SECTION REPORT
FAMILY LAW

http://www.sbotfam.org Volume 2009-6 (Winter)

SECTION INFORMATION

CHAIR
Douglas Woodburn, Amarillo
(806) 374-379-2355

CHAIR ELECT
Charlie Hodges, Dallas
(214) 740-1919

VICE CHAIR
Randall B. Wilhite, Houston
(214) 624-4100

TREASURER
Tom Ausley, Austin
(512) 454-8791

SECRETARY
Diana S. Friedman, Dallas
(214) 953-0600

IMMEDIATE PAST CHAIR
Wendy Burgower, Houston

COUNCIL

Terms Expire 2010

Charla Conner	Denton
Randall Downing	Dallas
Robert Sullivan	Dallas
Michael Paddock	Fort Worth
Chris Wrampelmeier	Amarillo

Terms Expire 2011

Miriam Ackels	Dallas
JoAl Cannon Sheriden	Austin
Linda Ann Hinds	Houston
Stephen J. Naylor	Fort Worth
James A. Vaught	Austin

Terms Expire 2012

Richard Flowers	Houston
Heather King	Fort Worth
John George	Victoria
Charles Hardy	San Antoni
Kathryn Murphy	Dallas

Terms Expire 2013

Joe Indelicato	Houston
Victor Negron, Jr.	San Antonio
Georganna Simpson	Dallas
Cindy Tinsdale	Grandbury
Fred Walker	El Paso

Terms Expire 2014

Richard Fry	Austin
Latrelle Bright Joy	Lubbock
Kristal Cordova	San Antonio
Kyle Sanders	Houston
Sherri Evans	Houston

NEWSLETTER EDITOR
Georganna L. Simpson
1349 Empire Central Drive, Ste. 600
Dallas 75247
214.905.3739; 214.905.3799 (fax)
glslaw@gte.net

Message from the Chair

We are glad to have you as a member. I hope everyone is having a good Fall, and that your football team is winning all its games. This quarterly Section Report contains some really interesting reading and cases. Thanks as always to Georganna and her troubadours for the hard work. Thanks also to Joe Indelicato for the great topics and speakers at this year's Ultimate Trial Notebook in San Antonio. It was really special. Don't forget to make plans now to attend the TAFLS Trial Institute, "Gone With the Trials—An Uncivil War" in Santa Fe, February 12-13, 2010.

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

COUNCIL ADMINISTRATIVE ASSISTANT
Christi A. Lankford. 1-800-283-8099
Section Wear and Publications

© 2009 by the State Bar of Texas. The copyright of a signed article is retained by the author unless otherwise noted. For reprinting authorization, contact the Chairman of the Family Law Section of the State Bar of Texas. All rights reserved.

EDITOR'S NOTE

Winter is a time of reflection on and thanksgiving for the year that has once again flown by much too quickly. I have been honored to be the Editor-in-Chief of the Section Report for the past two years. I am grateful for the contributions made by Dr. Zervopoulos and Christi Adamcik Gammill, and I am looking forward to working with our many fine paralegals and giving them a well-deserved voice in this publication. I am also very grateful to the many folks that have contributed outstanding and timely articles of interest to us all. Thanks to all of you for helping to make the SectionReport a success. Also, I hope all of you will attend the Texas Academy of Family Law Specialist's 26th Annual Trial Institute in Santa Fe, New Mexico on February 12-13. Stay over on Sunday, February 14, 2009 and write off Valentine's Day. All are welcome, both certified and non-certified, lawyers and paralegals. Jimmy Vaught and I are the course directors and have put together a fun and interesting program for your enjoyment and learning experience.

TABLE OF CONTENTS

TABLE OF CASES

In the Law Reviews and Legal Publications

TEXAS ARTICLES

Teresa Stanton Collett, *Whose Life is it Anyway? Texas Public Policy and Contracts to Kill Embryonic Children*. 50 S. Tex. L. Rev. 371 (2009)
Joseph W. McKnight, *Family Law: Husband and Wife,* 62 S.M.U. L.R. 1197 (2009)
Linda B. Thomas, Ardita L. Vick, *Family Law: Parent and Child,* 62 S.M.U. L.R. 1149 (2009)

LEAD ARTICLES

Joseph W. Booth, *A Guide for Assisting Military Families with the Uniform Interstate Family Support Act (UIFSA)*, 43 Fam. L.Q. 203 (2009)
William J. Camp, *Health Care Options for Former Military Spouses: Triacare and the Continued Health Care Benefit Program* (CHCBP) 43 Fam. L. Q. 227 (2009)
Kristen MH Coyne, et al., *The SCRA and Family Law: More Than Just Stays and Delays*, 43 Fam. L. Q. 301 (2009)
Lauren S. Douglass, *Avoiding Conflict at Home When There Is Conflict Abroad: Military Child Custody and Visitation*, 43 Fam. L. Q. 315 (2009)
Kathlene J. Somerville, *The Military Report Card Concerning Domestic Violence and Sexual Assault, Including Compliace with the Lautenberg Amendment*, 43 Fam. L. Q. 349 (2009)

ASK THE EDITOR

Dear Editor: At trial, I did not prove up appellate attorney's fees. The other side has now filed a Motion for New Trial and is threatening to file an appeal. Is there any way that I can get appellate fees for my client? *Quizzical in Quinlan*

Dear Quizzical in Quinlan: Yes. Texas Family Code Section 6.709 allows, not later than the 30th day after the date an appeal is perfected, for you to file a motion requesting temporary orders necessary for the preservation of the property and for the protection of the parties during the pendency appeal, including an order for the payment of reasonable attorney's fees and expenses. Similarly, Texas Family Code Section 109.001 allows, not later than the 30th day after the date an appeal is perfected, for you to file a motion requesting temporary orders necessary to preserve and protect the safety and welfare of the child during the pendency of the appeal, including an order requiring payment of reasonable attorney's fees and expenses. The order granting temporary relief pending appeal must be signed within thirty days of the filing of the notice of appeal. *Love v. Bailey-Love*, 217 S.W.3d 33, 36–37 (Tex. App.—Houston [1st Dist.] 2006, no pet.). *G.L.S.*

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

IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Alimony: A Massachusetts divorce judgment that awarded wife one-third of husband's "gross annual employment income" as alimony required husband to include in the alimony calculation proceeds from the exercise of stock options granted to him as part of his compensation package. *Wooters v. Wooters,* 74 Mass. App. Ct. 839, 911 N.E.2d 234 (2009). Even though a Connecticut ex-wife was the beneficiary of a trust that earned "more than enough income to provide for [her] care and maintenance . . . without any invasion of the principal," the trial court erred when it reduced ex-husband's alimony obligation from $5,000 per month to $1 per year. *Taylor v. Taylor,* 117 Conn. App. 229, 978 A.2d 538 (2009).

Child support: California permits a subsequent spouse's income to be considered for child support purposes, but only "in an extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award," not shown in this case given obligor's income. *In re Knowles,* 178 Cal. App. 4th 35, 100 Cal. Rptr. 3d 199 (2009). A Kentucky court refused to reduce an inmate's child support obligation, observing that "criminal conduct of any nature cannot excuse the obligation to pay support." *Ward v. Lowery,* No. 2009 WL 2341486, 2008-CA-000178-ME (Ky. App. 2009). An Illinois trial court erred when it found that an obligor had an earning capacity of $350,000 per year when the obligor was fired from his prior job, then began working for his wife at $110,000 per year. *In re Marriage of Gosney,* ___ N.E. 2d ___, 2009 WL 3336060 (Ill. App. 2009). The Supreme Judicial Court of Maine held that parties cannot stipulate to limit child support because such stipulations violate public policy by preventing a court from modifying a child support award when there is a substantial change in circumstances. *Holbrook v. Holbrook,* 2009 ME 80, 976 A.2d 990 (2009).

Child support - Sub S earnings: The Supreme Judicial Court of Massachusetts wrote:

> When a small business corporation elects to be an S corporation, its earnings or income is not taxed at the corporate entity level but is passed through and taxed to the individual shareholders on a pro rata basis, determined by each shareholder's percentage ownership interest in the corporation; the pass-through occurs whether or not the income is actually distributed.

After reviewing decisions from other states, the Court held that determining how to treat pass-though earnings for child support purposes requires a court to consider the level of control an obligor has over corporate distributions, the legitimate business interests justifying retained corporate earnings and whether there has been any attempt to shield income. *J.S. v. C.C.,* 454 Mass. 652, 912 N.E.2d 933 (2009).

Jurisdiction: An Indiana court had in rem jurisdiction to dissolve a marriage when the petitioner was a state resident regardless whether the court had in personam jurisdiction over the respondent. *D.L.D. v. L.D.* 911 N.E.2d 675 (Ind. App. 2009). The Idaho Supreme Court reversed an order forbidding a mother to move to Michigan, with or without the parties' child, explaining that "[a] court presiding over a child custody matter does not become a family czar with unlimited authority to order the parents to do anything that the court believes is in the best interests of the child." *Allbright v. Allbright,* 215 P.3d 472 (Ida. 2009). In a divorce case, a New York trial court erred when it found that the parties married in a Hindu ceremony performed in India in 1952 because that finding required the court to analyze "various and customary rites, customs, and practices of the Hindu religion of a particular caste in a particular region," an undertaking forbidden by the First Amendment when "analysis is entrenched in religious doctrine and cannot be resolved by the application of neutral principles of law." *Madireddy v. Madireddy,* 886 N.Y.S.2d 495 (App. Div. 2009).

Prenuptial agreements: The Supreme Court of Georgia reversed a summary judgment upholding the validity of a prenuptial agreement when the husband failed to disclose his income and the wife waived her right to seek alimony, rejecting husband's argument that "the parties' spending habits while dating" should have put wife on notice of husband's income. *Quarles v. Quarles,* 285 Ga. 762, 683 S.E.2d 583 (2009). After marriage, a Michigan husband mentally and physically abused his wife, harassed and bullied her, and threatened to make her life miserable, which led the court to find the parties' prenuptial agreement unenforceable because of changed circumstances since execution of the agreement. *Hutchison v. Hutchison,* 2009 WL 2244522, No. 284259 (Mich. App. 2009).

Retirement: The fact that a Kentucky statute protected state employee retirement benefits from "execution, attachment, garnishment, or any other process," did not render them undistributable in a divorce case. *Piper v. Piper,* 2009 WL 2408377, No. 2008-CA-000588-MR (Ky. App. 2009). The Supreme Court of Tennessee held the parties' 401(k) accounts to be "retirement or other fringe benefit rights relating to employment" and therefore marital property distributable upon divorce. *Snodgrass v. Snodgrass,* 295 S.W.3d 240 (Tenn. 2009).

What "is" means: A California statute provides that termination of a child support order can constitute a change of circumstances to modify spousal support, the key language being that "a companion child support order *is in effect."* The obligor relied on this language to convince a trial court to modify spousal support even though the child support order had terminated 17 months previously. The appellate court observed:

> This is a case of first impression. The question of first impression is what the Legislature meant by the words "if a companion child support order is in effect," and particularly what it meant by the phrase, "is in effect." Or, put another way: How much time can elapse before *is* becomes *was*?

The court reversed: "The definition of 'is' cannot be stretched to include something that became past tense seventeen months ago."

COLUMNS

USING PSYCHOLOGICAL TESTS IN COURT: TELLING TESTS APART Part III

by

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

Our last column described three important aspects of psychological tests that identify whether those tests should be deemed as legally reliable: the examinee's response style, the sample of people used to develop and standardize the test, and the test's statistical reliability. This column identifies three other key aspects.

Validity: A test's validity involves two key issues. The traditional validity question is whether a test or a scale within a test actually measures what it purports to measure. For example, does a test which claims to measure posttraumatic stress disorder, or PTSD, actually measure PTSD, or does the test measure more general anxiety symptoms that might be related to other disorders. Lawyers should not rely simply on a test's name or the apparent logic of the test questions to assume the test's validity. Rather, lawyers should ask for

---

[1] *John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs PSYCHOLOGYLAW PARTNERS, a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. He also authored an ABA-published book, Confronting Mental Health Evidence: A Practical Guide to Reliability and Experts in Family Law. Dr. Zervopoulos is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

proof that the test measures what it purports to measure. A well-developed test manual and other research will demonstrate this proof with studies that compare the test's results with other procedures measuring the same characteristic or with well-supported diagnoses of the characteristic.

A second validity question asks if the psychologist is using the test in the way the test was intended to be used. For example, while the MMPI-2 measures certain emotional problems, it was not designed and should not be used solely to diagnose PTSD or to function as a parenting skills inventory.

Standard Error of Measurement (SEM): No test score established in the test's development is free of some measurement error. Consequently, as with polls, the test score an examinee obtains equals the examinee's "true score" plus measurement error. The smaller the amount of error associated with the test or test scale, the narrower will be the range in which the examinee's "true score" will be found. The range in which the true score lies is the SEM. SEM data are found in the test manual.

The SEM is important when psychologists offer interpretations of test scores that lie at or near an interpretation cut-off line. For example, suppose an examinee obtains an MMPI-2 T-score of 67 on Scale 2, which measures depression. T-scores of 65 and above are generally viewed in research studies as indicating depression. Does the examinee's T-score of 67 reflect her true score? The SEM of Scale 2 indicates that there is only a 68% chance that the examinee's true score lies between 62 and 72, and a 95% chance that the true score lies between 58 and 76.

The SEM emphasizes that interpreting a test score is a probability exercise in which the true score falls within an accepted range rather than a fixed point that demands a particular interpretation. Psychologists who do not account for SEM in their test interpretations risk misrepresenting test results and invite questions about the legal reliability of those interpretations as evidence.

Sensitivity and Specificity: Sensitivity and specificity issues arise when psychologists classify people based on test results or other set criteria. For example, a test intended to classify whether an examinee is depressed has high sensitivity when it correctly classifies a depressed examinee as depressed (a true positive). In contrast, the test has high specificity when it correctly classifies a person who is not depressed as not depressed (a true negative). Lawyers must account for both sensitivity and specificity for tests or checklists that classify people; accounting for one without the other may lead to serious data misinterpretations and unreliable expert conclusions. Such misinterpretations sometimes occur in evaluations in which child abuse has been alleged. For instance, consider a psychologist who uses a checklist of symptoms such as general anxiety, nightmares, and strong preference for the nonaccused parent to support an opinion that a child was abused. The professional literature indicates that such a checklist cannot accurately classify a child as an abuse victim. While the checklist may have high sensitivity (it may identify many abuse victims), the specificity is low (it does not accurately identify nonabused children who may exhibit these same symptoms for reasons other than abuse).

In sum, if any of the six key aspects of a test discussed in this and the last columns are violated and the expert relies on the test results, serious legal reliability concerns may be implicated. Such concerns may be grounds to challenge the admissibility of the test data and of the expert's opinions that are based on that data.

THE BASICS OF QUALIFYING DEPENDENT EXEMPTIONS

by
Christy Adamcik Gammill, CDFA[1]

One of the financial items to be negotiated on the divorce checklist may be deciding who gets to take what kids as dependents. Typically the custodial parent or parent with whom the child lived with for most of the year is entitled to the dependent exemption.[2] However, if all of the following requirements are met, the non-custodial[3] parent is able to take the exemption:

1) Parents are

   a) divorced or separated under a legal agreement;
   b) separated under a written separation agreement; or
   c) lived apart at all times at least 6 months of the year;

2) The child received over half of his or her support for the year from the parent;

3) The child is in the custody of one or both parents for more than half of the year; and

4) If the custodial parent signs a written statement that he or she will not claim the child as a dependent for the year, and the noncustodial parent attaches this written declaration to his or her return if the decree or agreement went into effect after 1984[4]

There are different types of dependents to include qualifying children and qualifying relatives. Sometimes a child may meet the relationship, residency, age, and support tests to be a qualifying child of more than one person, however, only one person can claim the child on their return. All of the following qualifying child benefits can be taken if eligible and none of the benefits can be divided between parties (one parent cannot take 2 of them and the other 4).

- The exemption for the child.
- The child tax credit.
- Head of household filing status.
- The credit for child and dependent care expenses.
- The exclusion from income for dependent care benefits.
- The earned income credit.

To claim a person as a dependent as a qualifying relative certain tests must be met including:

1. Not a qualifying child test,
2. Member of household or relationship test,
3. Gross income test, and

---

[1] Christy Adamcik Gammill, CDFA is a fee-based financial consultant with Liberty Financial Group. She can be reached at Christine.Adamcik@LibertyFinancialGroup.org

[2] In a recent case from the Dallas Court of Appeals, the court actually counted the number of days each parent had possession of the child to determine who was the custodial parent as defined by 26 USCA § 152(3)(1). *In the Interest of S.L.M.*, 293 S.W.3d 374 (Tex. App.—Dallas 2009, no pet.).

[3] Beginning in 2009, the non-custodial parent claiming a dependent must complete a form 8332 signed by the custodial parent if the decree or agreement went into effect after 2008. Reference IRS Publication 501 for more details.

[4] Pre-1985 agreements or decrees may have different rules; Special tax forms may be required to claim a written declaration; Reference IRS Publication 501 for more details.

4. Support test.

Unlike the qualifying child test, a qualifying relative may be any age. The qualifying relative may not be claimed by anyone else as a dependent or file his or her own tax return unless it is to get a refund of excess funds withheld.

Once it is determined there is a qualifying child or qualifying relative, the value of the dependent exemption needs to be determined. The maximum amount of each dependent exemption is $3,650 for 2009. It is important to be aware that the dependent exemptions are not equal for everyone and may be much less that $3,650. When certain income levels are met, there is a reduction or phase-out of the exemption. The phase-out may make a dependency exemption to a high wage earner have little or no value.

2009 Filing Status	2009 AGI Level that Reduces Exemption Amount
Married filing separately	$125,100
Single	$166,800
Head of Household	$208,500
Married filing Jointly	$250,200

If the AGI level is reached for the phase-out, you must reduce the dollar amount of your exemptions by 2% for each $2,500, or part of $2,500 ($1,250 if you are married filing separately), that your AGI exceeds the amount shown above for your filing status. However, you can lose no more than of the dollar amount of your exemptions.

Before deciding who should take the kids as dependents, it is important to determine what tests have been met to qualify the dependent as an exemption, and then, which exemptions or credits may apply. Because one parent's status may qualify for one or many of the tax deductions or credits and to varying degrees, it may be wise to have each divorcing party's CPA run a few scenarios to see what they are actually worth and therefore to whom they are most advantageous.

THE WAY TO A LAWYER'S HEART – BILLABLE HOURS

By
Martha Jones[1]

It is my belief that family lawyers are the best of the best! Working with them in this area of the law is all I have done for 30 years and I cannot imagine doing anything else. Family lawyers are also the group who seem to appreciate their paralegals the most. People getting divorced or seeking other orders for their children are in the worst times of their lives. I believe the term is "situationally crazy." So, the work we do is sometimes the most stressful of any in the legal field, and can also be very complicated. In short, the work involves a lot of billable hours for both the attorney and the paralegal.

The State Bar has been actively involved for more than 25 years not only in defining the role of the paralegal in the law office, but in educating paralegals to handle many of the tasks previously handled only by an attor-

[1] Martha is a paralegal certified in family law and practices at Davis & Tisdale in Granbury, Texas. She can be reached at martha@davisandtisdale.com. Martha collaborated with and wishes to thank Virginia "Ginger" Dvorak Smith, who is also a paralegal certified in family law, who practices at Brown McCaroll, L.L.P. in Austin, Texas, and who can be reached at gsmith@mailbmc.com.

ney. In 1974, the *Gill Savings* case was the first upper-court ruling allowing attorneys to charge their paralegal's time to a client. Since then, the way paralegals account for their time has become very important in the legal profession.

My recommendation to Lawyers: use your paralegals to the fullest! They are very smart, have great organizational skills, multi-task with the best, and in most cases they know your clients better than you do. Don't hesitate to give your paralegal work – such as drafting or document review or witness interviews – work that you might normally do yourself. If they don't do it right the first time, they'll learn quickly. They will also generate a healthy amount of revenue for your offices. It is very important that you train and encourage your paralegals to keep good records of all the time they spend on client files and to bill those hours. I was very fortunate in my legal career to have worked with and been trained by the "billable hours boys" Jon Coffee, Ted Terry and Tom Ausley. They impressed on me that billable hours are how a paralegal shows his/her attorney how much work they are doing on a case and hopefully how valuable they are to the attorney's legal team. The clients also like to see who is spending time and effort on their case and on their behalf. And, in fact, many of the clients would rather deal with the paralegal than the lawyer, as they find them less intimidating and easier to talk to than the attorney.

