SECTION REPORT
FAMILY LAW

http://www.sbotfam.org **Volume 2007-4 (Winter)**

Message from the Chair

We have now passed the midpoint of our Council year – my, how time flies when you are having so much fun! We chose not to have a Fall Council meeting this year in conjunction with any December CLE event. Nevertheless, many of our committees have been extremely busy this fall, working on their tasks. This includes the "Big Three" committees: Formbook, Legislative, and Pro Bono. I really need to mention another committee to make it the "Big Four" now with our new Section Report committee, or Board of Editors. It, too, has been working diligently to bring you all the up-to-date information you need to be on the cutting edge of Family Law. I am really so proud of all of our committees and the work they have done up to this point in the year. I am also very proud to be able to serve as the Chair of such a great section. As always, I encourage all section members to contact me or any other Council member if you have questions, ideas, suggestions, or comments about section activities.

Don't forget the Texas Academy of Family Law Specialists' Annual Trial Institute, which will be in Santa Fe, New Mexico in January 2008. It will be outstanding, as usual. Details are provided on the Section and TAFLS websites.

I wish everyone very Happy Holidays!

----------Sally Emerson, Chair

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EDITOR'S NOTE

I am honored and humbled that the Section has asked me to fill the very big shoes of Jack Sampson. We all owe a large debt of gratitude to Jack for his long service to the Family Law Section. I can also now more fully appreciate the time and effort that it took Jack to put out this Report four times a year for 31 years. Needless to say, I need and want all the assistance I can get from the section members. Specifically, I want to hear from you about what you like, do not like, and want to change about the Report. I also want you to submit articles on specific topics that relate to family law issues. Many of your local bars have programs where papers are presented that would be of value to everyone in the State, but are unknown to many of us. If you would encourage the authors of those papers to submit them for consideration for inclusion in the Report that would be very helpful. This is also a good way for you younger lawyers to let everyone in the section know who you are and to showcase your talent and your practice. The Report needs articles from all disciplines of law (probate, real estate, bankruptcy, etc.) and professions related to family law (psychologists, financial planners, CPAs, insurance agents, etc.). The editorial board and I are also considering starting a letters to the editor feature for the membership to comment on various subjects presented in the Report either in the articles or the cases. We are also considering adding a feature similar to the *Newsweek* "My Turn" essay, which allows individuals to comment on various issues in their lives that relate in some form or fashion to family law issues or the practice of family law. I also hope you have all noted, that not only has the Report gone to an electronic format but Thompson West hast generously provided us with hyperlinks to all of the cases, statutes, and articles cited in the report at no charge to the membership. I particularly want to thank Jonathan Pullano and Gretchen Craver for their assistance in helping us get this done and in their continuing support of this endeavor. Finally, I would like to thank the newly-appointed Board of Editors – Sally Emerson, Doug Woodburn, Wendy Burgower, Warren Cole, Justice Ann McClure, and Jimmy Vaught – for helping me to launch my new Editorship of the Report. Last, and certainly not least, I would also like to thank my very able and talented law clerk, John H. Chase, a third-year law student at UT and future Jones Day associate, who has been invaluable in assisting me in this project and in getting the Report out on time.

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IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Alimony: In Louisiana, fault in the breakup of the marriage prevented a wife from receiving spousal support after divorce when the wife had subjected the husband to "a pattern of mental harassment, nagging and griping which rendered the marriage insupportable." The appellate court agreed that the record contained no evidence that the husband's habit of frequenting "Gentlemen's Clubs" had been "a predicate to marital strife; rather, that seemed to be [the husband's] 'reaction' to a failing marriage.'" Wolff v. Wolff, 966 So.2d 1202 (La. App. 3rd Cir.) (October 3, 2007). A New York court did not abuse its discretion when it reduced a wife's maintenance award by $300 per month because the wife, who had taken a second job, earned more money. *Haines v. Haines*, 44 A.D.3d 901, 845 N.Y.S.2d 77 (N.Y.A.D. 2 Dept. 2007) (Oct. 23, 2007).

Child support: An Indiana court held a father's $1,000,000 personal injury settlement to be income for child support purposes. *Knisely v. Forte*, 875 N.E.2d 335 (Ind. App. 2007) (Oct 23, 2007). The Tennessee Supreme Court ruled that income for child support purposes included $687,550 that the father received from selling property awarded to him upon divorce, as against the father's "double-dipping" argument. *Moore v. Moore*, ___ S.W.3d ___, 2007 WL 2481931 (Tenn. 2007) (Sept. 5, 2007). The fact that a child who performed poorly in public school after the father withdrew the child from private school supported a New York order that the father's child support obligation would continue to include private school expenses. *Aulicino v. Kaiser*, 44 A.D.3d 114, 844 N.Y.S.2d 457 (N.Y.A.D. 3 Dept. 2007) (Oct. 18, 2007). Rejecting a substantive due process defense of unreasonableness, the Illinois Supreme Court affirmed a statutory penalty of $100 per day - total-

ing $1,172,100 - against an employer who failed to forward withheld child support to the state. *In re: Miller*, ___ N.E.2d___, 2007 WL 4200819 (Ill. 2007) (Nov. 29, 2007).

Grandparents: Arizona's "move-away" statute, which requires a best interests finding before a custodial parent may move a child, does not apply to a grandparent who has court-ordered visitation. *Sheehan v. Flower*, 170 P.3d 288 (Ariz. App. 2007) (Nov. 13, 2007). The Illinois Supreme Court held the contention that ''a child can only benefit from a relationship with a loving grandparent" insufficient to rebut the presumption that a fit parent's decision to deny grandparent visitation is not harmful to the child, reasoning that otherwise a parent never could deny grandparent visitation. *Flynn v. Henkel*, 223 Ill.2d 633, 865 N.E.2d 968 (Ill. 2007) (Nov. 29, 2007). A New York court granted custody to the maternal grandmother after finding the father to be an unfit parent when the father, while intoxicated, killed the mother in a boat accident. *Jodoin v. Billings*, 44 A.D.3d 1244, 843 N.Y.S.2d 873 (N.Y.A.D. 3 Dist. 2007) (Oct. 25, 2007).

Nuptial agreements: A New York court set aside a postnuptial agreement when the agreement was financially lopsided, had been drafted by the husband's attorney, and the wife had signed it while "undergoing treatment and suffering from the mental and physical effects of complications arising from a surgery." *Barchella v. Barchella*, 44 A.D.3d 696, 844 N.Y.S.2d 78 (N.Y.A.D. 2 Dist. 2007) (Oct. 9, 2007). A wife's claim that she had not understood the terms of a prenuptial agreement was undercut by the fact that "she acted in accordance with the terms of the agreement throughout the marriage, maintaining separate bank accounts in her own name in which she deposited income from properties she inherited from her family." *Stawski v. Stawski*, 43 A.D.3d 776, 843 N.Y.S.2d 544 (N.Y.A.D. 1 Dist. 2007) (Sept. 27, 2007). A New York court upheld a maintenance award to a wife of $3,300 per month, despite the wife's argument that the amount was insufficient, when a valid prenuptial agreement required the husband to provide "suitable housing (either rented or owned)" for the wife while the parties' child resided with her and the record supported the trial court's finding that $3,300 would suffice. *Cerami v. Cerami*, 44 A.D.3d 815, 845 N.Y.S.2d 67 (N.Y.A.D. 1 Dist. 2007) (Oct. 16, 2007).

Paternity: A California court granted mandamus to retract a genetic testing order when the adjudicated father questioned paternity after limitations had run but failed to invoke the court's equitable jurisdiction when he alleged only that he and the mother had not been "mutually exclusive" sexual partners and that he had "heard" that the child did not look like him. *Orange County v. Superior Court (Rothert)*, 155 Cal.App.4th 1253, 66 Cal. Rptr. 3d 689 (Cal. App. 4 Dist. 2007) (Oct. 3, 2007. The Sixth Circuit affirmed a judgment (including attorney's fees) against a father who claimed that permitting a woman, but not a man, to terminate a pregnancy violates the equal protection clause of the United States Constitution. *Dubay v. Wells*, ___F.3d___, 2007 WL 3253650 (6th Cir. Mich. 2007) (Nov. 6, 2007). An Alaska resident who failed to pay a filing fee when he filed an answer to an Idaho paternity action and subsequently suffered a default judgment was not denied due process under UIFSA upon registration of the judgment in Alaska. *Fowler v. State of Alaska*, 168 P.3d 870 (Alas. 2007) (Oct. 12, 2007). A Florida court held that a man who claimed to have impregnated a married woman while she was separated from her husband could not seek paternity of the child when the husband and wife reconciled prior to the child's birth. *Lohman v. Carnahan*, 963 So.2d 985 (Fla. App. 4 Dist, 2007) (Sept. 19, 2007).

Procedure: A Louisiana trial court, reversed for sealing an entire divorce file, sealed most of the file on remand but was again reversed for sealing information that "would not impinge on the safety or security of the children." *Copeland v. Copeland*, 966 So.2d 1040 (La. 2007) (Oct. 16, 2007). A stipulation signed by an attorney that California, rather than Texas, would have jurisdiction over child support issues bound the client despite the client's claim that his attorney had no right to waive his "substantial right" to dispute the appropriate forum in which to hear the case. *Knabe v. Brister*, 154 Cal.App.4th 1316, 65 Cal. Rptr. 3d 493 (Cal. App. 3 Dist. 2007) (Sept. 6, 2007). In New Hampshire, minor children may not intervene in their parents' divorce even when their guardian ad litem has made a custody recommendation in conflict with the children's expressed wishes. *In re: Stapleford*, 931 A.2d 1199 (N.H. 2007) (Sept. 28, 2007).

Property: A trial court erred by discounting the value of an S corporation by applying C corporation taxation rules and further erred by applying key man and marketability discounts when the husband intended to keep his corporate interest after divorce rather than sell it. *Bernier v. Bernier*, 449 Mass. 774, 873 N.E.2d 216 (Mass. 2007). In Alaska, a trial court may not disregard the value of one spouse's retirement account because the court did not "have a dollar value" for it but must require the parties to produce sufficient evidence to value the asset. *Mellard v. Mellard*, 168 P.3d 483 (Alas. 2007) (Sept. 21, 2007). Comity did not require a Maryland court to apply Pakistani law upon the divorce of Pakistanis who were long-term United States residents when Pakistani law provided that the wife could not share in the husband's admittedly valuable pension. *Aleem v. Aleem*, 175 Md.App. 663, 931 A.2d 1123 (Md. App. 2007) (Sept. 10, 2007).

ARTICLES

Termination of Parental Rights and Family Code § 263.405(i): Expediency at the Expense of Due Process

by

Jeremy C. Martin* and John H. Chase**

Termination of a parent's rights is an action with particularly serious consequences that requires rigorous supervision by the courts. Although the right to appeal a termination order is not constitutionally guaranteed, the United States Supreme Court has recognized that termination of a parent's rights must follow the requirements of due process. *See* *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also* *In re E.A.R.*, 201 S.W.3d 813, 815-16 (Tex. App.—Waco 2006, no pet.) (citing *In re K.L.*, 91 S.W.3d 1, 5 & n. 12 (Tex. App.—Fort Worth 2002, no pet.). However, one issue involving the appeal of parental termination judgments and due process has become disturbingly common in the last twenty-four months—appellate courts' dismissal of an appeal because the parent did not file a timely "statement of points."[1]

The Texas Legislature initially required a statement of points for an appeal of a final termination order in subsection 263.405(b), which provides:

> *Not later than the 15th day after the date a final order is signed by the trial judge, a party intending to appeal the order must file with the trial court a statement of the point or points on which the party intends to appeal. The statement may be combined with a motion for a new trial.*

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[1] *See, e.g.*, *Pool v. DFPS*, 227 S.W.3d 212 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *In re A.J.H.*, 205 S.W.3d 79 (Tex. App.—Fort Worth 2006, no pet.); *Coey v. Texas Dept. of Family and Protective Services*, No. 03-05-00679-CV, 2006 WL 1358490 (Tex. App.—Austin 2006, no pet.) (memo. op.); *In re R.M.*,, 2007 WL 1988149 (Tex. App.—San Antonio 2007, pet. denied); *In re M.D.*, , 2007 WL 1310966 (Tex. App.—Dallas 2007, no pet.); *In re S.C.*, No. 06-07-00051-CV, 2007 WL 1223880 (Tex. App.—Texarkana 2007, no pet.) (memo. op.); *In re R.C.*, ___ S.W.3d ___, 2007 WL 1219046 (Tex. App.—Amarillo 2007, no pet.); *In re C.B.M.*, 225 S.W.3d 703 (Tex. App.—El Paso 2006, no pet.); *In re B.S.*, No. 09-06-293-CV, 2007 WL 1441273 (Tex. App.—Beaumont 2007, no pet.) (memo. op.); *In re T.R.F.*, 230 S.W.3d 263 (Tex. App.—Waco 2007, pet. filed); *In re M.N.*, 230 S.W.3d 248 (Tex. App.—Eastland 2007, pet. filed); *In re J.H.*, No. 12-06-00002-CV, 2007 WL 172105 (Tex. App.—Tyler 2007, no pet.) (memo. op.); *In re R.M.R.*, 218 S.W.3d 863 (Tex. App—Corpus Christi-Edinburg 2007); *In re C.M.*, 208 S.W.3d 89 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

TEX. FAM. CODE ANN. § 263.405(b) (Vernon 2006). This requirement—which is only applicable when the termination suit is brought by the Department of Family Protective Services—was enacted in 2001 in an attempt to reduce the amount of time children spend in foster care due to delays resulting from post-judgment appellate proceedings in termination cases. HOUSE COMM. ON JUVENILE JUSTICE AND FAMILY ISSUES, BILL ANALYSIS, H.B. 409, 79th Leg., R.S. (2005). However, several appellate courts held that there were no adverse consequences if a parent failed to file a statement of points. *See, e.g.*, *In re S.J.G.*, 124 S.W.3d 237, 240-43 (Tex. App.—Fort Worth 2003, pet. denied) (holding that failure to comply with requirement is "not a jurisdictional defect"); *In re D.R.L.M.*, 84 S.W.3d 281, 290-91 (Tex. App.—Fort Worth 2002, pet. denied) (same); *In re S.P.*, 168 S.W.3d 197, 201-02 (Tex. App.—Dallas 2005, no pet.) (same); *In re T.A.C.W.*, 143 S.W.3d 249, 250-51 (Tex. App.—San Antonio 2004, no pet.) (same); *In re T.C.*, No. 07-03-0077-CV, 2003 WL 21658314 at *3 (Tex. App.—Amarillo 2003, no pet.) (not designated for publication) (same).

In response to these decisions, the Legislature decided a statutory penalty was necessary to effectuate the purpose of section 263.405(b): "These decisions frustrate the Legislature's goal to speed up the post-judgment process in parental termination cases in order to shorten the time to final resolution." HOUSE COMM. ON JUVENILE JUSTICE AND FAMILY ISSUES, BILL ANALYSIS, H.B. 409, 79th Leg., R.S. (2005). As a result, in 2005 the Legislature passed subsection 263.405(i), which states:

> *The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial. For purposes of this subsection, a claim that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal.*

TEX. FAM. CODE ANN. § 263.405(i) (Vernon Supp. 2006).

The Legislature's desire to reduce the amount of time that abused and neglected children spend in foster care is understandable and commendable. However, the requirements of section 263.405(i) have created very serious, and potentially unconstitutional, repercussions to parents in termination cases.

Section 263.405(i) ignores the reality for indigent parents represented by appointed counsel. Specifically, appointed trial counsel for indigent parents is frequently different from the appointed appellant counsel. *In re E.A.R*, 201 S.W.3d at 817. Moreover, appellate counsel is sometimes not appointed within the fifteen-day deadline and therefore is precluded from filing a timely statement of points. *See, e.g.*, *id.*; *Pool v. Tex. Dep't of Family & Protective Servs.*, 227 S.W.3d 212, 216 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Finally, even if appellate counsel is appointed within the fifteen-day period prescribed in section 263.405(i), the appellate record is highly unlikely to be available quickly enough to give appellate counsel sufficient time to prepare and file a statement of points. *In re E.A.R*, 201 S.W.3d at 817. Consequently, the trial counsel is the only attorney that has the information to file the statement of points at this juncture. Unfortunately, too often the trial counsel's appointment terminates on the date the Court signs the order.

As a result of the above practical realities in termination cases involving indigent parties, appointed trial counsel is charged with the responsibility for filing a timely statement of points before appellate counsel is appointed. Notably, the fifteen-day deadline for filing a statement of points does not correspond with the length of other post-judgment deadlines prescribed in section 263.405; further, the statute only applies in cases where the Department of Family and Protective Services has filed for termination. *See* TEX. FAM. CODE ANN. § 263.405 (Vernon 2006); *In re J.R.S.*,2007 WL 2067786, at *2 (Tex. App.—Fort Worth, July 19, 2007, no pet. h.) (noting that statement of points not required in private termination proceedings). Such a unique and fast-approaching deadline is unlikely to be well known to appointed trial counsel—especially those whose primary area of practice is not family law—no matter how diligent he or she may be in becoming aware of and meeting the more conventional deadlines.

A party's usual protection against such a problem would be an appeal based on ineffective assistance of counsel. However, section 263.405(i) makes the very omission that rendered the trial counsel ineffective—not filing a timely statement of points—fatal to the parent's appeal. Under the statute, an appellate court cannot consider *any issue* on appeal that is not included in a statement of points, including the failure of counsel to file the statement itself. *In re R.M.*, 2007 WL 1988149, at *1 (Tex. App.—San Antonio, July 11, 2007, pet. pending); *see also In re R.M.R.*, 218 S.W.3d 863, 864 (Tex. App.—Corpus Christi 2007, no pet.); *In re D.A.R.*, 201 S.W.3d 229, 231 (Tex. App.—Fort Worth 2006, no pet.). This creates a Catch-22 situation that effectively denies the right to appeal to parents whose ties to their children have been permanently severed. This is especially relevant because, as the Second Court of Appeals has specifically noted, parents in termination cases—unlike criminal defendants—do not have access to habeas corpus relief if they receive ineffective assistance of counsel and failed to preserve the issue for appeal. *See In re D.A.R.*, 201 S.W.3d at 230-31. A direct appeal is the only available remedy, and section 263.405(i) forecloses it.

Courts have repeatedly stated that their hands are tied by the legislature in dealing with this issue. *See, e.g.*, *id.*; *In re R.C.*, No. 07-06-0444-CV, 2007 WL 1219046, *1 (Tex. App.—Amarillo April 25, 2007, no pet.). Until the latter part of 2007, courts showed little appetite for challenging the constitutionality of section 263.405(i). For example, the Dallas Court of Appeals found that the statute did not violate the equal protection clauses of the United States and Texas Constitutions because it applies to all parents equally. *In re R.J.S.*, 219 S.W.3d 623 (Tex. App.—Dallas 2007, pet. denied).[2] When asked if barring an ineffective assistance of counsel claim violates the appellant's due process rights, the Dallas court declined to address the issue because the appellant did not raise an ineffective assistance of counsel claim on appeal.

Other courts have similarly avoided addressing the due process implications of section 263.405(i). They accomplish this in two ways: (1) by holding that the party did not adequately brief the issue, or (2) by deciding that the statute itself bars the court from considering the issue of due process. *E.g.*, *Pool v. Tex. Dep't of Fam. & Prot. Servs.*, 227 S.W.3d at 216 ("[A]ppellant has not asserted that his trial counsel effectively abandoned him after the trial court signed its judgment, nor has he made any argument that his trial counsel provided ineffective assistance in not filing a statement of points or a new trial motion")), *In re R.M.R.*, 218 S.W.3d at 864 (questioning constitutionality of statute, but holding that "we are barred by the legislature from considering appellant's issues"); *In re D.A.R.*, 201 S.W.3d at 230-31 ("[W]hile we … [question] the practical applications and constitutional validity of this statute, we are barred by the legislature from considering Appellant's points on appeal because they do not appear in Appellant's statement of points or motion for new trial"); *In re S.E.*, 203 S.W.3d 14, 15 (Tex. App.—San Antonio 2006, no pet.) ("[I]n a situation such as this, where no statement of points exists, under the express terms of the statute, there is no contention of error that can be raised that we may consider on appeal"); *In re H.H.H.*, 2006 WL 2820063, at *1 (Tex. App.—Texarkana, Oct. 3, 2006, no pet.) (mem. op.) (same)).

Of course, the initial obstacle to a due process challenge is the court of appeals' waiver holdings.[3] Those courts holding that the appellant has waived constitutional challenges to section 263.405(i) by failing to in-

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[2] The Fifth Court of Appeals did not specifically address the issue of whether the statute is unconstitutional based on its disparate impact upon indigent appellants (as opposed to non-indigent appellants) in termination cases. *In re R.J.S.*, 219 S.W.3d 623 (Tex. App.—Dallas 2007, pet. denied). While the Second Court of Appeals has rejected an equal protection challenge based on disparate impact, it construed the constitutional issue as complaining of the disparate denial of a free clerk's record for indigent appellants upon a trial court finding of frivolousness. *In re K.D.*, 202 S.W.3d 860, 865 (Tex. App.—Fort Worth 2006, no pet.). Accordingly, the issue of whether the statute violates equal protection guarantees because of its disparate impact upon indigent appellants—*i.e.*, the ability to seek appellate relief—may still be viable.

[3] Courts dismiss these appeals for failure to timely file a statement of points on the ground of waiver, not lack of jurisdiction. *See e.g.*, *In re R.J.S.*, 219 S.W.3d 623, 625 (Tex. App.—Dallas 2007, pet. denied); *In re S.E.*, 203 S.W.3d 14, 15 (Tex. App.—San Antonio 2006, no pet.) (holding that court not deprived of jurisdiction but barred from considering error not preserved under subsection (i)). The only court to squarely address the issue whether the issue is waiver or lack of jurisdiction specically held that "[s]ection 263.405, including subsection (i), does not

clude them in a timely filed statement of points ignore the reality that these challenges do not arise until the appellate court has dismissed the appeal. Specifically, the appellant cannot include due process, equal protection, or Sixth Amendment (ineffective assistance) issues in a statement of points because they do not arise until the appellate proceedings. To require the anticipatory inclusion of such issues in the statement of points is not only illogical, but counter to the well-settled ripeness requirement for determination of constitutional issues. *See* *Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852 (Tex. App.—Austin 2004, no pet.) ("This prudential aspect of the ripeness doctrine is particularly important in cases raising constitutional issues.").

The Texas Supreme Court has recently addressed an analogous preservation issue in a termination of parental rights case. *In re K.A.F.*, 160 S.W.3d 923 (Tex. 2005). In *In re K.A.F.*, the appellant's parental rights were terminated, and she filed a motion for new trial and alternatively motion to modify the termination order. *Id.* at 924. Because she was appealing the termination order—an expedited appeal under Texas Rule of Appellate Procedure 26.1(b)—her notice of appeal was due 20 days after the judgment was signed. However, the appellant failed to file her notice of appeal until 74 days after the order was signed. *Id.*

The court of appeals dismissed the appeal for lack of jurisdiction due to the appellant's failure to timely file her notice of appeal. *Id.* The appellant argued on rehearing that the filing of her motion for new trial extended the time to file her notice of appeal to 90 days after the termination order was signed. The court of appeals denied her motion for rehearing. *Id.* at 925.

The appellant filed a petition for review in the Texas Supreme Court raising an ineffective assistance of counsel claim, as well as an issue complaining that the statute providing that appeals in parental rights termination cases are accelerated and governed by the rules of appellate procedure for accelerated appeals was unconstitutional as applied. *Id.* at 928. The Texas Supreme Court held that while the appellant could not have raised the issues in the trial court, she nevertheless waived them by failing to raise them in the court of appeals: "While Carroll's constitutional complaints relate to her appeal and therefore could not have been asserted in the trial court, she was required to raise them in the court of appeals in order to preserve error. Because she did not, her constitutional complaints are waived." *Id.*

By that same token, an appellant in Family Code Section 263.405 cases cannot raise constitutional challenges to the statute based on the court of appeals' dismissal of the appeal in a statement of points, which by necessity must be filed before the appeal is dismissed. Under *In re K.A.F.*, appellants in section 263.405 cases do not waive constitutional challenges by failing to raise them in the trial court, but they must raise them in the court of appeals. *See* *In re R.J.S.*, 219 S.W.3d at 628.

Once the waiver hurdle is successfully navigated, the due process ramifications of Family Code section 263.405 are clear. The United States Supreme Court held in *Santosky v. Kramer* that "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." 455 U.S. 745, 753-54 (1982). In the termination context, due process "turns on a balancing of . . . 'three distinct factors.'" *Id.* at 754. (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Those factors are: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Id.*

In a parental termination case, the private interest affected is the right of a parent to raise his or her child, which is undeniably "an interest far more precious than any property right." *Id.* at 758-59. The Supreme Court has observed that "[w]hen a State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* at 759. The Supreme Court has thus termed the private interest in a parental termination case "a commanding one." *Id.*

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operate, in the absence of a timely filed statement of points, to deprive this Court of jurisdiction over the appeal." In re S.K.A., No. 06-07-00003-CV, 2007 WL 3011091 *3 (Tex. App.—Texarkana, Oct. 17, 2007, no pet. h.). *But see* *In re E.A.R.*, 201 S.W.3d 813, 814 (Tex. App.—Waco 2006, no pet.) (holding that court of appeals lacked jurisdiction to review termination of parental rights due to absence of statement of points).

The second factor identified by the Supreme Court in *Santosky* is "the risk of error created by the State's chosen procedure." In section 263.405 termination cases, the risk of error is substantial. The articulated public policy considerations underlying sections 263.405(b) and (i) are to (1) expedite finality in termination proceedings, and (2) weed out frivolous appeals. However, as reflected by the cases outlined above, multiple appeals have been dismissed not because they were frivolous, but because appointed counsel was unaware of the fifteen-day deadline to file a statement of points: "It appears that the failure to file the statement of points is most often not intentional but rather, it is the result of the failure of the family code to direct parents' attention to the provision. As it stands right now, Family Code section 463.405(b) is a trap for the unwary." *In re R.J.S.*, 219 S.W.3d at 627-28. The fact that so many appeals of termination orders are dismissed for failure to file a statement of points, combined with the fact that the failure to file the statement of points has no bearing on the merits of the appeal, demonstrates that the risk of error created by Family Code sections 263.405(b) and (i) is great indeed.

