS CAN BE TERMINATED IF HER MENTAL ILLNESS CAUSES HER TO BE UNABLE TO PROVIDE FOR THE PHYSICAL, MENTAL, AND EMOTIONAL HEALTH OF CHILD

¶ 08-4-29. ***Liu v. TDFPS,*** ___ S.W.3d ___, 2008 WL 5006566 (Tex. App.—Houston [1st Dist.] 2008) (11/26/08)

Facts: On 02/15/2005, mother, a diagnosed schizophrenic, gave birth to child. In 09/05, mother received a Mental Health and Mental Retardation Authority (MHMRA) screening report that indicated she was experiencing "psychotic symptoms" and that she was "suicidal and feels she wants to harm others if she does not take her medication." Her MHMRA treatment plan indicated that mother was delusional, paranoid, and suspicious of others. Grandmother alerted TDFPS that mother was unable to care for child due to her mental illness. On 10/23/05, TDFPS assigned a caseworker for a Family Bases Safety Services case. Mother was involuntarily committed to in-patient treatment, and child was placed with grandmother while Mother was receiving treatment. In 02/06, mother attacked a grocery store employee and was involuntarily committed again. On 03/08/06, TDFPS explained in a home visit with grandmother that it would not be in child's best interest if mother was allowed to live in the home with child due to her behavior. Grandmother would not agree to exclude mother from home with child, and on 03/09/06, TDFPS removed child and was appointed child's temporary sole managing conservator. Child was placed in temporary foster care. In 10/07, a jury trial took place, during which evidence was presented that mother's mental illness precluded her from caring for child, that her mental illness was likely to persist through child's 18th birthday, and that mother had failed to comply with TDFPS service plan. The jury found by clear and convincing evidence that termination of mother's parental rights was in child's best interest in light of the evidence. Trial court rendered judgment on the jury verdict and named foster parents managing conservators of child. Mother appealed.

Held: Affirmed. The evidence presented was legally and factually sufficient to terminate mother's parental rights.

Opinion: While mental illness in and of itself is not sufficient to terminate parental rights, the evidence supports a finding under TFC § 163.003(a)(1) that mother could not care for child's physical, mental, and emotional health due to her mental illness, that she displayed inappropriate and dangerous behavior around child due to her mental illness, and that she had a long history of hospitalization for her mental illness. Further, the evidence was sufficient to show that mother's mental illness would likely persist through the rest of her life, causing her to be unable to care for child physical, mental, and emotional health through his 18th birthday under TFC § 163.003(a)(4). As such, termination of parental rights was in child's best interest.

SAPCR
Parentage

THE UNIFORM PARENTAGE ACT, NOT THE UCCJEA, CONTROLS JURISDICTION FOR CHALLENGES TO AN ACKNOWLEDGMENT OF PATERNITY FILED IN TEXAS

¶ 08-4-30. ***In re McMillan,*** 265 S.W.3d 918 (Tex. App.—Austin 2008, orig. proceeding) (09/10/08)

Facts: On 03/14/06 child was born to mother in Texas. The next day, mother and father signed and Acknowledgment of Paternity (AOP) which declared that father was the biological father of child. The AOP was subsequently filed with the Vital Statistics Unit of DSHS. In Sept. 2007, mother filed suit in Tennessee, where she was living with child, seeking custody of and a declaration that father was not child's biological father. On 11/06/07, Tennessee trial court found that mother does not have standing to deny that father is the

father of the child having signed under penalty of perjury an acknowledgment of paternity in Texas. Tennessee trial court also awarded temporary custody to father and ordered that the suit shall proceed before the Court as a custody case. No final order was issued in the Tennessee litigation. Two days after the temporary order was issued in Tennessee, mother filed suit in Texas, challenging the AOP. Father filed a plea to the jurisdiction, which argued that Texas lacked subject-matter jurisdiction under the UCCJEA. Trial court denied the plea to the jurisdiction and father filed a petition for writ of mandamus, seeking to compel trial court to grant his plea on the ground that Tennessee has exclusive, continuing jurisdiction under the UCCJEA.

Held: Mandamus denied. The Uniform Parentage Act (UPA), not the UCCJEA, controls the process by which an AOP can be challenged in Texas.