My recommendation to Paralegals: be all that you can be! Read the case law updates, be familiar with the changes in the Family Code and attend CLE to further educate yourself. Make efficient use of your time. When the mail comes in each day, look through it, anticipate the need of the client and your attorney, write that letter or draft that initial pleading for the attorney to review, revise and send out. Network with other paralegals in other offices and other cities, this can result in referrals to your attorney. And develop a system that works for you to keep track of the time that you spend on a client file each day. Enter your time into whatever system your attorney utilizes for that purpose, and try to close out your time daily so you don't forget what you've actually accomplished that day.

Again. . . .bill those hours!

Articles

WHOSE MONEY IS IT?
THE CHARACTERIZATION OF PARTNERSHIP DISTRIBUTIONS

By
Jim Wingate[7]

Introduction

As of August 1, 2009, there are over 147,000 active limited partnerships and over 11,000 limited liability partnerships registered to do business in Texas plus an indeterminate number of general partnerships.[1] Given the prevalence of the usage of the partnership form of business, it is surprising that there have only been two courts of appeals cases that have considered the character (separate, community or mixed) of distributions from partnerships. The first of these was *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd n.r.e), and the second, almost twenty years later, was *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex. Civ. App.—San Antonio 2006, pet. den'd).[2] The interesting thing about both cases is that, notwithstanding the fact that neither case actually involves a distribution of capital by a partnership, both are cited as standing for the

[7] *The author thanks Jim Ryan, III and Alden Crow of Jackson Walker L.L.P. for their assistance in reviewing and suggesting changes to that part of the article dealing with the statutes governing partnership formation, capital contributions, distributions and profits. The suggestion to include an example was also contributed by Jim.*
Jim Wingate is a Dallas attorney and CPA who practices exclusively in the area of family law, and most of his work centers on issues of characterization, tracing and fraud. He can be reached at jmwingate@msn.com

proposition that you cannot trace capital through a partnership's capital account for purposes of characterizing capital distributions as separate property.

Both *Marshall* and *Lifshutz*, although reaching the correct result, were wrongly reasoned. The courts of appeals in both cases state that separate property assets contributed to a partnership do not retain their separate property character in the hands of the partnership. Although this is correct, it is not dispositive in determining the character (separate, community or mixed) of a distribution from a partnership. Following is a discussion of tracing principles, partnership capital accounts, profits and distributions, summaries of both *Marshall* and *Lifshutz*, and an analysis of both cases.

A different analysis, however, applies to the characterization of amounts received as a result of redemptions and liquidations of partnerships. For this reason, I have also included a brief discussion of the treatment of proceeds received in liquidation and redemption of partnership interests.

Principles of Tracing and Mutation in Form

Most Texas attorneys are familiar with the basic tenants of Texas' community property system, and most Texas family law attorneys can recite them from memory. For the sake of completeness and for a frame of reference, I repeat them here:

No. 1: Community property is all property acquired during the marriage other than separate property.[3]
No. 2: All property of the marriage is presumed to be community property.[4]
No. 3: Separate property is (a) property owned or claimed by a spouse before marriage, (b) property acquired by a spouse during the marriage by gift, devise or descent, and (c) any recovery for personal injuries sustained by a spouse during marriage, except for recoveries for loss of earning capacity during the marriage.[5]
No. 4: Clear and convincing evidence is required to establish separate property.[6]

Courts also recognize that property may be of mixed character, i.e., part separate and part community, based upon the relative amounts of separate and community property used to acquire the property.[7]

Frequently, the establishment of separate property involves some form of tracing of assets. By definition, tracing involves demonstrating the separate origin of the property by showing that it derived from property that was the separate property of a spouse.[8] For example, when shares of stock that are the husband's separate property are sold and the proceeds reinvested in other shares, then the new shares are considered a mutation in form of the original shares provided the husband can show by clear and convincing evidence that the proceeds from the sale of the old shares were used to purchase the new.[9] As far back as 1851, only five years after statehood, the Texas Supreme Court applied the community presumption and the interrelated concepts of tracing and mutation in form.[10] Mutations in form typically involve some form of cash held in a financial account at some point in the tracing trail.[11]

Harris v. Ventura, 582 S.W.2d 853 (Tex. Civ. App.—Beaumont 1979, no writ), contains an excellent description of the tracing of assets through mutations in form. In *Harris*, the deceased, George Ventura ("George"), owned real property and also held inherited funds, all of which was his separate property. George deposited his inherited monies into a bank account, and he sold the real property and deposited the proceeds into that same account. George also deposited other monies, whose origin was not identified by the court of appeals but that were of a separate character, into that same account. The account earned community interest, and George wrote checks drawn on the account. The husband's estate hired an expert, who prepared tracing schedules of the activity in the account. The expert prepared exhibits showing the activity in the account, characterizing each deposit and withdrawal as separate, community or mixed. The tracing was facilitated by use of the community-out-first presumption, which presumes that all withdrawals are made first from community funds.[12] By tracing funds as a mutation in form of antecedent assets, the estate's expert was able to trace separate property into a bank account, and then trace and characterize the activity in that account. The

tracing expert was ultimately able to demonstrate that the account held $3,657.88 of the deceased's separate property.

When tracing funds held in an account, attorneys and experts treat the process as tracing actual dollars held in an account for a spouse, but everyone realizes this is not actually the case. As we all know too well during these times of accelerating banks failures (one hundred fifteen FDIC insured banks as of October 30, 2009 as compared to twenty-six in 2008, and only three in 2007), no actual dollars are segregated at the bank and identified as belonging to the account holder.[13] What each depositor actually holds are rights under the deposit contract that he or she signed with the bank, and the bank is required to return the customer's funds according to the terms of the deposit agreement.[14] Title to the deposited funds rests in the bank, and the relationship between the bank and its depositor is that of debtor (the bank) and creditor (the depositor).[15] The bank is required under the contract to pay out funds on deposit according to the directions of the depositor.[16] This is why banks use the phrase "credit your account." In accounting terms, a "credit to your account" represents a liability of the bank to repay you your funds.

Partnership Formation, Capital, Profits, and Distributions

Effective January 1, 2010, the present Texas statutes governing partnerships, as well as all other entities, will be replaced by the provisions of the Texas Business Organizations Code (the "TBOC").[17] Because it will soon apply to all partnerships, this discussion is based upon the partnership provisions contained in the TBOC. It should be noted, though, that the TBOC is basically a recodification of existing statutes.[18]

The term "partnership" is defined in the TBOC as any entity that is governed under Title 4 of the TBOC.[19] Title 4 governs general partnerships (Chapter 152, §152.001 through §152.914), limited partnerships (Chapter 153, §153.001 through §153.312) and limited liability partnerships (Chapter 153, Subchapter H, § 153.351 through §153.555.). Also, the statutes contained in Title 4, Chapter 151 supplement the general partnership provisions of Chapter 152 and the limited partnership provisions of Chapter 153, unless specifically provided for otherwise.[20] Because limited liability partnerships are a special form of either a general or limited partnership, there is no need for purposes of this discussion to separately discuss limited liability partnerships.[21] Those provisions of the TBOC that are applicable to general partnerships can be cited as "Texas General Partnership Law" ("TGPL"), and the provisions applicable to limited partnerships can be cited as "Texas Limited Partnership Law" ("TLPL").[22]

There are different requirements for the formation of general and limited partnerships. To form a general partnership, all that is required is for two or more persons to engage in a business for profit as owners, regardless of whether they intended to create a partnership.[23] Thus, there is no requirement for a written partnership agreement, and the TGPL lists five factors that indicate whether a partnership has been created.[24] Not surprisingly, such informality in the formation process has led to lawsuits over the existence or nonexistence of general partnerships.[25] If a matter is not dealt with in the partnership agreement of a general partnership, the provisions of the TGPL govern such matters.[26] In contrast to a general partnership, a limited partnership is formed only after the partners enter into a partnership agreement and file a certificate of formation with the Texas Secretary of State.[27] The term "partnership agreement" includes both written and oral agreements.[28]

Usually, limited and general partners contribute capital upon formation of the partnership and possibly at other times during the life of the partnership. The TBOC broadly defines contributions to include any tangible or intangible benefit transferred to an entity, including cash, services rendered, a contract for services to be rendered, promissory notes, securities, etc.[29] Limited partnerships are required to maintain a statement of the agreed value for any noncash contribution, but there is no similar requirement for general partnerships.[30] Partnership capital contributions, for both general and limited partnerships, are generally recorded at the fair market value of the capital contributed.[31] The accounting records of any partnership (or at least those partnerships in which the participants intended for there to be a partnership) will include a capital account for each partner in which a running total is maintained for the value of all capital contributed by the partner, the profits and losses allocated to that partner and all distributions to the partner. Similarly, for purposes of the partner-

ship provisions of the TBOC, "capital account" is defined as a calculation: an amount calculated by adding a partner's cash contributions to the partnership, the agreed value of non-cash assets contributed, plus the partner's share of profits, and then subtracting distributions to the partner as well as the partner's share of losses.[32]

The TGPL and the TLPL differ with respect to the allocation of profits. For limited partnerships, if the partnership agreement is silent as to the allocation of profits, they are allocated to the partners based upon their respective capital contributions.[33] For general partnerships, however, each partner is entitled to an equal share of partnership profits and losses unless the partnership agreement provides otherwise.[34]

TLPL provides that distributions of cash or other assets to a partner shall be made by a limited partnership "in the manner provided by a written partnership agreement," and to the extent and in accordance with the schedule provided for in that agreement.[35] The TLPL also provides that a distribution from a limited partnership that is a return of capital is to be made on the basis of the agreed value of the original contribution of the capital (unless the partnership agreement provides otherwise).[36] With respect to distributions of profits, TLPL provides that profits are to be distributed in proportion to the allocation of profits as determined under the limited partnership agreement, or distributed as specified in TLPL if there is no agreement.[37] TGPL is silent regarding distributions from general partnerships except to require that each partner be charged with cash and the value of any non-cash assets distributed to the partner.[38]

Partnership agreements can become quite complex with respect to the sharing of revenue and expenses between partners, and this is especially true in partnerships involved in the development and production of oil and gas leases. For example, various costs can be allocated disproportionately between partners, and allocation of revenues to the partners can depend upon whether development costs have been recovered.[39] Similarly, real estate development partnerships can also be complex, with preferred returns and carried interests.

There is no requirement in either TGPL or TLPL that profits be distributed before capital is distributed. The order of distributions is controlled by the partnership agreement. However, in the absence of a provision in a limited partnership agreement specifying the order of distributions, then profits are distributed before capital.[40] An example of the various possibilities for the order of distributions can be found in Sally Schreiber's State Bar of Texas CLE article entitled *Partnership (General, Limited and LLP) Formation and Opt-In Decisions*.[41] In her example limited partnership agreement, distributions are made first to limited partners to satisfy a preferred return requirement, then to all partners to the extent of unreturned capital contributions and finally to all partners in accordance with their profit sharing ratios.

Summary of Marshall and Lifshutz

In *Marshall*, the parties had remarried each other only five months after their earlier divorce. Then just fifteen months after their remarriage, both parties filed for divorce on the same day. The husband, Woody, was a partner in an oil and gas partnership, and he had acquired his interest in the partnership before his second marriage to Arlene. Woody received approximately $542,000.00 from the partnership during the short marriage. Of that amount, approximately $22,000.00 was received as wages, and the balance was received by him as partnership distributions. The partnership agreement provided that all distributions to the partners were to be from the profits of the partnership.

Woody's position was that the partnership distributions were received by him as a return of his separate property partnership capital. He reasoned that the distributions to him were mutations in form of his separate property because they were derived from sales of oil and gas sold from leases that were all acquired by the partnership prior to his marriage. Thus, he argued, they were received by him as a return of capital and not as income. Woody appeared to be relying on the legal principle that separate property, if properly traced through mutations in form, remained separate property. Arlene understandably took the opposite view—that all partnership distributions to Woody were community property because they were either wages or distributions of partnership profits.

In support of his position that the partnership distributions received by him were his separate property, Woody cited the Texas Supreme Court's decision in *Norris v. Vaughn*, 260 S.W.2d 676 (1953). In that case, the Supreme Court concluded that distributions from an oil and gas partnership were received by the husband as his separate property.[42] The Supreme Court's characterization in *Norris* was based on the aggregate theory of partnership law in force at that time. Under the aggregate theory, a partnership is treated as an aggregate of its individual partners, and the assets are considered held by the individual partners, not the partnership. However, the Dallas Court of Appeals found that *Norris* was no longer relevant because Texas had adopted the entity theory of partnerships subsequent to that decision when the Texas legislature passed the Uniform Partnership Act in 1961.

Under the entity theory, the partnership is the owner of all partnership assets, and the partners simply hold an interest in the partnership itself. It is only this interest that can be characterized as either separate or community property, and not the assets of the partnership. The Dallas Court of Appeals therefore held that profits distributed to a partner are community property "regardless of whether the partner's interest in the partnership is separate or community in nature." The court of appeals noted that (i) "all monies disbursed by the partnership were from current income," and that (ii) the partnership agreement specifically provided that amounts distributed to a partner in excess of salary are to be charged against the partner's share of profits. The court of appeals then stated that "[u]nder these facts, we hold that all of the partnership distributions that Woody received were either salary under the partnership agreement or distributions of profits of the partnership."
The Dallas Court of Appeals in *Marshall* also engaged in an analysis regarding the tracing of assets through a partnership's capital accounts, and concluded that a distribution from a partner's capital account can never be characterized as a mutation in form of a partner's separate property contribution to the partnership. The court of appeals' reasoning was that if a partner could trace through his capital account, this would imply that the partners retained an ownership interest in the assets contributed to the partnership. The court of appeals noted that the Texas Supreme Court had already determined in *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976), that "the only partnership-related property a trial court can award upon dissolution of a partner's marriage is the partnership interest." It then concluded that since partnership assets were the property of the partnership and not of the partner, it was impossible to trace a capital contribution so as to determine that a later distribution from a capital account was a mutation in form of the original capital contribution.

Lifshutz, which is the only other case in which a Texas court of appeals has considered the issue of the characterization of partnership distributions, involved some unusual facts. The parties, James and Kymberly, were married in 1990. James was a partner in Liberty Properties Partnership ("Liberty Partnership"), and in 1990 Liberty Partnership acquired one-third of the stock of Berlee Lumber Company ("Berlee Lumber") from James's father. The record is silent as to whether the stock was purchased by Liberty Partnership or was contributed as capital by James's father. Pursuant to a plan of reorganization, Liberty Partnership transferred the Berlee Lumber stock to Liberty Financial Corporation ("Liberty Corporation") in 1996. The trial court found that, to the extent of his relative ownership interest in the partnership, there was a constructive distribution of the Berlee Lumber stock to James by Liberty Partnership followed by a contribution of the stock by James to Liberty Corporation.

James made two arguments to the Court: first that under *Thomas v. Thomas*, 738 S.W.2d 342 (Tex. App.—Houston [1st Dist.] 1987, writ denied), "corporate earnings remained corporate property until distributed and, therefore, were not divisible on divorce"; and, second, that the distribution of the Berlee Lumber stock constituted an asset distribution and not a profits distribution. The San Antonio Court of Appeals summarily disposed of James's first argument by noting that the present case was one in which assets were distributed, not one in which assets were retained.

James's second argument, that his case involved a distribution of assets instead of profits, apparently was made in order to circumvent the holding in *Marshall* that profits distributed by a partnership constituted community property upon receipt. The San Antonio Court of Appeals applied the logic of *Marshall* in spite of James's attempt to reframe the issue. The court of appeals quoted with approval the Dallas Court of Appeals' statements in *Marshall* that "[a] withdrawal from a partnership capital account is not a return of capital

in the sense that it may be characterized as a mutation of a partner's separate property contribution to the partnership and thereby remain separate." Like the Dallas Court of Appeals, the San Antonio Court of Appeals also cited cases holding that a partner has no interest in the assets of the partnership. The San Antonio Court of Appeals then held that distributions from a partnership are characterized as community property because partnership property does not retain a separate character, "regardless of whether the distribution is of income or an asset."

Analysis of Marshall and Lifschutz

The Dallas Court of Appeals in *Marshall* based its decision on the terms of the partnership agreement, which specifically provided that all partnership distributions were to be made from the profits of the partnership. The trial court had previously found that partnership income each year exceeded the dollar amount of the distributions to the partners. The methodology applied by the court of appeals in its analysis was consistent with the numerous cases that have held that the agreement of the parties as contained in the partnership agreement is controlling. Thus in *Park Cities Corp. v. Byrd*, 534 S.W.2d 668, 672 (Tex. 1976), the Texas Supreme Court found that the agreement of the parties was controlling in reaching a decision as to whether a partner had to restore a negative capital account balance upon the dissolution of a partnership. Moreover, the Texas Supreme Court also held in *Park Cities Corp.* that a partnership agreement constitutes a contract between the partners.[43]

However, going beyond the terms of the partnership agreement, the court of appeals in *Marshall* also stated:

> [A] withdrawal from a partnership capital account is not a return of capital in the sense that it may be characterized as a mutation of a partner's separate property contribution to the partnership and thereby remain separate. Such characterization is contrary to the UPA and implies that the partner retains an ownership interest in his capital contribution. He does not; the partnership entity becomes the owner, and the partner's contribution becomes partnership property which cannot be characterized as either separate or community property of the individual partners. Thus, there can be no mutation of a partner's separate contribution; that rule is inapplicable in determining the characterization of a partnership distribution from a partner's capital account.

These statements of the Dallas Court of Appeals are *obiter dicta*. *Dicta* is defined as those "words of an opinion entirely unnecessary for the decision of the case …. Such are not binding as precedent."[44] The court of appeals' statements regarding tracing through a capital account are not necessary for the decision in *Marshall* because the court's opinion in *Marshall* was based on the finding of the trial court that the distributions Woody received from the partnership were comprised of salary and distributions of partnership income. As such, they were not distributions of capital, but rather of profits and wages, and were received by Woody as community property. Since the distributions in *Marshall* consisted of wages and partnership income, the court of appeals did not have before it the issue of the character of a distribution to a partner of previously contributed capital.

In *Lifshutz*, the husband, James, was also attempting to trace assets "through" a partnership, and both the facts and James's legal arguments were somewhat unusual. The district court had found that the Berlee Lumber stock was distributed to James as a "non-liquidating community distribution," and then recontributed by James to Liberty Corporation, his separate property company. Therefore, the community was due reimbursement for the value of the community stock that was contributed to Liberty Corporation. Evidently, the district court was uncertain as to whether the stock represented a distribution of income or of capital, and sidestepped this issue by simply calling it a "nonliquidating community distribution."

The San Antonio Court of Appeals' opinion is silent regarding one important matter. The record is also totally devoid of any discussion of the terms of the partnership agreement of Liberty Partnership, and of what, if any, provisions that it contained regarding partnership distributions. Were all distributions to come from

profits, as in *Marshall*, or did the agreement permit contributed capital to be repaid to the partners prior to liquidation? Were there any partnership provisions specifying the priority of distributions, i.e., profits first, then capital or vice versa?

There is also nothing in the record indicating how the Berlee Lumber shares were acquired by Liberty Partnership, only that they were acquired by the partnership from James's father. Were the shares purchased from James's father, or instead did James's father convey them to the partnership as a contribution to capital? Regardless, there was nothing to indicate that James held any interest in the stock before its transfer to Liberty Partnership.