Finally, the third due process factor identified in *Santosky* is the governmental interest supporting use of the challenged procedure. Again, the governmental interests underlying Family Code sections 263.405(b) and (i) are to (1) expedite finality in termination proceedings and minimize the period of time a child remains in foster care, and (2) weed out frivolous appeals. While these are reasonable governmental interests, case law reflects that the statute attempts to accomplish these goals at the expense of indigent parents' due process rights. The procedure under Family Code sections 263.405(b) and (i) not only deprives indigent parents of an appeal of an order terminating parental rights, but under current case law the statutes foreclose as a matter of law any constitutional challenge relating to the dismissal of an appeal.

Practitioners finding themselves in the unfortunate position of appealing a termination order in the absence of a statement of points should brief the substantive issues in the appellate court relating to the termination order. In light of recent case law, counsel should also brief the constitutional ramifications of dismissing the appeal. Counsel should also provide any further briefing necessary to respond to the State's waiver arguments in a reply brief. Finally, upon dismissal of the appeal for failure to timely file a statement of points, counsel should file a motion for rehearing addressing the constitutional issues. Under *In re K.A.F.*, counsel will have properly preserved the constitutional issues for a petition for review.

By far the most successful constitutional challenge to section 263.405(b) and (i) was sustained by the Sixth Court of Appeals in *In re S.K.A.*, No. 06-07-00003-CV, 2007 WL 3011091 (Tex. App.—Texarkana, Oct. 17, 2007, no pet. h.). In that case, the State petitioned to remove the children from their mother and her paramour. *Id.* at *1. The father, who was incarcerated in Mississippi, received notice of the termination proceedings and transmitted his contact information to the trial court. *Id.* The record did not reflect that the trial court contacted the father during the following ten months, despite the fact that several hearings regarding the children occurred during that time. *Id.*

On July 11, 2006, the trial court set the termination trial for December 11, 2006. *Id.* After the State notified the father of the trial, the father requested a continuance from the State (rather than from the trial court) in a letter. *Id.* The State did not notify the trial court of the letter requesting a postponement of the trial until the December 11 trial. *Id.*

In a letter to the trial court post-marked December 1, 2007, the father requested a continuance and appointed counsel. *Id.* at *2. However, the trial court did not receive the letter until several hours after it had entered a default judgment and terminated the father's parental rights on December 11. *Id.* While the trial court granted the father's request for appointed counsel, the order granting the appointment was not entered until January 2, 2007. *Id.* On January 3, 2007, the day he received notice of his appointment, the father's counsel filed a notice of appeal. *Id.* On January 4, counsel filed "points for appeal," a motion for new trial, and a motion to set aside the default. *Id.* The trial court denied the motion for new trial but held that the father had presented nonfrivolous grounds for appeal. *Id.*

On appeal, the father challenged the constitutionality of subsections 263.405(b) and (i) on the ground that they "in combination and as applied to him—an indigent parent without counsel, despite a request for statutorily mandated appointed counsel—have deprived him of the meaningful judicial revew required under federal due process and Texas due course of law guarantees." *Id*. at *3. In three sentences, and in the face of subsections 263.405(b) and (i), the court of appeals reasoned that because the father had raised his constitutional challenge in his timely motion for new trial—as well as his *un*timely statement of points—and the trial cout had addressed the challenge, it was preserved. *Id*.

After recognizing that the federal and Texas due process guarantees ensure appellate review once the State affords that right, the court of appeals held that a "'rule governing preservation of a complaint' must be reviewed under the procedural due process analysis." *Id*. at *6. The court of appeals then engaged in the above-referenced *Eldridge* analysis and held that (1) the State's interests in economy and efficiency were minimal in light of the father's filing of his statement of points only one week after the deadline and the trial court's opportunity to consider them; (2) the State's interest in "maintaining procedural integrity" was "not compelling" in light of the untimely appointment of the father's counsel after the deadline to file the statement of points had passed; and (3) the risk of erroneously depriving the father of fundamental liberty rights was "too high" when his counsel was not appointed until the deadline for filing the satement of points had passed. *Id*. at *9-10. The court of appeals ultimately held that subsection (i), "in the particular facts of this case, has had a profoundly discriminatory effect." Accordingly, the court of appeals deemed the father's late-filed statement of points timely under subsection (b). *Id*. at *10.

In the absence of common law sustaining less fact-specific constitutional challenges, three potential solutions present themselves. First, the legislature could amend the statute to require that the trial court admonish appointed trial counsel of the requirements of Family Code section 263.405(b), as well as the repercussions of Family Code 263.405(i). This notice should occur simultaneously with the rendition of the final termination order.

Secondly, as suggested by Justice Bill Vance in his concurring opinion in *In re E.A.R.*, 201 S.W.3d 813, 818 (Tex. App.—Waco 1999, no pet.) (Vance, J., concurring), the statute could be amended to require the trial court to hold a hearing on the statement of points, thereby insuring the parties' knowledge of the requirement under Family Code section 263.405. Moreover, requiring a hearing would foster the trial court's actual consideration of the statement of points in deciding whether to grant a new trial and avoid unnecessary and lengthy post-judgment appellate proceedings. Accordingly, the legislature would meet its goal of decreasing post-judgment delay in these cases, while ensuring that appointed counsel is aware of this fast-approaching critical deadline.

Finally, the statute could be amended to include an exception to Family Code section 263.405(i), allowing appellate courts to consider ineffective assistance of counsel claims even in the absence of a statement of points reflecting an ineffective assistance issue. This would also meet the goals of the statute, while preventing indigent parents from being denied access to the appellate process due to mistakes of counsel.

In its current form, section 263.405(i) effectively deprives indigent parents of their parental rights while simultaneously depriving them of the protections of due process and appellate relief. As the Sixth Court of Appeals recognized in *In re S.K.A.*, the need for expediency in termination cases must be balanced with the demands of justice and due process.

Dealing with the Death of a Parent:
Family Code §§ 154.015 and 154.016
by
Marilyn Shell* and Georganna L. Simpson**

This paper will address the recent legislative changes effecting child support upon the death of the obligor. Unfortunately, the changes made by the Legislature raise as many or more questions and problems, than they address and answer. In reality, however, most obligors' estates will not be large enough to pay the claims that will result from an acceleration of child support. Consequently, there may not be many obligees that want to pursue these types of claims and have sufficient money to do so.*

A. The Legislative Changes.

This past legislative session, the Legislature made several revisions to the Texas Family Code ("TFC") and the Texas Probate Code ("TPC") regarding an obligor's child support obligation in the event of the obligor's death. Specifically, the Legislature revised TFC § 154.006 and added TFC § 154.015 and 154.016 and TPC § 322.

1. Revised TFC § 154.006 no longer provides that the child support order terminates on the death of the parent ordered to pay child support. *See* TFC § 154.006. This provision became effective on September 1, 2007, and applies to all child support orders regardless of whether the order was rendered before, on, or after the effective date. Prior to this amendment, the child support obligation (as to future payments) terminated on the death of the obligor unless a court order provided otherwise.

2. New TFC § 154.015 mandates the acceleration of an obligor's unpaid child support obligation upon the obligor's death. Specifically, TFC § 154.015 provides as follows:

> TFC § 154.015. Acceleration of Unpaid Child Support Obligation
>
> (a) In this section, ''estate'' has the meaning assigned by Section 3, Texas Probate Code.
>
> (b) If the child support obligor dies before the child support obligation terminates, the remaining unpaid balance of the child support obligation becomes payable on the date the obligor dies.
>
> (c) For purposes of this section, the court of continuing jurisdiction shall determine the amount of the unpaid child support obligation for each child of the deceased obligor. In determining the amount of the unpaid child support obligation, the court shall consider all relevant factors, including:
>
> (1) the present value of the total amount of monthly periodic child support payments that would become due between the month in which the obligor dies and the month in which the child turns 18 years of age, based on the amount of the periodic monthly child support payments under the child support order in effect on the date of the obligor's death;
> (2) the present value of the total amount of health insurance premiums payable for the benefit of the child from the month in which the obligor dies until the month in which the child turns 18 years of age, based on the cost of health insurance for the child ordered to be paid on the date of the obligor's death;
> (3) in the case of a disabled child under 18 years of age or an adult disabled child, an amount to be determined by the court under TFC § 154.306;
> (4) the nature and amount of any benefits to which the child would be entitled as a result of the obligor's death, including life insurance proceeds, annuity payments, trust distributions, social security death benefits, and retirement survivor benefits; and

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(5) any other financial resource available for the support of the child.

(d) If, after considering all relevant factors, the court finds that the child support obligation has been satisfied, the court shall render an order terminating the child support obligation. If the court finds that the child support obligation is not satisfied, the court shall render a judgment in favor of the obligee, for the benefit of the child, in the amount of the unpaid child support obligation determined under Subsection

(c). The order must designate the obligee as constructive trustee, for the benefit of the child, of any money received in satisfaction of the judgment.

(e) The obligee has a claim, on behalf of the child, against the deceased obligor's estate for the unpaid child support obligation determined under Subsection (c). The obligee may present the claim in the manner provided by the Texas Probate Code.

(f) If money paid to the obligee for the benefit of the child exceeds the amount of the unpaid child support obligation remaining at the time of the obligor's death, the obligee shall hold the excess amount as constructive trustee for the benefit of the deceased obligor's estate until the obligee delivers the excess amount to the legal representative of the deceased obligor's estate.

TFC § 154.015. This new statute became effective on September 1, 2007, and applies only to the estate of a decedent who dies on or after September 1, 2007.

3. **New TFC § 154.016** provides the trial court with the statutory authority to order the child support obligor to obtain a life insurance policy to satisfy the obligor's child support obligation in the event of the obligor's death, which is something that the trial court already had the discretionary authority to do and which many parties did by agreement. Specifically, TFC § 154.016 provides as follows:

TFC § 154.016. Provision of Support in Event of Death of Parent

(a) The court may order a child support obligor to obtain and maintain a life insurance policy, including a decreasing term life insurance policy, that will establish an insurance-funded trust or an annuity payable to the obligee for the benefit of the child that will satisfy the support obligation under the child support order in the event of the obligor's death.

(b) In determining the nature and extent of the obligation to provide for the support of the child in the event of the death of the obligor, the court shall consider all relevant factors, including:

(1) the present value of the total amount of monthly periodic child support payments from the date the child support order is rendered until the month in which the child turns 18 years of age, based on the amount of the periodic monthly child support payment under the child support order;
(2) the present value of the total amount of health insurance premiums payable for the benefit of the child from the date the child support order is rendered until the month in which the child turns 18 years of age, based on the cost of health insurance for the child ordered to be paid; and
(3) in the case of a disabled child under 18 years of age or an adult disabled child, an amount to be determined by the court under TFC § 154.306.

(c) The court may, on its own motion or on a motion of the obligee, require the child support obligor to provide proof satisfactory to the court verifying compliance with the order rendered under this section.

TFC § 154.016. This statute became effective on September 1, 2007, and applies to an order for child support issued before, on, or after September 1, 2007.

4. Revised TPC § 322 now includes potential claims arising against the obiglor's estate under new TFC § 154.015. Specifically, TPC § 322 now provides in pertinent part as follows:

> TPC § 322. Classification of Claims Against Estates of Decedent.
>
> **Class 4.** Claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Subchapter F, Chapter 157, Family Code, and claims for unpaid child support obligations under TFC § 154.015.

TPC § 322. This amended provision applies to estates of decedents who die on or after September 1, 2007. Class 4 claims fall behind claims for funeral expenses (Class 1); expenses of administra-tion (Class 2); and secured claims for money (Class 3). *See id.*

B. What Happens on the Death of Obligor Under Family Code Section 154.015?

1. Whose Claim is It? TFC § 154.015, subsection (e), specifically allows only the obligee to file a claim on behalf of the child against the deceased obligor's estate. Who is the obligee? The Family Code defines the obligee as "a person or entity entitled to receive payments of child support, including an agency of this state or of another jurisdiction to which a person has assigned the person's right to support." TFC § 101.021. If there is a final child support order, presumably the obligee should be obvious? However, does this mean that only the conservator who is actually receiving child support at the time of the death of the conservator who is actually paying support under the child support order be designated as the obligee? What if the decree provides that both conservators have the right to receive child support payments even though only one conservator actually receives child support payments? What if the child support order provides that each conservator pay one-half of extracurricular activities and, if the conservator that is not receiving monthly child support payments but is entitled to receive reimbursements for payments made under these provisions meet the definition? What if the obligee is the parent who has been paying the health insurance premiums, does this turn the obligor into an obligee in the event of the obligee's death with the right to bring a claim for at least the amount of the health insurance premiums under TFC § 154.015?

A more complicated question is what if at the time of the conservator's death there are only temporary orders in place regarding conservatorship and child support? Does a temporary joint conservator receiving temporary child support meet the definition of an obligee as that term is used under TFC § 154.015? Does the answer change if neither conservator was designated as the conservator with the exclusive right to determine the child's primary residence and if the surviving conservator was receiving child support solely as an offset because of the shared possession scheme or if the monies that the surviving conservator was receiving were not specifically designated as child support? What if the decree only designates the parties as parent conservators without either having the right to establish the child's primary residence both having the right to receive child support but since only one of the parents has access to health insurance that parent has the obligation to carry the insurance as child support? Who is the obligee or are both obligees?

TFC § 154.015 should be contrasted with TFC § 154.013, which appears to allow a number of individuals to lay claim to current child support payments in the event of the obligee's death including:

a. a person, other than a parent, who is appointed as managing conservator of the child;
b. a person, including the obligor, who has assumed actual care, control, and possession of the child, if a managing conservator or guardian of the child has not been appointed;
c. the county clerk, as provided by TPC § 887 in the name of and for the account of the child for whom the support is owed;
d. a guardian of the child appointed under Chapter XIII, Texas Probate Code, as provided by that code; or
e. the surviving child, if the child is an adult or has otherwise had the disabilities of minority removed.

Compare TFC § 154.013 *with* TFC § 154.015.

Another question left unanswered by TFC § 154.015 is how long does the obligee, once determined, have to file such a claim in the family court and present it to the probate court? Additionally, this statute raises the question is the obligee a creditor of obligor's estate and, if so, do the rules that apply to other creditors under the Probate Code also apply to the obligee? Specifically, if the obligor's estate's representative sends out notice under TPC § 294 to the obligee, is the obligee's claim barred if it is not presented within four months of the notice? *See* TPC § 294(d). Also, presentation of this type of claim to the Probate Court must be supported by an affidavit and be in a particular format to be accepted. *See* TPC § 301; *see also* Jamieson, *Creditors' Claims and Allowances in Decedents' Estates*, Building Blocks of Wills, Estates & Probate, State Bar of Texas CLE, ch. 5.1 (2007). As further discussed below, this may require the obligee to do discovery and introduce additional evidence at the hearing on the obligee's TFC § 154.015 claim.

2. Where Should Suit be Filed? Suit should be filed in the court of continuing jurisdiction, which is the court that entered the order regarding conservatorship, possession of and access to the obligor's child, or support of the obligor's child. *See* TFC § 154.015(c) and §§ 155.001 *et. seq.* If there are multiple obligees, there may be multiple courts of continuing jurisdiction and multiple claims and suits. The statute, however, states "the court of continuing jurisdiction shall determine the amount of unpaid child support for each child of the deceased obligor." Does this mean that each court of continuing jurisdiction must make a finding as to each child of the deceased obligor whether that child is before that court or not? Obviously, if there are multiple obligees and multiple children, any determination of child support made by a court could significantly impact any other claim for child support. The total amount of the claims from multiple obligees and children could far exceed the obligor's estate, so even assuming a pro rata pay out of the claims once they are filed in the probate court, if one obligee is able to get a significantly higher judgment, this could severally and negatively impact other deserving children of the deceased obligor.

In conjunction with filing this claim, the obligee may also be able to pursue a claim for a family allowance in the probate court. Specifically, TPC § 286 authorizes the "surviving spouse or any person who is authorized to act on behalf of the minor children of the deceased" to apply for a family allowance. The amount of the family allowance is an amount sufficient for the maintenance of such surviving spouse and minor children for one year from the time of the death of the decedent. No family allowance shall be made for the minor children when they have property in their own right adequate to their maintenance. The priority of this claim falls just behind a Class 1 claim in the priority of claims. *See* TPC §§ 286, 287, 290, 291. Does TPC § 286 authorize the obligee to share in the family allowance with the surviving spouse in addition to enforcing the claim for unpaid child support obligation? Would the family court determination of the claim for unpaid child support be stayed pending the probate court determination of the family allowance, or vice versa?

3. Who should be served? TFC § 154.015 makes no provisions for service. Logic would suggest that the obligee should serve all interested parties. This would necessarily include the obligor's estate to put it on notice that a claim is being made so that the estate may enter an appearance to challenge the amount of the obligee's claim. As noted above and further discussed below, this may require that the claim be accompanied by an affidavit and to be in a certain format. *See* TPC. § 301; *see also* Jamieson, *Creditors' Claims and Allowances in Decedents' Estates*. This, of course, presumes that there is an estate to serve. If a probate action has been filed and TPC § 294(d) notice has not been received by the obligee, then notice to the probate court that a suit in the family court is pending would at least put that court on notice of the pending cause of action. As discussed above, the obligee should also consider seeking a family allowance if a probate action has been filed. *See* TPC §§ 286, 287, 290, 291. If no probate action has been filed, then consideration should be given to serving the widow or widower, and any other heirs, if known. Also, since the obligee's claim is being filed on behalf of the child, if the obligee is not in actual care, control, and possession of the child, then the child's representative should be served. There also may be some strategic benefit to serving all other obligees to put those obligees on notice of the obligee's claim. The purpose for this would be to encourage those obligees to file their own claims so that matters could move forward more quickly in the probate court. Otherwise, if there are multiple obligees, does the probate court have to wait for all obligees to file and obtain a final judg-

ment as to their claims before proceeding with distributing monies to any obligees? Of course, if the obligee that you are representing is the only party to make a claim, that obligee is more likely to get all or at least a larger part of that obligee's claim if that obligee does not have to fight additional claimants.

4. Who has the Burden of Proof? The obligee has the burden to put on a prima facie case that, at the time of obligor's death, there was a remaining child support obligation due to the obligee and the amount of that obligation. Once the obligee meets this burden, the burden shifts to the obligor's estate and other third-party defendants, if any, to establish any offsets, a different discount rate, or any other matter that may affect the amount of the obligee's claim. The problem arises, however, when the obligor's estate does not enter an appearance or any other party challenges the obligee's claims. Since any claims presented to the probate court pursuant to section 301 have to be supported by an affidavit that specifically states "that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed," does the obligee, in addition to establishing the amount of the claim, also have to provide testimony or other evidence that the obligor's estate is not entitled to any offsets against that claim for monies provided for the child by life insurance proceeds, annuity payments, trust distributions, social security death benefits, and retirement survivor benefits. *See* TEX. FAM. CODE § 154.015. Does this mandate that the obligee conduct some type of discovery to make this determination?

5. What Evidence is Needed?

a. "Unpaid Child Support Obligation" – What does it mean? The statute does not define "unpaid child support obligation." Therefore, it is unclear as to what may be included under that term. Under the relevant factors, when the statute mandates a present value, it only requires the court to present value the monthly periodic child support payments and the health insurance premiums. Does this mean that the obligee is limited to accelerating only those monthly payments and the health insurance premiums? Or, for example, should private school tuition be included if it was provided for in the child support order, as child support, in addition to the monthly child support? What if the decree provides for $1000 per month in child support, plus 20% of any year-end bonus received by the deceased obligor each year, can the yearly bonus be included in the calculation of the accelerated child support? Are unreimbursed medical expenses that may become due in the future included in the definition? What about extracurricular activities that are referenced in the decree and of which the obligor had a duty to pay one-half?

b. "Obligor's Estate" – What does it mean? For this term, the statute references TPC § 3, which provides in pertinent part as follows:

> (*l*) "Estate" denotes the real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by an accretions and additions thereto (including any property to be distributed to the representative of the decedent by the trustee of a trust which terminates upon the decedent's death) and substitutions therefore, and as diminished by any decreases therein and distributions therefrom.

TPC § 3(*l*). Unless the estate is designated as a beneficiary, life insurance proceeds, retirement accounts, and retirement benefits are not payable to the estate and; therefore, these benefits are not part of the obligor's estate. Typically, most of an individual's personal wealth consists of their retirement accounts and their homestead, which may be subject to a life estate in favor of a new spouse. Consequently, there may be little or no estate from which the obligee may collect any claim obtained.

c. "Present Value" – How is it determined? Present value is calculated by taking the full amount of a claim for future damages (child support) and multiplying by a discount rate. The discount rate can vary depending on a number of factors. Basically, the calculation of the present value of future "child support" requires two elements:

- The amount of the future child support must be projected; and

- Future interest, or discount rates, must be projected.

The effect of changing the discount rate can be quite significant if child support goes far into the future. As can be seen in the following table, which reflects only the child support due for one child for an obligor with $7500 of monthly net resources, the effect of the discount rate varies with the number of future years for which child support is being sought. With more years, the effect of changing the discount rate increases. It should be noted that the lower the discount rate, the larger the present value, and the larger amount of money the obligor's estate will have to pay to the obligee to compensate the obligee for future child support payments. Accordingly, it may be worth it for both the obligee and the obligor to hire an economist to address this part of the suit.

Present Value of $18,000.00 per year			
	Discount Rate		
Years	6.0%	4.0%	2.0%
4	$62,372	$65,338	$68,539
8	$111,776	$121,190	$131,858
12	$150,908	$168,932	$190,356

Determining the proper discount rate is a whole topic on its own. For an in depth discussion of discount rates and the factors that should be considered, the author refers the readers to an article by Stephen Horner, Ph.D., *Factoring Inflation and Present Value Discounts into Estimates of Future Discounts*, Advanced Expert Witness II Course, State Bar of Texas CLE, ch. 8 (2002).

d. <u>What factors may the court consider in determining the amount to award the obligee in future child support?</u> In making its determination as to the amount of the unpaid child support obligation for each child of the deceased obligor, the statute mandates that the trial court consider all relevant factors, including:

(1) present value of the total amount of monthly periodic child support payments that would become due between the month in which the obligor dies and the month in which the child turns 18 years of age, base on the amount of the periodic monthly support payments under the child support payments in effect on the date of obligor's death;
(2) the present value of the total amount of health insurance premiums payable for the benefit of the child from the month in which the obligor dies until the month in which the child turns 18 years of age, based on the cost of health insurance for the child ordered to be paid on the date of the obligor's death;
(3) the nature and amount of any benefit to which the child would be entitled as a result of the obligor's death, including life insurance proceeds, annuity payments, trust distributions, social security death benefits, and retirement survivor benefits; and
(4) any other financial resource available for the support of the child.

TFC § 154.015. The statute, however, clearly indicates that these are not the only "relevant factors" that may be considered, which raises the questions:

- can anticipated increases in child support be considered?
- can the cost for private school be included if this cost was denominated as additional child support in the decree? What if it was in the decree but designated as a contractual obligation only?
- can the costs of extracurricular activities be considered? What if obligor had agreed to pay these expenses or some portion thereof under the Decree? What if the child showed a particular talent that obligor had been supporting while alive?
- can future unreimbursed medical expenses be included, especially if there has been a history of these expenses?

- what discount rate should be used to calculate present value and should it be applied to the entire claim or just a portion of the claim?
- does any other financial resource available for the support of the child include property owned or inherited by the child, including property inherited from the obligor by the child, if so, which claim takes priority – the obligee's claim or the child's claim since any monies left to the child will necessarily be decreased by the obligee's claim?
- should the obligee's income be taken into consideration?
- if the obligee has remarried, should the obligee's new spouse's income be taken into consideration?

e. What evidence should the obligee present? Under TFC § 154.015, the obligee needs to establish the following to be entitled to a claim for accelerated child support:

- a valid child support order;
- a valid medical support order;
- date of the obligor's death;
- date on which the child turns 18 years of age;
- date on which the medical support order terminates for each child; and
- the discount rate to be used to determine the present value and why and what portion of the claim should be subject to a present value.

In addition to the above evidence, since the statute is unclear as to what other factors the trial court may consider in determining the amount of the claim, the obligee should also put on evidence of the following:

- date on which the child is due to graduate from high school;
- other child-support-related matters mentioned in the child support order;
- history of child support increases since the original order;
- history of increases in health insurance premiums in this matter as well as in the industry in general;
- history of unreimbursed medical expenses for the child at issue;
- history of other support paid by the obligor prior to the obligor's death for this child; and
- other matters that specifically relate to future child support needs.

If the trial court disallows any of the above evidence at the hearing, the attorney should ask to make an offer of proof to protect the record for appeal. *See* TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.1(a)(1)(B).

In the event that the obligor's estate fails to appear at the hearing, the obligee should also consider putting on some evidence that the claim is just and that all legal offsets, payments, and credits known to the obligee have been allowed so that mandates of Probate Code Section 301 are fulfilled when the claim is presented to the probate court. In effect, does the probate code require that the obligee conduct of discovery in order to fulfill this requirement? If so, how much discovery is sufficient? Or, is it the obligor's estate's duty to come forward with any offsets, payments, or credits? What if the obligor's estate failed to enter an appearance in the family court even though properly served, can the obligor's estate subsequently challenge the obligee's claim and claim any additional offsets or credits in the probate court?

If this is not the first claim filed for accelerated child support against the obligor's estate, evidence presented in the earlier cases should possibly also be presented in this obligee's case especially if the earlier court used a low discount rate and gave a higher award based on evidence of child support other than the periodic monthly child support payments and health insurance premiums.

f. What evidence should the obligor's estate present?