Opinion: The AOP was signed in Texas, filed with the Texas Vital Statistics Unit, and bears the heading, "State of Texas Acknowledgment of Paternity." Under TFC § 160.308, a signatory of an acknowledgment of paternity may commence a proceeding to challenge the acknowledgment. Furthermore, it appears that the Tennessee court has declined to assert jurisdiction over the parentage action involving child, so that as a practical matter, if Texas cannot exercise jurisdiction over the AOP, mother will be deprived of the opportunity to challenge it as authorized by TFC § 160.308. In light of these circumstances, Texas has subject-matter jurisdiction over the AOP challenge in this case.

MISCELLANEOUS

A LAWYER CAN NOT SERVE AS BOTH MEDIATOR AND ATTORNEY FOR UNREPRESENTED MARRIED COUPLE IN A DIVORCE PROCEEDING

¶ 08-4-31. ***Ethics Opinion No. 583,*** Professional Ethics Committee for the State Bar of Texas (September 2008)

Facts: Lawyer is hired by husband and wife to mediate a divorce. Under the proposed agreement, lawyer will conduct the mediation and, if an agreement is reached, prepare the decree of divorce and other necessary documents, which may include conveyances of real property, child support provisions, and visitation schedules. Neither husband nor wife are represented at any time by their own legal counsel. The lawyer/mediator advises both parties that he does not represent either party during the mediation or in the preparation of the documents to implement the agreed terms of divorce. Husband and wife agree that the fee of the lawyer/mediator will be paid one-half by each.

Discussion: Under the Texas Disciplinary Rules of Professional Conduct, mediation constitutes action as an "adjudicatory official." As such, as lawyer acting as a mediator is subject to the requirements of Rule 1.11. Since the proposed arrangement is to be agreed upon by the parties before the mediation begins, this arrangement would be in violation of Rule 1.11(b) ("A lawyer who is an adjudicatory official shall not negotiate for employment with any person who is involved as a party or as an attorney for a parting in a pending matter in which that official is participating personally and substantially").

If a lawyer who is also a mediator chooses to act solely as a lawyer with respect to a particular divorce, the lawyer may represent only one of the parties in preparing documents to implement an agreement for divorce. A divorce, no matter how amicable, is still a litigation proceeding under Texas law. A lawyer in the case of a divorce cannot provide legal services to both parties as an "intermediary" under Rule 1.07; instead, representation of parties in a divorce is governed by Rule 1.06(a) ("[A] lawyer shall not represent opposing parties to the same litigation").

Opinion: Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary

documents to effect an agreement resulting from mediation. Because divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce.

ONE-YEAR DISMISSAL DEADLINE IN TFC § 263.401 DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE TEXAS CONSTITUTION

¶ 08-4-32. ***TDFPS v. Dickensheets,*** ___ S.W.3d ___, 2008 WL 4165038 (Tex. App.—Houston [1st Dist.] 2008) (09/11/08)

Facts: On 02/06/06, TDFPS filed a SAPCR against mother and father regarding 5 children under TFC Chapter 163. Following a hearing, trial court awarded TMC to DFPS and set a dismissal date of 02/12/07 as required by TFC § 263.401(a). On 01/05/07, TDFPS filed a motion to extend the dismissal date 180 days. After a hearing on 01/09/07 that mother and father did not attend, trial court granted TDFPS's motion, extending the dismissal date to 08/10/07, and set trial for 04/23/07. On 04/13/07, TDFPS filed an amended SAPCR, regarding only 3 of the children. On 06/19/07, father filed a motion to dismiss for TDFPS's failure to failure to exercise due diligence in locating placement for the children. Father asked trial court to dismiss the suit or to order TDFPS to look at home studies of three relatives whom he designated. On the same date, father filed a motion to set aside trial court's order extending the final order deadline because TDFPS failed to give him proper notice of the 01/09/07 hearing, which would have enabled him to voice an objection to the extension sought by TDFPS. Trial court held a dismissal hearing on 06/25/07 and ordered TDFPS and mother and father to attend an informal settlement conference. TDFPS and mother and father were able to reach an agreement regarding all but one child. The parties reconvened in front of trial court, and entered into a Rule 11 agreement whereby paternal grandparents would have TMC of the final child. Following the agreement, TC dismissed TDFPS's suit. On 07/11/07 TDFPS appealed the dismissal, claiming that the one-year deadline for dismissal of suits brought by TDFPS in TFC § 263.401 invades the exclusive function of a district or county attorney to represent TDFPS and thus violates the Separation of Powers Clause. On 08/08/07, mother and father filed a motion to dismiss TDFPS's appeal, claiming that trial court's dismissal order was interlocutory.