Lifshutz did not have to be decided on the basis that a partner cannot trace his capital contribution through a partnership. There is nothing in the record to show that the Berlee Lumber stock distributed to James was a return of capital, and James did not even put forth an argument that it was a return of capital. James simply asserted that the stock was "an asset distribution and not a profit distribution." The record shows that the stock was conveyed to Liberty Partnership by his father, so James did not contribute the stock to the partnership. Additionally, no evidence was brought forward at trial to show that, under the terms of the partnership agreement, the distribution of the Berlee Lumber stock was a return of invested capital. The mere fact that a distribution was in the form of a non-cash asset is not determinative of its classification as a distribution of profits or a distribution of invested capital. Profits can be held by partnership in the form of a non-cash asset. Thus there was nothing in the record in *Lifshutz* to evidence a return of capital to James, so James had not established any basis whatsoever for arguing that this was a return of his separate property investment.[45]

James was essentially arguing that his distribution could not be a distribution of profits because it was a distribution of a non-cash asset instead of cash. This presupposes that profits can only be distributed in the form of cash. This is not the case. As decided by the Texas Supreme Court in a 2009 case dealing with the issue of whether a general partnership existed, profits are simply the excess of revenue over expenditures.[46] This is a mathematical calculation, and there is not necessarily a one-to-one correlation between cash and profits. Thus, a distribution of either a cash or non-cash asset could be either a distribution of capital or of profits. Cash generated from operations is frequently used to purchase assets, and it is possible for such assets to be distributed to the partners, as may have been the case in *Lifshutz*. Whether such in-kind distribution is a distribution of capital or of profits will be determined by the partnership agreement, and, in the absence of provisions in the partnership agreement, then by TGPL and TLPL, as appropriate.[47]

Unfortuntately, the San Antonio Court of Appeals based its decision upon the dicta in *Marshall* that, because the partnership, and not the partners, is the owner of any assets contributed to it, then a distribution of capital cannot be traced as a mutation in form of the original contribution. The court of appeals appears to be confusing the tracing of the ownership of individual assets with the tracing of investments made in entities. When a partner contributes capital to a partnership, whether in the form of cash or other assets, there is no denying that the assets become the property of the partnership.[48] However, notwithstanding the fact that the partners do not own the assets of the partnership, the partners do hold an investment in the partnership that is represented by the value of their capital contributions, regardless of whether that contribution is of cash or of a non-cash asset, and those capital investments are to be repaid according to the terms of the partnership agreement. If and when the partnership repays the capital to the partners according to the terms of the partnership agreement, the funds received in repayment have the same character as the original capital that was contributed. It is the character of the investment that determines the character of the capital contribution that is repaid, and this has nothing whatsoever to do with ownership of partnership assets or with how the partnership may have invested that capital.

The relationship of the partners to the partnership with respect to their capital accounts is similar to that of a bank's depositors to a bank. Both the partners and the depositors expect to be repaid their monies, and one court of appeals, perhaps overstating the case, has even held that a partner's positive capital account balance is a debt owed by the partnership to the partner.[49] The cash held by a financial institution is neither separate cash nor community cash, but rather is the bank's cash, some part of which is subject to the claims of the de-

positors. Nevertheless, we speak of tracing cash held in an account, when it is actually the institution's obligation to repay its depositors according to the terms of the deposit agreement that is being traced. In like manner, a partnership's obligation to repay the capital it holds according to the terms of its contract with the partners can be traced. Cash withdrawn from a bank account is not literally the same cash that was deposited. A tracing expert acts like it is when he or she traces the cash, but this is simply an intellectual construct. There is no reason for the tracing of capital invested in a partnership to fail because the assets held by a partnership are not owned by the partners. The assets of the partnership play no role in the tracing of the capital invested by the partners. When characterizing a distribution of capital from a partnership, the capital returned to the partner will have the same character as the capital contributed, just as cash withdrawn from a bank account will have the same character as the funds initially deposited.

Partnership Redemptions and Liquidations

The principal of mutation in form applies to more than just distributions from partnerships—it also applies, although in a somewhat different manner, to both redemptions of a partner's interest and to liquidations of partnerships. The treatment of amounts received in redemption of a partner's interest was considered by the Houston Court of Appeals in a 1988 case, *Harris v. Harris*, 765 S.W.2d 798, 803 (Tex. App.—Houston [14 Dist.] 1988, writ denied), involving the redemption of a partner's interest. In *Harris*, a partner in the law firm of Andrews and Kurth received monthly installments from the partnership as a buy-out, i.e., redemption, of his interest in that partnership, and the total value of the redemption payments was estimated as being $500,000.00.[50]

The husband had acquired his partnership interest prior to his marriage. During the marriage, the partners executed a new agreement that changed the terms of redemption for any withdrawing partner. The wife argued that since the new agreement changed the amount that her husband would receive upon leaving the firm, the partnership interest redeemed was different from the partnership interest held by her husband at the time of their marriage. The court of appeals cited the Texas Supreme Court's holding in *Norris* that property remains separate even when it undergoes "any number of mutations and changes in form," and upheld the jury's characterization of redemption payments as the husband's separate property. In its analysis, the court of appeals analogized a partnership interest to an interest in stock, holding that the interest the husband held prior to marriage was the same interest that he held upon withdrawing from the firm, and any increase in value attributable to the new agreement was analogous to stock splits and other increases in the value of stock. The redemption payments received by the husband were therefore a mutation in form of his partnership interest.
Although there do not appear to be any cases directly on point regarding the characterization of a liquidating distribution from a partnership, the Beaumont Court of Appeals has recently considered the character of payments received in complete liquidation of a corporation. In *Legrand-Brock v. Brock*, 246 S.W.3d 318, 322 (Tex. App.—Beaumont 2008, pet. denied), a corporation distributed its assets to the shareholders "in complete cancellation or redemption of all the shares" of the corporation. The husband was paid approximately $7 million cash in return for the cancellation of his shares, which were admittedly his separate property. The wife's expert attempted to characterize the liquidating distributions as "liquidating dividends," and argued that they should be characterized the same as dividends paid from on-going operations, that is to say, as income from separate property and therefore community property.

The Beaumont Court of Appeals concluded that the cash received by the husband was a mutation in form of the husband's cancelled stock, and was therefore his separate property. The court of appeals relied on two earlier decisions, one by the El Paso Court of Appeals in 1957 and another by the Texarkana Court of Appeals in 1956, both of which involved the distribution of assets to a shareholder in liquidation of his separate property interest.[51] Both of those courts concluded that assets distributed in liquidation of separate property stock were received as separate property.[52] The Beaumont Court of Appeals also supported its opinion by citing to the holding in *Harris* that a partner receives redemption payments as a mutation in form of his investment, and "the character of property is not altered by the sale, substitution or exchange of the property …." The Beaumont Court of Appeals obviously believes that a liquidating distribution of a corporation is similar to a redemption payment by a partnership.

How is it that retained earnings that are distributed as dividends with respect to separate property stock are community property, while retained earnings that are received in liquidation of separate property shares are separate property? The answer is that the Beaumont Court of Appeals viewed the transaction between the husband and the corporation as an exchange of his separate property stock for cash remitted by the corporation. In its analysis, the court of appeals held that the fact that the liquidating distribution was paid from corporate earnings was not relevant to the characterization of the distribution because the earnings of a corporation belong to the corporation until a dividend is declared. The court of appeals also noted that federal case law also distinguishes between dividends and liquidating distributions.

The Beaumont Court of Appeals' analysis is consistent with the manner in which dividends received by a spouse are characterized. In characterizing a dividend, you do not trace earnings to determine which earnings were accumulated prior to marriage and which were accumulated during marriage. Thus, dividends received during marriage are considered community property regardless of the fact that the earnings from which they are paid were accumulated prior to marriage, and, similarly, the community has no claim to undistributed earnings held by a corporation at the time of divorce. The only thing controlling the characterization of a dividend as community property is simply whether the dividend was paid during the marriage. The analysis of the court of appeals is consistent with this methodology—accumulated earnings belong to the corporation, and are community property only if and when a dividend is declared. The community has no claim to these assets, and receipt of a liquidating distribution is therefore distinguishable from the receipt of a dividend even though both are paid from accumulated earnings.

Likewise, a liquidating distribution to a partner should also be treated as a mutation in form of the partnership interest. This is consistent with both the treatment of corporate liquidations as determined by the court of appeals in *LeGrand-Brock* and with the characterization of partnership redemption payments in *Harris*. As with the retained earnings of a corporation, the accumulated earnings of a partnership are partnership assets and cannot be characterized as either community assets or separate assets. If payments are made in liquidation of a partnership, they should be characterized as a mutation in form of the partnership interest surrendered in exchange for the payment. All assets received in liquidation, including the previously undistributed earnings, would be received by the partner as his or her separate property. Conversely, if a partnership distribution is not made in liquidation, then the partnership agreement should be examined to determine whether the distribution is from income or from capital. This treatment creates a dichotomy between the treatment of earnings distributed during the ordinary course of business versus those distributed in liquidation or redemption, but it is consistent with the treatment of funds received in exchange for an interest in an entity as a mutation in form of that entity.

Consistency in the application of the law requires that assets received in liquidation of a partnership be treated the same as those received in liquidation of a corporation. Both are entities formed under the applicable laws of Texas, and both have a separate existence from their owners. Additionally, the basis for the Beaumont Court of Appeals' holding in *LeGrand-Brock* was that liquidating distributions are distinguishable from dividends because the community has no claim to the accumulated earnings of a corporation until they are distributed as either a dividend or a liquidating distribution. This applies equally to a partnership. As described above, partnership assets belong to the partnership until distributed to the partners. As with corporate distributions, the character of partnership distributions should be determined by the nature of the distributions, and liquidating distributions should have the character of the partnership interest surrendered.[53]

Example

A hypothetical example, based loosely on facts from an actual case, might be instructive. In 1999, a real estate promoter in Houston held an option to purchase ten acres of undeveloped land on South Padre Island for $100,000.00. He found a group of investors who were willing to purchase the land at that price, and give him a 10% carried interest. The investors agreed with the promoter to form a limited partnership to purchase the land. Because of the carried interest, the developer did not contribute any capital for the purchase of the land, but, along with the investing partners, was assessed capital calls from time to time by the partnership to cover

his pro rata share of the carrying costs of the land (taxes, insurance, upkeep, etc.). The limited partnership agreement provided that the first distributions from the partnership would be paid to the investors as a return of their initial $100,000.00 investment, then capital contributed for carrying costs would be repaid, and finally profits, if any, would be distributed pro rata, 90% to the investors and 10% to the promoter. The agreement also provided that the partnership would terminate upon the disposition of all the land.

The land was sold in two parcels, five acres in 2005 and five acres in 2009. The carrying costs of the land up through the point of the first sale were $40,000.00, and there were $50,000.00 of additional carrying costs through the date of the second sale. The net proceeds from the sale of the first parcel in 2005 were $200,000.00, and the net proceeds from the second parcel in 2009 were $400,000.00. The only distributions from the partnership were in 2005 and 2009, at the time of the sale of each parcel. The entire net proceeds were distributed on each occasion, but the 2009 distribution was handled as a liquidating distribution.

Based upon the partnership agreement, the first $140,000.00 distributed to the partners in 2005 represented a return of both the investing partners' $100,000.00 initial capital investment and all partners' subsequent $40,000.00 contributed as capital to pay the carrying costs of the land. The remainder of the 2005 distribution, $60,000.00, represented a distribution of profits, and was allocated 90% to the investors and 10% to the promoter. By the time of the 2009 liquidating distribution, the only unreturned capital was the carrying costs incurred between the sale in 2005 and the sale in 2009 ($50,000.00). The balance, $350,000.00, came from profits.

The characterization of the first distribution is handled differently than the characterization of the second based upon the fact that the second distribution is a liquidating distribution. To the extent that the first distribution is a repayment of the partners' contributed capital, it has the character of the capital that was contributed. Thus, $140,000.00 would have the character of the capital that was contributed, and $60,000.00 would be characterized as community property because it represented a distribution of profits, which, absent a binding agreement between spouses, is always characterized as community property. The second distribution, which was a liquidating distribution, would be treated as a mutation in form of the partnership interest that was given up. Therefore, all of the second distribution would have the character of the original investment in the partnership, which, based upon both *LeGrand-Brock* and *Harris v. Harris*, would be separate if the investment for a given partner were separate and community if the investment were community.

Conclusion

Characterizing distributions made to a partner is not unlike characterizing the withdrawal of funds from a bank account. Just as a depositor holds rights under his or her deposit contract that specifies what is held in the account as interest and what is held as deposits, a partner is a party to the partnership agreement that specifies what is contributed capital and what are profits. In neither case is it necessary to characterize and trace the assets held within the entity, regardless of whether it is a bank or a partnership, in order to establish the character of amounts repaid to the investor or depositor. The fact that funds withdrawn from a bank account are not the same physical dollars that were deposited into that account does not prevent the tracing of funds held within an account. Likewise, the fact that dollars or assets invested in a partnership cannot be traced through the accounts of a partnership does not prevent the tracing of the mutation in form of a partnership investment.

The courts of appeals in both *Marshall* and *Lifschutz* concluded, based upon the legal premise that partnership assets are owned by the partnership and not the partners, that a distribution of capital to a partner cannot be traced as a mutation in form of the original capital investment. This shows a misunderstanding of the manner of tracing the mutations in forms for investments in entities. Under the former, aggregate theory of partnerships, tracing of individual assets held within the partnership would have been required because the partners were viewed as owners of those assets. Under the present, entity theory of partnerships, such tracing within a partnership not only cannot be done, but is not required to be done to establish the character of a distribution of capital because the partner simply holds an investment in the partnership, and not in the underlying assets.

There is no need to trace "through" a partnership in order to characterize a return of invested capital as the separate property of a spouse. In both *Marshall* and *Lifschutz*, both husbands were attempting to prove separate property claims by tracking individual assets from the point in time at which they were conveyed to the partnership to the point at which they were later distributed to the husbands. For the reasons discussed above, these arguments were flawed. In rejecting the husbands' logic, however, both courts of appeals appear to have accepted the husbands' premise that the tracing of a separate property capital contribution by a partner would have to involve the tracing of assets from the point in time at which they were contributed to a partnership to a later point in time at which these same assets were distributed back to the partner.

---

[1] E-mail dated August 18, 2009, from Lorna Wassdorf, Director, Business & Public Filings, Texas Secretary of State to Jim Wingate. No count of active general partnerships is available because there is no requirement for general partnerships to file with the Secretary of State. Both general and limited partnerships can register as limited liability partnerships, but no information is maintained by the Texas Secretary of State's office as identifying those limited liability partnerships that are also registered as limited partnerships.

[2] The Houston Court of Appeals noted in *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex. App.—Houston [14 Dist.] 1988, writ denied), that the Dallas Court of Appeals in *Marshall* had held that distributions of income from a partnership were always community in nature. *Id.* However, the issue being considered in *Harris* was whether payments received by a former partner to redeem his interest in a partnership were community or separate. There was no analysis in *Harris* of the character of distributions from partnerships.

[3] *See* TEX. FAM. CODE § 3.002; *see also Bailey-Mason v. Mason*, --- S.W.3d ---, 2008 WL 5158912, 4 (Tex. App.—Dallas 2008, pet. denied).

[4] *See* TEX. FAM. CODE § 3.003(a); *see also McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973).

[5] *See* TEX. FAM. CODE § 3.001; *see also Wilson v. Wilson*, 44 S.W.3d 597, 601 (Tex. App.—Fort Worth 2001, no pet.)(denying husband's claim of separate property for property acquired during separation from wife).

[6] *See* TEX. FAM. CODE § 3.003(b); *see also Long v. Long*, 234 S.W.3d 34, 37 (Tex. App.—El Paso 2007, pet. denied)(requiring clear and convincing evidence to prove separate property).

[7] *See Gleich v. Bongio*, 99 S.W.2d 881, 883 (Tex. 1937) (when property is purchased partly with community funds and partly with separate funds a tenancy in common is created between the separate and community estates with each estate owning an interest in the proportion that it supplied the funds); *see also Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975) (citing Gleich).

[8] The "typical" definition of tracing used in case after case is that "[t]racing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property." *See, e.g., Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.—Fort Worth 2004, no pet.); *Granger v. Granger*, 236 S.W.3d 852, 856 (Tex. App.—Tyler 2007, pet. denied); *Mock v. Mock*, 216 S.W.3d 370, Tex. App.—Eastland 2006, pet. denied).

[9] *See, e.g. Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953); *Legrand-Brock v.Brock*, 246 S.W.3d 318, 322 (Tex. App.—Beaumont 2008, pet. denied).

[10] *See, e.g., Love v. Robertson*, 7 Tex. 6 (Tex. 1851) ("The presumption that property purchased during the marriage is community property is very cogent, and must be repelled by clear and conclusive proof; but where it is established that the property was purchased with the separate money of one of the parties, it remains, as in the case of property received in payment of a debt due one of the parties, (McIntyre v. Chappell, 4 Tex. R., 187,) the separate property of the party with whose money it was purchased.") There is also a discussion in this case of the earlier Spanish law from which the concepts of community and separate property were taken.

[11] The most common exception to this would be mutations in the form of a business entity, which obviously would not involve the tracing of cash.

[12] *See Hill v. Hill*, 971 S.W.2d 153, 158 (Tex. App.—Amarillo 1998, no writ); *Sibley v. Sibley*, 286 S.W.2d 657, 659 (Tex. Civ. App.—Dallas 1955, writ dism'd)

[13] *See* http://www.fdic.gov/bank/individual/failed/banklist.html.

[14] *See* TEX. FINANCE CODE § 95.004 (Vernon Supp. 2008).

[15] *See* Mesquite State Bank v. Prof'l Inv. Corp., 488 S.W.2d 73, 75 (Tex. 1972).

[16] *Id.*; *see also Newsome vs. Charter Bank Colonial*, 940 S.W.2d 157, 166 (Tex. App.—Houston [14 Dist.] 1996, pet. denied).

[17] Although the TBOC was enacted in 2003, it contained transitional rules that applied to existing entities, and it is not until January 1, 2010 the TBOC will apply to all entities. *See* TEX. BUS. ORGS. CODE §§401.001 *et seq.*]

[18] *See* TEX. BUS. ORGS. CODE § 1.001.

[19] *See* TEX. BUS. ORGS. CODE § 1.002(67).

[20] *See* TEX. BUS. ORGS. CODE §§ 152.001(4), 152.003, 153.001 and 153.003(a).

[21] *See* TEX. BUS. ORGS. CODE § 153.351.

[22] *See* TBOC §§ 1.007 (f) and (g).

[23] *See* TGPL § 152.051(b).

[24] *See* TGPL §152.052 (a).

[25] *See, e.g.*, *Ingram v. Deere*, --- S.W.3d ---- (Tex. 2009) WL 1900537.

[26] *See* TEX. BUS. ORGS. CODE § 152.002(a).

[27] *See* TBOC §§ 3.001(c) and 3.011.

[28] *See* TBOC § 151.001(5).

[29] *See* TBOC § 1.002(9).

[30] *See* TLPL §§ 153.551(5)(A) and (B).