If the obligor's estate makes an appearance, then the obligor should put on the following evidence:

- any challenge to the validity of the child or medical support order under which obligee is seeking support;
- the existence of any additional children for which other obligees are making claims or potentially may make claims;
- the discount rate to be used to determine the present value of the total amount claimed;
- the nature and amount of any benefit to which the child would be entitled as a result of the obligor's death, including life insurance proceeds, annuity payments, trust distributions, social security death benefits, and retirement survivor benefits;
- the obligee's financial resources to support the child;
- any family allowance received by obligee; and
- any other financial resources available to support the child (i.e. the obligee's spouse, grandparents, the child's own earnings or income from investments, TUGMA accounts, health savings account, other trust funds available to the child, the child's inheritance from the deceased obligor).

If this is not the first claim filed for accelerated child support against the obligor's estate, evidence presented in the earlier cases should be reviewed and possibly be presented on behalf of the obligor's estate in the current matter especially if the earlier court used a higher discount rate and limited the size of its award to the periodic monthly child support payments and health insurance premiums.

6. Is the Obligee entitled to Costs or Attorney's Fees? Since the new statute falls under Title V of the Family Code, then Sections 106.001 and 106.002 provide for the award of costs and attorney's fees. TEX. FAM. CODE §§ 106.001, 106.002. Given the sizeable nature of the potential claims in these situations, however, many attorneys may be willing to take these cases on a contingency basis especially if the deceased obligor has a sizeable estate.

C. How Should the New Statutes be Addressed at the Time of the Child Support Order?

1. Life Insurance. In addition to TFC § 154.015, the Legislature also added TFC § 154.016 to the Family Code. TFC § 154.016 permits a court to order a child support obligor to obtain and maintain a life insurance policy, including a decreasing term life insurance policy, that will establish an insurance-funded trust or an annuity payable to the obligee for the benefit of the child that will satisfy the support obligation under the child support order in the event of the obligor's death. TFC § 154.016. Relevant factors in determining the nature and extent of this obligation include the present value of the periodic child support payments until the child would turn eighteen and the health care premiums until the month the child would turn eighteen, based on the cost of health insurance for the child ordered to be paid. *Id.* It is also important to note that, unlike in Section 154.015, under Section 154.016, relevant factors do not include "any other financial resources available for the support of the child." *Id.* Once again, however, with the use of the word "including" prior to the list of factors, the Legislature does not appear to be limiting the factors that the court may consider to just those listed. *Id.* Consequently, the obligee should try to include as much evidence as possible to raise the amount of the future child support and the obligor should include evidence of any governmental benefits or other benefits the child would receive as a result of the obligor's death and any, even though not specifically listed, other financial resources that would be available to the child. Once again, the discount rate becomes an important factor in this calculation.

The language that addresses the order regarding life insurance should also be carefully considered. Currently the Family Law Practice Manual uses the following language in regards to life insurance:

Life Insurance

As additional child support, IT IS ORDERED that obligor shall purchase and, as long as child support is payable under the terms of this decree, maintain in full force and effect at obligor's sole cost and expense a life insurance policy insuring the life of obligor, naming obligee as primary beneficiary *as trustee for the benefit of the child* that on obligor's death will pay to obligee an amount not less than $_____. Obligor is

> ORDERED, within thirty days after receiving written request, to furnish written proof from the life insurance company confirming the coverage required under this decree.

TEX. FAM. LAW PRAC. MANUAL Form 17, § 10.F.15 (emphasis added). A divorce decree or other order or life insurance policy designating a primary beneficiary "as trustee for the benefit of the child" might have legal consequences under the Texas Trust Code that should be explained to the client. For example, if a "trust" as defined in the Texas Trust Code is created, then the trustee would have the fiduciary duties imposed on a trustee, including but not limited to the duties now expressly imposed by the Trust Code among them Sections 113.051 (administer the trust in good faith according to the trust instrument, the statute and common law), 113.053 (prohibitions on self-dealing), 113.058 (non-corporate trustee provides a bond payable to the trust estate or registry of the court) , 113.151 (if demanded, deliver an accounting) and the myriad investment provisions. TEX. TRUST CODE §§ 113.051, 113.053, 113.058, 113.151. If the trustee had a duty as a parent to support the child, would payment of trust funds by the trustee, would payment of trust funds by the trustee to himself or herself be considered improper use of trust funds or a proper use to replace the obligor's child support?

The above quoted life insurance clause may be sufficient to create a trust under section 112.001 (requiring a declaration or transfer) and section 112.002 of the Texas Trust Code (trust created only if settlor manifests an intention to create a trust). TEX. TRUST CODE §§ 112.001, 112.002. To be an enforceable trust, the divorce decree or other order must comply with the statute of frauds in Texas Trust Code section 112.004. TEX. TRUST CODE § 112.004. A trust cannot be created unless there is trust property. TEX. TRUST CODE § 112.005. Whether or not the divorce decree creates a trust for the life insurance proceeds, similar questions posed above with respect to a "constructive trustee" might arise.

The questions raised by the new provisions should be addressed at the time of the divorce and later when drafting a judgment for unpaid child support. Consider modifying the above life insurance provision in a divorce decree by changing "for the benefit of the child" to "to be administered in accordance with the Child Support Trust Agreement attached to this decree of divorce." If the parties do not agree to a separate trust instrument, consider altering the life insurance clause to clarify that the life insurance is intended to replace the unpaid child support – for example, change "for the benefit of the child" to "for unpaid child support to be determined by the court" or "in full satisfaction of the unpaid child support obligation" and state that an express trust is not intended.

If the parties intend to create a trust for life insurance proceeds, the better practice is a trust instrument meeting all the requirements of the Trust Code and with express provisions for the trustee's powers and duties, distributions of principal and income, and termination of the trust. However, if the divorce decree is intended as an express trust, at a minimum then the divorce decree should state that an express trust is created, be signed by the settler or the settlor's authorized agent to comply with the statute of frauds, transfer legal title to property to the trustee (or if a nominal sum such as $10 is transferred, attach to the decree evidence of delivery of cash to the trustee), identify the property transferred in trust to the trustee, be signed by the trustee in acceptance of the trust and contain a distribution provision such as "in the trustee's discretion for the health, education, maintenance and support of the child until the child reaches age 18, when the remaining trust property shall be distributed to the child outright and free of trust."

If possible, the obligor should also request that the obligee be required to take out a life insurance policy in the event of the obligee's death for an amount equivalent to what the obligee would pay in guideline child support if ordered to do so. Even though the court may not be able to order this at present, unless the parties agree, it should be requested under the provisions in the Family Code that require both parties to provide support for the child. This statute could be used to argue that this was the Legislature's real intent and to hold otherwise causes equal protection problems as detailed below. Additionally, the obligor should argue that, for the purposes of future child support, the cost of the life insurance premiums should be a factor that the court considers in setting the child support.

2. Child Support Obligation in Event of Death. Given these new statutes, if you are the attorney representing the obligor, great care should be taken to explain to the obligor what may occur upon the obligor's death especially if a medium to large estate may be involved. There may be more reasons than ever before

not to agree to additional payments on behalf of the children being characterized in the nature of child support. Perhaps a better method is to characterize all additional voluntary payments as contractual in nature that terminate on the happening of specific events, one being the death of the obligor.

If the parties are entering into an Agreed Decree, it is unclear if they can also reach an agreement as to the child support obligation in the event of either parties' death. Can the obligee agree to take a set amount of child support upon the obligor's death and waive the obligee's rights under Section 154.015 or does this equate to an unenforceable contract as to children? What if the parties' agree and the court then orders that, in the event of death, the obligee will receive a set amount based upon some agreed upon calculation? Can the parties' agree to a discount rate? Can the parties' agree that the support would continue until the child turns 18 and graduates from high school? Can the parties agree that monies would be placed monthly in an account for the child and that, in the event of the obligor's death, whatever monies were in that account would satisfy the child support obligation? In other words, can the parties be creative for estate planning purposes or are they now limited to the remedies provided by either TFC § 154.015 or TFC § 154.016.

D. Other Issues.

1. Are the New Family Code Sections Constitutional? Although the Texas Family Code provides that both parents have a duty to support their children, both of the new Family Code Sections address only one parent's duty to support the child upon death – that being the obligor. The Family Code makes no provision for child support payments upon the death of the obligee. Most often, upon the death of the obligee, the full burden to support the parties' child will fall upon the obligor without any contribution from the obligee's estate. Even if the burden falls on some other third party, there are no provisions in the Family Code to seek support, in addition to any life insurance proceeds or other benefits, if any, that the child may receive as a result of the obligee's death from anyone other than the obligor. Since both of these statutes treat obligors and obligees differently, both of these statutes may be unconstitutional under the equal protection clauses of both the United States and Texas Constitutions. In fact, for this reason, the whole child support scheme set forth in the Family Code may be unconstitutional since there is no specific support obligation imposed on the obligee at the time of the entry of the child support order or that any type of determination be made as to the obligee's net resources and child support obligation in the event of the obligee's death. Consequently, it might be time for the Legislature to consider imposing an obligation on both the obligor and the obligee to provide for life insurance in the event of their death or for an obligation to be imposed upon the obligee's estate based upon the obligee's net resources at the time of the entry of the child support order and for that obligation to be accelerated in the same manner as the deceased obligor's child support obligation.

Additionally, these statutes treat children of divorced parents differently from children of non-divorced parents and divorced parents differently from non-divorced parents. For example, if the obligor remarries and subsequently has children, then dies with a significant outstanding child support obligation owing to the obligee, the obligor's new wife and new children may be left with only the right to seek a family allowance for a period of one year and the homestead, while the obligor's and the obligee's children collect the bulk of the deceased's obligor's non-exempt estate. *See* TPC §§ 286, 270. TPC § 320 gives a family allowance priority of payment over Class 4 claims for unpaid child support obligations.

2. What Duties Does the Obligee Have Once the Obligee Receives the Accelerated Child Support and, What Claims, if any, does the Child Have? Finally, TFC § 154.015 does not address the duties of the obligee with respect to any funds received as "constructive trustee for the benefit of the child" from the estate. *See* TFC § 154.015. Under Texas Trust Code Section 111.003, a "trust" is an express trust only and does not include a constructive trust or a resulting trust. TEX. TRUST CODE § 111.003. Will principles of equity require the constructive trustee to segregate and invest these funds and to make periodic "child support" payments to herself or himself? Can the constructive trustee be required, in a subsequent SAPCR order, to turn these constructive funds over to a new obligee? Which court would make this determination – the probate court or the family court that has continuing, exclusive jurisdiction over the children? Does the child, upon reaching majority, have a cause of action against the constructive trustee for an equitable accounting or for misuse of the funds? Again, if

so, where is suit filed? What if there are multiple obligees and multiple children? What if the money is gone? What if the obligee dies after receiving the money? Since there is nothing in the statute that mandates an accounting of the monies received from the obligor's estate, is the obligee free to bequeath these monies to a third party leaving the child with only the right to pursue a family allowance for one year in the probate court?

If the obligor makes the child a beneficiary of the obligor's estate, TFC § 154.015 puts the child's interest in direct conflict with the obligee's interest. The obligee's claim would necessarily decrease the child's inheritance from the obligor. In this case, must the court appoint a guardian ad litem to protect the child's interest? Does the child have the right to an independent cause of action against the obligee to protect the child's interest in the obligor's estate? Should the child's claim be filed in the court of continuing jurisdiction or in the probate court?

What happens if the child dies before reaching the age of 18 or enlists in the military or has his or her disabilities removed? Does the obligee have to return any monies to the obligor's estate? Does the obligee have to give the money to the child?

E. Conclusion.

In conclusion, although the Legislature may have had the best of intentions, these new statutes raise numerous questions and issues that will undoubtedly lead to litigation that may have the effect of leaving even less to support the child and lead to lengthy and costly litigation that may tie up the obligor's estate for years. Accordingly, until a statute is drafted that addresses the numerous questions and issues raised above, the Legislature should seriously consider repealing the above statutes in its next session.

Family Law Appeals Distinguished
by
Michelle May O'Neil*

Although family law is considered a civil case and is covered under the civil rules generally, there are several distinctions between a family law appeal and a standard civil appeal.

Findings of Fact

Most requests for findings of fact in a family law case fall under the civil rules generally. However, some of the specific findings have shorter deadlines. Failure to comply with these deadlines may result in difficulty presenting error to the court of appeals on that issue.

Child Support

Generally, findings of fact must be requested within 20 days after the date the final judgment is *signed*. Tex. R. Civ. P. 296. However, if a party wishes to have the court make findings regarding a child support order, the party must either make an oral request for the findings made in open court during the hearing[1] or file a written request for the child support findings within 10 days of the date of the *hearing*. TFC §154.130(a). If the trial court deviates from the child support guidelines, then the trial court *must* make the findings, regardless of whether a party requests them. *Id.* The required child support findings are set out in the statute. TFC §154.130(b).

Possession Order

Where the possession times by each parent are contested, and the court's order varies from the standard possession schedule set out in the Texas Family Code, findings must be requested orally in open court or not later than 10 days after the date of the *hearing.*[2]

Division of Property

The deadline for requesting findings of fact regarding characterization, valuation, or division of property, or any other order not specifically mentioned is the same as for civil cases generally. TFC §6.711.

Standards of Review

The purpose of the standard of review at the appellate level is similar to the burden of proof at the trial court level. It provides the height of the hurdle to be jumped before the appellate court starts listening. Evaluating the standard of review in a family law case can be confusing. Where the trial judge renders a decision, the standard of review is generally abuse of discretion. However, if there is a jury trial, there will be certain issues that the jury decides and certain issues that will remain within the province of the judge. In such a scenario, there may be multiple standards of review to be evaluated, depending on the error alleged.

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[1] It goes without saying that the request for findings made in open court should be on the record. Otherwise, there is no proof that the findings were requested.

[2] See footnote 1.

Abuse of Discretion Standard

The general standard of review in a family law case when reviewing a bench trial decided on the merits is abuse of discretion. This standard applies to most substantive decisions made by a trial judge on issues like property division, conservatorship, possession and access, maintenance, or child support. *See* Norris v. Norris, 56 S.W.3d 333, 337 (Tex. App. – El Paso 2001, no pet.); *see also* Lopez v. Lopez, 55 S.W.3d 194, 198 (Tex. App. – Corpus Christi 2001, no pet.).

In order to find an abuse of discretion, the appellate court must find that the trial court's decision was arbitrary and unreasonable. In reviewing a judge's decision on the merits, most of the courts of appeals agree that sufficiency of the evidence is not a separate ground for error, but is a part of the analysis of abuse of discretion when reviewing a trial court's decision on the merits. *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex. App. – Amarillo 1995, writ denied); *In re C.R.O.*, 96 S.W.3d 442, 447 (Tex App. – Amarillo 2002, no pet.).

Justice Ann McClure of the El Paso Court of Appeals applies a hybrid analysis to the abuse of discretion standard, which includes analysis of the grounds of sufficiency of the evidence.

In applying the abuse of discretion standard, an appellate court must engage in a two-pronged inquiry:

(1) whether the trial court had sufficient evidence upon which to exercise its discretion; and,
(2) whether the trial court erred in applying its discretion.

Lindsey v. Lindsey, 965 S.W.2d 589, 592 (Tex. App. – El Paso 1998, no pet.); *C.R.O.*, 96 S.W.3d at 447.

Commentators perceive a difference between the general rule that sufficiency of the evidence is a part of the abuse of discretion standard of review and Justice McClure's methodical approach. *See* James W. Paulsen, *Family Law: Parent and Child*, 52 SMU Law Rev. 1197, 1223-24 (1999). Justice McClure's analysis has been accepted by the Houston 14th, Austin, Amarillo, and Eastland courts of appeals. *Evans v. Evans*, 14 S.W.3d 343 (Tex. App. – Houston [14th Dist.] 2000, no pet.); *Schlafly v. Schlafly*, 333 S.W.3d 863 (Tex. App. – Houston [14th Dist.] 2000, pet denied); *Zeifman v. Michels,212 S.W.3d 582, 587-88 (Tex, App. – Austin 2006, pet. denied); Echols v. Olivarez*, 85 S.W.3d 475, 477-78 (Tex. App. – Austin 2002, no pet.); *C.R.O.*, 96 S.W.3d at 447; *In re B.A.S.*, 2007 WL 2674815 (Tex. App. – Eastland 2007, no pet.) (not designated for publication). To the contrary, the Corpus Christi Court of Appeals has specifically declined to apply this method of analysis. *Zorilla v. Wahid*, 83 S.W.3d 247, 252 fn. 1 (Tex. App. – Corpus Christi 2002, no pet.).

Interestingly, Justice Priscilla Owen has opined that factual sufficiency may not exist under an abuse of discretion standard:

> Under an abuse of discretion standard, courts of appeals do not have the option of remanding a case if the trial court's decision was supported by some evidence but was against the great weight and preponderance of the evidence [factual sufficiency standard]. An appellate court may not attempt to reconcile disputed factual matters under an abuse of discretion standard. Under that standard, a reviewing court must defer to the trial court's resolution of factual issues, and may not set aside the trial court's finding unless the record makes it clear that the trial court could reach only one decision [legal sufficiency standard].

In Re Doe 2, 19 S.W.3d 278, 289 (Tex. 2000) (Owen, J., concurring) (citations omitted). Thus, following Justice Owen's logic, only legal sufficiency is considered in reviewing the evidence for an abuse of discretion. Regardless, courts of appeals continue to conduct the factual sufficiency analysis in abuse of discretion reviews.

Sufficiency of the Evidence Standard

A jury's decision on the merits of a family law case is reviewed on a straight sufficiency of the evidence challenge. In applying the sufficiency of the evidence to the abuse of discretion standard, the sufficiency analysis is the same. In that situation, a judge's findings of fact are given the same weight as a jury's decision. *Lindsey*, 965 S.W.2d at 591. Legal sufficiency issues assert a complete lack of evidence on an issue. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App. – Amarillo 1988, writ denied). The remedy for legally insufficient evidence is to render judgment. *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176, 176-77 (Tex. 1996); *Buzbee v. Buzbee*, 870 S.W.2d 335, 340 (Tex. App. – Waco 1994, no writ). Factual sufficiency complains that evidence is so slight, or counterveiling evidence is so strong, that the finding is clearly wrong and manifestly unjust; or, that the finding is against the great weight and preponderance of the evidence. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The remedy for factually insufficient evidence is to remand the case to the trial court for a new trial. *Prather v. Brandt*, 981 S.W.2d 801, 807 (Tex. App. – Houston [1st Dist.] 1998, pet. denied).

Special Family Law Issues

Although family law is similar in many ways to other civil cases, there are aspects of family law that make it unique. Some of these unique areas have special considerations on appeal.

Temporary Orders and Injunctions

Family law temporary orders, temporary restraining orders, and temporary injunctions are not subject to interlocutory appeal. TFC §§ 6.507 and 105.001(e). The appropriate remedy is mandamus. *Dancy v. Daggett*, 815 S.W.2d 548 (Tex. 1991); *In re Lemons*, 47 S.W.3d 202, 203-204 (Tex. App. – Beaumont 2001, orig. proceeding).

At first glance, there appears to be a conflict between the Civil Practice and Remedies Code provisions regarding interlocutory appeal of an order granting temporary injunction and the Family Code provisions prohibiting interlocutory appeals in such instances. However, the interpretation has been that the specific statute in the Family Code trumps the general provisions of the Civil Practice and Remedies Code, which makes interlocutory appeal unavailable. *Cook v. Cook*, 886 S.W.2d 838 (Tex. App. – Waco 1994, orig. proceeding). Further, even where the injunctive relief granted varies from the standardized orders allowed in the Family Code, it appears that the Family Code will prohibit interlocutory appeals. *See Moreno v. Ruiz*, 1997 WL 214831 (Tex. App. – San Antonio 1997, no pet.) (not designated for publication).

Protective Orders

There is a split between the courts of appeals regarding whether a protective order is appealable through direct appeal or only mandamus. A majority of the appellate courts considering the issue have concluded that a protective order is akin to a permanent injunction, and is, therefore, appealable if it disposes of all parties and issues. *Smith v. Smith*, 2005 WL 608190, *1 (Tex. App. – Eastland 2007, no pet.)(not designated for publication); *Vongontard v. Tippit*, 137 S.W.3d 109, 110 (Tex. App. – Houston [1st Dist.] 2004, no pet.); *Ulmer v. Ulmer*, 130 S.W.3d 294 (Tex. App. – Houston [14th Dist.] 2004, no pet.); *Kelt v. Kelt*, 67 S.W.3d 364, 366 (Tex. App. – Waco 2001, no pet.); *Cooke v. Cooke*, 65 S.W.3d 785, 787-88 (Tex .App. – Dallas 2001, no pet.); *Striedel v. Striedel*, 15 S.W.3d 163, 164- 65 (Tex. App. – Corpus Christi 2000, no pet.); *In re Cummings*, 13 S.W.3d 472, 475 (Tex. App. – Corpus Christi 2000, no pet.); *Winsett v. Edgar*, 22 S.W.3d 509, 510 (Tex. App. – Fort Worth 1999, no pet.); *James v. Hubbard*, 985 S.W.2d 516, 518 (Tex. App. – San Antonio 1998, no pet.). Further, the Austin Court clarified that family-violence protective orders that dispose of all parties and issues are final and appealable despite the trial court's continuing jurisdiction to modify the order. *B.C. v. Rhodes*, 116 S.W.3d 878, 882 (Tex. App. – Austin 2003, no pet.).

On the other hand, several courts of appeals rely on the distinction of whether the protective order is granted during the pendency of a divorce, or whether the protective order is an independent cause of action. The El Paso court concluded that a protective order granted during the pendency of a divorce is not a final judgment and is, therefore, an unappealable interlocutory order. *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App. – El Paso 1997, no pet.). The Tyler court of appeals adopted the same conclusion. *In re K.S.L.-C*, 109 S.W.3d 577, 579 (Tex. App. – Tyler 2003, no pet.) The Austin court also agreed with the El Paso court and denounced the *James*, *Kelt*, and *Cooke* reasoning. *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 281(Tex. App. – Austin 2002, no pet.). The Austin court adopted the reasoning of the *Ruiz* opinion and concluded that "any protective order rendered during the pendency of a divorce is not a final judgment for purposes of appellate jurisdiction." *Id.* Further, mandamus is the proper appellate procedure to review complaints about a protective order issued during a divorce. *Id.*

The clear and convincing burden of proof

Issues that require proof by clear and convincing evidence at trial have a higher standard of review on appeal in certain circumstances. Clear and convincing evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. TFC § 101.007. The following issues require proof by clear and convincing evidence at the trial court level:

a. Termination of parental rights. TFC § 161.001.
b. Proof of or denial of parentage. *In Re Marriage of M.C.*, 65 S.W.3d 188 (Tex. App. – Amarillo 2001, no pet.).
c. Rebutting the community property presumption. TFC §3.003(b).
d. Reimbursement claims involving an allegation of separate property. TFC §3.003(b). *See also Nurse v. Nurse*, 2002 WL 1289898 (Tex. App. – Corpus Christi 2002, no pet.) (not designated for publication).

When addressing legal and factual sufficiency where the issue is subject to the clear and convincing evidence burden of proof, the sufficiency of the evidence standard applies. The Texas Supreme Court set forth standards for both legal and factual sufficiency of the evidence, recognizing the elevated burden of proof at trial.

When determining legal sufficiency on appeal, the court reviews "all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); *In re A.A.A.*, __ S.W.3d ___, 2007 WL 4099346, *3 (Tex. App. – Houston [1st Dist.] 2007, no pet. h.). To give appropriate deference to the factfinder's conclusions, the court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* The court of appeals disregards all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* This does not mean that the court must disregard all evidence that does not support the finding. *Id.* Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. *Id.*

When the burden of proof at trial is by clear and convincing evidence, the factual standard for review on appeal is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the allegations sought to be established. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002); *A.A.A.*, 2007 WL at *3. The Court reasoned that this provides a standard that focuses on whether a reasonable jury could form a firm conviction or belief, yet retains the deference an appellate court must have for the factfinder's role. *C.H.*, 89 S.W.3d at 26; *In re B.S.W.*, 87 S.W.3d, 766, 769 (Tex. App. – Texarkana 2002, pet. denied). If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *J.F.C.*, 96 S.W.3d at 266; *A.A.A.*, 2007 WL at *3.

Jurisdiction

The type of review of a trial court's determination of a jurisdiction question in a family law case depends on the trial court's ruling. If a trial court *grants* a challenge to the jurisdiction, then typically the case will be dismissed. Thus, the remedy is by direct appeal. *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 75 (Tex. App. – Austin 2001, pet. denied). If the trial court *denies* a challenge to the jurisdiction, the remedy is by mandamus. *In re Calderon-Garza*, 81 S.W.3d 899, 902 (Tex. App. – El Paso 2002, orig. proceeding). However, due to the "unique and compelling circumstances" involved in questions regarding child custody jurisdiction, it is not necessary to show that the petitioner has no adequate remedy at law. *In re McCoy*, 52 S.W.3d 297, 301 (Tex. App. – Corpus Christi 2001, orig. proceeding).

Contempt

An order granting a motion for contempt is not appealable through regular appellate procedures. *McCoy v. McCoy*, 908 S.W.2d 42, 43 (Tex. App. – Houston [1st Dist.] 1995, no writ). The only review by an appellate court available to a contemnor is by a petition for writ of habeas corpus. *Smith v. Holder*, 756 S.W.2d 9, 10-11 (Tex. App. – El Paso 1988, no writ). The habeas jurisdiction is limited to situations where a person is restrained in his liberty, and may include probation if the terms of probation include some type of tangible restraint of liberty. *Ex Parte Urbanowicz*, 653 S.W.2d 355, 355-56 (Tex. App. – San Antonio 1983, orig. proceeding); *Ex Parte Hughey*, 932 S.W.2d 308, 310 (Tex. App. – Tyler 1996, orig. proceeding). The Supreme Court recently clarified that issue of contempt punishable by imprisonment for failure to pay contractual alimony, holding that the failure to pay a private alimony debt, even one referenced in a court order, is not contempt punishable by imprisonment. *In re Green*, 221 S.W.3d 645, 647 (Tex. 2007).