Held: Affirmed. Although a dismissal order is final and appealable, TFC § 263.401 is not facially unconstitutional and does not violate the Separation of Powers Clause.

Opinion: A dismissal order is a final and appealable order as defined by TFC §263.401(d). As such, court of appeals denied mother and father's motion to dismiss. Court of appeals affirmed trial court's dismissal. The one-year deadline in TFC § 263.401 is not facially unconstitutional and does not violate the separation of powers clause. The statute was passed pursuant to the Legislature's constitutional authority to legislate, and thereby to regulate, "the means, manner, and mode of assertion" of SAPCRs seeking to terminate parental rights. TFC § 263.401 furthers the objective of facilitating "permanence and stability in the lives of children subjected to [TDFPS's] involvement" by ensuring a speedy resolution of child custody issues in accordance with long-standing Texas policy. Furthermore, the one-year deadline set out in TFC § 263.401 does not unduly interfere with prosecutorial case preparation.

Editor's comment: *The court reminds us that the substance of an order determines whether it is final. This order was final even though it appointed "temporary" managing conservators. J.V.*

A FINDING THAT A PARTY INTENDED VICTIM TO SUFFER INJURY BY FILING A FRADULENT LIEN IS REQUIRED UNDER CIVIL PRACTICES AND REMEDIES CODE § 12.002 TO SUSTAIN AWARD FOR DAMAGES AND ATTORENY'S FEES

¶ 08-4-33. ***Aland v. Martin,*** ___ S.W.3d ___, 2008 WL 4981686 (Tex. App.—Dallas 2008) (11/25/08)

Facts: Husband and wife divorced in 2006. During the divorce proceeding, wife retained attorney. Attorney agreed to represent wife in exchange for a promissory note in the amount of $10,315.64. To secure that promissory note, wife signed a deed of trust granting a lien on certain real property owned jointly by husband and wife, thereafter deed of trust was filed in the deed records of Dallas County. Wife did not consult husband about the deed of trust prior to executing the note. In the ensuing divorce decree, husband was awarded the certain real property in question, "including any obligations due thereon, excluding any lien in favor of wife's attorney." Also included in the decree was language which stated that wife was ordered, in part, to pay the "debt owed to [wife's attorney] underlying the Deed of Trust and Promissory Note executed by [wife] against [property]." There was originally a provision in the decree that required wife to discharge the lien within five days, but that portion was manually removed and initialed by both wife's attorney and husband's attorney. Wife's attorney did not release the lien until she received payment from wife on 01/26/07.

Husband attempted to refinance the property in August 2006 and was unsuccessful due to the deed of trust lien held by wife's attorney at that time. Husband's attorney sent several letters to wife's attorney demanding that she remove the lien. Husband filed suit against wife's attorney pursuant to TCPRC § 12.002, and sought damages, attorney's fees, and court costs. Following a trial, trial court entered findings of fact and conclusions of law that supported an award of $10,000; trial attorney's fees of $13,683.84; conditional appellate attorney's fees of $10,000; and costs of court. Wife's attorney appealed.

Held: Reversed and remanded. The evidence was legally and factually insufficient to support the statutory elements of liability under TCPRC § 12.002.

Opinion: Trial court made no finding, and the evidence does not support a presumed finding, that wife's attorney "made, presented, or used the lien at issue with intent to cause Martin to suffer physical injury, financial injury, or mental anguish or emotional distress" as required by TCPRC §12.002(a)(3). As such, the evidence is not legally sufficient to support a finding of intent by wife's attorney to cause husband to suffer the requisite injury under TCPRC § 12.002.