[31] *See* Partnership Audit Technique Guide – Chapter 1 – Basic Principles (Rev. 3/2008), Internal Revenue Service, at http://www.irs.gov/businesses/partnerships/article/0,,id=134691,00.html.
[32] *See* TEX. BUS. ORGS. CODE § 151.001(1); *see also* TEX. BUS. ORGS. CODE § 152.202(a) and (b).
[33] *See* TEX. BUS. ORGS. CODE § 153.206(a) and (b).
[34] *See* TEX. BUS. ORGS. CODE §§ 152.002(a) and 152.202(c).
[35] *See* TEX. BUS. ORGS. CODE §§ 153.208(a) and 153.209.
[36] *See* TEX. BUS. ORGS. CODE § 153.208(b).
[37] *See* TEX. BUS. ORGS. CODE §§ 153.208(b) and 153.206.
[38] *See* TEX. BUS. ORGS. CODE § 152.202(b).
[39] *See, e.g.*, *XCO Production Co. v. Jamison*, 194 S.W.3d 622, 625 -626 (Tex. App.—Houston [14 Dist.] 2006, pet. denied)
[40] *See* TEX. BUS. ORGS. CODE § 153.208(c).
[41] *See* Sally A. Schreiber, *Partnership (General, Limited and LLP) Formation and Opt-In Decisions* published in Chapter 4, Texas Business Organizations: Choice of Entity and Formation 2006, State Bar of Texas, San Antonio, May 26, 2006.
[42] *Id.* at 681.
[43] *Park Cities Corp.*, 534 S.W.2d at 672; s*ee also XCO Production Co*, 194 S.W.3d at 627-628 (general partnership agreement interpreted under the law of contracts); *Crossley v. Staley*, 988 S.W.2d 791, 798 (Tex. App.—Amarillo 1999, mandamus denied)(limited partnership agreement construed under the law of contracts)(citing *Park Cities Corp. v. Byrd*, 534 S.W.2d 668, 672 (Tex.1976)); *Parker County's Squaw Creek Downs, L.P. v. Watson*, 2009 WL 885941, 3 (Tex. App.—Fort Worth 2009, pet. filed)(limited partnership agreement construed under the law of contracts).
[44] *State v. Skiles*, 938 S.W.2d 447, 456 (Tex. Crim. App. 1997) (Baird, J., concurring and dissenting) (quoting Blacks Law Dictionary, 6th Ed.); *see also Continental Cas. Ins. Co. v. Functional Restoration Associates*, 19 S.W.3d 393, 400 (Tex. 2000)(dictum is not binding as precedent).
[45] In his petition for review that was filed with the Texas Supreme Court, James's counsel pointed to the fact that the Berlee Lumber stock was acquired by Liberty Partnership prior to the parties' marriage as further evidence of its separate property character upon receipt by James. [45] This is also of no consequence in determining the character of the distribution because, as stated in both *Lifshutz* and *Marshall*, partnership assets are assets of the partnership and not of the partners. The fact that assets are held by an entity prior to marriage says nothing regarding their character upon distribution. For example, almost anytime someone acquires stock in a public corporation it has retained earnings. Yet there are no Texas cases that stand for the proposition that dividends paid on separate property stock from earnings accumulated prior to marriage should be characterized as separate property when distributed during the marriage. Dividends are characterized as a community asset regardless of when the earnings have accrued.
[46] *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009).
[47] *See* TEX. BUS. ORGS. CODE § 152.002(a) (partnership agreement governs relations of partners and of partners to partnership, and if not provided for in partnership agreement, then TGPL or TLPL controls, as applicable); see also *XCO Production Co*, 194 S.W.3d at 628 (general partnership agreement is enforced according to its terms).
[48] *See* TEX. BUS. ORGS. CODE § 152.202(b)(partners do not have an ownership interest in partnership property). Although § 152.202 is found in the provisions governing general partnerships, it is also applicable to limited partnerships pursuant to TEX. BUS. ORGS. CODE § 153.003.
[49] *Farnsworth v. Deaver*, 147 S.W.3d 662, 664 (Tex. App.—Amarillo 2004, no pet.). Partners are equity investors, and have a right to repayment of their investment only to the extent allowed by the partnership agreement.
[50] *Harris*, 765 S.W.2d at 802-03. The court of appeals in *Harris* also considered the character of husband's interest in a Reserved Capital Agreement that governed the sharing of fees arising from a contingent fee agreement between the partners and the maternal heirs of Howard Hughes. The agreement had been entered into during the parties' marriage, and the jury had characterized the agreement as the husband's separate property. The husband's interest in the agreement was estimated as being worth millions of dollars. Noting that the agreement only clarified the rights of the respective partners in the contingent fee contract, the court of appeals sustained the jury's separate property characterization of the husband's interest. *Id.* at 804.
[51] *Fuhrman v. Fuhrman*, 302 S.W.2d 205 (Tex. Civ. App.—El Paso 1957, writ dism'd) and *Wells v. Hiskett*, 288 S.W.2d 257 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.).
[52] *See Fuhrman*, 302 S.W.2d at 212; *Wells*, 288 S.W.2d at 265.
[53] *See Norris*, 260 S.W.2d at 496.

WHY ARE WE DOING PROVE-UP HEARINGS?

By Clint Westoff[8]

Introduction

You settled your case with a Mediated Settlement Agreement, an agreement reached through an Informal Settlement Conference, a Rule 11 Agreement, or just direct negotiations that get incorporated into an agreed judgment. In Family Law cases, probably more than other areas of the law, there is the potential for buyer's remorse after the parties reach an agreement. One party may claim fraud, or another defense, or they may just withdraw their consent to entry of an agreed judgment.

Everything is drafted and approved, from the Decree or Final Order right down to any releases, powers of attorney, and deeds. In fact both attorneys and all parties to the case have signed your proposed judgment. The content of your proposed final judgment also accurately states what it is based upon, such as the agreement of the parties, a Mediated Settlement Agreement, or another type of agreement, because simply stating that the order is "approved as to both form and substance" does not necessarily establish that it is an agreed judgment.[9] Now it is time to have the parties' agreement turned into a judgment that a judge signs.

Depending on the court your case is in, you could simply have the judge sign the order. Of course the appearances section of your order should be accurate; it should not say everyone appeared and gave testimony if no one did. Also, many judges will not sign even agreed orders without a formal "prove-up" hearing, or will only do so for certain kinds of cases such as modifications that only change the possession schedule.

What this article addresses is what if you skip the prove-up, or realize later that something was left out of the evidence presented at the prove-up. We will examine the elements of a typical prove-up in a divorce and whether the evidence typically presented at a prove-up is required, or not, to support an agreed judgment challenged at a later time.

The Typical Family Law Prove-Up

The Texas Family Law Practice Manual, Second Edition, contains Form 17-7. The form provides a list of suggested questions for the prove-up of an agreement reached in a divorce proceeding and is also a widely used checklist for the various legal requirements to keep in mind when presenting evidence to protect your client's judgment from attack.

i. Have you been a domiciliary of Texas for the preceding six-month period and a resident of this county for the preceding ninety-day period?

For the Court to grant a divorce one party must have been a domiciliary of Texas for at least six months prior to, and a resident of the county for at least ninety days immediately prior to, the filing of the petition.[10] The requirements of section 6.301 are not jurisdictional, but simply state conditions that must be met before the court can grant a divorce.[11]

The easiest way to satisfy this requirement at the prove-up is to have one party to the divorce simply answer the standard question in the affirmative. But what if no one asks that question on the record?

---

[8] Clint Westhoff is a lawyer with Bruneman, Lake, Griffin, & Westhoff, PLLC, and is Board Certified in Family Law by the Texas Board of Legal Specialization.

[9] *Baw v. Baw*, 949 S.W.2d 764, 767-767 (Tex. App.—Dallas 1997, no pet.).

[10] TEX. FAM. CODE ANN. § 6.301.

[11] *McCaskill v. McCaskill*, 761 S.W.2d 470, 472 (Tex. App.—Corpus Christi 1988, writ denied).

The original petition, or counterpetition, or both, in most divorce pleadings will have an allegation that a party, or both, meet the residency requirement. In *Dokmanovic v. Schwarz*[12], the wife challenged the divorce based on her allegation that no evidence of residency was presented to the trial court. The court of appeals found that the statements of residency in the original petition and counterpetition were judicial admissions. The court went on to say "we find these judicial admissions more than sufficient evidence of residency."[13]

In *Prieto v. Prieto,*[14] on the morning of trial the husband's attorney, and wife's attorney, appeared in court without either party to the litigation. The two attorneys announced the parties had reached an agreement and recited the agreement into the record.[15] Part of the agreement was a stipulation that the husband met the residency requirements. Based solely upon the stipulations as recited by the attorneys the trial court rendered judgment and granted the divorce. Then the husband died.[16]

The wife, after rendition and after the husband had died, withdrew her consent to the agreement and challenged the court's authority to enter a Decree claiming the husband had not met the residency requirements.[17] The trial court signed a Decree over the wife's objections and she appealed. The court of appeals upheld the trial court reasoning that the statements of the attorneys amounted to a valid stipulation as to husband's residency even considering the wife's challenge to the evidence.[18] Since the parties, through their attorneys, stipulated to husband's residency, there was no error when the trial court granted the divorce and then entered the Decree without any testimony from either party as to their residency.

ii. Has your marriage become insupportable because of a discord or conflict of personalities that destroys the legitimate ends of the marriage relationship?

The most common ground for divorce stated in an agreed judgment is insupportability.[19] Assuming the witness at the prove-up answers the standard question in the affirmative then the record will have sufficient evidence to establish this element. But, again, what if for some reason the direct testimony of the person wanting the divorce is not available or you skip the prove-up hearing? Will the divorce then be subject to challenge?

In *Austin v. Austin,*[20] the wife was not present in court and her attorney offered the stipulation that if she had been present, she would have testified "that the marriage has become insupportable due to discord and conflict of personality; that there is no hope of reconciliation." Mr. Austin seemed to agree that the offered stipulation was accurate, but he never testified that the marriage was insupportable.[21] The Texas Supreme Court held that the stipulation "was probative evidence of insupportability and the trial court was entitled to find in favor of Mrs. Austin in her suit for divorce" although there was no evidence other than the stipulation regarding the grounds for divorce.[22]

In *McCaskill v. McCaskill,*[23] the husband and wife reached an agreement on the day of trial that was read to the court in the presence of the parties. The wife had filed a Petition for Divorce and the husband had filed a counterpetition also seeking divorce.[24] About a month after the agreement was presented, the trial court en-

---

[12] 880 S.W.2d 272, 277 (Tex. App.—Houston [14th Dist.] 1994, no writ)

[13] *Id.* at 277. See also, *Barnard v. Barnard*, 133 S.W.3d 782, 786 (Tex. App.—Fort Worth 2004, pet. denied) ("Admissions by a husband and wife in petitions for divorce, stating that they satisfied the residency requirements of divorce, are considered judicial admissions in the case in which the pleadings are filed, and no additional proof is required of the admitted fact.").

[14] 2002 WL 31875985 (Tex. App.—El Paso 2002, no pet.) (not designated for publication).

[15] *Id.* at 2.

[16] *Id.*

[17] *Id.* at 2-3.

[18] *Id.* at 3.

[19] TEX. FAM. CODE ANN. § 6.001

[20] 603 S.W.2d 204, 206 (Tex. 1980)

[21] *Id.* at 206

[22] *Id.* at 207

[23] 761 S.W.2d 470 (Tex. App.—Corpus Christi 1988, writ denied)

[24] *Id.* at 472

tered a Decree and "granted a divorce without receiving evidence or specifying the grounds it relied upon to authorize the divorce."[25]

The wife apparently changed her mind and challenged the validity of the Decree. One of her challenges was that neither party presented any evidence regarding the grounds for divorce to support the trial court's granting of the divorce. The court of appeals rejected her contention stating:

> Admissions in trial pleadings are regarded as judicial admissions in the case in which that pleading is filed, require no proof of the admitted fact and authorize the introduction of no evidence to the contrary. It is not necessary for either party to prove facts which are distinctly alleged by the adverse party. Facts admitted in a pleading are considered judicial admissions or a substitute for evidence.
>
> In the present case, appellant's petition serves as a judicial admission and a substitute for evidence of the grounds of divorce she alleges. She cannot now challenge the sufficiency of the evidence to support the divorce granted by the trial court.[26]

iii. Have you and your spouse entered into an agreement concerning the division of your property and debts and is that agreement fair and equitable to both you and your spouse?

A property division imposed by the trial court in a divorce proceeding must be just and right.[27] In addition, Texas Family Section 7.006(b) imposes an affirmative duty on the trial court to find that the terms of any agreement between the spouses to settle their divorce is also just and right. In fact the trial court, based on its opinion of what is just and right, can refuse to enforce an agreement that the spouses themselves think is just and right.[28] However, this rule does not apply to agreements that are enforceable under some rule of law other than section 7.006, such as Mediated Settlement Agreements under section 6.602, Informal Settlement Agreements under section 6.604, Partition and Exchange Agreements under section 4.102, or Collaborative Law Agreements under section 6.603.

At the prove-up hearing, the witness can testify that the agreement is just and right, and fair and equitable and that both sides of the case have consented. Unless fraud, collusion, or misrepresentation induced the agreement, a party cannot appeal from a judgment to which he or she agreed and consented.[29] A consent judgment waives all errors, other than jurisdictional errors, committed before its rendition.[30]

In *Boufaissal v. Boufaissal*, 251 S.W.3d 160, 161 (Tex. App.-Dallas 2008, no pet.), the husband and wife participated in a prove-up hearing before the Decree was drafted. A few weeks later, a Decree was presented to the trial court that contained the signatures of both parties and recited that the agreement was just and right, but then the wife filed a Motion for New trial and appealed. *Id.* The appellate court framed, and decided, the issues as follows: "the dispositive issue in this appeal is whether, after approving and consenting to entry of the agreed divorce decree as to both form and substance, Wife may now raise the above issues on appeal. Because she cannot, we affirm." *Id.* The entry of a consent judgment was a bar to the appeal and the appellate court did not address any of wife's alleged errors by the trial court.

---

[25] *Id.*
[26] *Id.* at 472.
[27] TEX. FAM. CODE ANN. § 7.001
[28] *See e.g. Patino v. Patino*, 687 S.W.2d 799, 801-802 (Tex. App.—San Antonio 1985 no writ)
[29] *Pillitteri v. Brown*, 165 S.W.3d 715 (Tex. App.—Dallas 2004, no pet.); *In re Garza*, 126 S.W.3d 268 (Tex. App.—San Antonio 2003, orig. proceeding)
[30] *Minnick v. Rogers*, 873 S.W.2d 420 (Tex. App.—Tyler 1994, no pet.)

iv. Do you think that the proposed parenting plan is in the best interest of the child(ren) and do you ask the court to approve that proposed parenting plan?

The trial court must render an order based on an agreed parenting plan if the court finds it to be in the child's best interest. TEX. FAM. CODE ANN. § 153.007(b). Similar to the provisions regarding the trial court's duty to evaluate whether an agreed property division is just and right, the trial court also has a duty to evaluate whether an agreed parenting plan is in a child's best interest, even in the case of a Mediated Settlement Agreement. TEX. FAM. CODE ANN. § 153.0071(e-1)(2).

As with other types of cases, if consent to an agreement in a Suit Affecting the Parent Child Relationship is revoked prior to rendition of the judgment then that revocation is effective. *See e.g.*, *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App.—Houston [14th Dist.] 1996, no writ). What is absent from the case law are situations where a party revokes consent after rendition and the consent judgment is reversed on a best interest challenge. The rule discussed above that "unless there has been fraud, collusion, or misrepresentation that induced the agreement, a party cannot appeal from a judgment to which he or she agreed and consented," appears to be applicable in SAPCRs at least in practice.

The trial court could hold an evidentiary hearing to evaluate whether an agreement is in a child's best interest. However, it does not appear that such a hearing is mandatory.[31]

If there is a prove-up hearing, the parent or parents will answer the standard question that their agreement is in the child's best interest. Assuming the order is drafted using standard provisions, the signed order will also recite that the agreement is in the child's best interest. This process begs the question of whether stating "yes" to one question at a prove-up hearing provides better evidence of the child's best interests than a stipulation in a proposed agreed order signed by both parents. Although there does not appear to be a case directly on point, as long as consent to an agreement exists at the time of rendition, and the parties have stipulated in the order that their agreement is in the child's best interest, that stipulation should withstand any appeal if one of the parents later changes their mind.[32]

Why Do a Prove-Up at All?

Maybe we as a profession should be asking ourselves why we are charging our clients for trips to the courthouse to engage in an exercise of asking preordained questions that everyone already knows the answers to in order to get a document signed that everyone but the court has already reviewed, approved, and signed. Does a trip to the courthouse in an agreed case help to resolve a conflict? Are we promoting some interest of justice or preventing fraud? Are we promoting judicial efficiency?

All of the cases discussed above have a common thread: judicial admissions in pleadings and written stipulations contained within an agreed judgment are legally and factually sufficient evidence to support, and uphold, the entry of an agreed judgment. The standard prove-up questions, and the almost universal "yes" and "no" answers to those questions, do little to make an agreed judgment any more secure on appeal, so long as the judgment is well drafted, is signed and consented to by both parties, and consent is not revoked prior to rendition.

---

[31] See, *Beyers v. Roberts*, 199 S.W.3d 354, 360-361 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)("courts have not held that the policy favoring children's best interest requires that trial courts determine best interest when the parties have settled their disputes, in every case.")

[32] See *Boufaissal*, infra.

REAL ESTATE ASSET OPTIONS IN DIVORCE: FORECLOSURE VS SHORT SALES

By Margaret O'Brien and MaryAnn Comparin[33]

What is a married couples' most significant monetary asset? Typically, it is their primary residence. The real estate market has been through some significant changes over the last few years. Foreclosure rates have steadily increased while the economy overall has resulted in rising unemployment rates thus creating new challenges in the area of family law. This article will address and summarize the options available in lieu of property foreclosures as well as a brief synopsis on foreclosure from a mortgage consultant's perspective.

Foreclosure is a legal process by which a defaulted borrower no longer has interest (or title) in the mortgaged property. Foreclosure rates have been historically higher in the subprime mortgages; however, the rates of mortgage defaults are increasing among prime borrowers. Besides job loss, illness, reduced income, mortgage fraud, medical issues, predatory lending as well as several other underlying reasons, divorces also contribute to the increasing rates of foreclosure. If the stress and unsettling feelings of divorce are not enough, foreclosure proceedings for most homeowners also represent more unchartered, nerve-wracking territory. Depending on state laws and the loan instrument being utilized, the proceedings of foreclosure may occur quickly or become a lengthy process as in New York where proceedings may take more than 400 days.

In a divorce situation, there may be a few options before your client begins the foreclosure process. For instance, some options may be to refinance, lender workout, sell and bring cash to closing, deed in lieu of foreclosure or a short sale. Depending on the financial situation of both parties, the previously mentioned options may be feasible, however, this article will focus on the advantages of a short sale and how to qualify your clients who may benefit from this option and both parties are released from their largest financial joint asset. A short sale is an alternative to foreclosure.

What is a short sale and who qualifies for a short sale? The lender in a short sale has not yet foreclosed on the property, which may allow the owner a window of opportunity to sell the property. In a short sale situation the owner owes more money on the loan and any other liens on the property than the proceeds of a sale for fair market value will bring; furthermore, the owner is unable or unwilling to bring money to the closing. A short sale is also referred to as pre-foreclosure or being upside down. Typically, an experienced real estate professional will be able to qualify a distressed homeowner for a short sale. The National Association of Realtors has a certification for real estate professionals known as the Short Sales & Foreclosure Resource (SFR) Certification. Qualifying a potential short sale candidate requires an exacting and thorough process that considers but is not limited to the following items: determining if the homeowner has a valid hardship; sufficient time for the short sale process; professional advice obtained by homeowner (regarding tax, finance and legal); amount owed on the property; additional liens on the property (tax liens, home owner association liens, etc.); property condition; and the full cooperation by homeowner throughout the process. Moreover, the actual sale of the property in a short sale situation is never guaranteed. A real estate professional will determine the timeline to accomplish short sale in each situation by confirming the foreclosure timeline in the appropriate state and subtracting the number of missed months of payments by the homeowner. In some cases, if there is less than two months remaining to list, market and sell the property, many real estate professionals may not take the listings because the time line is not long enough for a successful outcome.

The benefits of a short sale versus a foreclosure clearly make the short sale a better option. For instance, the following are some of the benefits of a short sale that a divorcing couple may be unaware of: a short sale is

---

[33] Margaret O'Brien is a Broker Associate, CCIM Candidate and has her Short Sales & Foreclosure Resource Certification (SFR). Margaret has been practicing real estate through Keller Williams Realty since 2004 and her experience includes both residential and commercial transactions. mo-re@kw.com 972-897-6427

MaryAnn Comparin is a Mortgage Consultant with Intrust Mortgage, Inc. MaryAnn has been in mortgage lending since 2002 and her experience is in residential lending. mcomparin@intrustmortgage.com 972-239-5326

not reported on credit history (whereas a foreclosure is reported on a person's credit history anywhere from 7-10 years); credit score is less impacted and can be as brief as 12-18 months (foreclosure can lower a credit score 250 to over 300 points and can be affected for over 3 years); shorter time period for obtaining a new loan allowing eligibility for a Fannie Mae backed mortgage after 2 years (foreclosure homeowners are ineligible for a Fannie Mae backed mortgage for 7 years); does not challenge most security clearances; does not create a current or future challenge for employment (foreclosure in many cases may be grounds for employment termination or immediate reassignment); higher possibility the lender will give up the right to pursue a deficiency judgment (whereas foreclosures result in a deficiency judgment); and lastly, the Mortgage Debt Relief Act of 2007 in most short sale situations forgives the debt-forgiveness tax on the federal level for mortgage restructuring or discharge on a principal residence through 2012 (seek advice from a CPA to further understand the implications of this act and in regards to a divorce). In addition, in a divorce being able to do a short sale not only benefits the parties in the ways discussed but more importantly, upon the sale of the property, it removes the parties from joint ownership of a marital asset and without the serious impact to their credit created by the foreclosure process.