The only ground for relief in a habeas corpus appeal is that the judgment of contempt is void. Some of the most common reasons for declaring a judgment void include lack of jurisdiction, inadequate notice, impossibility of performance, opportunity to obtain counsel, or failure of the contempt order to comply with statutory or common-law requirements. If the order is erroneous rather than void, the court of appeals may reform the erroneous order instead of releasing the relator. *Ex Parte Balderas*, 804 S.W.2d 261, 263-64 (Tex. App. – Houston [1st Dist.] 1991, orig. proceeding).

Review of Grant or Denial of Habeas Corpus

The granting or denial of a petition for writ of habeas corpus in the trial court is not subject to appeal. *Gray v. Rankin*, 594 S.W.2d 409 (Tex. 1980). Even if it is clearly erroneous, mandamus is the appropriate remedy. *Zeissig v. Zeissig*, 600 S.W.2d 353, 357 (Tex. Civ. App. – Houston [1st Dist.] 1980, no writ). However, an order awarding attorney's fees and costs in a habeas proceeding may be subject to direct appeal. *Miericke v. Lemoine*, 786 S.W.2d 810, 811 (Tex. App. – Dallas 1990, no writ).

Since a mandamus proceeding is a request for equitable relief, the petitioner must show that it has no adequate remedy at law. *Broyles v. Ashworth*, 782 S.W.2d 31, 34 (Tex. App. – Fort Worth 1989, orig. proceeding). The reviewing court will only grant the mandamus petition if the trial court committed a clear abuse of discretion that was so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *M.R.J. v. Vick*, 753 S.W.2d at 528.

Motions to Transfer Venue

Transfer of a case to a county where the child has resided for more than six months is a mandatory, ministerial duty. TFC § 155.201. Remedy by appeal is inadequate to protect the rights of parents and children. *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987). Thus, mandamus is the available remedy to compel mandatory transfer in suits affecting the parent-child relationship.

Conclusion

In conclusion, although family law cases fall under the civil rules generally, there are many specific considerations unique to this area of law that must be kept in mind when pursuing an appeal. From the preservation of error, to the available appellate remedy, to the standard of review, family law is unique, with its own peculiarities.

Do You Know the New Law on A.J. Appeals?

by

Michelle May O'Neil

As of September 1, 2007, there are two laws that apply to appeals from an Associate Judge's recommendation. Yes, *two*!! The "old" law remains in effect for all cases pending as of September 1, 2007, with its requirement that an appeal be filed within three (3) days of the receipt of the Associate Judge's ruling.

The "new" law is effective only for cases *filed* on or after September 1, 2007. The "new" law provides that a party may request a de novo hearing of an Associate Judge's recommendations by filing with the clerk a written request not later than the *seventh working day* after the date the party receives notice of the report. TFC § 201.015(a). The written request must specify the specific issues that will be presented to the referring court. TFC § 201.015(b). If one side files a request for de novo appeal, then the other party may file their request for a de novo hearing within seven working days after the date of the initial request for the hearing was filed. TFC § 201.15(e).

Parental Alienation Syndrome: RIP?

by

Jeffrey C. Siegel, Ph.D.*

Michael C. Gottlieb, Ph.D., F.A.F.P.**

Few ideas have generated more heated debate and polarization in family law than the idea of Parental Alienation Syndrome (PAS).* At first, the idea made a great deal of sense to both lawyers and mental health professionals because it seemed to nicely correspond to our experience. Specifically, Gardner (1987; 1992) defined PAS by listing a series of elements that characterized what he considered to be a syndrome. Going beyond brainwashing or programming, he described it as comprising:

1. a campaign of denigration by one parent and the child/children against the other parent;
2. negative comments regarding the alienated parent are characterized by weak, frivolous, and absurd rationalizations;

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*Authors' Note:'*All examples are fictitious. Any resemblance to actual cases is purely coincidental.

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3. a lack of ambivalence in the negative statements;
4. the "independent thinker" phenomenon, in which the child reports that they came to the conclusion that the other parent was bad on their own, without help from the alienating parent;
5. a reflexive support of the alienating parent;
6. an absence of guilt over the cruelty and exploitation of the alienated parent;
7. the presence of borrowed scenarios [where the child echoes information from the alienator about the alienated parent]; and
8. animosity that spread to extended family and friends of the alienated parent such as previously adored grandparents, aunts, uncles, cousins, etc. (Also see, Turkat, 1994, 1995).

For many years, we assumed that this phenomenon was unidirectional i.e., one parent, usually the mother, caused all the problems, and the other parent, usually the father, was the victim who was due unqualified sympathy. One writer even went so far as to label it Malicious Mother Syndrome [Turkat, 1995].

When these cases came to our attention, we would often see:

- pronounced defensiveness on the part of the offending parent who vehemently denied any responsibility for the situation;
- a callous disregard for the impact on the other parent;
- vociferous denial that s/he had any influence over the child[ren]'s decision;
- claims that s/he had "tried everything" to preserve the relationship between the child[ren] and the former spouse;
- statements such as, "the children are very bright and can make up their own minds;"
- extraordinary efforts to prove their innocence;
- claims by the alienated parent that they were active and involved parents and that the children loved them before the other parent began to poison them;
- allegations that the other parent was sick, mean, and vengeful; and
- demands that the child[ren] need to be taken away from him/her.

What role did the children play in all this? We tended to see them as hapless pawns caught in the vindictive plan of one parent who was trying to destroy his/her child's relationship with the other.

Most readers are familiar with this information. It has been the topic of many lectures at family law conferences, and the theory has been argued in courtrooms across the country. But, the goal of science is to advance knowledge, and after a number of years, researchers and forensic psychologists began to examine Gardner's theory with a more critical eye. They wanted to better understand these situations and started asking questions such as: Is alienation present or not? What else could account for the phenomenon? Is only one person responsible? The result of this inquiry has borne a great deal of fruit, and we now have a far more sophisticated understanding of the phenomenon; below we summarize these developments in psychological testing and theory development.

Psychological Testing

One of the common sense notions regarding PAS was that alienating parents would emphasize their assets and minimize their limitations to a far greater degree than would typical custody litigants. One way to examine this is through psychological testing. Family law attorneys are aware that many of the tests used in child custody evaluations [CCEs] contain what we refer to as validity scales. These scales are designed to identify persons who portray themselves in either an unusually favorable or unfavorable light.

We have known for a number of years that custody litigants are highly likely to present themselves in a positive manner when taking psychological tests such as the MMPI-2. (Siegel, 1996; Siegel and Langford, 1998; Bagby, et al., 1999; Bathurst, et al., 1997; Posthuma and Harper, 1998). Today we refer to this behavior as impression management; in more extreme cases it is referred to as self-deceptive enhancement (Paulus,

1984, Paulus and Reid, 1991). The latter term is reserved for those parents who not only make deliberate attempts to present themselves in a favorable light but actually think of themselves as morally virtuous. This is because they have little or no understanding of themselves, their motives, or their affect upon others. They actually believe that they are right and virtuous whereas the other parent is wrong and evil.

More recently, scholars have documented that alienating parents exhibit these tendencies to a far greater degree than typical custody litigants. For example, when interviewing such parents, they denigrate the other parent to the extreme and show little if any insight into how absurd their allegations appear to others. For example, a parent told one of us that he should be appointed his children's sole managing conservator because his ex-wife was an "evolutionist" and therefore an evil influence because she did not agree with his religious views. This father believed that: he was absolutely right; his sole motive was protecting his children; and that his ex-wife had no redeeming qualities whatsoever. When these notions were challenged by the evaluator, he immediately become angry and accused the evaluator of attacking his religious beliefs and aligning with his ex-wife.

Theoretical Advances

After Gardner originally proposed his theory, a number of years passed before work in the area of psychological testing began. Even today, there are only a handful of studies on the subject, but the problem was even greater when it came to challenging Gardner on theoretical grounds.

The breakthrough finally came in 2001 when Kelly and Johnston "reformulated" the entire notion of PAS. Using family systems theory as their basis, they argued that alienators could not succeed in their efforts when, for example, non-resident parents maintained good relationships with their children and treated them in an authoritative manner (e.g., Amato and Gilbreth, 1999) despite the obstacles created by the other parent. To put this in the simplest terms, their argument was that it was rare that one parent could alienate a child from the other parent all by him/herself, and that when alienation did occur, it was the result of problematic behavior on the part of all the family members.

Shortly thereafter, two articles expanded this theory by offering more concrete ways of thinking about these relationships (Lee and Oleson, 2001; Drozd and Oleson, 2004). These authors proposed that there were at least three different ways of looking at these relationships.

First, the authors described children who are aligned with one parent. These are children who simply have a natural affinity for one parent or another. Such affinities can be based on gender, shared interest, similar personality traits, etc. But alignment is not alienation because the child still interacts and maintains good, loving relations with the other parent; the child simply prefers to spend time with the other parent. Healthy parents understand and are not personally offended when a boy prefers to go fishing with his father or a girl wants to go to the mall with her mother.

The second group is comprised of those children who are estranged from a parent. These children have strong negative reactions to the other parent that are often objectively based on inappropriate and/or ignorant parental behavior, whether it is inflamed by the other parent or not. Examples of this situation include parents who: impose needlessly harsh discipline; are critical or dismissive in their parenting style; abuse substances; mistreat their children; prematurely expose their children to their romantic relationships; make negative comments about the other parent with whom the child has a natural affinity; and ignore the child's appropriate developmental needs e.g., not allowing time with friends or allowing them to make appropriate choices for themselves.

For example, one of us was appointed to perform a CCE in which there were two girls aged 15 and 10. They lived primarily with their father, but their mother had significant periods of possession each week. Both girls complained that their mother wanted their complete attention. For example, they were not allowed to communicate with their friends while with her because she said, "it takes away from my time with them."

She insisted that they dress in a manner of her choosing despite the girls' protestations and would not even let them choose the restaurants at which they would eat. Their father asked them to be more tolerant of their mother, and they did want to see her. On the other hand, it did not change their desire to spend less time with her. If the mother reported that the children did not want to spend time with her and blamed the father for their feelings, it might be easy to assume that this was a case of alienation. In many cases, it is only through thorough investigation that estrangement can be identified and differentiated from alienation.

The third group is comprised of children who are alienated. These children may have many of the characteristics listed by Gardner. The difference lies in how the behavior is understood. Drozd and Oleson [2004] emphasize that if a child has become alienated from a parent, it is a result of the child and both parents playing a role in that outcome. Consider the following:

> A father reported that he was being alienated by a vindictive ex-wife and neither of his teenage children would even speak to him. During the evaluation, it was discovered that he had developed a camera lens that was advertised on the internet as being able to see through clothing and would be helpful to stalkers. The mother seized upon this as an example of his sexual perversity, for which there was no evidence, and his general disregard for women. She also alleged that he had been hiding money and had secret affairs for years; again there was no evidence to support these claims. The children preferred to spend time with their mother, but they also enjoyed good relations with their father before the above allegations were made. Even though most of the claims were baseless, the children picked them up and repeated them to whoever would listen. Eventually, they began to refuse to see their father. The only part of this story that was true, was that the father did invent and market the lens. This certainly was in bad taste, but none of the other allegations had merit. The mother's false allegations, and the children involving themselves inappropriately in adult matters with claims of their own independent judgment and reflexive support for their mother, led to the children becoming alienated from their father.

In this example, it is clear that the custody evaluator would have done a disservice to the family if s/he had blamed the mother and made a conclusion regarding PAS without considering the contributions of the other family members.

Finally, we must accept that there are uncommon situations in which something similar to Gardner's ideas may still arise; other credible scholars have supported this notion independently of Gardner. For example, Warshak (2003) suggested that some parents do attempt to destroy their children's relationships with the other parent. We do not know just how often such cases occur, but given the new research we report here, we conclude that they are infrequent if not rare.

This new thinking is very appealing, and lawyers will want to put this knowledge to use. If these ideas turn out to be correct, they will help lawyers: better understand the family situation; explain it more clearly to their clients; and assist clients in knowing what to expect and how to cope with it. While we do not discourage doing so, a brief caveat is in order. In terms of the progress of science, these ideas are very new, and so far there is only a small amount of research to support them (e.g., Johnston, 2003). Therefore, attorneys are wise to consider qualifying their advice to client regarding these matters. With this qualification in mind, we discuss some of these issues in more detail below.

Client Management

In this section we make recom-menddations for client management for attorneys with both alienating and alienated clients. We assume that the issues discussed below will arise at the time the divorce is about to be final or subsequently when modifications are contemplated. We hasten to add that it is easy and tempting to assume that alienation is occurring when it is not the case. Below we offer advice for attorneys that should be helpful both in cases of clear alienation and those more common situations of estrangement.

Representing the Alienating Parent

The lawyer for the alienating parent has the more difficult job. This is because alienating parents tend to be rigid, think in black and white terms, have difficulty compromising, find fault with others, do not take personal responsibility them-selves, and can be highly contentious.

Lawyers are trained as advocates. They are inclined to take their client's report as valid and prepare to fight for them. While this is helpful in many cases, it will not be so with the client who is an alienator. In these cases, it is important to critically evaluate the client's report and to thoroughly investigate their allegations before heading for the court house.

We often hear the joke that every family law dispute involves a horse's head and a horse's butt. While this may be humorous, it is seldom true. Rather, to oversimplify, psychological water seeks its own level. Therefore, when clients complain about their former spouse, it is easy and tempting to accept their black and white thinking and to assume that you have the horse's head. This is seldom the case, and attorneys are well advised to not make assumptions solely based upon a client's allegations.

No matter what your client may think of her/his former spouse, one thing remains true. Absent evidence of abusive and/or inappropriate behavior on his/her part, s/he is still the children's mother/father. The research literature overwhelmingly supports the fact that children need and are entitled to relationships with both parents, and since the law is a very blunt instrument in these situations, attorneys are encouraged to consider advising their clients to adjust to the reality of their situation and to try and make the best of it.

Finally, such clients are often inclined to view their position as so superior to that of the former spouse that they are inclined to violate court orders especially regarding possession and access. Needless to say, this is inadvisable, and lawyers should explain the potential consequences that can arise from contemptable behavior.

In some of these cases, attorneys may consider an agreement whereby the family would receive therapy in an effort to reestablish the damaged relationship, co-parent more effectively, and eliminate the need for litigation. Based on the considerations noted above, lawyers can anticipate that their clients will resist such recommendations. This is a time when strong client relationships are vital to a positive resolution of the case. If the client respects the attorney's opinion s/he may be more willing to consider therapy despite their feelings to the contrary.

Representing the Alienated Parent

Attorneys are often presented with, for example, a father who claims that his children won't talk to him and/or refuse to have anything to do with him. Such men complain about a myriad of problems such as: emotional hurts; frustration and anger; real and imagined injustices; and a genuine sense of loss. How should an attorney advise this client? Specifically, s/he should consider the following:

Probably the most important advise the lawyer can give his/her client is to not be deterred by the alienator's or the children's behavior. For example, this parent should be strongly encouraged to exercise all his/her possession despite the obstacles that are placed in his way. Second, when in possession of the children, they should behave as they normally would. That is, while enjoying one's children is appropriate, it is also necessary to be an authoritative parent [Amato, 1999]. Making sure children follow a routine, do their homework, behave, and get to bed on time are unpleasant for all parents, but such activities communicate very important messages to children about their parents viz., that their parent is there for them, will care for them, and make them behave. When children experience this behavior from their parent, it can trump a great deal of propaganda employed by the other parent.

Another possibility is family therapy. Determine if the parents will agree to see a qualified mental health professional who is experienced in these matters. If this option is to be successful, the client must recognize that the fight with his ex is over and that it is now about what is best for the children and the client's future relationship with them.

Clients should also be warned that this process will not be enjoyable. Clients can expect fractious meetings where the alienating parent may say thing such as, "Look, you asked for this, I didn't have any choice. I'm here, but the relationship with the children is your problem, not mine. I and the children are the innocent victims of your behavior." Therapists are accustomed to dealing with such conflicts delicately and even-handedly because they are able to keep their eyes on the ball that it's about the children. Clients are well advised to remember that as well.

A second prerequisite is that both parents understand the appropriate developmental needs of the children. Some children may feel threatened and intimidated if they have not been around the alienated parent for a significant period of time. For example, they may be scared and not want to be with the "bad" parent unless the "good" parent is there. Forcing the issue may only make matters worse, and a gradual period of reunification should be considered to help ease the transition.

If the other side agrees to family therapy, this may well be the best, not to mention the least expensive, solution for resolving post-divorce conflict. We acknowledge that this alternative is not commonly chosen and is often unsuccessful, but it is worth trying so long as the client understands that this endeavor will involve a great deal of hard work, patience, and time.

Furthermore, the alienated parent often finds him/herself having to deal with a number of very difficult problems, many of which are more appropriately dealt with by a therapist. For example, s/he may need to accept that the child is often close to and more dependent upon the alienator. This is very difficult for some alienated parents to accept, but acknowledging this reality is a key to eventually having better relations with one's children.

Second, s/he must resist the temptation to argue with the child about adult matters. One of us had to explain to a father that he was not accomplishing anything by arguing with his seven-year-old daughter about whether he was going to Hell because he did not go to church as often as his ex-wife did. A similar issue arises when children are exposed to adult information and use it to confront a parent in order to engage in adult behavior. In both situations, it is best not to argue about matters with children when they are beyond their control or understanding.

Third, there are times when your client must accept responsibility and admit that his/her behavior also may have contributed to the problem. If your client's behavior involved needless and excessive anger, substance abuse, harsh parenting, or maltreatment, they must accept responsibility and get treatment themselves. By doing so, they can begin to build new relationship with their children.

Fourth, the client may have restarted his/her life. She/he may have met someone who provided a distraction from the children and filled many empty hours that should have been devoted to parenting. This common situation leaves children feeling unwanted and parents unappreciated. Here there is really only one solution. The distracted parent must acknowledge that the children are right and work to rectify the error. In our view, parents should never allow anything to come between themselves and their children.

Fifth, a serious dating relationship or remarriage can trigger another set of issues akin to alienation (Warshak, 2000, 2001). This is the "You never really loved us anyway" scenario and may be brought about by the former spouse's (the alienating parent) sense of loss and feelings of betrayal e.g., "How could you do that (remarry) to the children?", when the actual feeling is, "How could you do that to me?" In these cases, the client needs to include the children in the new relationship and create opportunities for them to be part of the parent's new life. In doing so, children should be reassured that no matter what, they will always come first.

Finally, we must accept that there are times when nothing works and good-bye is the only option. We recommend reading Warshak (2001) who included a chapter on this subject and offers relevant recommendations. Reading this material can be painful, but it provides an invaluable outline for parents in this situation.

But even if it must be good-bye, the parent should make sure that the child always knows where s/he is and how s/he can be contacted. Also, birthday and holiday cards and brief voicemail messages serve as important messages that the child has not been forgotten. While the child may reject the parent now, years later these gestures may be important positive recollections of a parent who did not give up.

Conclusion

Should we say RIP to PAS? We think not because the answer is far from simple. Recent research has taught us that we should not jump to facile conclusions in these difficult and contentious cases. Does PAS exist? Yes, but it is far less common than we had previously believed, and the behavior is generally better explained by looking at the situation from multiple perspectives. This increased complexity creates additional demands for lawyers and mental health professionals, but we contend that making the extra effort is well worth it if one can develop a fuller understanding of the situation.

The situations we have described here are incredibly painful for clients and pose many challenges for their lawyers, not the least of which is encouraging the client to examine whether his/her own behavior may have contributed to the problem. Also, it is all too easy to become emotionally involved in these cases, especially when the client begs his/her lawyer to "make it all right." This is the time for the lawyer to know his/her own limits as an advocate and be cognizant of what legal remedies can and cannot realistically accomplish. It is very tempting to want to resolve all the client's problems, but it is a temptation that often must be resisted.

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DIVORCE
Grounds and Procedure

MSA ENFORCEABLE WITHOUT BEING ENTERED AS A FINAL DECREE AND REVOKED BENEFICIARY DESIGNATIONS IN WILL

¶ 07-4-01. **Spiegel v. KLRU Endowment Fund,** 228 S.W.3d 237 (Tex. App.—Austin 2007). (04/26/07)

Facts: Husband filed for divorce and both parties signed an MSA. Unfortunately, wife died the day before the trial court was to enter a final divorce decree. Wife's Will, dated before the divorce petition, left husband "our homestead," wife's car, and various personal property. The Will also left half the residuary estate to wife's nephews and half to several charities, including KLRU. Wife's executor filed for a declaratory judgment action in December 2004, seeking a construction of the Will and a ruling on the effect of the MSA. The trial court found: (1) MSA was enforceable, (2) no homestead property existed at the time of W's death, and (3) MSA revoked husband's interest in certain of wife's non-probate assets. Husband appealed.

Held: Affirmed. The MSA is enforceable, the parties had no homestead, and the MSA revoked the beneficiary designations in wife's Will.

Opinion: The appellate court found that TFC § 7.006 provides for settlement agreements that may be repudiated before divorce and that must be approved by the presiding judge. However, TFC § 6.602 allows for immediately binding agreements that do not need to be approved by the presiding judge. A TFC § 6.602 agreement must contain a prominently displayed statement that the agreement is irrevocable. The MSA at issue in this case contained such a statement. Also, the wording of the statute and the public policies behind it suggest that an agreement under TFC § 6.602 is meant to prevent litigation. Therefore, such an agreement should be enforceable even in the absence of a final divorce decree incorporating it.

The court of appeals also held that a person can abandon a homestead by discontinuing use of it as a home and not intending to use it again. In this case, at the time of wife's death, husband had established a separate house as his homestead and agreed to leave their original homestead to wife as separate property in their MSA. Therefore, there was no property that could be described as "our homestead."

Finally, the MSA allocated property as wife's separate property, and this allocation was sufficient to revoke the Will's beneficiary designations of that property in favor of husband. This follows the presumption that divorcing spouses intend to revoke beneficiary designations in favor of the other spouse. Even if additional language was required, the MSA contained adequate additional language to revoke the beneficiary designations.

ASSOCIATE JUDGE'S ORDER MAY BE MODIFIED BY THE REFERRING COURT

¶ 07-4-02. **Chacon v. Chacon**, 222 S.W.3d 909 (Tex. App.—El Paso 2007). (04/26/07)

Facts: Wife filed for divorce in September 2004. Associate judge granted the divorce on grounds of fault and awarded husband and wife an approximately equal division of the marital property and gave husband $15,000 for his reimbursement claim. Husband appealed associate judge's order as to division of property and liabilities and the award of attorney's fees. Trial court entered a final divorce decree dissolving the marriage on the grounds of cruelty and changing the original division of property, giving wife 53% and not mentioning husband's reimbursement claim.

Held: Affirmed. An associate judge's orders have only temporary effect and may be modified or rejected by trial court.

Opinion: TFC § 201.015(b) is intended to limit appealing party's ability to raise new issues, but it does not limit referring court's jurisdiction. The referring court holds *de novo* hearing on issues appealed from associate judge. Because husband's appeal included the division of property, the referring court could address characterization of such property.

MOTION FOR CONTINUANCE AND JURY DEMAND DID NOT COMPLY WITH STATUTORY REQUIREMENTS. ALSO, IT IS INAPPROPRIATE FOR AMICUS ATTORNEY TO FILE APPELLATE BRIEF.

¶ 07-4-03. **O'Connor v. O'Connor,** ___ S.W.3d ___, 2007 WL 1440990 (Tex. App.—Houston [1st Dist.] 2007). (05/17/07)

Facts: Father filed for divorce and trial was set for May 2005. Trial court granted mother's motion for continuance and the case was called to trial in September 2005. Mother did not appear because she was in a psychiatric hospital. Trial court named father temporary SMC. The trial reconvened in December 2005, with mother moving to disqualify the trial court. The case was then transferred and reset for March 2006. The trial court denied mother's new motions for continuance, stating that she was absent when the motions were heard. After a bench trial, the final decree appointed father SMC and denied visitation. Mother appealed, with amicus attorney also filing an appellate brief.

Held: Affirmed. Mother's continuance motion did not comply with TRCP, and her jury request was untimely. Also, amicus has no role in the appeal because amicus attorney's client is the trial court.

Opinion: The appellate court found that mother's motion for continuance did not comply with TRCP 251 and 252. "The motion was not supported by affidavit. It did not state the financial or other matters she wanted produced, the separate property claims she was making, or what 'other issues' she deemed critical to the valuation of any property." Therefore, the trial court did not abuse its discretion in denying the continuance.

The appellate court also found that the trial began on September 19, 2005 and was recessed until the March trial. As a result, mother's jury request on September 7 was untimely. Finally, the appellate court stated that an amicus attorney's role is to represent the interests of the trial court. The trial court is not a party to this appeal, so it is inappropriate for the amicus to file an appellate brief.

Dissent from denial of rehearing: The appellate court denied mother's request for rehearing on the issue of the trial court denying her visitation. Father requested supervised visitation and no evidence was presented at trial as to whether a complete denial of visitation was in the child's best interest. The dissent would modify the decree to allow for supervised visitation.

TEMPORARY ORDER REQUIRING HUSBAND TO PAY FEES FOR AN UNSUCCESSFUL APPEAL DID NOT REQUIRE MANDAMUS RELIEF

¶ 07-4-04. ***In re* Merriam,** 228 S.W.3d 413 (Tex. App.—Beaumont 2007, orig. proceeding). (06/07/07)

Facts: The trial court entered temporary orders pending appeal requiring husband to pay wife's attorney's fees if husband's appeal is unsuccessful. Husband filed for a mandamus.

Held: Mandamus denied. Appeal is an adequate remedy.

Opinion: PER CURIAM. The appellate court held that there is no statutory bar to an interlocutory appeal of a temporary order rendered during the appeal in a suit only for divorce under TFC § 6.709. The appellate court may also consider the fee issue along with the merits of the pending appeal from a final judgment. Mandamus relief is only available from a TFC § 6.709 order if there is an abuse of discretion. Here, the fees are only payable after conclusion of an unsuccessful appeal so there was no abuse of discretion.

INSUFFICIENT EVIDENCE TO SUPPORT DIVORCE DECREE

¶ 07-4-05. **Vazquez v. Vazquez,** ___ S.W.3d ___, 2007 WL 1745324 (Tex. App.—Houston [14th Dist.] 2007). (06/19/07)

Facts: Wife filed an amended petition for divorce. Father did not file an answer and did not attend the final hearing. The trial court entered default judgment, allowing mother to establish the primary residence of the children. Father filed a restricted appeal.

Held: Affirmed in part, reversed and remanded in part. The evidence was not sufficient to support a significant part of the trial court's judgment.

Opinion: The appellate court held first that the appellant was not required to specify issues in a general or restricted notice of appeal under TRAP 25.1(d). Therefore, father did not limit his issues by failing to mention some of them in his notice of appeal. Second, mother may not rely on an affidavit attached to a pretrial motion to satisfy her burden to present evidence at a hearing. Third, mother may not rely on the findings of fact in the temporary orders to satisfy her burden to present evidence at a hearing. Fourth, mother's testimony that she thought the conservatorship order was in the children's best interests was not competent evidence. Fifth, mother's testimony that she thought the property division was fair, without any support, was not sufficient. Finally, child support orders may be materially influenced by a property division, so the issue is remanded to the trial court.

PLEADINGS STILL MATTER – TRIAL COURTS CANNOT ENTER FINAL ORDERS WHEN ONLY TEMPORARY ORDERS HAVE BEEN REQUESTED

¶ 07-4-06. ***In re* B.M.**, 228 S.W.3d 462 (Tex. App.—Dallas 2007). (06/25/07)

Facts: Mother and father appointed JMCs, with mother having the right to determine primary residence and husband paying child support. In June 2005, the OAG filed a contempt action against father to collect unpaid child support. Father's answer stated that he had had exclusive possession of the child since June 2004, when mother abandoned the child into father's custody. In a Cross-Motion to Modify, Father requested child support from mother and suspension of his child support obligation as of June 2004 and asked for temporary orders appointing him SMC, with supervised visitation and drug screening for mother. Mother did not appear for a hearing scheduled in November 2005 before the associate judge. In the final order, the trial court named

father SMC with the right to determine residence, permitted mother to have only supervised visitation, and required mother to pay child support. The order also included a permanent injunction that prohibited mother from taking possession of the child. The OAG nonsuited its contempt action. Mother filed a restricted appeal.

Held: Reversed and remanded. The appellate court found error on the face of the record.

Opinion: The father's pleadings only requested temporary relief regarding conservatorship and custodial issues. Therefore, the pleadings did not vest the trial court with jurisdiction to issue a final decree concerning conservatorship and custody.

TFC § 153.317 DOES NOT PROVIDE FOR A SEPARATE CAUSE OF ACTION FOR PC SEEKING EXTENDED VISITATION

¶ 07-4-07. ***In re* C.A.P., Jr.**, ___ S.W.3d ___, 2007 WL 2331019 (Tex. App.—Fort Worth 2007). (08/16/07)

Facts: In November 2000, the trial court appointed mother and father JMC in an initial SAPCR. In November 2005, the trial court heard mother's suit to modify child support and increased father's child support. In January 2006, father filed a petition to modify, seeking an extended possession order under TFC § 153.317. The trial court found that TFC § 153.317 does not provide for a separate cause of action for modification of a possession schedule and dismissed.

Held: Affirmed. TFC § 153.317 required father to ask for extended visitation before or at the time of the original suit to modify.

Opinion: TFC § 153.317 requires a possessory conservator to ask for extended visitation either before or at the time of rendition of the original or modification order. This requirement ensures that the best interest of the child will be considered, because TFC § 153.317 does not contain a best interest requirement and conflicts with TFC § 153.002. The court also found that a request under TFC § 153.317 is not a compulsory counterclaim.

DIVORCE COURT LACKS EXCLUSIVE JURISDICTION BECAUSE WIFE'S FRAUD AND CONVERSION CLAIMS WERE SEPARATE FROM THE DIVORCE DECREE

¶ 07-4-08. **Solares v. Solares,** 232 S.W.3d 873 (Tex. App. – Dallas 2007). (08/28/07)

Facts: In June 1998, husband and wife signed an MSA. The MS provided that husband would convey his half-interest in certain property to wife and would execute all necessary instruments on real property before entry of the final decree. The husband and wife were both represented by counsel. The settlement was announced to the trial court in September 1998 and incorporated into a final decree in December 1998. On November 3, 1998, husband conveyed the entire property to a general partnership of which he was one of the partners instead of conveying it to wife. Subsequently, Wife sued husband for fraud in another court. The jury found husband committed fraud and awarded wife $350,000. Husband appealed, claiming that, under TFC § 9.001, the divorce court had exclusive jurisdiction.

Held: Affirmed in part, reversed and rendered in part. The divorce court did not have exclusive jurisdiction because the wife's claims were separate and apart from the divorce decree.

Opinion: The appellate court held that wife sued for common law fraud, conversion, and damages on a warranty of title in a deed conveying real estate, a legal instrument distinct from the divorce decree and subject to laws governing conveyances of real property. Wife's suit was not one to enforce or clarify the decree.

MANDATORY TRANSFER AFTER A PETITION FOR DIVORCE HAS BEEN FILED ONLY APPLIES IF THE PARENTS WERE ACTUALLY MARRIED IN THE FIRST PLACE

¶ 07-4-09. ***In re* M.A.S., a Child,** ___ S.W.3d ___, 2007 WL 3355110 (Tex. App.—San Antonio 2007). (11/14/07)

Facts: Shortly after the child's birth, Mother handed over custody to Maria, who shortly thereafter filed a SAPCR in Bexar County requesting to be named SMC. Father then filed a SAPCR in Reeves County seeking custody of the child. Three days before the Bexar County trial, father filed for a divorce from mother in Reeves County. This was despite the fact that he made earlier, verified pleadings in which he alleged he had never been married to mother and in which mother swore by affidavit that she had never been married to father. The Bexar County court declined to transfer the case, mother and father defaulted at trial, and Maria was appointed SMC. Father appealed.

Held: Affirmed. The evidence supported the trial court's finding that the divorce petition was a sham.

Opinion: TFC § 155.201(a) requires a trial court to transfer a SAPCR upon a "showing that a suit for dissolution of the marriage of the child's parents has been filed in another court" and a transfer has been requested. However, the statute "presumes the existence of a marriage subject to dissolution before the mandatory transfer provisions take effect." In this case, the record provides ample evidence that mother and father were never married. Father filed the divorce petition only after all other efforts to transfer the suit were unsuccessful. Also, the petition's "allegations of marriage ... were directly contrary to all prior assertions of non-marriage."

DIVORCE
Division of Property

WIFE PROVES HUSBAND INTENDED TO GIVE ONE-HALF INTEREST IN LAKE PROPERTY AS GIFT.

¶ 07-4-10. **Long v. Long,** ___ S.W.3d ___, 2007 WL 475794 (Tex. App.—El Paso 2007). (02/15/07)

Facts: Husband used proceeds from sale of separate property stock option to buy lake property whose title was taken in both husband's and wife's names. Wife claimed this showed husband's intent to make her a gift of undivided one-half interest in the property. Trial court agreed with wife and found that husband and wife each owned an undivided one-half interest as separate property. Husband appealed.

Held: Affirmed. Wife proved by clear and convincing evidence that husband intended one-half interest in the property as a gift.

Opinion: The appellate court found that the deed to the property taken in joint names of husband and wife created a presumption of a gift, which disappeared when husband testified that he did not intend a gift. The burden of proof then shifted to wife. Wife then proved by clear and convincing evidence that husband intended to make a gift.

As an illustration of property characterization analysis, the court of appeals laid out three scenarios and the burden of proof necessary at trial – Facts: Wife claims property as separate property and husband claims it is community property – (1) Trial court characterizes as community property and awards to wife. Wife appeals. Burden on wife to establish error by challenging that the characterization is against the great weight and preponderance of the evidence or that separate property was established as a matter of law. Wife must also establish that the characterization error was harmful because of the mischaracterization and the overall

division of property constitutes an abuse of discretion; (2) Trial court characterizes property as wife's separate property and awards it to her. Husband appeals. Husband must establish error by challenging sufficiency of the evidence to support separate property characterization and then must conduct a harm analysis; and (3) Trial court characterizes as community property and awards to husband. Wife appeals. If wife can establish that property is her separate property, it is unnecessary to show harm because divestiture of separate property is reversible error.

TRIAL COURT HAD NO AUTHORITY TO ORDER THE SALE OF SEPARATE PROPERTY

¶ 07-4-11. ***In re* Lewis**, 223 S.W.3d 756 (Tex. App.—Texarkana 2007, orig. proceeding). (05/9/07)

Facts: Husband and wife's 2002 divorce decree awarded each an undivided separate property interest in a tract of land. The decree also ordered the receiver to sell improvements on the property. However, the trial court ordered the receiver to sell the property itself. The property was sold before the order was entered.

Held: Mandamus granted; prohibition denied. Since decree did not provide for sale of property, trial court could not order the sale of separate property as part of enforcement of the decree.

Opinion: The appellate court held that the trial court was not authorized to order receiver to sell the property. Although the decree provided for partition of property, it did not order its sale. The property was husband and wife's separate property, and the trial court could not order parties to sell separate property as part of enforcement of the decree. Divorce had been completed, affirmed, and appealed years before this action.

UNEQUAL PROPERTY DIVISION SHOULD NOT BE USED TO PUNISH THE SPOUSE AT FAULT IN THE DIVORCE

¶ 07-4-12. **Chafino v. Chafino**, 228 S.W.3d 467 (Tex. App.—El Paso 2007). (06/28/07)

Facts: Wife filed for divorce on the grounds of insupportability, cruelty, and adultery. The trial court also saw videotape and heard eyewitness testimony on Husband's infidelity. As a result of this and other testimony, the court's final property division awarded roughly 70% of the marital property to wife. Wife appealed, alleging trial court erred by not giving her more of the marital property.

Held: Affirmed.

Opinion: An unequal property division may not be used to punish the party at fault in the divorce. While husband's conduct, both in and out of the courtroom, may well have provided the trial court with a reasonable basis for awarding an unequal property division in equity, wife is not entitled to additional assets to punish her former spouse for his behavior.

CLEAR LANGUAGE OF PREMARITAL AGREEMENT DOES NOT INCLUDE SALARY OR WAGES—THEREFORE THEY ARE COMMUNITY PROPERTY

¶ 07-4-13. **Williams v. Williams**, ___ S.W.3d ___, 2007 WL 4195666 (Tex. App.—Houston [14th Dist.] 2007). (11/29/07)

Facts: The day before husband and wife were married, they executed a premarital agreement. This agreement provided that "income from such separate property and from their respective personal efforts will be separate property." Thirteen years later, the parties divorced. The trial court entered a declaratory judgment, which was incorporated in the final divorce decree, decreeing that the parties' incomes during marriage were

separate property. The trial court also found that, pursuant to the agreement, no community property existed in the marital estate. The trial court then issued findings of fact and conclusions of law to support its ruling. Wife appealed.

Held: Reversed and remanded. The premarital agreement does not address the wages and salaries earned by the parties during marriage.

Opinion: After analyzing the complete language of the premarital agreement, the appellate court found that its terms were unambiguous and did not apply to the parties' incomes during marriage. The agreement refers to the "parties' general intent to retain the separate property character of the parties already-existing separate property" and indicates that the parties' income from separate property will "remain the separate property" of the party owning it. The court of appeals found that these provisions clearly showed "that the parties were concerned solely with the separate property in existence at the time of the marriage and all ... income acquired therefrom during marriage." Because the court construes premarital agreements narrowly in favor of the community estate, the lack of clear language addressing salaries or wages of the parties means that such income is community in nature.

Dissent: A division of marital property by a trial court is reviewed for an abuse of discretion. As a result, "a mischaracterization of community property as separate property must have a material effect on the property division in order to be reversible error. Moreover, it is the appellant's burden to demonstrate such an effect." Wife did not challenge the property division as not being just and right, or provide evidence of the existence of any salaries or wages remaining in either spouse's possession at the time of the divorce. Therefore, her issue should be overruled.

DIVORCE
Retirement Benefits

★★★★★ Texas Supreme Court ★★★★★

STATUTORY REQUIREMENTS FOR REVOCATION OF TRS BENEFITS MUST BE FOLLOWED—NO EXCEPTIONS

¶ 07-4-14. **Holmes v. Kent**, 221 S.W.3d 622 (Tex. 2007). (04/20/07)

Facts: Wife retired in 1997 and named husband beneficiary of her TRS benefits. During their later divorce, wife signed a form revoking the designation, but did not follow the statutory requirements of Gov't Code § 824.1012. The divorce decree awarded wife's retirement benefits to her only, but also did not follow the statutory requirements. TRS informed wife of the problems with her revocation throughout the process. One year after the divorce, wife died, leaving everything to her son. After TRS began making payments to husband, son sued to claim the benefits. The trial court granted summary judgment to husband. The court of appeals found that, although W did not follow the statute, the divorce decree divested husband of benefits and imposed constructive trust for wife's estate. Husband appealed.

Held: Reversed and rendered. The statutory requirements for revocation must be followed.

Opinion: PER CURIAM. The Texas Supreme Court held that neither wife's attempts at revocation nor the divorce decree divested husband of wife's retirement benefits. The retiree must follow the statutory requirements for revocation. These requirements were created to avoid litigation, and circumventing them would be neither equitable nor just.

FORMER WIFE ENTITLED TO BACK PAYMENTS FOR HER SHARE OF HUSBAND'S RETIREMENT

07-4-15. ***In re* Marriage of Malacara,** 223 S.W.3d 600 (Tex. App.—Amarillo 2007). (02/28/07)

Facts: A husband and wife divorced in 1987. During the marriage, the husband had worked for the City of Amarillo and had accrued retirement benefits. He retired four years after the divorce and began receiving his retirement benefits. These benefits were not addressed in the divorce decree and were not shared with the wife. In 2004, the wife petitioned the trial court for her portion. The trial court determined that 87% of the benefits were community property, and the wife was entitled to a 43.56% share as a co-tenant, in addition to back payments. The husband appealed.

Held: Affirmed. The division of both the current benefits and the back payments were authorized by the Property Code and the Family Code.

Opinion: PER CURIAM. The appellate court held that both parties were cotenants of the property in question at the time of their divorce. Property Code Section 23.001 allows cotenants to obtain a partition of property in which they own a joint interest. Therefore, the trial court was correct in granting the wife's request for a partition of the retirement benefits.

Also, the court of appeals found that the trial court could award a portion of the benefits already distributed as back payments. Family Code Sections 9.009 and 9.010(b) allow a court to enforce a division of property and render judgment against a defaulting party for the amount of unpaid payments. In this case, the divorce decree made husband and wife cotenants in the retirement property and the husband was in default to the wife for payments he received after his retirement.

FORMER HUSBAND'S MILITARY SERVICE BENEFITS MUST BE APPORTIONED BASED ON VALUE AT TIME OF DIVORCE

¶ 07-4-16. **Caracciolo v. Caracciolo**, ___ S.W.3d ___, 2007 WL 1341156 (Tex. App.—San Antonio 2007). (050/9/07)

Facts: Husband and wife's agreed divorce decree awarded wife 50% of husband's military service retirement benefits during the time of marriage. Once H retired, several years after the divorce, he sought a clarification order. The trial court awarded wife 36% of husband's disposable retirement pay, holding that time periods of marriage were not a benchmark for limiting wife's benefits. Husband appealed.

Held: Reversed and remanded.

Opinion: Retirement benefits must be apportioned based on value of community's interest at time of divorce. The opinion includes a detailed analysis of how to calculate anticipated disposable retired pay of an active duty service member. To properly divide retirement benefits, a number of factors must be taken into consideration.

Editor's Note: *Once again, careless drafting at the time of divorce caused these former spouses to incur unnecessary costs and fees to have this poorly drafted decree clarified. Practitioners dealing with military retirement should consider including the factors in the decree that are addressed in this opinion to avoid the need for these types of clarifications in the future. G.L.S.*

LIENS ON TRS ACCOUNTS ARE LEGAL

¶ 07-4-17. **Chacon v. Chacon**, 222 S.W.3d 909 (Tex. App.—El Paso 2007). (04/26/07)

Facts: Wife filed for divorce in September 2004. The community had two major assets – the marital residence and wife's TRS retirement funds. The trial court awarded husband a 47% interest in both the sale proceeds of the martial residence and wife's retirement monies. The community estate also had one unsecured debt – the Federal Income Tax liability incurred by husband's corporations. The trial court made husband responsible for the IRS debt and ordered him to reimburse wife for the $26,000 that the IRS had garnished from wife's paychecks. The court also imposed a lien on both the sale proceeds from the marital residence and the portion of wife's retirement monies awarded to husband until he reimbursed wife. Husband appealed claiming lien on retirement monies violated ERISA.

Held: Affirmed.

Opinion: Lien on wife's TRS account is legal. TFC § 7.003 requires a division of retirement benefits earned during marriage. The purpose of Gov't Code § 821.005 is to protect interests in TRS from a member's creditors, not from a community property division. Also, the lien does not violate ERISA's anti-alienation provisions because ERISA specifically excludes "governmental plans" from its coverage, and TRS falls under that definition.

DIVORCE
Post-Decree Enforcement

FAMILY CODE ALLOWS TRIAL COURTS TO CLARIFY CHILD SUPPORT ORDERS SO AS TO MAKE THEM ENFORCEABLE BY CONTEMPT

¶ 07-4-18. **Lee v. Lee,** ___ S.W.3d ___, 2007 WL 178940 (Tex. App.—El Paso 2007). (01/25/07)

Facts: The child support provisions in a divorce decree lacked enforcement language. As a result, mother requested the trial court to clarify the provisions to allow for enforceability by contempt. The trial court did so. Father appealed.

Held: Affirmed. The trial court must be allowed to make theses kinds of clarifications in order to make child support provisions effective.

Opinion: The father argued that the decree was a contractual agreement that the trial court may not clarify. The clarification turned the decree into a court order, which is an impermissible substantive change. The appellate court agreed that a trial court may clarify an order if it is not specific enough, but is prohibited from substantively changing provisions of an earlier order with a clarification order. Prior to revisions in the Family Code, an attempt to impose a specific obligation to pay child support where no such obligation previously existed was an unlawful substantive change, not a mere clarification. Under the current law, however, the statutory scheme for enforcement would be pointless if a trial court lacks the ability to clarify an order so as to render it capable of enforcement through contempt.

CLARIFICATION OF DIVORCE DECREE TO ENFORCE LIEN WAS APPROPRIATE

¶ 07-4-19. **Karigan v. Karigan**, ___ S.W.3d ___, 2007 WL 4157126 (Tex. App.—Dallas 2007). (11/26/07)

Facts: The parties' final divorce decree awarded husband a judgment of $35,000 and an equitable lien against the family residence in order to "secure the payment of the judgment … ." The wife was ordered to pay the judgment "on or before the 18th birthday of the youngest child or 30 days after the remarriage of [wife], whichever occurs first." Almost three years later, husband filed a motion to clarify and amend the final decree. The motion sought a statement tying the judgment and the lien, as well as a statement that the judgment would be due and payable upon the sale of the residence. The trail court granted husband's motion. Wife appealed, claiming that the changes substantively modified the decree rather than clarifying it.

Held: Affirmed. The order was consistent with the original property division in the divorce decree.

Opinion: According to the trial judge's Rulings by Memorandum, the equitable lien was imposed specifically to secure the payment of the judgment. "The residence itself is security for her debt to [husband]." Therefore, allowing her to sell the residence without paying the judgment from the proceeds would defeat the purpose of the lien.

DIVORCE
Spousal Maintenance, a.k.a. Alimony

SPOUSAL SUPPORT ORDER REQUIRING FORMER HUSBAND TO PAY SUPPORT UNTIL WIFE SELLS THE HOUSE WAS NOT AUTHORIZED BY THE FAMILY CODE

¶ 07-4-20. ***In re* Lozano**, ___ S.W.3d ___, 2006 WL 2640634 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding). (09/14/06)

Facts: During pendency of divorce, the trial court entered temporary orders requiring husband to pay spousal support, community debts including house payments, utilities, car note, and all other fixed debt and/or credit card debt. Then an agreed decree was signed, providing that temporary orders continue in effect until wife sold the house. The decree did not contain an order for wife to sell house. Subsequently, husband failed to pay certain spousal support payments, house payments, and utility payments, and wife filed a Petition for Enforcement of Spousal Maintenance. The trial court found husband in criminal contempt and sentenced him to sixty days in jail for not paying spousal support payments and installments on the house note. The court also held husband in civil contempt until he made payments. Husband immediately made payments and the court suspended his sentence. Husband filed for mandamus.

Held: Mandamus granted. Spousal support order requiring former husband to pay support until wife sells the house was not authorized by the Family Code and failure to make two house payments as required by divorce decree was not enforceable by contempt.

Opinion: The appellate court found that a court-approved contractual order for spousal maintenance is only enforceable by contempt to extent it is authorized by the Family Code. There is no statutory authorization for limited spousal maintenance contingent on sale of a house. In fact, husband's support obligation is unlimited because the order does not require that wife ever sell the house. The Family Code mandates that maintenance is limited to 3 years, so this support order is not enforceable by contempt. Also, husband's failure to make house payments according to court order is not enforceable by contempt because such enforcement would amount to imprisonment for failure to pay a debt.

WIFE FAILED TO OVERCOME STATUTORY PRESUMPTION AGAINST SPOUSAL MAINTENANCE

¶ 07-4-21. **Chafino v. Chafino**, 228 S.W.3d 467 (Tex. App.—El Paso 2007). (06/28/07)

Facts: Wife filed for divorce and sought spousal maintenance based upon TFC § 8.051(2)(C). During the trial, wife testified that she suffered from several medical problems, had high blood pressure, high cholesterol, asthmatic bronchitis, problems with her knee, and stomach problems, all of which required ongoing medical care. She also testified that she had "emotional problems" that forced her to retire. Wife also presented evidence of her expenses and that they exceeded her income by $2000 per month and, even with the assets awarded to her in the divorce, she could not meet her reasonable minimum needs. Trial court denied wife's request for spousal maintenance. Wife appealed.

Held: Affirmed.

Opinion: Denial of spousal support upheld because there was no evidence that wife attempted to return to work during the period of separation and no explanation of why her ailments prevented her from returning to work as a bookkeeper. Also, wife did not plead TFC § 8.051(2)(A) that she could not support herself due to incapacity caused by physical or mental disability. Consequently, wife did not overcome the statutory presumption against spousal maintenance found in TFC § 8.051(2).

SAPCR
Conservatorship and Procedure

★★★★★ Texas Supreme Court ★★★★★

FILING OF SECOND SAPCR ON DIFFERENT GROUNDS NOT A PROPER BASIS FOR SANCTIONS

¶ 07-4-22. ***In re* Moore,** ___ S.W.3d ___, 2007 WL 2457709 (Tex. 2007, orig. proceeding). (08/31/07)

Facts: Mother and paternal grandmother involved in series of suits over custody of child. The appellate court eventually granted two of mother's mandamuses and dismissed the underlying suits for lack of jurisdiction, giving mother custody of the child. The appellate court also ordered paternal grandmother to pay mother's costs and attorney's fees as a sanction. Grandmother filed for mandamus relief.

Held: Mandamus granted. Grandmother acted consistently with the appellate court rulings and should not have been sanctioned.

Opinion: PER CURIAM. The appellate court abused its discretion in issuing sanctions against the paternal grandmother. The appellate court's sanctions were based on paternal grandmother filing a second SAPCR after the appellate court dismissed an earlier SAPCR for lack of jurisdiction. However, paternal grandmother had alleged standing on a different ground in the second SAPCR and, therefore, was not acting inconsistently with the appellate court's first ruling. The paternal grandmother also followed the trial court's rulings. As a result, there was no basis for the appellate court's sanctions.

★★★★★ Texas Supreme Court ★★★★★

MOTHER MUST SEPARATELY CHALLENGE TERMINATION OF RIGHTS AND APPOINTMENT OF DFPS AS SMC

¶ 07-4-23. ***In re* J.A.J,** ___ S.W.3d ___, 2007 WL 3230169 (Tex. 2007). (11/02/07)

Facts: DFPS filed for termination of mother's parental rights and requested to be named SMC. The trial court ordered termination under TFC §§ 161.001(1)(D) and (E). The court also found that termination was in the child's best interest, that naming mother SMC would significantly impair the child's physical heath or emotional development, and that appointing DFPS SMC would be in the child's best interest. The 14th Court of Appeals found that the evidence was factually insufficient to support the statutory grounds for termination. Although mother did not challenge the trial court's conservatorship findings, the court of appeals also reversed the appointment of DFPS as SMC. DFPS appealed, arguing that the reversal of the conservatorship finding was improper because error was not assigned.

Held: Reversed. Challenges to termination and conservatorship are distinct issues that require separate assignments of error.

Opinion: TFC §§ 153.002, 153.005, and 153.131 provide the standards for determining conservatorship of a child. Specifically, TFC § 153.131 creates a presumption that a parent will be named SMC unless such appointment would significantly impair the child's physical health or emotional development. TFC §§ 263.404 and 161.205 also apply when the trial court denied termination but makes other determinations. The trial court did terminate mother's rights in this case, so these two sections do not apply.

However, DFPS sought to be named SMC under TFC § 153.131 in addition to TFC § 263.404. The trial court's finding that appointing mother as SMC would significantly impair the child's physical health or emotional development satisfy the requirements of TFC § 153.131.

Mother did not specifically appeal these findings or the conservatorship order and a challenge was not subsumed in her challenge to the termination order. First, the elements of a termination order are not the same. For example, the appointment of a parent as SMC could impair the child's physical health or emotional development in ways unrelated to the statutory grounds for termination. Second, termination decisions must be supported by clear and convincing evidence. Conservatorship appointments, though, are governed by a preponderance of the evidence standard. These differing proof standards require different standards of appellate review, which mean that a reversal of a termination order may not lead to the same result for a conservatorship order. Therefore, conservatorship determinations must be challenged separately from termination.

UNRECORDED INTERVIEWS IN CHAMBERS MUST BE CONSTRUED AS SUPPORTING THE TRIAL COURT'S FINDINGS

¶ 07-4-_24 **Patterson v. Brist,** ___ S.W.3d ___, 2006 WL 3030225 (Tex. App.—Houston [1st Dist.] 2006). (10/26/06)

Facts: In their divorce, mother was appointed SMC and father was appointed PC. Later, father sought to modify possession. Then, the state intervened and filed a contempt action for child support arrearage, after which father sought JMC with the right to determine residence. The parties reached a deal regarding the child support arrearage. After a hearing and an *in camera* interview with the child, the trial court appointed father JMC with the right to determine primary residence. Mother appealed.