From a Mortgage Consultant's perspective, losing a home to foreclosure due to an inability to keep up with your monthly mortgage payments is one of life's most unpleasant experiences and should be the last alternative or solution. It will affect your client's credit history many years after the home is no longer their asset. Not only will it result in the loss of their home, but the lender will pursue a judgment against your client for the arrearages you owe plus his costs for the foreclosure action. If your clients' plan on purchasing another house in the future, they will have to wait 3-7 years depending on the type of new loan. Although a short sale is a better option than foreclosure, the effects on one's credit score may be negatively impacted as well possibly as much as 200+ points. However, as long as one keeps several revolving credit cards open & continues to make timely payments as well as paying all other monthly obligations on time, your credit score will eventually get back to where it was before the short sale.

Fortunately, there are several solutions for your clients and with the involvement of a real estate professional, mortgage professional and CPA, your clients will receive the most current options available for their situation. Undeniably, good legal representation must include a knowledgeable team to provide the best options to support the critical decisions regarding your client's real estate asset evaluations in a divorce during this epidemic of foreclosures.

<u>References:</u>

National Association of Realtors, Real Estate Buyer's Agent Council, Inc.
Short Sales and Foreclosures: What Real Estate Professionals Need to Know. 2009

Manley, Michelle Lyn
The Benefits of a Short Sale. ML Properties 2009
(online www.orangecountyagent.netorange –county-shortsale.php)

Burns Law Office
The Economic Crisis: Foreclosure in Divorce. October 18, 2009. (online www.jburnslaw.com)

Debt Kid
Short Sale vs. Foreclosure: Which is the Better Option? January 17, 2008
(online www.debtkid.com)

In re Weekley
Requests for Electronic Documents

By Clint Westhoff[34]

Introduction

On August 28, 2009, the Texas Supreme Court issued its opinion in the *In re Weekley* case.[35] The Court set forth, in much greater detail than Texas law previously provided, the proper procedure to be used when requesting electronic documents in discovery and the standard by which the appellate courts will evaluate the granting, or denial, of such requests. The Court relied heavily in its analysis on the federal rules regarding electronic discovery and noted that "we look to the federal rules for guidance."[36] In the last pages of the opinion the Court sets forth an eight-point summary of the proper procedure for requesting electronic information, but a close reading of the case shows the summary is lacking many details and requirements that are set forth in the opinion itself, all of which this article discusses below.

The technical aspect of the operation of hard drives[37] is beyond the scope of this article. However, understanding the *Weekley* case requires at least a basic appreciation of the difference between electronic information in unallocated space on a hard drive and information in allocated space. As an example, assume a husband in a divorce case wrote a letter to his mistress and saved it on his computer. The letter is evidence of the adultery alleged by his wife. The letter is in allocated space and is easily accessible by simply turning on the computer, navigating to where it is saved, and copying it to be produced in response to a request for production. The computer puts the document in a specific spot on the hard drive; for this example let's call that specific place 'slot 1.' As long as slot 1 is allocated for the letter to the mistress the computer will save nothing else in slot 1.[38]

Now let's assume the husband deletes the letter while holding down the shift key on his computer.[39] The letter is now in unallocated space but is still physically present in slot 1. With the right expertise and software, that letter can be recovered from slot 1 even though the husband deleted it. However, the computer now assumes that it can use slot 1 for anything it needs. So if another file is created it might be written to slot 1, thus overwriting the evidence of the letter to the mistress so that it cannot be recovered or can only be partially recovered. This could happen simply by the user of the computer surfing the internet, which creates and deletes many temporary files on the hard drive. If slot 1 is used after the letter has been deleted then the letter to the mistress will be gone. However, until slot 1 is used, the letter, or even parts of the letter, will remain in slot 1.

Step One – Request Specifically What You Want

In *Weekley*, one of the parties in discovery requested "documents" that they defined to include "electronic or email messages."[40] The Texas Supreme Court found that the requesting party had not followed the rule regarding making a specific request and that the request was not specific enough to include deleted messages. However, the Court went on to say that before trial court intervention it had been made clear that deleted

---

[34] Clint Westhoff is a lawyer with Bruneman, Lake, Griffin, & Westhoff, PLLC, and is Board Certified in Family Law by the Texas Board of Legal Specialization.

[35] *In re Weekley Homes, L.P.*, ___ S.W.3d ___, 2009 WL 2666774 (Tex. 2009).

[36] *Id.* at *6.

[37] There are many different types of devices that store information electronically besides hard drives, such as flash drives, CD-Roms, and backup tapes. The term "hard drive" will be used in this article generically to refer to all such devices even though the way each media stores information can differ dramatically.

[38] Of course all of this is an oversimplification, but the basic idea is consistent with how a hard drive works.

[39] For a system using a Microsoft Windows operating system, holding down the shift key while deleting a file will prevent the file from being simply moved to the Recycle Bin where it could be easily recovered.

[40] *Weekley*, at *3, fn. 3.

emails were being sought and thus there was no prejudice to the responding party by the lack of specificity.[41] The Court stated that "parties seeking production of deleted emails should expressly request them."

The Court let the requesting party in *Weekley* get away with not being specific in their request, but only because of other proceedings in the trial court made it abundantly clear that deleted information, information in unallocated space on the hard drives, was being sought. The lesson here is if you want information from the unallocated space of a hard drive you must specify that is what you are seeking. If you do not specify you want deleted information the responding party can assume only information from allocated space is sought.

Step Two – Specify the Form of Production

Rule 196.4, the underlying rule of civil procedure upon which the *Weekley* case is based, also requires that a request for any electronic documents specify the form in which electronic documents are to be produced. Usually this requirement will be easy to satisfy by simply stating that responsive documents are to be produced in their original electronic format and specifying a storage media on which they are to be produced, such as a CD-Rom or DVD-Rom.

If the request does not specify a format of production then the responding party could simply not respond, object, or choose their own format for production.

Step Three – The Initial Response

It is always possible, however unlikely, that the responding party will receive the request, diligently search all available hard drives for the requested documents, and include both allocated and unallocated space in their search. If they then produce the requested documents there is no need to go further unless the response necessitates additional discovery in which case the requesting party starts over at step one.

However, the responding party only has to produce electronic information that is "reasonably available to the responding party in its ordinary course of business."[42] The appropriate objection suggested by the Texas Supreme Court would be that the documents and information "cannot through reasonable efforts be retrieved or produced in the form requested."[43] The case also references Rule 192.4, which suggests several other possible objections.[44]

For information that is in allocated space on an operating computer, it seems unlikely that this objection would ever be warranted. However, unless discovery is sought through the use of a computer forensic expert it is unlikely that information in unallocated space, deleted information, is available to the average party in litigation "in the ordinary course of business."

Step Four – Certificate of Conference

As with all discovery disputes the parties must make a good faith effort to resolve the dispute before seeking court intervention.[45] In the case of electronic documents, part of this effort should involve the exchange of "relevant information concerning electronic systems and storage methodologies so that agreements regarding

---

41 *Id*. at *3.
42 TEX. R. CIV. P. 196.4
43 *Weekley,* at *4.
44 The objections from Rule 192.4 would be that: 1) the discovery sought is unreasonably cumulative or duplicative, 2) the discovery is obtainable from some other source that is more convenient, less burdensome, or less expensive, or 3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.
45 TEX. R. CIV. P. 191.2; *Weekley*, at *10.

protocols may be reached or, if not, trial courts have the information necessary to craft discovery orders that are not unduly intrusive or overly burdensome."[46]

The hard part here is that in the typical family law case, the parties will probably know little about their "electronic storage methodologies" and the attorneys may know even less.

Step Five – The Responding Party's Burden

If the objection allowed by Rule 196.4 – that deleted electronic documents are not reasonably available in the ordinary course of business – is made, then either party can request a hearing. At the hearing, the burden of proof to support the objection will be on the objecting/responding party.[47]

It is unclear in the *Weekley* case what evidence would be sufficient to support the objection because the court reporter's record from the Motion to Compel at the trial court level was not provided as part of the mandamus proceeding.[48] In the typical family law case, the party could testify that they have no idea how to recover electronic documents from unallocated space, which will be true in the vast majority of cases. This alone could establish that the documents and information are not available "in the ordinary course of business." An expert could also be hired to testify regarding the efforts that would be required, and the cost to search for and recover information from unallocated space.

At this step, the trial court can even require additional steps to gather the information necessary to present at the Motion to Compel. Examples included in the *Weekley* case would be ordering limited discovery relevant to the Motion to Compel, requiring the responding party to sample or inspect the hard drives where the possible information might reside,[49] or allowing depositions of individuals knowledgeable about the hard drives at issue in the case.[50]

Step Six – The Requesting Party's Burden

If the responding party does not meet their burden, the trial court should order production, but should still limit the discovery to protect against undue burden and expense.[51] If the responding party does meet their burden, the trial court *may* order targeted production if the "benefits of ordering production outweigh the costs."

The burden of proof to show the benefits outweigh the costs is on the requesting party.[52] Part of this burden is a requirement that the requesting party "[demonstrate] that the particularities of [the responding party's] electronic information storage methodology will allow retrieval of emails that have been deleted or overwritten, and what that retrieval will entail"[53] and that the "responding party's production 'has been inadequate.'"[54]

This requirement is probably the biggest evidentiary hurdle for the requesting party. The Texas Supreme Court specifically states that conclusory statements such as "deleted emails are in some cases recoverable" are

---

46 *Weekley,* at *10.
47 TEX. R. CIV. P. 193.4(a)
48 *Weekley,* at *5, fn. 7.
49 *Weekley*, at *5. Sampling would not, as a practical matter, be appropriate if only one hard drive was at issue because "sampling" data on one hard drive is not appreciably more difficult that searching the entire contents of one hard drive. If multiple hard drives are at issue, as was the case in *Weekley*, then sampling may make sense.
50 *Id.*
51 *Id.* at *4.
52 *Id.*
53 *Id.* at *8.
54 *Id.* at *6. This evidentiary requirement is stated several times, using differing language, in the *Weekley* case. The most stringent description of the requirement is when the Texas Supreme Court states that there must be a showing that the requesting party's "experts are familiar with the particularities of the [responding party's] hard drives, that they are qualified to search those hard drives, and that the proposed methodology for searching those hard drives is reasonably likely to yield the information sought." *Id.* at 9.

insufficient.[55] How is it possible to meet this burden without conclusory and speculative statements? The most that the forensic expert will be able to say is that if the information existed once, and has not been over-written since, then it can be recovered. Whether the information is, or is not, still reasonably available is difficult to determine except in a very general sense without actually examining the hard drive. But examining the hard drive is not allowed by *Weekley* without showing that the information is reasonably available.

Assuming the responding party proves their objection that the requested information is not available in the ordinary course of business, the requesting party proves that the benefits of production outweigh the costs, and the requesting party proves that there is some likelihood of retrieval of the requested information, then the trial court should order production. When ordering production at this step, the trial court must "to the extent possible . . . choose the least intrusive means," and the trial court "must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."[56]

Step Seven – The Least Intrusive Means of Production

At this step, it is important to state the distinction between the production of an electronic document and an entire hard drive. Think of a document as a single piece of paper, such as the letter to the mistress mentioned above, or a group of documents such as a profit and loss report. Think of the hard drive as an entire file cabinet that contains both relevant and irrelevant information.

Weekley makes it clear that the initial steps are limited to requesting documents and that "ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be."[57] If the requesting party does not have the requested document, and has made it through all of the requirements detailed above, the trial court should allow restricted access to a hard drive.

If the trial court allows access to a hard drive, to protect against intrusion, the trial court must follow many rules in crafting the order to require production:[58]

a. the order should "not permit the requesting party itself to access the opponent's storage device; rather, only a qualified expert should be afforded such access."
b. the order must be crafted to guard against "fishing expeditions."
c. the order cannot "give the expert carte blanche authorization to sort through the responding party's electronic storage device."
d. the order should impose reasonable limits on production.
e. the order must address privilege, privacy, and confidentiality concerns.

What About Honza?

After the *Honza*[59]case, it appeared that getting access to hard drives would be easier so long as the order allowing access was carefully drafted to protect the interests of the responding party. The Texas Supreme Court in *Weekley* takes time to carefully distinguish the *Honza* case.[60]

As stated in the beginning of this article, keeping in mind the difference between documents in allocated space and unallocated space is important. If the electronic document is in allocated space (it has not been deleted) and a proper request for production is made, the document should be produced just like a paper docu-

---

55 *Id.* at *8.
56 *Id. at *4.*
57 *Id.* at *6.
58 *Id.* at *6-*7.
59 *In re Honza*, 242 S.W.3d 578 (Tex. App.—Waco 2008, pet. denied)
60 *Weekley*, at *8.

ment would have to be produced; *Weekley* was about compelling the production of deleted information (information in unallocated space) by inspection of hard drives.

In the *Honza* case, the initial electronic documents not only had not been deleted but were produced in electronic format.[61] The requesting party in *Honza* was seeking additional electronic information regarding electronic documents that was in existence and was produced. "Because the Honzas were required to preserve that evidence once it had been requested, there was a reasonable likelihood that a search of the Honzas' computers would reveal the information."[62] That is in stark contrast to the *Weekley* case where it was undisputed that the information sought, if it existed at all, had been deleted as much as two-and-a-half years before the litigation started.[63]

What it All Means

In *Weekley*, the requesting party issued a request for production asking for emails and made it clear they were seeking deleted emails. They alleged and presented evidence that the responding party did not diligently search for deleted emails when responding. They filed a motion to compel, they designated four possible expert witnesses to attempt recovery of the emails, and there was testimony that deleted emails are in some cases recoverable from a hard drive. The trial court allowed access to the hard drives only on a limited basis with a detailed Court order that protected against disclosure of irrelevant, privileged or private information.

Even after all of that, the Texas Supreme Court granted a mandamus requiring the trial court to vacate its order that had allowed only limited access to the hard drives. The hurdles to be jumped by the party requesting electronic documents have been set at an extremely high level by the Texas Supreme Court.

In the typical divorce case, a party resisting electronic discovery of deleted information will have a powerful weapon in the standards set forth in the *Weekley* case. The high evidentiary burdens and the costs associated with hiring a forensic expert will in many cases simply prohibit a requesting party from pursuing deleted electronic information. However, once a litigant makes it to the motion to compel many of the burdens involve the weighing of interests such as privacy versus discovery of potentially relevant information. In cases involving children there is certainly an opening for an argument that the need for complete disclosure to properly assess the best interest of a child outweighs the types of corporate interests that the Court was protecting in the *Weekley* case. Only time, and more appellate cases, will tell how much of a chilling effect *Weekley* will have on seeking deleted electronic information.

---

61 *In re Honza*, 242 S.W.3d at 580
62 *Weekley,* at *9.
63 *Id.*

Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Christopher Nickelson (*C.N.)*, Jeremy C. Martin (*J.C.M.)*

DIVORCE
Grounds and Procedure

TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING AN INMATE'S PETITION FOR DIVORCE FOR WANT OF PROSECUTION.

¶09-6-01. ***Hutchinson v. Hutchinson***, ___ S.W.3d ___, 2009 WL 3449732 (Tex. App.—Dallas 2009, no pet. h.) (10/28/09)

Facts: Husband, an inmate in TDCJ, filed a petition for divorce along with an affidavit of inability to pay costs on 10/08/07. On 10/11/07, trial court sent husband notice of a 01/03/08 dismissal hearing for want of prosecution. On 10/23/07, husband filed a motion to retain the case on the court's docket, advising the court that he was incarcerated and seeking a bench warrant so he could appear in court or permission to appear by telephone, video conference or affidavit. Associate judge signed a dismissal order on 01/03/08 for want of prosecution. Husband appealed.

Held: Reversed and remanded.

Opinion: Inmates have a constitutional right to access the civil trial courts subject to limitations on their ability to appear in court in person. If trial court determines inmate is unable to appear in person, it may allow inmate to appear by another effective means. Husband could not appear in court or retain an attorney to do so for him, and informed trial court of this fact. Trial court's requirement that husband appear at a hearing without allowing him an effective means to do so denied husband his right to access the courts, and thus was an abuse of discretion.

TRIAL COURT ABUSED ITS DISCTRETION BY DENYING MOTHER'S MOTION FOR NEW TRIAL AFTER SHE DID NOT RECEIVE PROPER SERVICE OF PROCESS UNDER THE HAGUE SERVICE CONVENTION

¶09-6-02. ***Velasco v. Ayala***, ___ S.W.3d ___, 2009 WL 3931074 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) (11/19/09)

Facts: Father and mother married in 1996 and lived in Mexico City. Child was born in 1998. In 10/03, father brought child to Houston to visit his family. In 11/03, mother also came to visit believing family would return to Mexico City. On 02/13/04, mother learned father did not intend to return to Mexico. A fight ensued, and mother was handcuffed and placed in a women's shelter where she remained for three months. On 04/21/04, father filed for divorce, seeking to be appointed JMC and to have mother pay child support. He misnamed mother in the petition as having his family name, and stated that she resided in Harris County. He did not seek service of process. In 05/04, mother returned to Mexico City and began proceedings to seek child's return through the Hague Convention. On 07/09/04, father filed an amended petition that did not seek child support. He again named mother as having his surname, but stated her residence at their home in Mexico City. Father did request process via certified mail, but it was returned unexecuted for "Termination of Law." On 09/20/04, father filed a second amended petition for divorce, seeking termination of mother's parental rights for voluntarily abandonment and child endangerment. He, for a third time, listed mother as having his surname and listed her residence as their home in Mexico City. Father moved for citation by publication, claiming that he did not know mother's location and that a package sent to her by Federal Express had been returned after they had been informed mother was dead. Trial court granted service of citation by publi-

cation. On 12/13/04, trial court appointed attorney ad litem for wife and an amicus attorney to represent child. On 07/18/05 and 08/15/08, trial court held a default hearing. At the hearing, attorney ad litem stated that all reasonable efforts to contact mother had been made but that she suspected father had information on mother's family members that he was withholding. On 09/07/05, trial court signed a Final Decree of Divorce and Termination. On 09/06/07, mother moved for a new trial. On 09/10/07, mother filed an amended motion for new trial with an affidavit in support of her motion. Father did not file a written response. At hearing, mother argued that under the Hague Service Convention, father could not cite her by publication but had to effectuate personal service on her in Mexico. Father argued the motion for new trial because mother had not submitted the required affidavit until after the two year deadline for a motion for new trial had passed. Trial court orally denied mother's motion. Mother appealed.

Held: Reversed and remanded.

Opinion: Because mother was represented at the "default" hearing by an attorney ad litem, trial court's order is not a true default judgment. Under TRCP 239, however, trial court may grant a new trial if a motion is filed within two years, and the defendant did not appear in person or by attorney of her own selection if the defendant shows good cause. Trial court may, therefore, grant a new trial if mother shows cause. The Hague Service Convention does not permit service of process by direct mail. Father should have sent his request for service to Mexico's designated central authority. Although the Hague Service Convention does not expressly prohibit service of process by publication, since it requires service in the recipient's country of residence service by publication in Harris County clearly was not adequate. Although mother's attorney ad litem did enter a general denial at the 2005 hearing, this did not waive mother's objection to defects of service because the Hague Service Convention pre-empts TRCP 121.

Editor's Comment: *This case suggests that to avoid falling into the Rule 121 trap, an ad litem should routinely contest a trial court's jurisdiction. J.V.*

Editor's Comment: *The court of appeals ruling appears to be based primarily on the Hague Service Convention which trumps the TRCP. Because of this fact, it appears that the court of appeals does not address whether filing a verified motion for new trial under TRCP 329 (rule covering new trial after citation by publication) is a jurisdictional prerequiste to reinstate the trial court's plenary power. C.N.*

DIVORCE
Division of Property

ADMISSION OF PAROLE EVIDENCE ALLOWED TO ESTABLISH EXISTENCE OF PREMARITAL AGREEMENT WHEN ORIGINAL UNABLE TO BE PRODUCED.

¶09-6-03. ***Jurek v. Couch-Jurek***, ___ S.W.3d ___, 2009 WL 3020084 (Tex. App. – El Paso, no pet. h.) (09/23/09)

Facts: No premarital agreement produced at trial. Husband denied ever signing such an agreement. Wife claimed and trial court found, prior to 1990 marriage, the parties, in fact, entered into a premarital agreement. Trial court also found that the agreement was identical to one entered into by wife's sister and her second husband in 1991 and that agreement was produced. If 1990 agreement identical to 1991 agreement, each party would retain "all rights, including profit and income" to his or her separate property, including any property acquired during the marriage, "as if no marriage had been consummated between them." Attorney who prepared sister's agreement testified without objection that he had also prepared one for Wife, which was identical, except for the names and attached exhibits. Sister's agreement was introduced into evidence over Husband's objections. Attorney had retired and destroyed his records that why could not produce Wife's agreement. Notary had died and her book could not be located. Throughout marriage, parties' behavior was

consistent with there being a premarital agreement in existence. CPA testified, without objection, that shortly after marriage, he met with Husband and Wife and Husband confirmed that he and Wife had signed a premarital agreement. Couple maintained separate bank accounts. When purchasing new properties, they would submit only their own financial information to lenders. They each received title to new properties in his or her name only. Husband did not claim any "partial ownership" in any of the rental properties for which title was in Wife's name. Wife claimed that after signing the agreement, she put in a box in the attic marked 1991 and, after filing for divorce, that box was missing from the attic. Trial court found there was a valid premarital agreement and it was in the same format as the sister's 1991 premarital agreement. Husband appealed asserting trial court erred in admitting sister's premarital agreement as parole evidence of a 1990 premarital agreement between Husband and Wife.

Held: Affirmed.

Opinion: At trial, Husband argued that Texas Rule of Evidence 1004(e) prohibits admission of the 1991 premarital agreement as parol evidence used to prove the contents of a document when that document is closely related to a "controlling issue" and that the 1991 premarital agreement was irrelevant. However, Husband never specifically objected to the admission of the 1991 premarital agreement under any other provision of Rule 1004.

Husband initially objected to admission of **any** evidence regarding contents of the 1990 premarital agreement and he argued that the 1991 premarital agreement was irrelevant. However, once the trial judge allowed the 1991 agreement into evidence, both parties referred to it and described its contents.

Both parties questioned CPA without objection regarding a section of the premarital agreement that declared "hereafter-acquired property" would be separate property. When CPA, sister and Wife were asked whether the premarital agreement was identical to sister's premarital agreement, Husband did not object. Husband never requested a clear and unambiguous running objection to any testimony regarding the 1991 agreement. By allowing testimony regarding details of the 1991 agreement, without objection, Husband waived any error in the admission of the 1991 agreement.

Even if the above error had been preserved, there was no error. Tex. R. Evid. 1002 states "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in these rules or by law." Tex. R. Evid. 1002 generally precludes admission of parol evidence to prove the contents of a document. Tex. R. Evid 1004 provides the exceptions for when an original document is not required, and permits other evidence of the contents of a writing if all originals are lost or have been destroyed, unless the proponent of the evidence lost or destroyed the evidence in bad faith. Tex. R. Evid. 1004(a). Here, no evidence that the loss of the original was due to any action by Wife.

Editor's Comment: *WWW – you think it means something about the internet, but for appellate courts it means "We Want Waiver." The court here found that the husband waived error to complain about the admission of evidence for failure to continue to object even when he sought to cross-examine on the issue. Maybe he should have requested a running objection to avoid waiver? This ruling underscores the fact that a trial judge's discretionary rulings on admission of evidence at trial almost never change the outcome of a case on appeal. M.M.O.*

Editor's Comment: *Even though the appellate court ultimately concluded that there was no error in the admission of the "identical" premarital agreement, this case reinforces the need to properly preserve error. Once the trial court has clearly indicated that it will admit a certain type of evidence, non-proffering counsel should absolutely address that evidence, but get a running objection before doing so! This case also illustrates the need for the appellate complaint to match the objection at trial—i.e., trial counsel objected to admission of the "identical" premarital agreement under TRE 1004(e) (the writing was closely related to a controlling issue), but the appellate complaint was under TRE 1004(a) (the party opposing admission had not lost or destroyed the original in bad faith). Appellate courts do not award "moving targets." J.C.M.*

Editor's Comment: *Tex. R. Evid. 1004 is an "or" rule: Parol evidence is not admissible unless it falls within one of Rule 1004's exceptions. At trial, husband objected based on (e) (the prenuptial agreement certainly did relate to a controlling issue) but he did not object based on (a) (all originals lost or destroyed). Because "the complaint on appeal must match the complaint raised in the trial court," husband lost this issue on appeal. J.V.*

Editor's Comment: *When in doubt, always object and keep objecting. Objection, hearsay! Objection, statute of frauds! Objection, original required by TRE 1002! Objection, lack of predicate under TRE 1004! Objection, document is not a duplicate of the original! C.N.*

P.S., Why doesn't anyone ever keep a copy of their premarital agreement in a safe deposit box where their spouse does not have access?

DISTRIBUTIONS UNDER AN IRREVOCABLE TRUST DURING MARRIAGE ARE COMMUNITY PROPERTY ONLY IF THE RECIPIENT HAS A PRESENT POSSESSORY RIGHT TO PART OF THE CORPUS

¶09-6-04. ***Sharma v. Routh***, ___ S.W.3d ___, 2009 WL 3210930 (Tex. App.—Houston [14 Dist.] 2009, no pet. h.) (op. on rhrng.) (10/8/09)

Facts: Husband was married from 1982 until 2001. During this marriage, husband developed psychiatric hospitals. His late wife's will created two trusts, a 'Marital' trust and a 'Family' trust, and designated husband the trustee of both. The will funded the Marital trust with two psychiatric hospitals, realty and shares of common stock in Cambridge International, Inc. with a total value of over $39 million, and funded the Family trust with shares of common stock of Cambridge International, Inc. The will requires the income of the trusts be distributed to husband under specified circumstances and in specified amounts. In 2003, husband, as trustee of the Marital trust, sold the realty and improvements for the two hospitals to a nonprofit organization in exchange for a promissory note. Both trusts received a promissory note from another nonprofit organization in exchange for their shares of common stock. The end result was that one nonprofit organization operated the hospitals while another owned the land and buildings. Since these transactions in 2003, husband has donated all income distributions to the nonprofit organization that controls the land and buildings without taking receipt of the money. Husband did report the distributions as income and claimed a charitable deduction for donation them. Husband and wife married in 08/04. Husband filed for divorce a few months later, and husband and wife soon separated. On 01/26/06, trial court entered an order granting a divorce and determined that the Marital trust was husband's separate property but that the interest on the corpus of the Marital trust was community property. Trial court, therefore, held that wife was entitled to one-half of the interest that accrued on the promissory note during the marriage. Although it did not specifically mention the Family trust, it did indicate that wife was also entitled to half of the interest on that promissory note as well. These determinations were insufficient for a final property division and a final decree because they lacked some necessary information that would require further proceedings. Husband and wife agreed on the amounts of interest after these initial proceedings. Following this agreement, trial court signed a final decree and issued findings of facts and conclusions of law. It found that a just and right division would be to divide the community estate equally including the income from the trust. To enforce this division, it rendered judgment for wife against husband secured by an equitable lien. Husband appealed the property division.

Held: Affirmed in part, reversed and remanded in part.

Opinion: Under the literal language of late wife's will, since husband acquired income from trust because late wife's will directed trustee to disburse the income, he acquired it by devise and it was therefore his separate property. In *Arnold v. Leonard*, 273 S.W. 799 (Tex. 1925), however, the Texas Supreme Court suggested that, if a spouse owns property that generates income during the marriage, the income results from the ownership of the property rather than any gift that may have bestowed that property. Therefore, husband must not have

owned the property that generated the trust income for that income to be separate property. There are a number of possible ways to determine the nature of distributions of income under an irrevocable trust during marriage, but neither the Supreme Court nor this Court of Appeals has previously addressed this issue. Based on case law, and the plain meaning of the Texas Constitution and the family code, the proper rule is that, in the context of a distribution of trust income under an irrevocable trust during marriage, income distributions are community property only in the recipient has a present possessory right to part of the corpus, even if that right remains unexercised. Because husband had no such right to the corpus of the Marital trust during the marriage, the Martial trust income is not community property as a matter of law. The fact that husband, as trustee, held legal title to the corpus of the trust in that capacity should not be a controlling factor in the marital-property characterization of the income. Although trial court did not err in granting the divorce or severing the marriage, because of its error in mischaracterizing the trust income, the remainder of the judgment is severed and reversed and remanded.

Concurring Opinion 2009 WL 4352378 (Dec. 3, 2009): The property in question is trust income in the form of interest payments from the MT building, MT asset, and FT notes. Courts have articulated the following rule: if a married beneficiary has an interest in trust principal and receives income from the principal, the income is characterized as community property. The trust corpus consisted of the promissory notes payable to the Marital Trust and the Family Trust. Thus, the respective principal payments on the notes became part of trust corpus. As trust corpus, these principal payments should have been deposited into trust accounts. Instead, as husband's former CPA and his bookkeeper testified, all principal and interest payments made to the Marital and Family trusts were directly deposited into husband's personal account, not separate trust accounts, until April 2005. It was improper for husband to deposit trust corpus into his separate personal bank account. Any receipt of principal payments by husband, without meeting the invasion requirements set forth by the trust settlor, would constitute an improper invasion of corpus. The settlor to the two testamentary trusts authorized invasion of corpus only "as ... necessary ... to provide for [husband's] health, support, and maintenance in order to maintain him ... in accordance with the standard of living to which [he] is accustomed...." Without any evidence before the court showing that a corpus distribution was necessary or made for husband's health, support, or maintenance, the court concluded that husband did not meet the invasion criteria as set forth in the trust and was not entitled to trust corpus. Accordingly, principal payments made to the trusts could not *properly* be distributed to husband. Although husband improperly took personal possession of the funds, such physical possession without a showing of need did not give husband a right to the principal payments or other trust corpus.

Editor's Comment: *Also supporting the court's holding are two older cases in which creditors of non-beneficiary spouses attempted to execute on income from the beneficiary spouses' trusts. Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S.W. 975 (1890); Gamble v. Dabney, 20 Tex. 69 (1857). These cases hold that income from a trust is not subject to execution to satisfy a husband's debt because that income is not community property. J.V.*

Editor's Comment: *This decision is a must read. It helps bring more clarity to the proper characterization of property held in, or disbursed from, a trust. At some point the day of reckoning will have to come for the tension between the "inception of title rule," which was developed to settle disputes in the marital property context, and the "split title rule" (i.e., legal title in the trustee and equitable title in the beneficiary), which was developed in trust law to give beneficiaries standing to sue the trustee once the settlor is dead and gone. These two rules cause too much confusion when someone tries to apply them in the divorce context to arrive at the correct characterization of trust property. The guiding rule ought to be the intent of the settlor as expressed in the plain language of the trust document with regard to whether the beneficiary spouse has a present right to possess trust property (whether or not it be corpus or income). If the beneficiary spouse has a present possessory interest, then whatever property (whether it be corpus, income, or both) becomes the separate property of the beneficiary spouse regardless of whether the spouse actually possesses it or it remains in trust. It is only after the property becomes separate property that we should ever trouble ourselves with wondering whether the income derived from that separate property is community property. C.N.*

TRIAL COURT ERRED IN FAILING TO INCLUDE A SEPARATE PROPERTY MORTGAGE IN VALUING WIFE'S SEPARATE PROPERTY ESTATE.

¶09-6-05. ***Knight v. Knight***, ___ S.W.3d ___, 2009 WL 3461149 (Tex. App.—Houston [14 Dist.] 2009, no pet. h.) (10/29/09)

Facts: Husband and wife entered into common law marriage in 1994, and had a ceremony on 12/26/00. In 1995, they bought two houses, one of which they paid in full in 1998. Both properties were used as rental properties. In 1996, they purchased a house that they used as a marital residence. In 1998, they purchased a fourth house from wife's brother and sister-in-law. They took title to all four houses in husband's name only. On 05/07/99, husband conveyed a 50% interest in the first two houses to wife, and on 11/24/99, he conveyed the remaining interest in those properties to her. After Tropical Storm Allison on 10/07/02, Harris County Flood Control District purchased one of the houses to which husband had given wife title. On 10/16/02, wife wrote a check to Bank One retiring the mortgage of the marital residence. On 10/18/02, the District purchased the property purchased in 1998 that was in husband's name. In 2005, wife and her sister each inherited a 50% interest in a new house. In 2006, wife took out a loan secured by a home equity lien on the remaining property in her name that she used to buy her sister's interest in their inherited property and a property on the same street that had been inherited by her brother. The remainder of the loan was used on capital improvements to those two properties. On 07/06/07, Bobby filed for divorce, and on 07/19/07 wife filed a counter-petition. Wife sought a disproportionate division of the community estate based on fault in the breakup of the marriage, fraud on the community, community indebtedness and the creation of community property through the use of her separate property. In addition, she sought reimbursement from the community estate for paying unsecured liabilities of husband's separate estate. In support of her claims, wife testified that husband had left her four times during the marriage, once staging his own kidnapping. She further testified that husband had paid his ex-wife $500 per month for eighteen months during the marriage. Husband testified he had paid his ex-wife so she could obtain a college degree. Wife also testified that husband had paid a separate property judgment debt. On 02/29/09, trial court granted a divorce on the grounds of insuperability and mental cruelty. It awarded $139,560.95 of the community estate to wife and $85,337.42 to husband. It did not grant wife's reimbursement claims for the retiring of the note on the marital property or for the community estate's retirement of Bobby's separate judgment debt. Trial court issued findings of fact and conclusions of law, and mother appealed.

Held: Affirmed in part, reversed and remanded in part.

Opinion: Since the undisputed evidence showed that husband paid a separate property judgment with community funds, trial court abused its discretion by failing to reimburse community for one-half of the funds used. Similarly, there was undisputed evidence that husband paid his ex-wife with community funds and that husband had deceived wife regarding those payments. The trial court again abused its discretion by failing to grant a claim for reimbursement for the community estate for those payments.

Although trial court properly characterized the loan on the property that husband transferred title to wife as her separate property, it did not take the value of that loan into effect when valuing wife's separate property. This error reduces the value of wife's separate estate by two-thirds and would presumably affect trial court's determination of a just and equitable division. Trial court could not, therefore, properly exercise its discretion in dividing the community estate. Trial court's granting of the divorce is confirmed. Its division of property is reversed and remanded.

DIVORCE
Post-Decree Enforcement

DIVORCE DECREE DIVIDING AIR FORCE "DISPOSABLE RETIRED OR RETAINER PAY TO BE PAID" DID NOT DIVIDE CRSC RECEIVED IN LIEU OF RETIRED PAY.

¶09-6-06. ***Sharp v. Sharp***, ___ S.W.3d ___, 2009 WL 3928131 (Tex. App.—San Antonio 2009, no pet. h.) (10/14/09)

Facts: In its divorce decree of 09/21/90, trial court divided husband's disposable current Air Force retired or retainer pay and any future increases in that pay equally between husband and wife. After the divorce, the VA gave husband a 100% disability rating entitling him to receive Combat-Related Special Compensation ("CRSC") in place of his full retirement pay if he so chose. In 2007, husband applied for and received CRSC. Wife filed a motion to enforce and clarify the original divorce decree and asked trial court to hold husband in contempt. Trial court denied the motion. Wife appealed.

Held: Affirmed.

Opinion: Under *Hagen v. Hagen*, 282 S.W.3d 899, 903 (Tex. 2009), the Texas Supreme Court held that "only military disability pay that was an earned property right [may] be divided upon divorce, and VA disability compensation [is] not an earned property right." A divorce decree that awarded wife a part of husband's retirement pay "if, as and when he received it" did not entitle wife to a share of VA disability benefits that husband received in lieu of his retirement pay. As the language of the Sharps' divorce decree is substantially similar to the language in the Hagens' divorce decree, and since, under 10 U.S.C. 1413a(g), CRSC is not retirement pay, the divorce decree does not divide CRSC.

Editor's Comment: *For a similar case, see Thomas v. Piorkowski, 286 S.W.3d 662 (Tex. App.— Corpus Christi 2009, no pet.), summarized in the Fall 2009 Section Report. J.V.*

Editor's Comment: *If a party divorces and the decree awards his or her spouse an interest in that party's military retirement why isn't the party a trustee of the spouse's interest when the party is later offered the ability to transmute its military retirement into some other form of property? Why isn't a resulting trust imposed on the new form of property with regard to the spouse's interest awarded through the decree? If the law stands as it is, can anyone in good conscience allow their client to agree to take a portion of the other party's military retirement when there is a risk that it will evaporate later? C.N.*

SAPCR
Conservatorship

EVEN IF APPOINTED AS JMCs WITH PARENTS, NON-PARENT MUST OVERCOME THE PARENTAL PREUMPSION PURSUANT TO TFC 153.151.

¶09-6-07. ***Critz v. Critz***, ___ S.W.3d ___, 2009 WL 2972619 (Tex. App. – Fort Worth 2009, no pet.) (09/17/09)

Facts: Mother and Father separated, after which Mother and the child moved in with the paternal grandparent. While Mother and child were living with the Grandparents, Mother met and began dating Chris. In January of 2004, she began staying with Chris and away from the Grandparents' house on weekends. In May 2004, Mother became pregnant with Chris's child.

In June 2004, Mother moved in with Chris and his parents while the child continued to stay with his Grandparents. During much of the remainder of 2004, Mother was hospitalized due to complications from her pregnancy. She saw the child one day in September, two days in October, no days in November, and three days in December. She also kept in contact with him by phone. During Christmas, she drove to the Grandparents' house to see the child but she became sick on the return trip and miscarried.

On January 27, 2005, Father filed an original petition for divorce requesting that he be appointed primary JMC of the child. The same day, the Grandparents filed a petition intervening into the divorce suit seeking primary JMC on the grounds that Father and Mother had voluntarily abandoned the child, and that appointing Father or Mother as a primary conservator would significantly impair the child's physical health or emotional development.

In November 2006, a caseworker for Family Court Services, submitted a social study report recommending that the child should continue to reside with the Grandparents, but that he should continue to see Mother as much as possible.

The trial court named Grandparents as primary JMCs and Father and Mother as JMCs. Mother was awarded specific periods of possession. Father was ordered possession at times agreed to by Grandparents. Mother appealed.

Held: Reversed and remanded.

Opinion: Under TFC 153.131(a) when read in conjunction with 153.131(b), non-parents must overcome the parental presumption as to both parents even if both parents are also appointed JMCs. Here, COA says evidence factually insufficient to find that Mother had voluntarily relinquished the child for a period of one year or longer or a significant impairment of the child's physical or emotional development. TFC 153.131 provides:

> (a) Subject to the prohibition in Section 153.004, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Dissent: TFC 153.372 authorizes a trial court to appoint parents and nonparents together as JMC. And Texas Supreme Court precedent holds that the mere appointment of grandparents as JMCs alongside parents in that same role does not require a trial court to apply the parental presumption to exclude the grandparents; rather, the trial court may make such an appointment if it deems the appointment to be in the best interest of the child. *Brook v. Brook,* 881 S.W.2d 297, 299-300 (Tex. 1994). In *Brook*, The court explained that the parental presumption applies "only to those situations in which a nonparent seeks custody *in lieu of* a natural parent." *Id.* at 299 (emphasis added). While *Brook* cited a previous version of the family code, the language analyzed in the decision is almost exactly the same as the language that now appears in subsection (a) of section 153.131. So would affirm appointment of Grandparents as JMCs.

Would still reverse and remand though because to be appointed primary, Grandparents had to overcome the parental presumption, which they failed to do. In *Sotelo v. Gonzales,* the El Paso Court of Appeals decided

that in an original custody determination, the parental presumption "applies when a non-parent and parent are appointed joint managing conservators of a child but the non-parent is given primary custody." 170 S.W.3d 783, 788 (Tex. App. – El Paso 2005, no pet.) (citing *In re De La Pena,* 999 S.W.2d 521, 534-35 (Tex. App. – El Paso 1999, no pet.)). The court reasoned that to "hold otherwise would permit the court to apply the presumption in appointing the parent a joint managing conservator but nevertheless choose the primary residence of the child on the basis of a heads-up best interest test, with the court determining which of the parties is the 'better' choice." *Id.* This would, according to the El Paso Court, result in the "appointment of a parent as a managing conservator in name only, a paper title which eviscerates the purpose of the statute." *De La Pena,* 999 S.W.2d at 535.