Held: Affirmed. The evidence was sufficient to support the trial court's findings that it was in the child's best interest to reside with father.

Opinion: The trial court's finding that a change in the child's primary residence was in his best interest was based, in part, on its interview of the child in chambers. Since the interview was not recorded and mother did not object to the absence of a transcript of the interview on appeal, there was not an entire record of the proceedings below. Where the appellate court has only a partial record of the trial proceedings, it must presume that the omitted portions support the trial court's ruling.

TRIAL COURT MUST ORDER RETURN OF A CHILD WHOSE FATHER HAS PROVEN A CLEAR RIGHT TO POSSESSION

¶ 07-4-25. ***In re* Jones,** ___ S.W.3d ___, 2006 WL 3377936 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding). (11/22/06)

Facts: Father adjudicated as the child's father in a court order that also appointed father as possessory conservator and mother SMC. Mother died in a car accident in September 2006, leaving the child in the care of maternal aunt. On October 14, father filed a writ of habeas corpus seeking the return of the child. On November 6, aunt filed a SAPCR seeking to be appointed SMC. On November 14, aunt obtained ex parte temporary orders naming her SMC and excluding father from possession of or access to the child. Father responded with this petition for mandamus.

Held: Mandamus granted. Father had a clear right to possession of the child, and the trial court had a nondiscretionary duty grant his writ.

Opinion: The appellate court found that before the trial court may grant temporary orders excluding a parent from possession of or access to a child, there must first be a verified pleading or an affidavit stating specific facts showing that immediate and irreparable injury, loss, or damage will result before notice can be served. Also, the rebuttable presumptions in favor of the standard possession order also apply to temporary orders. As a result, the trial court abused its discretion by granting aunt a temporary restraining order without notice to father and without hearing father's petition for writ of habeas corpus at the same time.

Also, where a parent has a clear right to possession of a child and has filed a habeas petition, issuing the writ is nondiscretionary. In this case, mother's death terminated the conservatorship order governing possession of the child. At the time father filed the petition for writ of habeas corpus, no SAPCR had been filed. Therefore, father had a clear right to possession and the trial court had a nondiscretionary duty to grant his petition for writ of habeas corpus.

TRIAL COURT MAY NOT MODIFY CUSTODY WITHOUT NOTICE AND AN ADVERSARIAL HEARING

¶ 07-4-26. ***In re* Herring,** 221 S.W.3d 729 (Tex. App.—San Antonio 2007, orig. proceeding). (01/31/07)

Facts: Mother and father were named JMCs of child in July 2002. In January 2006, Father filed a modification suit requesting the right to designate the child's primary residence and restricting mother's access to the child. The trial court entered temporary orders granting mother and father alternating weekly custody. In May 2006, the child made outcries of abuse against the mother to CPS. As a result, the trial court temporarily limited the mother's access to the child to supervised visits every other weekend. In October 2006, the jury returned a verdict in mother's favor, finding that no material and substantial change in circumstances had occurred. However, the trial court did not enter judgment immediately. The father moved for JNOV and mother moved for entry of the judgment. In December 2006, mother and father appeared before the trial court, who advised the parties their motions would be heard January 2007, after which the trial court entered a new temporary order requiring the child to live with the mother, with the father having weekend visits. Father filed petition for writ of mandamus.

Held: Mandamus granted. The trial court abused discretion by modifying custody without notice or a hearing and because new temporary order did not protect the safety and welfare of the child.

Opinion: The appellate court found that TFC § 105.001 requires notice and an adversarial hearing before entry of a new temporary order modifying custody. In this case, the father did not receive any notice of the new order modifying custody. Also, in a SAPCR, the trial court may make temporary orders for the safety and welfare of the child. However, here the trial court did not allow presentation of evidence about the status of ongoing criminal and CPS investigations against the mother. This showed lack of due regard for the safety and welfare of the child. This demonstrates a clear abuse of discretion.

GRANDFATHER'S REQUEST FOR ACCESS WAS NOT PREJUDICED BY NONSUIT OF DIVORCE ACTION

¶ 07-4-27. ***In re* Schoelpple,** 2007 WL 431877 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding). (02/08/07)

Facts: The mother filed for divorce in June 2004. In October 2004, the maternal grandfather filed for grandparent access. In November 2004, the mother and father filed notices of nonsuit, and the trial court dismissed the divorce action. However, in June 2005, mother again filed for divorce, this time in Cherokee County. She did not disclose the pending Harris County suit for grandparent access. In July 2005, the Harris County trial court granted the maternal grandfather access to the child. When grandfather subsequently filed a motion to enforce in Harris County, mother filed a motion to dismiss for lack of jurisdiction. She claimed that the nonsuit of the initial divorce action divested the Harris County court of jurisdiction. The trial court denied the motion to dismiss and mother filed for this mandamus.

Held: Mandamus denied. Grandfather's claim was independent of the initial divorce action and was not prejudiced by the nonsuit.

Opinion: PER CURIAM. Maternal grandfather's request for access falls under TFC § 153.432 and is a request for independent, affirmative relief. Upon filing a petition to intervene, the intervenor becomes a party to the suit for all purposes. The maternal grandfather's claim for affirmative relief therefore was not prejudiced by the nonsuit and the Harris County trial court was not divested of jurisdiction.

MOTHER'S ACTIONS ENDANGERED THE CHILD'S EMOTIONAL HEALTH, ALLOWING GRANDMOTHER TO BE APPOINTED SMC

¶ 07-4-28. **Whitworth v. Whitworth,** 222 S.W.3d 616 (Tex. App.--Houston [1st Dist.] 2007) (op. on rhrng.). (03/16/07)

Facts: Mother and father filed for divorce and their child was born six months later. The trial court entered temporary orders giving custody to mother and visitation rights to father. At a later temporary orders hearing, father testified that mother repeatedly denied him access to child. Mother, on the other hand, alleged that father sexually abused her other child and she feared father's unsupervised visitation with the child. Although the trial court ordered mother to bring the child to court for the hearing, mother refused to do so. At the end of the hearing, the trial court found mother in contempt, citing her denial of father's visitation rights and her behavior in court.

At the same time, the paternal grandmother filed a petition for intervention, requesting to be appointed SMC of the child. This petition stated no grounds for intervention. The trial court appointed grandmother temporary SMC; the court's final divorce decree also appointed grandmother SMC with temporary visitation

by mother and father. The trial court stated that the standard possession order for mother and father would be inappropriate and not in child's best interest. Mother appealed.

Held: Affirmed on rehearing. The trial court was correct to appoint grandmother as SMC because the child's emotional health was in danger.

Opinion: The appellate court raised the issue of standing sua sponte. It found that an intervenor in a SAPCR does not need to prove the standing required to institute an original suit because managing conservatorship is already at issue. TFC § 102.004(b), as it existed at time mother and father filed for divorce, allowed a grandparent to intervene when the trial court deemed the grandparent to have had substantial past contact with the child. The evidence supported the grandmother's standing to intervene in the SAPCR.

On the issue of conservatorship, for the trial court to award SMC to a non-parent, the non-parent must prove that making a parent SMC would result in serious physical or emotional harm to the child. This must be proven by specific acts or omissions by the parents. Here, the trial court found that mother had a history of making false claims of child abuse against father and grandmother. These claims and their subsequent investigations impaired the child's emotional health. The trial court also found that mother denied child's access to father, which also impaired the child's emotional health.

Dissent: The dissent found that TFC §§ 102.004(a)(1) and 102.003(13) give standing to grandparents seeking to file suit requesting SMC of a child if the order is necessary because child's physical health or welfare is in danger. Here, the grandmother did not allege there had been, and there was no evidence of, imminent danger to the child. Although TFC § 102.004(a) was modified in 1995, this modification was not meant by legislature to be substantive, and the requirement for immediate and serious harm still applied.

It is true that TFC § 102.004(b) allows grandparents to intervene in a SAPCR if grandparent has had substantial past contact with child. However, the record established that grandmother had no former contact with child. Furthermore, the majority's reading of the statute would give trial courts so much discretion to interfere with mother's constitutional right of access to her child that the statute would unconstitutionally violate due process. Additionally, the hearings in this case were de facto habeas corpus proceedings to which TFC § 157.374 applies. Therefore, the trial court should only have issued temporary orders transferring immediate possession of the child if there was a serious question about the child's welfare. Also, there was no evidence of specific, identifiable behavior by mother that would harm the child, making grandmother unable to overcome the presumption that mother should continue as SMC. Finally, the trial court improperly gave great weight to grandmother's assertion that the Indian Child Welfare Act governed the case. This Act only applies to proceedings for foster care or termination of parental rights. Therefore, it does not apply to this case.

BELIEF THAT A CHILD SHOULD BE WITH A PARENT INSTEAD OF GRANDPARENTS WAS NOT ADEQUATE TO CHANGE THE PRIMARY RESIDENCE OF THE CHILD

¶ 07-4-29. ***In re* Sanchez,** 228 S.W.3d 214 (Tex. App.—San Antonio 2007, orig. proceeding). (04/04/07)

Facts: Mother and father reached an agreement giving mother the right to determine the child's primary residence. The child stayed with mother's parents during the week while mother attended vocational training in Houston. In August 2006, mother was arrested and father filed a suit to modify, seeking primary custody and the right to determine the child's primary residence. Father alleged child's present environment placed her in jeopardy. The trial court denied father's requested orders, but rendered additional temporary orders awarding father possession during the week and limiting mother's possession to weekends. The trial court also placed conditions on mother's right to possession and granted father sole discretion to decide whether child would be placed in a day care center. Mother filed for mandamus relief.

Held: Mandamus granted. The record did not show any danger to the child that would lead to a change in primary residence.

Opinion: The appellate court found that TFC § 156.006(b)(1) states that a court may not render a temporary order changing the designation of the person who has the right to determine the child's primary residence unless the order is necessary because the child is in danger. Here, the substantial reduction in mother's possession time, the restrictions placed on her rights, and the indefinite duration of the temporary orders taken together deprive mother of the right to determine the child's primary residence. The trial court record did not contain any showing of the necessity of entering the orders. The trial court explained its ruling as being made because "a parent should be there instead of a grandparent. That's why I'm doing it. It's strictly because of that." This explanation did not meet the statutory requirement and was an abuse of discretion.

APPELLATE COURT ORDER OVERTURNING TERMINATION, BUT NOT EFFECT CONSERVATORSHIP FINDING

¶ 07-4-30. ***In re* J.R.**, 222 S.W.3d 817 (Tex. App.—Houston [14th Dist.] 2007). (04/10/07)

Facts: In 2002, DFPS removed children from mother. In 2004, the trial court terminated mother's parental rights and named DFPS as SMC. In 2005, the court of appeals reversed the termination order and remanded. On remand, the trial court removed the termination sections from the previous judgment and left the remainder of judgment intact. Mother appealed claiming that the court of appeals' mandate required the trial court to hold further proceedings to determine mother's status as conservator.

Held: Affirmed. The appellate court found that neither the trial court's appointment of DFPS as SMC nor the finding that such an appointment was in children's best interest was overturned by court of appeals in 2005. Also, mother did not seek a modification. Therefore, the trial court's judgment was proper.

LIMITING TESTIMONY DID NOT VIOLATE DUE PROCESS; SANCTIONS ORDER VOID

¶ 07-4-31. ***In re* M.A.S.**, 233 S.W.3d 915 (Tex. App.—Dallas 2007). (04/18/07)

Facts: Mother named SMC of child in the divorce. Ten years later, father filed a petition to modify, requesting appointment as SMC. Father's witnesses testified that mother was verbally and physically abusive toward the child, the child wanted to live with father, and that mother denied father access to the child. Additionally, the child signed a preference statement in favor of father. Mother, a lawyer licensed in OK, appeared pro se, did not call any witnesses, denied ever hurting the child, claimed child returned several times from visitation with father with injuries, and that child happy living with her, is involved in a lot of activities, and loves animals and has several pets. The trial court awarded father SMC and sanctioned mother. Mother appealed.

Held: Affirmed in part, reversed in part. Evidence sufficient to support awarding father SMC and court did not violate due process by limiting mother's testimony. However, court's plenary power had expired before sanctions order was issued.

Opinion: The trial court allowed mother two and one-half hours of narrative testimony, while mother had requested a half-day. The appellate court noted that two and one-half hours of narrative testimony is equivalent to a half-day of question and answer testimony. Also, the trial court entered judgment on May 11, mother filed a motion for new trial on May 18, father filed a motion for sanctions on May 31, the court heard the motions on June 13 and 20, the court denied motion for new trial on July 25, and the court lost plenary power on August 24. Since the court's sanction order not entered until October 17, so void.

MOTIONS FOR SUBSTITUTE SERVICE MUST FOLLOW STATUTORY FORMALITIES

¶ 07-4-32. ***In re* J.M.I.**, 223 S.W.3d 742 (Tex. App.—Amarillo 2007). (05/03/07)

Facts: In October 2005, maternal uncle and aunt filed suit for custody on basis that child had been living with them for 6 months. At same time, mother and father filed a writ of habeas corpus that led to them regaining possession of child. Trial court allowed substitute service on mother and father through maternal grandmother, allegedly because mother and father were avoiding service. Subsequently, mother and father were personally served. Mother and father, however, did not appear at hearing for temporary relief, and the trial court granted temporary JMC to uncle and aunt. Mother was served with a writ of attachment in November 2005 and child was turned over to uncle. In December 2005, mother and father did not appear at final hearing, which occurred prior to their answer date, and trial court entered default judgment appointing uncle and aunt the child's JMC. Both parents appealed.

Held: Reversed and remanded. Motion for substitute service did not follow the statutory requirements.

Opinion: The appellate court found substitute service improper because TRCP 106(b) requires specific facts showing number of attempts at personal service and dates on which service attempted. Here, motion for substitute service did not provide this information. Because personal service was eventually effectuated, court of appeals had to continue review. Because the final hearing took place prior to the deadline for their answer, mother and father denied due process.

TFC § 153.131 PRESUMPTION DOES NOT APPLY TO DETERMINATION OF PRIMARY RESIDENCE—THIS CONFLICTS WITH EL PASO OPINION

¶ 07-4-33. **Gardner v. Gardner,** 229 S.W.3d 747 (Tex. App.—San Antonio 2007). (05/09/07)

Facts: Mother and father ("Matt") filed for divorce and entered into an MSA on most issues, including JMC of the three children. A.M.G. was Matt's natural child, C.M.G. was his adopted child, and C.G., was neither Matt's natural nor adopted child, but Matt was listed as the father on C.G.'s birth certificate. The MSA also gave Matt the right to determine the primary residence of A.M.G. Subsequently, the trial court also gave Matt the right to determine the primary residence of the other two children. Mother appealed.

Held: Affirmed in part, reversed in part, and remanded. Appointment of parents as JMC in the MSA allows court to make residence appointment without a best interest finding.

Opinion: Mother's appeal asserted that TFC § 153.131 requires that for non-parent to be appointed an MC, the non-parent must submit proof that appointment of the parent is not in the child's best interest. However, the appellate court held that TFC § 153.131 is not applicable because the parties had already agreed to JMC in their MSA. The court also notes that this is contrary to the El Paso Court of Appeal's decision in *De La Pena*, 999 S.W.2d 521, 534-35 (Tex. App. – El Paso 1999, no pet.), which held that TFC § 153.131 presumption applies to both appointment of conservators and determination of primary residence.

GIVING ONE PARTY SOLE RIGHT TO DETERMINE VISITATION AND CUSTODY OF A CHILD IS EFFECTIVELY A COMPLETE DENIAL OF ACCESS

¶ 07-4-34. ***In re* M.A.H.,** 224 S.W.3d 838 (Tex. App.—Texarkana 2007). (05/16/07)

Facts: In January 2006, the trial court removed mother as SMC of her two children and appointed paternal grandmother as SMC. Mother was appointed PC, with paternal grandmother having sole discretion to deter-

mine visitation. Mother did not appear at the hearing, and paternal grandmother testified that one child had suffered violence from mother and her boyfriend. Mother appealed.

Held: Affirmed in part, reversed in part, and remanded with instruction. The trial court abused its discretion in granting paternal grandmother sole right to determine visitation and custody.

Opinion: The appellate court held that an order giving one conservator sole discretion to determine visitation effectively denies access to the child by the other conservator. Such a denial of access requires a best interest finding to support it. The case was remanded with instructions to either designate specific periods of possession or to make a determination that a complete denial of access to the children by mother is in the children's best interest.

JURY'S FINDING OF NO FAMILY VIOLENCE SUPPORTED BY THE EVIDENCE

¶ 07-4-35. **Hinkle v. Hinkle**, 223 S.W.3d 773 (Tex. App.—Dallas 2007). (05/29/07)

Facts: Mother and father separated after an altercation in which mother alleged father pointed a gun at her. Later, mother filed for divorce, and mother and father entered in to an agreement wherein father's visitation of the child would be supervised by family members. Both parents claimed that the other had committed family violence. At the end of the trial, the jury found there had not been any family violence during the two years preceding the suit. The final divorce decree named the parents JMC. Mother appealed.

Held: Affirmed. The appellate court held that the evidence supported the jury finding that father did not commit family violence.

Editor's comment: *This case was very fact specific, basically a "he said, she said" situation. G.L.S.*

IN ORDER TO CONTRAVENE A JURY'S VERDICT, THE TRIAL COURT MUST FIND THAT THE VERDICT IS NOT SUPPORTED BY ANY EVIDENCE; "GREAT WEIGHT" OF THE EVIDENCE IS NOT ENOUGH

¶ 07-4-36. **Harris v. DFPS**, 228 S.W.3d 819 (Tex. App.—Austin 2007). (06/15/07)

Facts: In 2000, mother's parental rights to three of her children were terminated. In February 2001, mother had another child, and DFPS immediately removed this child and filed a motion to terminate her parental rights. At the trial, the jury found that mother's rights should not be terminated and that mother should be named SMC. DFPS filed a motion for new trial, and the child's ad litem filed a motion asking the trial court to name DFPS as SMC. The trial court signed an order that mother's parental rights should not be terminated but named DFPS as SMC. Mother was appointed PC with supervised visitation. The trial court stated that the jury's finding that mother should be named SMC was against the evidence and not in the child's best interest. Mother appealed.

Held: Reversed and rendered. The evidence was sufficient to support the jury's finding.

Opinion: The appellate court held that TFC § 105.002 provides that, in most SAPCRs, the trial court may not contravene a jury's verdict on conservatorship. Although TFC § 161.205 provides that, if the trial court does not terminate a parent's rights, it shall either deny the petition or render an order in the best interest of child, the trial court may not disregard a jury's verdict under TFC § 105.002 unless the findings are not supported by the evidence. Here, the evidence was sufficient to support the jury's finding that mother should be named SMC. Also, the trial court provided no support for its finding that jury's verdict was unreasonable. By find-

ing that jury's verdict was against the great weight of the evidence, the trial court was conducting a factual sufficiency review, not a legal sufficiency review. This is not the proper role of the trial court.

Dissent: The dissent found that the record contains undisputed, conclusive evidence that mother's parental rights were terminated as to her older children. This evidence of an independent ground for termination cannot be ignored by the reviewing court. This evidence also supports the trial court's presumed finding that naming DFPS as SMC is in the child's best interest. The jury's finding was unreasonable and unsupportable.

TRIAL COURT'S RESTRICTIONS ON MOTHER'S VISITATION AND POSSESSION WERE IN THE CHILDREN'S BEST INTEREST

¶ 07-4-37. **George v. Jeppeson**, ___ S.W.3d ___, 2007 WL 2052073 (Tex. App.—Houston [1st Dist.] 2007). (07/19/07)

Facts: Mother and father divorced in 1997 and were named JMCs of their 2 children. In 2004, the oldest child made an outcry of abuse against mother's new husband, who admitted to molesting the child for four years. There were also allegations that the new husband had begun molesting the younger child. Criminal prosecution ended in deferred adjudication, with the requirement that husband would have no contact with either child. Nevertheless, mother continued her relationship with the husband and allowed him to have contact with the children on at least two occasions. The children's father filed an action to modify conservatorship and obtained temporary orders naming him SMC. The trial court named father SMC and mother possessory conservator. The order also required that all possession be exercised by mother through the S.A.F.E. program. Mother appealed.

Held: Affirmed. The trial court's order protects the children's best interests.

Opinion: The appellate court held that TFC § 153.193 authorizes limited restrictions imposed on a possessory conservator if those restrictions do not exceed what is required to protect the child's best interest. Here, the judgment was specific enough and served to protect both mother's possessory rights and the children's best interests.

MODIFICATION OF CUSTODY OUTSIDE OF THE PLEADINGS VIOLATES DUE PROCESS

¶ 07-4-38. ***In re* Parks**, ___ S.W.3d ___, 2007 WL 2351057 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding). (08/14/07)

Facts: In December 2007, mother and father divorced and agreed to be JMCs. In March 2007, father filed for enforcement, claiming mother denied him access to the child. Trial court held mother in contempt, sentenced her to 180 days incarceration, and ordered that father have possession of the child until further order of the court, even though father had no modification pleadings on file. Mother filed for writ of habeas corpus.

Held: Habeas granted. Modification of custody outside the pleadings violates due process.

Opinion: The appellate court found that, although it may be in the child's best interest to grant possession to the father while mother is incarcerated, the trial court's order went too far. Giving father possession "until further order of this Court" went beyond mother's period of confinement and was outside the scope of the court's authority. In doing so, the trial court violated mother's due process rights.

EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT MOTHER WAS A KIDNAPPING AND FLIGHT RISK AND ITS IMPOSITION OF A $50,000 BOND

¶ 07-4-39. **In re A.R.**, ___ S.W.3d ___, 2007 WL 3038097 (Tex. App.—Dallas 2007). (08/15/07)

Facts: Mother and father divorced and were named JMCs, with mother having the right to determine primary residence of the child. Mother wanted the child to be a model. On several occasion mother denied father access to the child. On one occasion, mother took the child to New York for modeling-related activities and, as a result, father moved to hold mother in contempt, which the trial court granted. The next day, mother videotaped the child in which she had the child describe inappropriate behavior allegedly engaged in by father. Then, mother made repeated allegations that father engaged in sexually inappropriate behavior with the child. Mother had child examined three times for evidence of sexual abuse, although father had supervised visitation at the time. In violation of court orders and ignoring the child's protests and distress, mother continued to videotape discussions about the case with the child. Mother also paid a $50,000 flat fee to retain a non-resident attorney who had a questionable background and a history of being associated with parents who later kidnap their children. Mother had a succession of four resident attorneys throughout the pretrial and trial proceedings. After a seven-day trial, the jury awarded SMC to father. The trial court concurred and also required supervised visitation for mother, and ordered mother to post a bond because she was a flight risk and kidnapping risk. Mother appealed.

Held: Affirmed. Evidence supported finding that Mother was a kidnapping and flight risk.

Opinion: The appellate court held that the trial court can condition access on a bond under TFC § 153.011. Although the trial court did not specifically find that the child would be removed from the country, the appellate court held that the factors set forth in TFC § 153.502 that a court may consider to determine whether there is a risk of international abduction by a parent of a child are instructive to an overall abduction analysis. Here, mother was unable to hold a full-time job, owned no property in Dallas County, was able to borrow $50,000 from her parents to hire an out-of-state attorney, refused to follow court orders, and was mentally unstable.

EVIDENCE DID NOT SUPPORT A FINDING OF IMMEDIATE DANGER TO THE CHILDREN

¶ 07-4-40. ***In re* DeFilippi**, ___ S.W.3d ___, 2007 WL 2446876 (Tex. App.—San Antonio 2007, orig. proceeding). (08/30/07)

Facts: Mother and father divorced, and father was awarded regular, unsupervised visitation. Subsequently, mother died, the maternal grandparents assumed immediate care of the children, filed a SAPCR, and obtained a TRO prohibiting father from removing the children from Texas. Then, Father filed a habeas petition seeking the immediate return of the children. The trial court denied the habeas and named the maternal grandparents as temporary SMCs, finding a serious and immediate danger to the children's emotional welfare.

Held: Mandamus granted. The evidence did not support the trial court's finding of a serious and immediate danger to the children.

Opinion: If a party can prove the bare legal right to possession, then the trial court has a ministerial duty to grant habeas relief. The only exception is when there is a serious and immediate question concerning the welfare of the child. Here, father established his legal right to possession of the children. Although father may have been considered a suspect in mother's death, such evidence of wrongdoing was speculative and was not a dire emergency to the children. Also, merely removing the children from their familiar environment did not create a serious danger to the child.

DENIAL OF SERVICEMAN'S APPLICATION FOR STAY OF CIVIL ACTION WITHIN TRIAL COURT'S DISCRETION WHEN STATUTORY FORMALITIES NOT FOLLOWED

¶ 07-4-41. ***In re* Walter,** S.W.3d , 2007 WL 2791116 (Tex. App.—Waco 2007, orig. proceeding). (09/26/07)

Facts: The father is a serviceman currently deployed in the Middle East. He filed a motion for stay on the day of a temporary orders hearing regarding the custody of his children. The trial court denied the motion and father filed this mandamus.

Held: Writ denied. Denial of stay was within the trial court's discretion.

Opinion: If filed by a person in military service, 50 U.S.C.S. Appx. § 522 requires a trial court to stay a civil action for not less than 90 days. However, the appellate court found appellant did not meet one of the requirements of the statute: he did not include a "letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter." Without this letter, the trial court has discretion over granting a stay.