In contrast, the San Antonio Court of Appeals held in *Gardner v. Gardner* that the parental presumption does not apply to the issue of primary possession between parent and nonparent joint managing conservators. 229 S.W.3d 747, 752 (Tex. App. – San Antonio 2007, no pet.). In *Gardner,* the parties agreed to joint managing conservatorship of the children at issue, and the only remaining custody issue was which joint managing conservator was going to be awarded the right to determine the primary residence. *Id.* The court reasoned that because the "plain words of [section 153.131] do not address or contemplate application of the [parental] presumption to the issue of primary possession, [it] would have to rewrite the statute in order to reach the result in *De La Pena*." *Id.*

Would adopt the holding and reasoning in *De La Pena*.

Editor's Comment: *I believe the majority's opinion conflicts with the Texas Supreme Court as stated in the dissent. However, I also believe the dissent got it wrong in accepting the reasoning of De La Pena, rather than Gardner. In any case, there is a conflict that needs to be resolved. Unfortunately, the resolution of the conflict will have to await for another case because here the parties elected to settle, rather than to pursue a petition for review. G.L.S.*

Editor's Comment: *I think it is interesting that the majority here conducts their entire analysis without one reference to Troxel and the dissent gives Troxel only a glancing notice. I agree that the Brook case is probably out of date and that the relevant family code statutes have been amended since the Brook decision, but they were amended after the Troxel opinion of the U.S. Supreme Court set out the standards for parental presumptions. The dissent and the majority quibble over the meaning of precedent, but both fail to acknowledge the ultimate U.S. Supreme Court precedent on point. M.M.O.*

TRIAL COURT MAY IMPOSE RESIDENCY RESTRICTIONS OF CHILD WHEN IT APPOINTS ONE PARENT SMC.

¶09-6-08. ***In re A.S.***, ___ S.W.3d ___, 2009 WL 3320918 (Tex. App.—Amarillo 2009, no pet. h.) (10/14/09)

Facts: Mother met father began to live together in 12/01. Father physically abused mother, resulting in a criminal conviction. Mother left father after giving birth to child. Trial court designated father PC and mother SMC of child but restricted child's residence to Travis County and contiguous counties. Mother appealed the geographic restriction of the child's residence.

Held: Affirmed

Opinion: Although T.F.C. 153.134(b)(1)(A) only specifies that trial court may impose a geographic restriction on child's residence when it appoints parents JMC, there is no authority that denies trial court the authority to do so when it appoints one parent SMC. While T.F.C. 151.132(1) grants the SMC the exclusive right to designate the primary residence of the child, that right is subject to limitation by court order. Texas public policy is to assure that children will have frequent and continuing contact with parents who have shown the

ability to act in the best interest of the child. Since, under T.F.C. 152.002, the best interest of the child shall be the primary consideration of the court in determining the issues of conservatorship, possession of, and access to the child, residency restriction may be imposed upon a SMC if in child's best interests.

Editor's Comment: *Here, the trial court cited the public policy of Texas in ensuring children will have frequent contact with parents who have shown the ability to act in their best interest in upholding a geographical restriction on a sole managing conservator's right to designate the primary residence of the child. At first glance, this case seems inconsistent with the Dallas Court's opinion in K.L..W., discussed later in this section report, which upheld Father's unrestricted right to designate the primary residence of the child, where both parents were appointed joint managing conservators. It would seem that the public policy cited in support of the Court's opinion in A.S. would be even more compelling in the K.L.W. case, where, although the Court acknowledged Mother had engaged in behavior before the divorce that did not show good judgment on her part; the parties were appointed joint managing conservators. But, as one judge in Dallas commented about this case, "Well I knew I had the discretion to act in the child's best interest, even in appointing SMCs." It all comes down to the trial judge's discretion. On a practical note, keep In re A.S. in mind if you are representing a possessory conservator and cite to it in support of your request that the trial court impose a geographical restriction on a SMC right to designate the primary residence. M.M.O.*

Editor's Comment: *The court's reasoning cannot be faulted, but what a difference the jurisdiction can make. At what point does a court become a "family czar with unlimited authority to order the parents to do anything that the court believes is in the best interests of the child? See Allbright v. Allbright, 215 P.3d 472 (Ida. 2009), summarized in Family Law From Around the Nation. J.V.*

STEP-GRANDMOTHER LACKED STANDING TO SEEK EITHER POSSESSION AND ACCESS OR CONSERVATORSHIP.

¶09-6-09. ***In re M.T.C.***., ___ S.W.3d ___, 2009 WL 3401123 (Tex. App.—Texarkana 2009, no pet. h.) (10/23/09)

Facts: On 06/19/07, mother left stepfather. She moved to Colorado, taking boy with her but leaving girl with stepfather. In 07/07, stepfather filed for and was appointed SMC of girl. Maternal Grandfather and his wife petitioned to intervene in stepfather's action and sought custody and access to children. After mother returned from Colorado, stepfather amended his petition to request trial court to appoint he and mother JMC of children. In a hearing on 09/10/07, trial court entered an agreed order appointing stepfather and mother JMC. On 10/11/07, trial court held that grandfather had standing to intervene and heard evidence on the merits of stepfather's and grandfather's petition. The court also held that step-grandmother did not have standing to seek possession and access. On 10/12/07, trial court appointed children an attorney ad litem and named grandfather, stepfather and mother temporary JMCs. In 12/08, trial court granted grandfather access to children until 5/4/09 and thereafter as mutually agreed by grandfather and mother. The trial court denied grandfather's petition for custody and appointed stepfather and mother JMCs. Grandfather and his wife appealed.

Held: Affirmed as modified

Opinion: Grandparent claimed that trial court erred in finding that grandfather's wife lacked standing to intervene. Grandfather's wife was not a biological or adoptive grandparent of children. Her only contact with children was seeing them about twice a year and mailing them cards and gifts on holidays. Over the preceding decade, mother testified that grandmother had seen children for a total of three weeks. Under TFC 102.004(b), grandfather's wife had to show the she had had substantial past contact with the children to have standing to intervene. The interaction she had with children, as a matter of law, was not substantial past contact, and, therefore, she lacked standing to intervene. Trial court's judgment is modified to clarify that she lacked standing to seek conservatorship in addition to lacking standing to seek possession and access.

TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A RESIDENCY RESTRICTION IN TEMPORARY ORDERS AFTER MOTHER HAD FAILED TO MAKE 'EXTREME EFFORTS' TO FIND EMPLOYMENT IN DALLAS COUNTY.

¶09-6-10. ***In re Cooper***, ___ S.W.3d ___, 2009 WL 3766428 (Tex. App.—Dallas 2009, orig. proceeding) (11/12/09)

Facts: Mother married father in 2003. During the marriage, they had two children and mother dropped out of her residency program to become full time caregiver. Couple separated in 2008 and mother moved to South Carolina with children to finish her residency program. On 08/29/08, mother filed for divorce. On 10/31/03, trial court entered agreed temporary orders allowing children to reside in South Carolina with mother while she completed her residency. Trial court expressly stated that children would continue to be considered residents of Dallas County and that the question of children's permanent residence would be decided later. After mother finished residency, mother looked for but was unable to find a job in Dallas County. She accepted the only job she was offered, a position in North Carolina. Mother applied to trial court for a modification of the agreed temporary orders so she could move to North Carolina with the children. On 04/16/09, associate judge issued a report granting mother's motion and permitting her to designate Gaston County, North Carolina as children's residence pending trial. Father appealed associate judge's ruling and asked for de novo review. Trial court conducted hearings at which trial court made comments reflecting skepticism about mother's attempts to find a job in Dallas. After the hearing, trial court ordered that children's domiciles be restricted to Dallas County and contiguous counties and that the children be returned to Dallas County by 10/01/09. Mother filed a writ of mandamus.

Held: Mandamus Granted.

Opinion: Since temporary orders are not appealable, mandamus is an appropriate remedy. Trial court's oral ruling implied that the judge was overturning the associate judge's ruling because mother did not make "extreme efforts" to find employment in Dallas County. There is no authority suggesting a parent is required to make "extreme efforts" to find employment in a residency-restricted area. Residency restrictions should be modified when a proposed relocation will improve the custodial parent's economic situation and benefit the child. Since trial court imposed on mother a higher burden than allowed under the law, it abused its discretion in overturning the associate judge's ruling.

Editor's Comment: *This case is particularly relevant now with the recent state of the economy and so many parents having to relocate to secure employment. This is a situation many of us are seeing more and more frequently in our practices. Pursuant to the Cooper opinion, it remains true that a parent seeking to modify a geographical restriction on the child's residence whether in temporary orders or upon final trial, must meet their burden. However, the Court in Cooper acknowledges the practical reality of relocation for many parents, refusing to impose the more onerous burden on relocating parent to prove they used "extreme efforts" to secure employment in the current geographical area. Instead, the Cooper Court cites to the Lenz factors as the more reasonable and controlling standard in Texas for removal or modification of a geographical restriction on a parent's right to designate the primary residence of their child. M.M.O.*

Editor's Comment: *I'm not certain the trial court was actually applying an "extreme efforts" standard. At the beginning of the ruling, the trial court states: "[T]he standard is, it's weighing the parent's need to move regarding her employment versus the effect that the move-that the change is [sic] domicile will have on the children's relationship with their father." This is a recitation of at least part of the correct standard. While the trial court did note that it did not know what "extreme efforts" the custodial parent had made in trying to find a job in Dallas, the trial court did not say that it was denying the relocation based on the lack of evidence of "extreme efforts." Bottom line: there are sometimes strategic reasons to encourage trial courts to comment extensively on the record regarding their rulings. J.C.M.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING FATHER AN UNRESTRICTED RIGHT TO DETERMINE CHILD'S RESIDENCE.

¶09-6-11. ***In re K.L.W.***, ___ S.W.3d ___, 2009 WL 4021581 (Tex. App.—Dallas 2009, no pet. h.) (11/23/09)

Facts: Mother and father married in 04/96. Child was born in 03/05. Mother moved out of marital home in 08/07. In 10/07, father filed for divorce and sought the exclusive right to designate the primary residence of child along with an order prohibiting contact between child and mother's new boyfriend. Mother filed an answer and a counter-petition seeking the exclusive right to designate the primary residence of child along with a restriction of child's residence to Collin County. After a bench trial in 06/08, trial court granted divorce, appointed father SMC and gave father an unrestricted right to determine child's residence. Mother filed a motion for new trial. After a hearing on that motion, trial court entered an amended divorce decree appointing mother and father JMC but leaving father's right to designate child's residence unrestricted. Mother appealed.

Held: Affirmed.

Opinion: Trial courts are to use the best interests of the child as their primary consideration in determining which parent should have the right to designate child's residence and whether that right should be restricted. Mother's behavior before the divorce did not reflect good judgment. She did not exercise all of her visitation rights, her new boyfriend had an extensive history of drug use and criminal behavior, and she shot her new boyfriend's wife. Since the evidence at trial supported a conclusion that father had been a good caretaker, trial court did not abuse its discretion in concluding that it was in the best interests of the child for there to be no geographic restriction on father's right to designate child's residence.

Editor's Comment: *As I commented above, this case seems inconsistent with the Amarillo Court's opinion in A.S., which cited the public policy of Texas in ensuring children will have frequent contact with parents who have shown the ability to act in their best interest in upholding a geographical restriction on a sole managing conservator's right to designate the primary residence of the child. It would seem that here, in a situation where the trial court has found it in to be in the best interest of the child that the parents be joint managing conservators, then the public policy cited in A.S. would be even more compelling for the imposition of a domicile restriction in this case. While the opinion indicated that Mother's behavior before the divorce did not reflect good judgment, implicitly, Mother's judgment was not so poor as to lead the trial court to appoint Father SMC. M.M.O.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING A GEORGRAPHIC RESTICTION ON MOTHER'S RIGHT TO DETERMINE CHILD'S RESIDENCE.

¶09-6-12. ***In re B.A.W.***, ___ S.W.3d ___, 2009 WL 4069049 (Tex. App.—El Paso 2009, no pet. h.) (11/24/09)

Facts: Mother and father had child in 07/95. Trial court appointed parents JMC after divorce. Mother moved to Denton County while Father lived in Ellis County. Father filed a motion to modify. On 08/22/05, trial court granted father the exclusive right to make decision related to child's education limited to First Baptist Academy in Dallas, and ordered father to pay the costs of education in lieu of child support. Trial Court granted mother the exclusive right to determine child's primary residence limited to Dallas and contiguous counties. Father never enrolled child in First Baptist Academy. After a hearing, on 03/09/27 trial court gave mother the right to make education decision and modified the visitation schedule, ordering that possession be exchanged at a street corner outside the office at which mother and father both worked. Trial court also modified the geographic restriction to Denton and contiguous counties, and denied mother's request for retroactive child support and attorney's fees. Mother appealed.

Held: Affirmed.

Opinion: Trial court's choice of time and place for exchanges was a permissible use of discretion to balance the burdens on each party. Trial court's change of the geographic restriction was permissible use of discretion based on trial court's evaluation of husband and wife's situation and credibility. Wife did not offer sufficient evidence to support her claims for retroactive child support or attorney's fees.

Editor's Comment: *The distances the parties must drive to surrender and return children are important facts to consider when a court establishes or reviews a possession orders. Although Justice McClure did not use the phrase "judicial notice," in fact, the court took judicial notice of the distances involved, relying on map-quest.com. See footnote 4. J.V.*

TRIAL COURT ERRED BY FINDING THAT SAME SEX PARTNER LACKED STANDING UNDER T.F.C. 102.003(a)(9) WHEN SHE HAD POSSESSION OF CHILD SIMILAR TO STANDARD POSSESSION ORDER.

¶09-6-13. ***In re M.K.S.-V.***, ___ S.W.3d ___, 2009 WL 2437076 (Tex. App.—Dallas 2009, no pet. h.) (op. on rehearing.) (12/1/09)

Facts: Mother and same sex partner met in 1997 and started living together in 1998. After counseling, the two decided to have a child together. In 2003, mother became pregnant with child through artificial insemination. Mother gave birth to child on 5/21/04. Mother and same sex partner co-parented until 08/03/05 when mother and child moved out. Mother agreed child could visit same sex partner pursuant to an agreement. The agreement provided for child to visit same sex partner overnight once a week, alternate Sunday afternoons, alternate weekends beginning on Friday afternoons during the school years, Thursday afternoons, "at times" during the summer, and some holidays. On 08/25/07, Mother terminated the visitation because same sex partner accessed child's school records against M's "directive." Same sex partner filed suit in 09/07, seeking to be appointed JMC or to adopt child. Same sex partner claimed standing under TFC 102.003(a)(9), as a person who had actual care, control, and possession of child for at least six months ending not more than ninety days preceding the date of filing of the petition. She also asserted she was a "parent by estoppel" and could sue for adoption under TFC 102.005(3). Mother specially excepted to same sex partner's claims and challenged same sex partner's standing. At an evidentiary hearing, trial court found that same sex partner did not have standing to pursue her conservatorship claim but did have standing to seek adoption under TFC 102.005(5) ("substantial past contact … sufficient to warrant standing."), not under TFC 102.005(3). Trial court ordered same sex partner to amend her petition to only assert adoption. Same sex partner did so, and mother moved to dismiss. After a hearing on that motion, trial court dismissed "all claims." Same sex partner appealed.

Held: Reversed and remanded.

Opinion: In computing time under TFC 102.003(a)(9), trial court cannot require that the time be continuous and uninterrupted, but should consider child's principal residence during the time period preceding the commencement of the suit. A principal residence is (1) a fixed place of abode; (2) occupied consistently over a substantial period of time; (3) which is permanent rather than temporary. The agreement between mother and same-sex partner has characteristics of a standard possession order. At same sex partner's house, child had her own room where she kept toys and movies. Same sex partner took care of child when child was sick and was listed on child's school records. The pattern of possession and care giving did not reflect a temporary arrangement but rather an intent for child to consistently live with same sex partner consistently over a substantial period of time. Consequently, trial court erred in determining that same sex partner lacked standing under TFC

102.003(a)(9). Furthermore, because same sex partner had standing to assert a claim for conservatorship, trial court also erred when it dismissed her claim for breach of the possession agreement without a hearing on the merits. On the other hand, since there was no evidence that mother had consented to same sex partner adopting child, trial court did not err by dismissing same sex partner's adoption claims.

Editor's Comment: *In the last section report I complained that the Dallas Court had gotten this one wrong, now I think they have it right. With the many permutations of family units now in existence, non-parents are frequently a child's primary or a significant care giver, who in the appropriate case should be allowed standing to seek conservatorship and other rights. G.L.S.*

SAPCR
Child Support

FATHER'S REQUEST FOR CHILD SUPPORT FINDINGS OF FACT MADE PURSUANT TO TRCP 296 INSTEAD OF TFC 154.130.

¶09-6-14. ***In re T.A.***, ___ S.W.3d ___, 2009 WL 2913820 (Tex. App.—El Paso 2009, no pet. h.) (9/9/09).

Facts: Mother filed petition alleging father's paternity of child on 04/11/06. Father denied paternity, but trial court entered interim paternity orders on 12/8/06 and designated mother and father JMC of child with mother as the primary conservator. On 04/13/07, mother amended her petition to include claims for child support, medical expenses and arrearage. 06/20/07, father amended his answer to admit paternity but to contest his owing of retroactive child support. After a trial to the court, the trial court issued a final judgment ordering father to pay child support and assessing $76,800 in child support arrears against father. Father appealed.

Held: Affirmed.

Opinion: Father failed to properly preserve six of his seven issues for appeal because father did not meet the briefing requirements of T.R.A.P. 38.1. His brief merely contained conclusory statements unsupported by case law. Father's only issue not waived by insufficient argument was the trial court's failure to enter findings of fact and conclusions of law. Father, however, made the request pursuant to T.R.C.P. 296 not pursuant to T.R.C.P. 154.130. Furthermore, father's document purporting to be a notice of past due findings merely stated that it was a "request for findings of fact and conclusions" and thus did not constitute a notification.

Editor's Comment: *This case underscores the absolute importance of knowing the specific rules of requesting findings of fact and conclusions of law in family law cases. Or, if you don't know the specific rules and don't want to open the rule book and read, this opinion should remind you to call one of your friendly family law appellate attorneys, like the folks that provide commentary to these court opinions, for advice. While findings of fact are typically requested in civil matters pursuant to TRCP 296, this Rule does not cover two specific situations that often arise in our family law cases (child support outside the guidelines and possession outside the standard order). The Texas Family Code provides special rules and deadlines for requesting those types of findings. Failure to properly request child support findings pursuant to TFC §154.130 will waive your right to challenge the issue on appeal, which could result in a call to your not-so-friendly insurance company. M.M.O.*

Editor's Comment: *If you ask for findings under T.R.C.P. 296, you can't complaint that the trial court didn't make TFC 154.130 findings. See Jurek v. Couch-Jurek, supra. J.V.*

TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES AS ADDITIONAL CHILD SUPPORT IN MOTION TO MODIFY CHILD SUPPORT.

¶09-6-15. ***In re K.J.D.***, ___ S.W.3d ___, 2009 WL 3491199 (Tex. App.—Dallas 2009, no pet. h.) (10/30/09)

Facts: Mother and father divorced in 2004. Trial court appointed both JMC and gave mother the exclusive right to designate the child's primary residence. Trial court ordered father to pay child support. In 12/06, mother petitioned to increase the amount of child support. Father counter-petitioned to lower the amount of child support. In 04/08, trial court granted father's counter-petition and ordered that the decrease be retroactive from 04/01/07. Trial court also ordered mother to pay attorney fee's as additional child support, and ordered that father's monthly child support payments be reduced to allow him to recover his attorney's fees from Mother. Mother appealed.

Held: Affirmed in part, and vacated in part.

Opinion: Although a trial court may award attorney's fees in an action to enforce child support as additional child support, it may not do so in an action to modify child support. Attorney's fees awarded in an enforcement action are not considered a debt and can be enforced by contempt while those awarded in a modification action are a debt. Since trial court awarded attorney's fees on a motion to modify, it could not award them as additional child support.

Editor's Comment: *Take a look at this case and others like it out of the Dallas court of appeals. Lawyers are being overzealous and some courts are being far too generous in characterizing awards of attorney's fees as child support. The rule that attorney's fees can be awarded as child support, applies only to enforcement proceedings, not modification proceedings. If you have both in one case, be prepared to segregate fees. C.N.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING A MOTION TO INCREASE CHILD SUPPORT.

¶09-6-16. ***In re J.A.H.***, ___ S.W.3d ___, 2009 WL 3855954 (Tex. App.—El Paso 2009, no pet. h.) (11/18/09)

Facts: Mother and father divorced 07/04. Trial court appointed father and mother JMC. It awarded mother possession of children 16 days per month, and father possession of children 14 days per month. Trial court also ordered father to pay $1,500 a month in child support, provide health insurance for the children, and to place $11,000 per year in a trust fund for each child. On 01/14/06, mother remarried. In 07/06, mother sought to increase child support based on unspecified material and substantial changes in the circumstances of children and affected persons. Trial court denied motion. Mother appealed.

Held: Affirmed.

Opinion: Although mother did present evidence of a change in her lifestyle after the divorce, she did not present evidence of a change in children's circumstances. She purchased a more expensive home, and several cars. There is no authority to support the proposition that a subsequent marriage constitutes a material or substantial change in circumstances warranting an increase in support. Trial court could reasonable have doubted mother's testimony that the needs of the children were not being met due to discrepancies in her records. Lastly, trial court did not err by failing to make specific findings on the children's needs. Such findings are only required when requested in a contested hearing where the amount of support is set or modified. They are not required when trial court denies a motion to modify.

SAPCR
Termination of Parental Rights

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ENFORCING MSA BETWEEN TDFPS AND MOTHER

¶09-6-17. ***In re C.H.***, ___ S.W.3d ___, 2009 WL 3260895 (Tex. App.—Dallas 2009, no pet. h.) (10/13/09)

Facts: TDFPS filed a petition to terminate mother's parental rights. Mother and TDFPS mediated the case and signed an agreement listing other potential homes for child subject to completion of a home study and approval of child's Guardian ad Litem. After conducting or attempting to conduct home studies of all the individuals named in the MSA, TDFPS did not recommend placement with any of them. The MSA provided that mother's rights would be terminated and TDFPS would be appointed MC of child if none of the homes in the MSA were suitable. Mother moved to set aside the MSA. Trial court denied the motion. Mother timely filed a motion for new trial with a statement of points on appeal, which was overruled by operation of law.

Held: Affirmed

Opinion: Mother claimed that she was denied due process. T.F.C. 153.0071(c) permits trial court to refer a SAPCR to mediation. An agreement meeting the statutory requirements is binding on the parties. The MSA met the statutory requirements and TDFPS was entitled to enforce it as written. Mother, therefore, was not denied due process.

Mother's also claimed that she received ineffective assistance of counsel because she was not told her rights would be terminated if TDFPS did not approve of any home listed in the agreement. Since mother testified before trial court that she had reviewed the mediated settlement agreement more than once, discussed it with her attorney, understood it and signed it freely and voluntarily, she did not rebut the strong presumption that she received competent counsel.

TRIAL COURT CANNOT TAKE JUDICAL NOTICE WITHOUT NOTIFYING THE PARTIES THAT IT HAS DONE SO AND GIVING THEM AN OPPORTUNITY TO CHALLENGE THE DECISION.

¶09-6-18. ***In re C.L.***, ___ S.W.3d ___, 2009 WL 3319932 (Tex. App.—Waco 2009, no pet. h.) (10/14/09)

Facts: TDFPS filed a petition alleging mother knowingly placed or allowed the children to remain in dangerous conditions or surroundings and engaged the conduct or knowingly placed the children with persons who engaged in conduct which endangered the children. At trial, TDFPS did not attempt to prove these allegations, but instead offered testimony that mother had failed to comply with her service plan and that termination would be in the best interest of the children. At the close of evidence, mother moved for a directed verdict. TDFPS responded by requesting a "trial amendment" to add an allegation that mother had failed to comply with a court order that established the actions necessary for the return of the children. TDFPS granted the request, and issued a termination order that cited T.F.C. 161.001(1)(O) as the sole ground for termination. Mother appealed.

Held: Reversed and rendered.

Opinion: Mother's second issue was that there was legally or factually insufficient evidence to support the predicate ground for termination cited by the trial court. To establish a predicate ground for termination under T.F.C 161.001(1)(O), TDFPS must prove (1) that child was removed from parent because of abuse or neglect; (2)TDFPS has been the permanent or temporary MC of child for at least nine months; (3) a court order specifically established the actions necessary for the parent to obtain the return of the child; and (4) the parent failed to comply with that order. TDFPS offered no evidence of the first three elements but asserted that the court took judical notice of its records. The record, however, does not affirmatively indicate that trial court took judicial notice in this case. Although a court may take judicial notice sua sponte, it must notify the parties that it has done so. Since TDFPS did not ask trial court to take judicial notice, and trial court did not announce in open court or in the termination decree that it had taken judicial notice, trial court did not take judicial notice. There was therefore no evidence to establish the first three elements of T.F.C. 1621.001(1)(O), and therefore, the evidence is legally insufficient to support the termination.

TFC 263.405's 15-DAY DEADLINE FOR A STATEMENT OF POINTS IS CONSTITUIONAL WHEN MOTHER FAILED TO SHOW AN ISSUE SHE WAS PREVENTED FROM RAISING ON APPEAL.

¶09-6-19. ***M.C. v. TDFPS***, ___ S.W.3d ___, 2009 WL 3450987 (Tex. App.—El Paso 2009, no pet. h.) (10/28/09)

Facts: When child was born, mother was bipolar, unemployed and lacked a stable residence. Due to a cleft lip and pallet, child was hospitalized for a week after being born. During that time, mother did not gather necessities for child. On 01/11/07 TDFPS filed a petition to terminate mother's parental rights and was appointed temporary MC. TDFPS kept child in state care until the final hearing in 12/07. During that time, TDFPS prepared a family service plan that provided opportunities for mother to restore her parental rights after counseling and parenting classes. The plan also allowed mother to visit child. Mother did not regularly visit or maintain significant contact with child. She also failed to attend counseling or to seek treatment for her mental disorders. At final hearing, trial court found that termination found three statutory predicates for termination under TFC 161.001, and found that termination was in the best interest of the child. Trial entered its final termination order on 01/15/08. Mother appealed.

Held: Affirmed.

Opinion: Mother claimed that TFC 263.405's 15-day deadline for a statement of points on appeal violated her due process rights. Mother failed to establish that the statute was unconstitutional on its face because she did not meet the 'no set of circumstances' test. She failed to establish that the statute was unconstitutional as applied because she did not establish any appellate issues she was prevented from raising. Although TFC 263.405 has been held unconstitutional as applied in some circumstances in recent cases, this case is distinct from the facts in those cases.

EVIDENCE THAT MOTHER HAD INTERMITTENT EXPLOSIVE DISORDER WAS SUFFICIENT TO SUPPORT TERMINATION.

¶09-6-20. ***In re E.I.T.***, ___ S.W.3d ___, 2009 WL 3644926 (Tex. App.—Beaumont 2009, no pet. h.) (11/5/09)

Facts: Mother gave birth to child in 12/07. In 04/08, TDFPS investigated a report of physical abuse and neglectful supervision. The investigator found that child had suffered an eye injury. That month, Mother voluntarily placed child in her sister's care. Mother gave conflicting accounts to TDFPS about child's injury. At trial in 02/09, the court-appointed special advocate submitted a report that was admitted into evidence without objection. The report stated that mother's medical report indicated she was diagnosed with intermittent explosive disorder. No psychologist testified at trial, and mother's medical records were not introduced into

evidence. TDFPS did introduce evidence that mother had pleaded guilty in 2006 to injuring a child. Trial court found that termination was in the child's best interest. Mother appealed.

Held: Affirmed

Opinion: As there was evidence that mother had been diagnosed with intermittent explosive disorder, and mother did not dispute that fact, the trial court could infer that her condition had not been treated or cured. Based on that inference, trial court could reasonably conclude that leaving child in mother's custody could endanger his physical well being. The evidence was therefore legally and factually sufficient to support termination.

TRIAL COURT ABUSED ITS DISCRETION BY GRANTING T.D.F.P.S'S PLEA TO THE JURISDICTION WHEN PARENTS CONSENTED TO RELATIVE'S SAPCR.

¶09-6-21. ***In re Cervantes***, ___ S.W.3d ___, 2009 WL 3766375 (Tex.App.—Waco 2009, orig. proceeding) (op. on rhrng.) (11/10/09)

Facts: TDFPS petitioned for termination of parents' rights on 06/27/08. In 02/09, foster parents petitioned to intervene seeking adoption. In 03/09, five relatives also sought to intervene. Trial court granted foster parents leave to intervene, but denied relatives' petition. In 06/09, relatives filed an original petition seeking to be appointed JMC of child supported by an affidavit of relinquishment of parental rights from father. Two relatives alleged standing under TFC 102.003(a)(10), while three alleged standing under TFC 102.004. TDFPS responded with a plea to the jurisdiction and motion to strike relatives' petitions. At a hearing on 08/07/09, trial court refused to allow testimony regarding mother's competence to execute a document consenting to relative's SAPCR and heard testimony from father regarding his consent to relative's SAPCR. Trial court granted the plea to the jurisdiction, finding (1) that relatives had failed to establish that the child's present circumstances would significantly impair child's physical health or emotional development; (2) that relatives had failed to establish that mother was competent to consent to relatives' suit; and (3) that relatives had failed to establish that father voluntarily consented to relatives' suit and understood the consequences of relinquishing his parental rights. Respondent moved for an emergency stay and petitioned for mandamus on 08/12/09.

Held: Mandamus Granted.

Opinion: TFC 102.003(a)(10) provides that a SAPCR may be filed by a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161. Father gave contradictory testimony at the hearing regarding his understanding of the significance of his affidavit. He testified that he understood that he had no legal way to force relatives to allow him to see his child if his rights were terminated and that he understood he might not see his children again if trial court accepted his affidavit of relinquishment. But he also testified that he believed he had a right to see his child after signing the affidavit and that he would continue to have visitation rights after signing.

Although trial court interpreted this as father having a false belief that he would continue to have legal rights, it might also be interpreted as his believing that the relatives would give him access despite not having legal rights. More importantly, the fact that father believed he should or would continue to have contact with child does not render his decision involuntary. Trial court, therefore, abused its discretion by finding that father's affidavit was not sufficient to grant relative's standing.

TFC 102.004(a)(2) allows a relative of child within the third degree of consanguinity to file a SAPCR if there is satisfactory proof that both parents consented to the suit. Trial court ruled that there was insufficient evidence that parents "jointly" consented to relative's SAPCR, but, although the statute requires the consent of both parents, it does not require the parents to consent jointly.

Moreover, the court has no discretion to disbelieve the testimony of a witness favorable to the party asserting standing but must accept such testimony as true. The mother's document should likewise have been believed as lay testimony is admissible on the issue of a person's capacity to sign a document. Trial court thus abused its discretion by excluding testimony regarding mother's competence, and by finding that parent's consent was not adequate to satisfy TFC 102.004(a)(2).

Dissent (C.J. Gray): It first should be noted that opinion lacks precedential values because, although Justice Davis joined Justice Reyna's result, Justice Davis did not join the opinion. Court of Appeals has ignored the distinction between two separate proceedings. Relatives' SAPCR filed in 06/09 was an entirely distinct case from TDFPS's termination proceeding. Thus trial court's ruling that relatives lacked jurisdiction in the 08/07/09 hearing was a final ruling, and mandamus was an inappropriate remedy because direct appeal was immediately available. Furthermore, Court of Appeals had no authority to issue a stay in the termination proceeding because no petition had been filed in that case. Granting relief in this case also uses an incorrect standard of review that eliminates trial court's role as fact finder and ignores numerous procedural errors by the relatives.

TDFPS WAS NOT REQUIRED TO PRESENT EVIDENCE AT FRIVOLOUSNESS HEARING WHEN JUDGE ALSO PRESIDED OVER BENCH TRIAL REGARDING TERMINATION.

¶09-6-22. ***In re J.J.C.***, ___ S.W.3d ___, 2009 WL 3817892 (Tex. App.—Houston [14th Dist.] 2009, no pet. h.) (11/18/09)

Facts: TDFPS investigated allegations of abuse of children by mother and father in 2001 and 2002, but nonsuited termination proceedings. On 04/27/07, TDFPS received reports that children were unsupervised, and local police picked up the children who were trying to walk home after their expected caregiver refused to take them in. That night, mother threatened father with a knife and was charged with aggravated assault with a deadly weapon. On 05/04/07, a caseworker visited mother's home and found it in disrepair. Children reported sexual abuse by mother's family. After a bench trial in 10/08, trial court terminated mother's and father's rights to children and appointed TDFPS SMC. Parents appealed and asserted indigency. Trial court held a hearing to determine if appeals were frivolous. Trial court found each parent's proposed appeal frivolous.

Held: Affirmed.

Opinion: Because each parent's statement of points on appeal merely alleged that there was insufficient evidence to support termination and did not challenge sufficiently specific factual findings, parents failed to preserve those challenges for appeal. They did, however, preserve a challenge to trial court's finding that termination was in children's best interest.

Appellate court's review of trial court's frivolousness finding on a factual insufficiency claim is not limited to trial court's frivolousness hearing because the same judge conducted the trial and the hearing. Consequently, trial court is presumed to judicially know what had previously taken place in the case and parties are not required to re-prove facts. The hearing record in this case reflects that trial court reviewed its notes from the original bench trial. So, although Father claimed that TDFPS failed to meet its burden of proof on the frivolousness issue because it did not offer evidence at the hearing, TDFPS was not required to do so.

The evidence presented at trial was sufficient to support trial court's findings that parents' challenge of the sufficiency of the evidence regarding children's best interest was frivolous.

EVIDENCE OF PARENTS MENTAL DEFICIENCY WAS INSUFFICIENT TO SUPPORT TERMINATION UNDER TFC 161.003.

¶09-6-23. ***In re A.L.M.***, ___ S.W.3d ___, 2009 WL 3877943 (Tex. App.—Texarkana 2009, no pet. h.) (11/20/09)

Facts: Mother and father had two children. In 2000, child made an outcry of sexual abuse by mother's brother-in-law. TDFPS ruled out this claim. Child made another outcry in 2001, which TDFPS gave a "reason to believe" designation but ultimately dismissed. In 2007, child made a third outcry against mother's brother-in-law. Also in that year, mother and father lived with paternal grandfather, a convicted sex offender. In 10/07, TDFPS removed children from home and filed a petition for termination of both parent's parental rights. While that petition was pending, mother gave birth to another child. Three months after child's birth, TDFPS removed child and filed a new petition for termination. On 9/18/08, TDFPS amended its petition as to all children to add a ground for termination under TFC 161.003. After bench trial, trial court ruled on 9/30/09. It terminated parental rights to youngest child based on affidavit of relinquishment and termination, but terminated parental rights to two elder children based on TFC 161.003. Trial court explicitly stated that it did not find that parents put children in dangerous conditions. Parents appealed.

Held: Reversed and rendered.

Opinion: TFC 161.003 allows trial court to terminate parental-child relationship if it finds that parent has a mental or emotional illness or emotional deficiency that renders parent unable to provide for the physical, emotional, and mental needs of the child. The elements of TFC 161.003 are more stringent than the elements of TFC 161.001. Trial court heard no allegations of drug use or that children were inadequately nourished. Children did have some physical ailments such as dental problems, but parents had taken children to medical professionals. There was evidence that parents had problems with cleanliness, but those issues were relatively easy to remedy. This evidence does not demonstrate an inability to meet children's physical needs but rather hypercritical observations of the parents. Although trial court heard sufficient information to conclude that parents did suffer from a mental deficiency, that evidence was not factually or legally sufficient to establish that parents were unable to meet the needs of children.

EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT FINDING THAT TERMINATION WAS IN BEST INTEREST OF CHILD WHEN MOTHER POSED NO THREAT TO CHILD AND TDFPS INTENDED TO PLACE CHILD WITH BIOLOGICAL FATHER.

¶09-6-24. ***In re J.N.***, ___ S.W.3d ___, 2009 WL 4042124 (Tex. App.—Amarillo 2009, no pet. h.) (11/23/09)

Facts: In 04/07, TDFPS received a report that child had been extensively bruised in the vaginal, rectal and chest areas. On the evening the child sustained the bruises, mother left child with boyfriend while she went to work. Mother had not sought medical attention for child after discovering the bruises. TDFPS filed suit to terminate mother's parental rights. TDFPS did not seek the termination of biological father's parental rights, and stated that it intended to try to place child with father. After bench trial, trial court found (1) that mother had knowingly placed or allowed child to remain in dangerous surroundings, (2) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangered the physical or emotional well-being of the child; and (3) failed to comply with the provisions of a court order that specifically established the actions necessary for Mother to obtain the return of the child. Trial court also found by clear and convincing evidence that termination was in best interest of child. Mother appealed.

Held: Reversed and remanded.

Opinion: The evidence at trial established that mother regularly visited child after child was removed, interacted appropriately with child and had bonded with child. There was no claim that mother had abused the child, and a TDFPS caseworker expressly testified that mother posed no danger to child during supervised visitation. On the other hand, mother tested positive for drugs on two separate occasions after child had been removed and continued to see boyfriend after the abuse occurred. There is a strong presumption that the best interest of child is served by keeping custody in the natural parent. In light of TDFPS's plans to attempt to place child with father, and the evidence that the child was doing well while mother had supervised visits, the evidence is factually insufficient to support trial court's determination that termination is in child's best interest.

MISCELLANEOUS

TRIAL COURT ERRED IN ORDERING CHILDREN'S RETURN TO MEXICO WHEN IT WAS NOT THEIR HABITUAL RESIDENCE.

¶09-6-25. ***In re J.G.***, ___ S.W.3d ___, 2009 WL 3838859 (Tex. App.—Dallas 2009, no pet. h.) (11/18/09)

Facts: Mother and father lived in California with one child. In 08/05, mother, while pregnant, went to Mexico for a medical procedure and brought child with her. She gave birth to second child in Mexico. Father arrived in Mexico in 09/05. Family lived in father's mother's house while in Mexico. Second child was baptized in Mexico on 12/10/05. In 01/06, mother moved to her father's house in Mexico City with children. In 04/06, mother moved in with another relative. Father did not support mother after mother moved out of father's mother's house. Father did file a custody suit but was unable to serve mother. In 08/06, mother moved to Texas with children. Father learned of children's location in 2007, and filed a petition under the Hague Convention to have children returned to Mexico. Trial court found that children's habitual residence was Mexico and that mother had wrongfully removed children from Mexico in breach of Father's custody rights. Trial court ordered children returned to Mexico. Father appealed.

Held: Reversed and remanded.

Opinion: The proper standard, as set out in *In re S.J.O.B.G.*, 292 S.W.3d 764, 780 (Tex. App.—Beaumont 2009, no pet.), for determining child's habitual residence is to 1) Determine the last place that parents had a shared intent to fix children's residence and 2) Determine whether the evidence unequivocally proves that child has acclimatized to a new location and thus acquired a new habitual residence. There is no evidence that Mother in this case ever intended to fix children's residence in Mexico, and thus there was no shared intent to establish Mexico as a habitual residence. The last time parents had a shared intent for children's residence was in California. Although mother moved to Texas rather than California, because the Hague Convention is concerned with children being moved between countries, trial courts inquiry should focus on the country where the parents last shared the intention to reside, not whether they agreed on a state within that country. Since there is no evidence that parents had a shared intent to make Mexico children's habitual residence, the next question is whether there is unequivocal evidence that children acclimatized to Mexico. Because there is no evidence that children were part of a meaningful social network outside of their extended family, trial court could not conclude that children had acclimatized to Mexico. Trial court, therefore, erred by ordering children's return to Mexico.