UCCJEA DOES NOT REQUIRE A BEST INTEREST FINDING WHEN DECLINING JURISDICTION

¶ 07-4-42. **Hart v. Kozik,** S.W.3d , 2007 WL 2948639 (Tex. App.—Eastland 2007). (10/11/07)

Facts: Parents divorced in Harris County in 1996 and were named JMC's, with mother given the right to determine the primary residence of the children. In May 1996, mother and children moved to Florida. In 2000, while residing in Alabama with the children, mother filed a motion to modify child support. Although father lived in Midland County, father moved to transfer the case to Ector County. The case was transferred, and father's child support and visitation were modified. Five years later father filed a motion to modify in Ector County. At this point, the mother and children still lived in Alabama and father lived in League City. Mother asked the trial court to decline jurisdiction under the UCCJEA. The trial court declined jurisdiction. Father appealed.

Held: Affirmed. The trial court did not err in not making a best interest finding. Also, the evidence supported the trial court's decision to decline jurisdiction.

Opinion: The appellate court found that the UCCJEA does not explicitly require a trial court to consider a child's best interest when determining jurisdiction. The court also rejected father's argument that the differences between Texas and Alabama law regarding consideration of the child's preferences amount to a violation of due process if the case were tried on Alabama. There is no substantial difference in the law of the two states in this area and the trial court did not err in failing to analyze them.

After reviewing the record, the court of appeals also found that the evidence was sufficient to support the finding that the earlier litigation in Ector County did not constitute an agreement between the parties to litigate these issues in Ector County. The current litigation "is sufficient proof that, if there was an agreement, it no longer holds." Although the trial court could consider the earlier litigation as a factor in its decision, it was not required to retain jurisdiction.

TRIAL COURT'S ORDERS SHOULD CONFORM TO THE PLEADINGS. ALSO, NO EVIDENCE TO SUPPORT DEVIATION FROM THE STANDARD POSSESSION ORDER

¶ 07-4-43. **Baltzer v. Medina**, ___ S.W.3d ___, 2007 WL 3101653 (Tex. App.—Houston [14th Dist.] 2007). (10/25/07)

Facts: Parents divorced and were named JMC's, with mother given the right to determine the primary residence of the child. Several years later, the child told a friend's parents that his step-father had been hitting him. The Constable was called and the child was removed from mother's custody. Father then filed a petition to modify, requesting that he be given the right to determine the primary residence of the child and the right to make educational decisions for the child. Father also asked that mother be limited to supervised visitation. The trial court appointed father SMC, limited mother's visitation to supervised visits, and ordered mother to pay father's attorney's fees as "child support." Mother appealed.

Held: Reversed and remanded. Father did not request to be named SMC in his pleadings and there was no evidence to support the trial court's visitation order or award of attorney's fees.

Opinion: The appellate court found that father never requested to be named SMC, either implicitly or in his pleadings. As a result, the trial court erred in entering an order that did not conform to father's pleadings. Also, there was no evidence that mother had a history or pattern of abuse or neglect of the child. Because there was no other basis on which the trial court could have deviated from the standard possession order, the trial court abused its discretion in limiting mother's possession. Finally, because the court of appeals was "not reasonably certain that the trial court's attorney's fees determination was not significantly affected by its errors regarding conservatorship, periods of possession, and supervision," the issue of attorney's fees was remanded along with the other issues discussed above.

A FOSTER HOME IS JUST LIKE ANY OTHER HOME FOR TRANSFER PURPOSES.

¶ 07-4-44. ***In re* Kerst**, ___ S.W.3d ___, 2007 WL 3119277 (Tex. App.—Texarkana, orig. proceeding). (10/26/07)

Facts: After terminating the parental rights, DFPS placed the children with foster parents. After a dispute with the foster parents, DFPS removed the children from their care. The foster parents then filed a suit to modify conservatorship in Hopkins County, the county in which court of continuing jurisdiction, along with a motion to transfer the case to Bowie County. The trial court denied the motion to transfer. The foster parents filed for mandamus relief.

Held: Mandamus granted. The trial court had a ministerial duty to grant the transfer because the children had resided in Bowie County for more than six months.

Opinion: The appellate court found that the children were considered to be residing in Bowie County when they were placed there for foster care. Their home in Bowie was their only home, and they had been there for more than six months. Therefore, the trial court was required to transfer the case.

DEATH OF SMC DOES NOT TERMINATE A PRIOR CONSERVATORSHIP ORDER FOR THE PURPOSES OF A MODIFICATION. ALSO, DENIAL OF PARENTAL PRESUMPTION IN A MODIFICATION DID NOT VIOLATE FATHER'S DUE PROCESS

¶ 07-4-45. ***In re* C.A.M.M.,** ___ S.W.3d ___, 2007 WL 3145835 (Tex. App.—Houston [14th Dist.] 2007). (10/30/07)

Facts: Parents were not married, but father's paternity was established. He was named possessory conservator with a standard possession order. Mother and daughter lived with mother's parents and father actively involved with the daughter's life. This was especially true after mother began having serious health problems when the daughter was nine years old. Mother died while at home with the daughter, and father was immediately notified. Although he took the daughter home with him for a few days, father returned her to the grandparents when school resumed. The grandparents filed a petition to modify, accompanied with a signed statement by the daughter, now over twelve years old, that she preferred her grandparents to determine her primary residence. The parties entered into an agreed interim order requiring that the daughter would reside with the grandparents until June 1st with father having standard possession. Then, daughter would reside with father, and the grandparents would have visitation according to an agreed schedule. However, in July the grandparents sought to modify the interim order. After a hearing, father and the grandparents were appointed JMC, with grandparents having primary custody and father having visitation. At final trial, the trial court appointed both parties JMC with the grandparents having the right to determine primary residence and father having a standard possession order. The trial court stated that this order was a modification of the original order between mother and father created back in 1996. Father filed a motion for new trial, after which the trial court reformed its order, adding a finding that appointing father as SMC would significantly impair the daughter's emotional development and physical health. The court also ordered that father's visitation would be supervised. Father appealed.

Held: Affirmed as modified. The parental presumption does not apply in a modification proceeding and the trial court properly considered the daughter's best interest. However, the court erred in ordering supervised visitation and that part of the order was removed.

Opinion: The appellate court found that mother's death did not terminate the prior conservatorship determination. The grandparents had standing to pursue a modification of the prior order because they met the requirements of TFC § 102.003(11). Although the Texas Supreme Court had held in *Greene v. Schuble*, 654 S.W.2d 436 (Tex. 1983) (orig. proceeding), that the death of a conservator ends the conservatorship order, its holding was limited to habeas corpus proceedings. The Second Court of Appeals also considered and rejected a similar argument in *P.D.M.*, 117 S.W.3d 453 (Tex. App.—Fort Worth 2003, pet. denied). Therefore, the court of appeals found that the trial court was authorized by the Family Code to treat the grandparent's suit as a modification and avoid the parental presumption.

The court of appeals also rejected father's claim that the trial court violated his due process rights by not applying a parental presumption to the modification. However, the trial court did err by reforming its order to require supervised visitation for father. The court was apparently under the impression that an order appointing non-parents as JMC had to be accompanied by a finding of physical or emotional danger to the child. However, as discussed above, such a finding was not required. Also, such a finding must be supported by sufficient evidence to overcome the statutory presumption in favor of the standard possession order. The appellate court found no such evidence.

Concurrence: The concurring opinion found that denying father a parental presumption violated his due process rights. Although the majority opinion is correct under the law, "this case raises serious question about the fundamental rights of fit parents to make decisions concerning the care, custody, and control of their own children." The current state of the law allows trial courts to name non-parents as SMC without applying any deference to the parent or showing that the parent is unfit. This "has adversely impacted the ability of fit parents to make decisions concerning ... their own children."

VISITING JUDGE WAS ASSIGNED TO HEAR MOTION TO RECUSE, BUT PRESIDED OVER THE TRIAL ALSO—JUDGMENT IS VOID

¶ 07-4-46. ***In re* B.F.B.,** ___ S.W.3d ___, 2007 WL 4117977 (Tex. App.—Texarkana 2007). (11/21/07)

Facts: Father was convicted of murdering mother. Before his conviction, the children's maternal grandfather and step-grandmother filed suit seeking custody of the children. Several other relatives subsequently filed similar suits and the cases were consolidated. The maternal grandfather filed a motion to recuse the trial judge, and a visiting judge was assigned to hear this motion. However, after denying the motion to recuse, the visiting judge went forward with a trial on the merits. He ultimately awarded possession and JMC to the children's paternal aunt, but with the paternal grandfather named JMC with custody until a transition plan was developed. Six other various relatives were appointed PC. Maternal grandfather appealed, claiming, among other things, that the visiting judge lacked a valid assignment to hear the case.

Held: Reversed and remanded. The order of assignment in this case only assigned the visiting judge to hear the motion to recuse.

Opinion: The order provided that the assignment was "for the purpose of the assigned judge hearing a motion to recuse." It also cites TRCP 18a, which applies only to recusal or disqualification of judges. Although this language was contained in the wrong part of the order, that does not change the proper interpretation of the order. When a visiting judge's action exceeds the scope of the assignment, the judgment is void.

SAPCR
Child Support

BEST INTEREST FINDINGS ARE NOT NECESSARY WHEN THE TRIAL COURT IS NOT SETTING OR MODIFYING THE CHILD SUPPORT ORDER

¶ 07-4-47. ***In re* J.D.M.,** 221 S.W.3d 740 (Tex. App.—Waco 2007). (02/28/07)

Facts: In November 2003, pursuant to a modification suit, the trial court appointed mother and father JMCs, with father to determine the children's primary residence. The trial court did not order mother to pay child support and allowed father a monthly child support credit in the event any of the children resided with their mother in the future. In November 2004, mother filed a modification suit seeking the right to establish the primary residence of the youngest child, which the trial court granted. The trial court did not order father to pay child support to mother. Mother appealed, claiming the trial court erred in not making best interest findings or child support findings pursuant to TFC § 154.130.

Held: Affirmed. Best interest findings were not necessary because the trial court did not set or modify the child support.

Opinion: The appellate court held that TFC § 154.130 does not require best interest findings. Even if it did, TFC § 154.130 only applies when the trial court sets or modifies the amount of child support. Here, because the trial court did not set or modify the amount of child support, the requested findings were not mandatory.

FATHER NEEDED TO PROVIDE EVIDENCE OF SUPPORT BEFORE HE IS ENTITLED TO AN OFF-SET OF HIS CHILD SUPPORT PAYMENTS

¶ 07-4-48. **Pedregon v. Sanchez,** 234 S.W.3d 90 (Tex. App.—El Paso 2007). (03/22/07)

Facts: In 1992, mother and father divorced and were named JMCs, with mother having the right to primary possession. In June 2001, mother agreed to relinquish custody of son to father, and son went live with father. As a result, father reduced his child support payments, but without seeking a formal court order. In January 2004, mother filed a motion for increased child support payments for the daughter and for enforcement of the child support father owed from the time the son moved in with him. Father sought credit for the support he was required to pay to mother while son lived with him. There was conflicting testimony as to who provided support for the child and how much support while he was in father's possession. The trial court awarded mother arrearages, attorney's fees, and costs. Father appealed.

Held: Affirmed. Father did not provide any evidence of the amount of support he provided to the son and therefore was not entitled to an offset.

Opinion: The appellate court held that in order to be entitled to a child support offset, the obligor must provide some evidence of the actual amount of support paid when obligor did not solely support child. In this case, there was conflicting evidence as to who provided support and how much support, and "[t]he record is devoid of any receipts or estimates indicating the amount of support [father] provided." Because father did not present any evidence as to the amount of support he actually provided, the trial court did not err in denying an offset.

INDEPENDENT CONTRACTOR'S WAGES CANNOT BE CONSIDERED WAGES FOR PERSONAL SERVICES AND ARE EXEMPT FROM GARNISHMENT

¶ 07-4-49. **Campbell v. Stucki**, 220 S.W.3d 562 (Tex. App.—Tyler 2007). (03/30/07)

Facts: In August 2004, the trial court reformed the parties' divorce decree, awarding the wife child support and a fifty-percent interest in husband's insurance renewal commissions. Wife's attorney was also awarded fees. Afterwards, the trial court issued writs of garnishment against the husband's employer. In January 2005, husband moved to dissolve the writs, claiming that the funds were exempt from garnishment. The trial court agreed and found that, although the husband was an independent contractor, he received compensation for personal services that was exempt under the Texas Constitution. The trial court dissolved the writs and ordered the wife to pay attorney's fees for both husband and his employer. Wife appealed.

Held: Reversed and remanded. Husband cannot be both an independent contractor and receive wages for personal services.

O**pinion**: The appellate court found that although the Texas Constitution forbids garnishment of wages for personal service, such wages exclude compensation paid to an independent contractor. The trial court found that husband was an independent contractor and, therefore, erred in concluding that husband's wages were exempt from garnishment.

The court also held that husband did not request attorney's fees and that there is no mandatory statute or rule that provides for a judgment debtor to recover fees. Therefore, the trial court abused its discretion in awarding fees to the husband. Furthermore, if a judgment debtor unsuccessfully contests a writ of garnishment, then the debtor is responsible for attorney's fees. Because the court of appeals found that the writs were dissolved in error, the husband is now responsible for paying fees.

QUASI-ESTOPPEL ESTABLISHED BY DAY CARE PAYMENTS MADE IN PLACE OF CHILD SUPPORT

¶ 07-4-50. **In re A.L.G.**, 229 S.W.3d 783 (Tex. App.—San Antonio 2007). (05/23/07)

Facts: Mother and father divorced and father was ordered to pay child support. Later, mother filed a motion for enforcement of child support. Father raised the defense of quasi-estoppel since he had paid their daughter's daycare tuition, which mother then claimed on her taxes. Nevertheless, the trial court found an arrearage for half of the amount sought by mother. Father appealed.

Held: Reversed. Father established the elements of quasi-estoppel based on evidence.

Opinion: The appellate court found that nothing in the record supports the conclusion that father intended the daycare payments to be in addition to his child support obligations. The mother knew of the payments and benefited from them on her taxes. This established the elements of quasi-estoppel.

Dissent: Would still reverse but would remand because does not agree that the trial court's award of one-half of the arrearage sought implies that the trial court found that the parties had a verbal agreement. Such an implied finding is inconsistent with the judgment. Although quasi-estoppel may apply to this case, father did not meet his burden because the evidence was no so strong that reasonable minds could draw only one conclusion. An appellate court cannot substitute its judgment for that of fact finder. Because the evidence was not conclusive that mother affirmatively misled father, case should be remanded to trial court.

TRIAL COURT'S CONTEMPT JURISDICTION ENDS WHEN CHILD SUPPORT OBLIGATION ENDS

¶ 07-4-51. ***In re* Munks,** S.W.3d , 2007 WL 1844893 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding). (06/28/07)

Facts: Mother and father divorced in 1987 and father was ordered to pay child support. In April 1988, the trial court ordered father to pay arrears as a combination of a lump sum payment and monthly payments. In September 1992, the trial court found father had missed additional child support payments and ordered him to make an additional lump sum payment and additional monthly payments. In May 2002, the trial court found father had further missed child support payments and held him in criminal contempt, ordering him to serve 60-days confinement. The trial court also held him in civil contempt and ordered him confined until he made a lump sum payment to mother. Further, the trial court ordered father to make additional monthly payments and awarded a cumulative judgment to mother for total remaining arrearages. The child turned eighteen the day after the order was signed. In November 2006, mother filed a motion for enforcement, alleging father had missed more payments. In February 2007, the trial court held father in contempt and ordered him confined for 60 days each for five separate violations. Also, the trial court ordered father confined until he paid the total amount of arrearages. Father petitioned for relief the day after the hearing.

Held: Habeas granted. Trial court no longer had jurisdiction to enforce the support obligation by contempt.

Opinion: The appellate court held that TFC § 157.005(a) provides the trial court has jurisdiction to render a contempt order for failure to comply with a child support order not later than the 6th month after the date the child becomes an adult or the child support obligation terminates. Mother and father's divorce decree provided that father's obligation to continue paying new child support terminated when the child turned eighteen. Although father's payments on the arrearage extended beyond the child's eighteenth birthday, the trial court's jurisdiction to enforce the obligation by contempt did not.

Editor's Note: *TFC § 157.005(a) now allows the trial court to render a contempt order not later than the second anniversary of the date the child becomes an adult or the child support obligation terminates. G.L.S.*

SAPCR
Termination of Parental Rights

★★★★★ Texas Supreme Court ★★★★★

ACCELERATED APPEAL IS AN ADEQUATE REMEDY IN A TERMINATION PROCEEDING, EVEN WHEN THE TRIAL COURT ACTS WITHOUT AUTHORITY

¶ 07-4-52. **In re DFPS**, 210 S.W.3d 609 (Tex. 2006, orig. proceeding). (12/15/06)

Facts: The trial court failed to render a final order in a termination case before the statutory deadline. Mother and great grandmother then filed a motion to dismiss. Subsequently, the trial court terminated mother's parental rights and named DFPS SMC. Mother and great grandmother responded by filing for a mandamus, which the appellate court granted. DPFS then filed a mandamus of their own with the Texas Supreme Court.

Held: Mandamus granted. Mother and great grandmother had an adequate remedy by accelerated appeal.

Opinion: The Texas Supreme Court found that it is mandatory for a trial court to dismiss a case if a final order has not been rendered by the first Monday one year after DFPS was named temporary SMC. However, mother and great grandmother's mandamus was not appropriate because the Family Code allows an accelerated appeal under these circumstances. Such an appeal would be an adequate remedy.

Dissent: The dissent found that a party may be excused from pursuing an appeal when the trial court acts with complete lack of authority. In this case, the trial court lacked authority to do anything but dismiss the case, and writ of mandamus should be issued. The dissent stressed that child custody proceedings in particular are of great consequence, and flexibility in the mandamus process is essential in such cases.

TRIAL COURT CAN INVOKE EMERGENCY JURISDICTION WHEN A CHILD'S PARENTS ARE ARRESTED AND NOBODY IS LEFT TO CARE FOR CHILD

¶ 07-4-53. ***In re* J.C.B.,** 209 S.W.3d 821 (Tex. App.—Amarillo 2006). (11/29/06)

Facts: Parents were arrested for drug possession while driving through Texas from their home in Oklahoma. After their arrest, the child was left with no one to care for him. The trial court invoked TFC § 152.204(a) (granting temporary emergency jurisdiction) and terminated parent's parental rights. Father appealed.

Held: Affirmed. The child had been abandoned and now Texas is his home state.

Opinion: TFC § 152.201(a) does not allow Texas courts to make custody determinations if the child has a home state other than Texas and the courts of that state have not declined to exercise their jurisdiction. However, TFC § 152.204(a) provides for an exception if the child has been abandoned or is threatened with mistreatment or abuse. The appellate court found that when the parents were arrested and taken into custody, nobody was left to care for the child. Also, in the 14-month period from his parents' arrest to their trial, the child was in the care of the DFPS and no proceedings involving child were filed in Oklahoma. Therefore, the child's home state is now Texas.

EVIDENCE DID NOT SUPPORT TERMINATION UNDER TFC § 161.001(1)(D)

¶ 07-4-54. **Colbert v. DFPS,** ___ S.W.3d ___, 2006 WL 3752371 (Tex. App.—Houston [1st Dist.]). (12/21/06)

Facts: Mother lived with her five children, her boyfriend, her mother, and her mother's boyfriend. Mother's boyfriend brought his daughter from another relationship home to visit. During that visit, the daughter was abused on at least two occasions and died from her injuries. Mother's boyfriend was found guilty of injury to a child and sentenced to life in prison. DFPS took possession of the children and filed a petition for protection of a child, conservatorship, and termination of parental rights. DFPS did not remove the children from the home, but told mother not to allow the children to have any contact with mother's boyfriend. However, mother did not believe her boyfriend had caused his daughter's death and allowed him to move back into the home. DFPS reacted by removing the children from M's care. After DFPS took custody, mother revealed that her mother had a criminal history that included drug convictions, prostitution, and burglary. The grandmother's boyfriend had convictions for aggravated robbery, breaking and entering, and possession of cocaine. Several months later, mother gave birth to twins, whose father was mother's boyfriend. DFPS removed the twins and filed a petition for protection, conservatorship, and termination of parental rights. The two cases were tried together, with the trial court terminating mother's parental rights to all of her children.

Held: Reversed and rendered in part, reversed and remanded in part. The evidence was not sufficient for the trial court to find that mother knowingly placed or allowed the twins to remain in conditions or surroundings that endangered their physical or emotional well-being. It was also not sufficient to support the finding that terminating mother's parental rights was in the best interests of the five oldest children.

Opinion: The appellate court found that there was no evidence that the twins' current condition placed them in danger. Also, the evidence of past crimes by the grandmother and her boyfriend do not show any current danger to the children. Finally, there was uncontested testimony that DFPS did not visit the home before removing the children.

In regards to the best interests of the five older children, the court of appeals held that the evidence did not support the trial court's findings. The children who were old enough to express a preference wanted to stay with their mother. Mother has also made great improvements in her stability, finances, and ability to care for her children. The weight of the evidence in the record weighs against the termination of mother's parental rights being in the children's best interests. Because the termination order is reversed, TFC § 263.404 only allows the trial court to appoint DFPS as SMC after making specific findings, which was not done. As a result, that part of the judgment was reversed. TFC § 161.205 requires that a factfinder make a best interest determination when a termination order is denied, so the case was remanded.

Concurrence/Dissent: TFC §§ 161.205 and 263.404 only apply when the trial court does not order termination of a parent's rights. Here, the trial court did order termination. Also, mother did not challenge the order appointing DFPS as SMC. Therefore, the majority errs in ruling on an unassigned error. Finally, the trial court also has continuing jurisdiction in the underlying SAPCR and may modify the conservatorship order without the need for a remand.

Editor's Note: See ¶ 07-4-23. *In re J.A.J, ___ S.W.3d ___, 2007 WL 3230169 (Tex. 2007) for the Supreme Court's resolution of the concurrence's issue. G.l.S.*

INCARCERATED FATHER COULD NOT HAVE ENDANGERED HIS CHILDREN WHILE HE WAS IN JAIL

¶ 07-4-55. **Walker v. DFPS,** S.W.3d , 2006 WL 3751456 (Tex. App.—Houston [1st Dist.] 2006). (12/21/06)

Facts: CPS investigated mother and removed the children from her care because of neglect and drug abuse. Father was incarcerated during the investigation. DFPS petitioned to terminate both parents' parental rights. The trial court agreed and terminated father's rights on the statutory grounds that he knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being. The court also terminated father's rights on the ground that he engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their physical or emotional well-being. Father appealed.

Held: Reversed. Father could not have taken any action or inaction that would endanger his children because he was incarcerated.

Opinion: The appellate court found that "the fact that a parent is incarcerated, standing alone, does not constitute engaging in conduct that endangered a child's physical or emotional well-being." The children were in their mother's custody at the time of the CPS investigation and the father was in jail. Additionally, DFPS could not cite to any evidence that supported termination based on any action or inaction taken by father to endanger his children.

TRIAL COUNSEL NOT INEFFECTIVE BECAUSE MOTION FOR NEW TRIAL WOULD HAVE BEEN UNSUCCESSFUL

¶ 07-4-56. **Doe v. Brazoria Co. CPS**, 226 S.W.3d 563 (Tex. App.—Houston [1st Dist.] 2007). (01/16/07)

Facts: Mother and her boyfriend sold and abused drugs in their home. This led CPS to remove their children and petition for termination of mother's parental rights. The trial court agreed with CPS and terminated mother's parental rights. Mother appealed.

Held: Affirmed. Mother's trial counsel's performance did not prejudice her defense and was therefore not ineffective.

Opinion: Mother asserted ineffective assistance of counsel because her trial counsel failed to file a motion for new trial or statement of points on appeal. The appellate court found her counsel was not ineffective because a review of the record showed that a motion for a new trial raising insufficiency of the evidence would have been unsuccessful. Also, the failure of counsel to file a statement of points on appeal did not affect the outcome of mother's trial, so trial counsel not ineffective. The court also found that her counsel's choice not to call witnesses other than the mother was based on trial strategy and did not prejudice her defense.

Editor's Note: *Even though appellants failed to file a timely statement of points on appeal, this Court nevertheless found a way to address the issue in a manner that gets around TFC 263.405(i) by addressing appellant's ineffective assistance of counsel claim and doing the necessary sufficiency review as a part of that claim.*

FATHER COULD NOT HAVE ENDANGERED A CHILD IN THE CARE OF A MOTHER HE COULD NOT LOCATE

¶ 07-4-57. **Earvin v. DFPS**, 229 S.W.3d 345 (Tex. App.—Houston [1st Dist.] 2007). (03/15/07)

Facts: Father was dating mother when child was conceived. Father broke up with mother because of her drug abuse. When child was born with cocaine in her system, both child and mother were transferred to a drug treatment center. While at the center, father brought them food, clothes, and other things. After release, mother and child disappeared for several months. DFPS found them living in squalid conditions, with mother abusing drugs again. The child was taken into DFPS custody and the Department petitioned for termination of father's parental rights. The trial court found that father's rights should be terminated because he allowed the child to remain with mother in conditions that endangered the child. The court also appointed DFPS permanent SMC. Father appealed.

Held: Affirmed in part, reversed in part. Evidence insufficient to support termination of father's parental rights; evidence sufficient to support appointment of DFPS as SMC.

Opinion: The appellate court found that father did not know the whereabouts of the child or her mother, so therefore could not have knowingly allowed the child to remain in conditions dangerous to her health. However, the trial court determined that it was in the child's best interest to appoint DFPS as SMC, and the evidence was sufficient to support this finding.

FATHER NEEDED TO PROVIDE EVIDENCE OF SUPPORT BEFORE HE IS ENTITLED TO AN OFFSET OF HIS CHILD SUPPORT PAYMENTS

¶ 07-4-58. **In re E.M.E.**, ___ S.W.3d ___, 2007 WL 695967 (Tex. App.—El Paso 2007). (03/08/07)

Facts: Father was incarcerated from April 2002 to June 2006. In May 2006, mother filed a petition to terminate father's parental rights on grounds that father had failed to pay child support while incarcerated, which the trial court granted.

Held: Reversed. There was no evidence that father had the ability to pay child support while incarcerated.

Opinion: The appellate court held that although father did not support child for 12-month period before petition filed, he had no income because he was incarcerated. Mother did not provide any evidence that father had the ability to pay during the relevant time period.

TERMINATION UNDER TFC 161.001(T) FOR AN ACT COMMITTED BEFORE THE ACT WAS IN FORCE DOES NOT VIOLATE THE PROHIBITION AGAINST EX POST FACTO LAWS

¶ 07-4-59. ***In re* E.M.N.,** 221 S.W.3d 815 (Tex. App.—Fort Worth 2007). (04/05/07)

Facts: Mother convicted of murdering father in March 2004. Paternal grandmother, her niece and her niece's husband named temporary JMC. Paternal grandmother filed a petition to terminate mother's parental rights in February 2006. The trial court granted termination in September 2006 under TFC § 161.001(1)(T), which was enacted in 2005. This Section provides for termination when one parent has been convicted of murdering the other parent. Mother appealed, claiming that termination under the statute violated the prohibition against ex post facto laws.

Held: Affirmed. The purpose of the statute and the nature of the case show that termination does not violate the prohibition against ex post facto laws.

Opinion: The appellate court held that application of TFC § 161.001(1)(T) in this case does not violate the prohibition against ex post facto laws. "Subsection (T)'s underlying purpose is not to add additional punishment to Appellant for murdering E.M.N.'s father, but to safeguard the public welfare and advance the public interest by facilitating termination when one parent murders the other-an act previously used to support terminations under subsection (E). ... Therefore, Appellant cannot now claim surprise and damage to her settled expectations under these circumstances."

EVIDENCE SUFFICIENT TO SUPPORT VALIDITY OF AN AFFIDAVIT OF RELINQUISHMENT NO MATTER WHICH PARTY HAD BURDEN OF PROOF

¶ 07-4-60. ***In re* R.B.,** 225 S.W.3d 798 (Tex. App.—Fort Worth 2007). (05/10/07)

Facts: Mother and father were living in a motel with their seven children when CPS received a report that one of children was drowning in the motel pool. The report stated that mother and father had not tried to save their child and another hotel guest had to rescue her. CPS also received a report that the two-year old child was seen wondering around the motel with a knife. A subsequent CPS investigation led to outcries of sexual abuse and neglect by several of the children. As a result, DFPS filed a petition to terminate mother and father's parental rights. At the final hearing, mother and father presented affidavits of relinquishment for six of the children (the remaining child turned eighteen during the pendency of the suit). Mother and father also stated that they had entered into a Rule 11 agreement with DFPS, wherein DFPS agreed not to initiate proceedings to terminate mother and father's rights to other children based on allegations and proof in this case (mother became pregnant twice more during the pendency of this suit). The trial court terminated mother and father's parental rights based on the affidavits. Shortly afterwards, mother and father filed new affidavits revoking their affidavits of relinquishment. After being denied a new trial, mother and father appealed.

Held: Affirmed. The evidence supports a finding that the affidavits of relinquishment were signed voluntarily, no matter who has the burden of proof.

Opinion: The appellate court held that traditionally the party claiming coercion or duress has the burden of proof. However, a plurality of the Texas Supreme Court has recently stated that this should be "reformulated." The court of appeals found that in this case, although it is not clear who has burden to prove or disprove validity of affidavits of relinquishment, the court does not have to decide because the outcome will be same. There is ample evidence to support a finding that affidavits were signed voluntarily and willingly, and there is no evidence of coercion or duress.

MOTHER AND FATHER FAILED TO COMPLETE SERVICE PLAN—TFC §161.001(1)(O)

¶ 07-4-61. ***In re* T.T.,** ___ S.W.3d ___, 2007 WL 1438441 (Tex. App.—Houston [14th Dist.] 2007). (05/17/07)

Facts: CPS came to mother and father's house to investigate an incident where one of their children fell out of a window. While at the house, CPS removed the five children, requiring that the parents clean up their home and make it safe by a set deadline. M&F complied with the requirements. However, the next morning one of the children was found wandering around outside while the parents were sleeping. The children were removed and DFPS filed a petition to terminate the parent's rights on several statutory grounds. The trial court terminated. The parents appealed the ground of TFC § 161.001(1)(O) and that termination was in the best interests of the children.

Held: Affirmed. Evidence sufficient to support termination of mother's parental rights under TFC § 161.001(1)(O) and that such termination was in the children's best interests.

Opinion: The record contained adequate evidence that mother and father failed to complete the requirements of their court-ordered service plan and that termination of their parental rights was in the best interests of the children. Also, the evidence was sufficient to support appointing DFPS as SMC rather than a family member because the family member in question would have had difficulty managing the five children and following the court's visitation rules.

TRIAL COURT DOES NOT HAVE A DUTY TO ENTER FINDINGS ON EVIDENTIARY ISSUES

¶ 07-4-62. ***In re* M.M.M.,** ___ S.W.3d ___, 2007 WL 1776067 (Tex. App.—Fort Worth 2007). (06/21/07)

Facts: Father filed a petition to terminate mother's parental rights. After a trial, the court found termination was not in the best interest of the child. Although mother requested findings of fact and conclusions of law, the trial court did not file them. Mother appealed.

Held: Affirmed. There was sufficient evidence to support the trial court's judgment.

Opinion: The appellate court held that the trial court's finding that termination was not in child's best interest was sufficient—the trial court does not have a duty to enter findings on merely evidentiary issues. Although there was evidence to support the termination of mother's parental rights, there was also conflicting evidence that termination was not in child's best interest, so the trial court did not abuse discretion.

EVIDENCE SUFICCIENT TO SUPPORT TERMINATION UNDER TFC §§ 161.001(1)(D) AND (E)—MOTHER HAD A CRIMINAL HISTORY RELATED TO HER DRUG USE

¶ 07-4-63. ***In re* T.N.S.,** ___ S.W.3d ___, 2007 WL 1826272 (Tex. App.—San Antonio 2007). (06/27/07)

Facts: Mother abused cocaine while pregnant and had a criminal history related to her drug use. DFPS found out about her drug use after she was involved in a car accident while pregnant with her youngest child. She tested positive for cocaine after the accident, and the child tested positive for cocaine after he was born. DFPS filed for termination of mother's rights to all three of her children. The trial court terminated her rights under nine of the statutory provisions listed in TFC § 161.001. Mother appealed.

Held: Affirmed. Evidence sufficient to support termination of mother's parental rights under TFC §§ 161.001(1)(D) and (E).

Opinion: The appellate court found that mother's "course of conduct relating to her addiction, including incarceration on three occasions and her repeated attempts and failures to complete rehabilitation programs, indicate instability and uncertainty for her children." This endangers the children's emotional and physical well-being, fulfilling the requirements of the statute.

FATHER'S ACTIONS SUFFICIENT TO SUSTAIN TERMINATION OF PARENTAL RIGHTS

¶ 07-4-64. ***In re* N.S.G.,** ___ S.W.3d ___, 2007 WL 2609797 (Tex. App.—Texarkana 2007). (09/12/07)

Facts: Uncle and aunt petitioned for termination of father's parental rights after he repeatedly abused drugs, physically abused mother, and left the state to avoid a burglary charge. The child had been living with uncle and aunt since she was five days old. Trial court terminated father's rights. Father appealed.

Held: Affirmed. Evidence sufficient to support at least one statutory ground for termination and to support finding that father's termination was in child's best interest.

Opinion: The father signed an agreement to place the child with her aunt and to undergo drug screening. The father was subsequently ejected from the household after he abused drugs in the home, physically abused mother, and fled to Tennessee to escape a burglary charge. After reviewing the record, the appellate court found sufficient evidence to support termination on the basis that the father had engaged in endangering conduct or placed the children with persons who engaged in endangering conduct, under TFC § 161.001(1)(E).

The appellate court also found the evidence sufficient to support termination being in the child's best interest. The child's emotional and physical needs would be well met with her aunt and uncle. The father's continued criminal behavior, including drug use, creates a physical and emotional danger to the child.

Dissent: The father "only had a few weeks of freedom" between the child's birth and the start of father's incarceration. The dissent believes that the majority is speculating as to father's future misconduct and is finding that father's incarceration is per se evidence of endangering the child.

FOSTER PARENTS HAD STANDING TO INTERVENE IN TERMINATION SUIT BECAUSE OF PAST CONTACT WITH THE CHILD

¶ 07-4-65. ***In re* N.L.G.**, ___ S.W.3d ___, 2007 WL 2963741 (Tex. App.—Fort Worth). 10/11/07

Facts: DFPS removed the child from mother's custody and filed to terminate her parental rights after mother and child both tested positive for methamphetamine. The child's foster parents filed a petition to intervene in the termination suit. Mother moved to strike the petition to intervene on the ground that it was filed less than thirty days before trial, making her unable to conduct proper discovery on the foster parents' claims. After a hearing on the issue, the trial court allowed the intervention and reset the trial date. After trial, the court terminated mother's parental rights. Mother appealed, claiming that the trial court erred in refusing to strike the intervention.

Held: Affirmed. The foster parents had standing because they had substantial past contact with the child.

Opinion: This opinion has a good discussion of the avenues available to foster parents to bring a suit regarding their foster children. Specifically, the appellate court found that TFC § 102.004 grants foster parents standing when they have had substantial past contact with the child. In this case, the child had lived with the foster parents for practically the child's entire life. This clearly established their ability to intervene.

CONFLICTED TRIAL JUDGE DID NOT FORM A FIRM BELIEF THAT TERMINATION WAS IN THE CHILDREN'S BEST INTERESTS

¶ 07-4-66. ***In re* S.R.L.**, ___ S.W.3d ___, 2007 WL 3286796 (Tex. App.—Houston [14th Dist.] 2007). (11/08/07)

Facts: Mother's parental rights were voluntarily terminated in 2005. During this time, father was incarcerated for assault. He had been in prison frequently over the past ten years for a variety of offences, including assault on the children's' mother. His current ten-year sentence began in 2003. DFPS petitioned for termination of father's parental right under TFC § 161.001(1)(Q), claiming that he knowingly engaged in criminal conduct resulting in incarceration and his inability to care for his children. The trial court heard significant evidence that father had changed his life while in prison and wanted the opportunity to parent his children. He took anger management classes and was a model inmate. His mother testified that she and her husband would support father until he was able to care for himself and his children. Father also got married while in prison and planned to live in his wife's house after being released. Finally, father wrote letters to his older

children explaining the mistakes he had made and urging them not to follow his path. The trial court judge was conflicted and terminated father's parental rights only because he felt he did not "have any choice."

Held: Reversed and remanded. The evidence did not support a finding that termination was in the children's best interests.

Opinion: Termination is a drastic remedy and should be strictly scrutinized. "It is apparent from the trial judge's own statements that he did not form a firm conviction or belief that appellant should be deprived of all rights to his children." The AG conceded this in its own brief. The best interest determination is a separate inquiry from the statutory determination under TFC § 161.001(1)(Q) and because the trial judge did not actu-**ally believe that termination was in the children's best interests, the evidence is legally insufficient to support** termination. Additionally, the factual evidence does not support such a finding. The trial record shows that father had made changes in his life and his incarceration alone does not automatically establish that termination is in the children's best interests.

TO TERMINATE PARENTAL RIGHTS PURSUANT TO TFC 161.001(O), THERE MUST HAVE BEEN A COURT ORDER REMOVING THE CHILD FOR ABUSE OR NEGLECT

¶ 07-4-67. ***In re A.A.A.,*** S.W.3d , 2007 WL 4099346 (Tex. App.—Houston [1st Dist.] 2007). (11/15/07)

Facts: Child born in April 2005. In September 2005, mother moves to a Houston shelter. In January 2006, she leaves the 8-month old child at the shelter while she goes to shop. While shopping, mother is arrested for shoplifting and spends 2 days in jail. When mother does not return to the shelter, they notify DFPS of mother's neglectful supervision and, when DFPS unable to get a hold of any of mother's emergency contacts, DFPS named temporary managing conservators. DFPS placed child in foster care and subsequently placed child with a maternal relative. When mother failed to regularly visit the child, support the child, or fully comply with DFPS service plan, DFPS sought and obtained termination of mother's parental rights. Mother appealed.

Held: Reversed in part, affirmed in part. Evidence legally insufficient to support termination of mother's parental rights. Evidence sufficient to support appointment of DFPS as child's SMC.

Opinion: For DFPS to terminate mother's parental rights pursuant to TFC 161.001(O), DFPS had burden to show that child was removed for abuse or neglect, which DFPS failed to do. Challenge to appointment of DFPS as child's SMC not raised in statement of points, so it could not be reviewed on appeal.

SECTION 263.405(I) AND THE STATEMENT OF POINTS

Editor's comment: *In the past year, there were a series of cases that called into question the constitutionality of TFC § 263.405(i) and its statement of points requirement. The majority of these cases are straightforward and vary little in their facts and application of the statute. They find that the appellate court may not consider any issue not contained in a timely filed statement if points—even an ineffective assistance of counsel claim. They also all question the practical application and constitutional validity of the statute. However, two of these cases take a different approach and deserve more detailed treatment. These two cases—In re D.M. and In re S.K.A.—are discussed below. Citations for the remaining cases follow those summaries. For an in-depth discussion of TFC § 263.405(i) and the constitutional questions that surround it, please see the above article. G.L.S.*

¶ 07-4-68. *In re* D.M., ___ S.W.3d ___, 2007 WL 2325815 (Tex. App.—Waco 2007). (08/15/07)

Facts: The trial court terminated mother's parental rights. She filed her notice of appeal late, but within grace period.

Held: Affirmed. Not knowing that your client wants to appeal within the deadline is not a reasonable explanation. Also, because mother did not file a statement of points, the appellate court refused to look at her due process complaint.

Opinion: PER CURIAM (Actually two concurrences and a dissent). Majority held notice of appeal for accelerated appeal must be filed within 20 days of the termination order. Although a late-filed notice implies a motion for extension, a reasonable explanation must be given. Here, the explanation given was that the attorney did not know that mother wanted to appeal until after the deadline.

Dissent: Enforcement of the statement of points requirement under TFC § 263.405(b) and (i) violates mother due process rights.

¶ 07-4-69. *In re* S.K.A., ___ S.W.3d ___, 2007 WL 3011091 (Tex. App.-Texarkana 2007). (10/17/07)

Facts: DFPS began investigating mother for possible neglect of her children while she lived in Texas and father was incarcerated in Mississippi. After several months, DFPS petitioned to terminate both parent's parental rights. Father sent a letter to the district attorney requesting a postponement of the trial, but this letter was not brought to the attention of the court until the trial. Father also sent a letter to the trial court requesting appointed counsel, but the court did not receive it until several hours after entry of the judgment. Counsel was finally appointed to father on January 3, a week after the deadline for filing a statement points had passed. Father appealed, challenging both the trial court's judgment and the constitutionality of TFC § 263.405(i) as applied in his case.

Held: Affirmed**.** TFC § 263.405(i) was unconstitutional as applied in this case. However, the evidence supported the trial court's judgment.

Opinion: This is the first case to declare TFC § 263.405(i) unconstitutional as applied to an indigent parent without counsel. The appellate court conducted a lengthy *Eldridge* due process analysis and found that the private interests at stake, combined with the risk of error, outweighed the government interests served by the statute. "On the whole, the parent's and children's interest in ensuring the decision to permanently extinguish the family bond is an accurate and just decision weighs heavily in favor of permitting appellate review of that decision, despite the statutory bar, when counsel was unavailable to assist in meeting the procedural prerequisites." In comparison, "the State's interests here in economy and efficiency are minimal: Chad filed his statement of points one week late and in conjunction with a timely motion for new trial; the court did have an opportunity to consider Chad's points of error at the hearing on the motion for new trial and for frivolousness." As a result, barring father's right to appeal would render his "right to effective counsel a 'useless gesture' and [render] counsel's efforts at appeal a 'meaningless ritual.'" The court of appeals therefore held TFC § 263.405(i) "unconstitutional as applied to an indigent parent not provided timely requested appointed counsel during the critical period before the deadline established in subsection (b)."

Unfortunately for father in this case, the appellate court still found that the evidence supported the trial court's decision to terminate his parental rights.

¶ 07-4-70. ***In re* C.B.M.**, 225 S.W.3d 703 (Tex. App.—El Paso 2006). (12/14/06)

¶ 07-4-71. **Pool v. DFPS**, 227 S.W.3d 212 (Tex. App.—Houston [1st Dist.] 2007). (03/01/07)

¶ 07-4-72. ***In re* R.C.**, ___ S.W.3d ___, 2007 WL 1219046 (Tex. App.—Amarillo 2007). (04/25/07)

¶ 07-4-73. ***In re* M.D.**, ___ S.W.3d ___, 2007 WL 1310966 (Tex. App.—Dallas 2007). (05/07/07)

¶ 07-4-74. ***In re* T.R.F.**, 230 S.W.3d 263 (Tex. App.—Waco 2007). (06/27/07)

¶ 07-4-75. ***In re* R.M.**, ___ S.W.3d ___, 2007 WL 1988149 (Tex. App.—San Antonio 2007). (07/11/07)

In a related case, ¶ 07-4-76. ***In re* J.R.S.,** 232 S.W.3d 278 (Tex. App.—Fort Worth 2007) (07/19/07), the court of appeals affirmed that a statement of points is not required in private termination proceedings, only those brought by DFPS.

SAPCR
Parentage

STATUTE OF LIMITATIONS DEFENSE TO ADJUDICATION OF PATERNITY WAIVED IF NOT AFFIRMATIVELY PLED

¶ 07-4-77. **Miles v. Peacock,** 229 S.W.3d 384 (Tex. App.—Houston [1st Dist.] 2007). (04/19/07)

Facts: After husband and wife divorced, both requested genetic testing for father (not the same as husband). Father did not appear at trial, so the court adjudicated his paternity and ordered child support without possession. Father appealed.

Held: Affirmed in part, reversed in part, and remanded. Trial court did not err in adjudication of paternity, but findings of child support payments and possession not supported by the evidence.

Opinion: Father challenged the adjudication of paternity by claiming that the statute of limitations set by TFC § 160.607 had passed. The appellate court held that the statute did not bar the trial court's adjudication of F's paternity because it is an affirmative defense that father did not plead.

However, the court of appeals also found that the evidence was insufficient to support the trial court's child support finding and possession finding. The trial court abused discretion because the child support order was based on amounts father had previously paid, not on his net resources. Also, the trial court did not hear evidence of the child's best interest with regard to possession.

ADOPTION

THE VALIDITY OF ADOPTION ORDERS CANNOT BE ATACKED AFTER SIX MONTHS; NO EXCEPTION FOR SAME-SEX ADOPTIONS

¶ 07-4-78. **Hobbs v. Van Stavern,** ___ S.W.3d ___, 2006 WL 3095439 (Tex. App.—Houston [1st Dist.] 2006). (11/02/06)

Facts: Mother became pregnant through artificial insemination. Both the mother and her same-sex partner cared for the child and the partner adopted the child in 2001. Mother and partner separated in 2004, and the partner filed a SAPCR seeking to be named JMC. In response, mother tried to claim that the adoption order was void as a matter of public policy. The trial court disagreed and appointed partner JMC. Mother appealed.

Held: Affirmed. The validity of adoption orders cannot be attacked after six months.

Opinion: The appellate court found that TFC § 162.012 clearly states that the validity of adoption orders cannot be attacked after six months. Mother tried to argue that the new amendment to the Texas Constitution prohibiting same-sex marriage states a public policy against same-sex adoptions. The court of appeals found this argument unpersuasive, especially after mother had used the court system to obtain an adoption in the first place. The fact that she was now trying to use the same courts to void the adoption was unacceptable to the appellate court.

DOMESTIC VIOLENCE

APPOINTMENT OF COUNSEL FOR AN INDIGENT PARTY IN A FAMILY VIOLENCE PROTECTIVE ORDER IS IN TRIAL COURT'S DISCRETION

¶ 07-4-79. **Cox v. Simmons**, 2007 WL 2409746 (Tex. App.—Amarillo 2007). (08/24/07).

Facts: Trial court entered family violence protective order against Appellant. Appellant appealed, requesting appointment of counsel for the appeal.

Held: Abated and remanded. Pursuant to Tex. Gov't Code § 24.016, the trial court must determine on a case by case basis if due process requires appointment of counsel if litigant "makes an affidavit that he is too poor to employ counsel."

Opinion: PER CURIAM. Whether due process requires the appointment of counsel for an indigent party in a proceeding involving a family violence protective order is in trial court's discretion. Trial court should determine whether party is indigent and whether due process requires appointment of counsel. Court of appeals cites a series of cases dealing with similar situations where counsel was appointed for trial court to use in making its determination.

Editor's Note: Although this opinion will not be reported, it provides a little used provision for an indigent litigant to possibly qualify for the appointment of counsel where such is not specifically provided for in the TFC. This might be particularly helpful in non- TDFPS termination cases.

TRIAL COURTS CANNOT GRANT A PROTECTIVE ORDER TO A PARTY IF THE PARTY HAS NOT APPLIED FOR A PROTECTIVE ORDER

¶ 07-4-80. **Cockerham v. Cockerham,** 218 S.W.3d 298 (Tex. App.—Texarkana 2007). (03/21/07)

Facts: After an incident of domestic violence, daughter filed for protective order against father. After an evidentiary hearing, the trial court granted a protective order against father and also granted a protective order against daughter. Daughter appealed.

Held: Reversed and rendered. The trial court cannot grant a protective order where one was not requested.

Opinion: Father did not file an application for a protective order against the daughter and therefore the trial court could not enter one. The appellate court specifically held that TFC § 85.001 does not require a trial court to enter a protective order against both parties to the proceeding, absent both parties filing an application

for a protective order. Also, the appellate court found that, although the protective order against daughter has expired, the consequences of having had a protective order imposed means the issue is not moot.

MISCELLANEOUS

★★★★★ Texas Supreme Court ★★★★★

PROVISION IN WILL NAMING STEP-DAUGHTER AS CONTINGENT BENEFICIARY DOES NOT FALL UNDER PROBATE CODE SECTION 69(a).

¶ 07-4-81. ***In re* Estate of Nash**, 220 S.W.3d 914 (Tex. 2007). (04/20/07)

Facts: Husband executed his Will in 1994, naming wife primary beneficiary and his step-daughter the contingent beneficiary in the event that wife predeceased him. Husband and wife divorced in 2002. Husband died in 2004, never having updated his Will. The trial court declared that the step-daughter was entitled to husband's estate because Probate Code Section 69(a) provides that all Will provisions favoring former spouse must be read as if former spouse failed to survive testator. Therefore, wife is treated as if she had predeceased husband and step-daughter takes. Son appealed and the court of appeals reversed, declaring requisite condition precedent never occurred. Step-daughter appealed.

Held: Affirmed. The provision does not fall under Probate Code Section 69(a) because it did not favor the wife.

Opinion: The "failed to survive" language in Probate Code Section 69(a) is only meant to reinforce the "void" language in the statute and does not trigger a contingency unless it is a provision that favors the former spouse. Because wife did not predecease husband, and the contingent bequest was not a provision falling under § 69 as favoring the wife, the step-daughter does not take under husband's Will.

FORMER WIFE CAN RAISE THE ISSUE OF INCONVENIENT FORUM THROUGH A DECLARATORY JUDGMENT ACTION

¶ 07-4-82. **Monk v. Pomberg,** ___ S.W.3d ___, 2007 WL 926491 (Tex. App.—Houston [1 Dist.] 2007) (op. on rhrng.). (02/08/07)

Facts: Mother left father in Texas and moved to Iowa with their son. They divorced in Texas a few months later. After father declared bankruptcy two years later, the trial court stayed all legal proceedings against him. Mother filed a motion with the trial court requesting the stay be lifted so that she could file a suit terminating the father's parental rights. After the trial court granted her motion, the mother sought declaratory action in Texas requesting that the trial court find that Iowa was mother's and child's home state, that Texas was an inconvenient forum, that circumstances had not changed since the divorce, and that the trial court defer jurisdiction to Iowa. The trial court granted the declaratory judgment. Father appealed.

Held: Affirmed as modified. The Declaratory Judgments Act allows the wife to have the trial court decline jurisdiction under TFC § 152.207.

Opinion: TFC § 152.207 provides that the court that has jurisdiction to make a custody determination may decline to exercise its jurisdiction if it determines that Texas is an inconvenient forum. However, the procedural requirements of TFC § 152.207 are that litigation must be brought by a motion of the party or by request of another court. The wife in this case did not meet those procedural requirements. However, the appellate

court found that the Declaratory Judgments Act allows wife to have the trial court declare her rights, status and other legal relations under TFC § 152.207.

The Declaratory Judgments Act allows relief if the subject matter concerns statute, municipal ordinance, contract, or franchise. In this case, the subject matter concerns Section 152.207. Also, the trial court had continuing jurisdiction over custody of child and therefore had jurisdiction over the declaratory action. Finally, the three lawsuits filed in Iowa over custody of the child prove that the controversy is ripe enough to warrant declaratory judgment. The use of declaratory judgment allows an award of attorney fees not otherwise available under the Family Code.

TRIAL COURT'S AWARD OF ATTORNEY'S FEES IN CONSERVATORSHIP ACTION WERE SUPPORTED BY THE EVIDENCE

¶ 07-4-83. **Diamond v. San Soucie**, ___ S.W.3d ___, 2007 WL 4111934 (Tex. App.—Dallas 2007). (11/20/07)

Facts: The parents' divorce was followed by a long and contentious conservatorship battle. The trial court appointed a guardian ad litem for the children. Mother also pursued a separate civil action against father from 2000-2004. The conservatorship case was initially tried in 2002, but was vacated and remanded on appeal due to mother's pre-trial objection to the visiting judge who presided at the trial. After the case was tried again, father was named SMC. Also, both father and the ad litem were granted attorney's fees. Mother appealed this award of attorney's fees.

Held: Affirmed. The evidence in the record supports the trial court's finding that the total amount of all fees was reasonable and necessary.

Opinion: Mother did not offer any evidence to controvert whether any of the legal services rendered were reasonable and necessary. As a result, father's evidence in the form of billing records is taken as true as a matter of law. Also, the fees were appropriately segregated between the conservatorship action and the accompanying civil trial. Finally, the ad litem's fees were supported by her uncontroverted testimony. Mother's contention that the trial court had limited the amount of time the ad litem could spend in the courtroom and then awarded fees beyond that amount of time is "unsubstantiated speculation."