

SECTION REPORT

FAMILY LAW

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Message from the Chair

Once again we are indebted to Georganna Simpson and her "crew" for a great Section Report. Since we began the electronic version of the Report (along with the Annual Bibliography and Special Legislative Report) more than 3 years ago, it has become a treasure trove of information and unlike the old print version, it is always timely.

Things have been fairly quiet for the past few months but it's just the calm before the storm. The Texas Legislature convenes in January, 2011 and since this year's election produced some unusual results, we expect some unusual legislation to be introduced. The Family Law Section will again be working with the State Bar and the Texas Family Law Foundation to monitor legislation affecting families and family lawyers and to keep you informed and up to date.

Lots of thanks to Rick Flowers and his Planning Committee for producing a very successful Advanced Family Law Drafting Seminar, December 9 -10 in Houston. If you didn't go, you missed a good one.

But, you have some wonderful CLE opportunities just ahead. The TAFLS Trial Institute will be held at Caesar's Palace in Las Vegas, February 18-19, 2011. (a great course and what happens there stays there) and our annual Marriage Dissolution seminar will be in Austin at the Sheraton Hotel, April 28-29, 2011. Plan on attending both.

Have a great holiday season.

-----**Charlie Hodges, Chair**

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Section Wear and Publications

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EDITOR'S NOTE

Once again this year has just flown by. I am grateful to all of the regular contributors to the section report—Jimmy Verner, Melanie Wells, John Zervopoulos, and Christi Adamcik Gammill. These folks have gone out of their way to provide timely and interesting articles each and every quarter. I also want to thank the many paralegals who have been contributing their expertise. Finally, I have been fortunate to have outstanding articles contributed by many well-respected members of the bar, new lawyers, and students. As always, I encourage all of you to contribute articles for future editions. I encourage all of you to express your gratitude to those who have aided and assisted you in your many endeavors this year.

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*In the law reviews
And legal publications*

TEXAS ARTICLES

- The Rules for Unmarried Couples.* Jonathan J. **Bates**, TEX. L (2010) p. 16
- Cases To Consider In Calculating Net Resources for Child Support.* Georganna L. **Simpson**, TEX. L (2010) p. 18
- Proving the Existence of a Common-Law Marriage.* Julia **Henry**, TEX. L (2010) p. 20
- [*Wanted: Loving Homes for Children.* Denise **Brady**, 73 TEX. B.J. 766, \(2010\).](#)
- [*The Impact of Child Protection Cases on General Civil Practice.* Charles **Childress** & Sandra **Hachem**, 73 TEX. B.J. 740, \(2010\).](#)
- [*The Constitutional Rights of Children.* Barbara J. **Elias-Perciful**, 73 TEX. B.J. 750, \(2010\).](#)
- Comment: [*Yours, Mine, Ours?—Why the Texas Legislature Should Simplify Caretaker Consent Capabilities for Minor Children and the Implications of the Addition of Chapter 34 to the Texas Family Code.* John W. **Ellis**, 42 TEX. TECH L. REV. 987, \(2010\).](#)
- [*Texas Foster Children Need Your Help.* Patricia M. **Hogue** & Kristy Sims **Piazza**, 73 TEX. B.J. 758, \(2010\).](#)
- [*Where Are Your Children Tonight?* Carole **Hurley**, 73 TEX. B.J. 762, \(2010\).](#)
- [*The Role of the Judicial System in Improving the Lives of Texas' Foster Children.* Rebecca **Lightsey** & Marcy **Hogan Greer**, 73 TEX. B.J. 746, \(2010\).](#)

LEAD ARTICLES

- Criminal Law or Family Law: The Overlapping Issues.* Samuel V. **Schoonmaker**, IV, FAM. L.Q., Vol. 44 No. 2 (Summer 2010)
- Failure to Protect from Exposure to Domestic Violence in Private Custody Contests.* Leslie Joan **Harris**, FAM. L.Q., Vol. 44 No. 2 (Summer 2010)
- No Honor Amongst Thieves or Spouses—Issues Confronting the Divorcing Spouse in Disgorgement, Forfeiture, and Restitution Proceedings.* Allen Gary **Palmer**, FAM. L.Q., Vol. 44 No. 2 (Summer 2010)
- The Space Between: The Cooperative Regulation of Criminal Law and Family Law.* Melissa **Murray**, FAM. L.Q., Vol. 44 No. 2 (Summer 2010)
- That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age.* Elaine M. **Chiu**, FAM. L.Q., Vol. 44 No. 2 (Summer 2010)
- Civility & the Family Law Gladiator.* Moshe **Jacobius**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- Seven Commandments for Drafting Ethical Fee Agreements.* Evan **Marks** & Carolyn W. **West**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- Make More Money by Being More Ethical.* Chaim **Steinberger**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- E-Discovery in the Age of Facebook, Twitter, & the Digital Family.* William **Hamilton** & Wendy K. **Akbar**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- The Dangers of Electronic Communications.* David N. **Hofstein** & Scott J.G. **Finger**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- The Ethics of Unbundling.* Stephanie L. **Kimbrow**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- Before You Take a Collaborative Law Case.* John **Lande** & Forrest S. **Mosten**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- The Wayward Client.* Marcia L. **Proctor**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)
- Why Can't We be Friends?* Kathleen A. **Hogan**, ABA FAM ADVOCATE, Vol. 33, No. 2 (Fall 2010)

- Communicating with Children in Custody Disputes.* Liisa R. **Speaker** & Jodi M. **Latuszek**, ABA FAM ADVOCATE, Vol. 32, No. 3 (Winter 2010)
- The Evolution of Same-Sex Marriage.* Charles P. **Kindregan, Jr.**, ABA FAM ADVOCATE, Vol. 32, No. 3 (Winter 2010)
- DOMA Damages Same-Sex Families and Their Children.* Mary L. **Bonauto**, ABA FAM ADVOCATE, Vol. 32, No. 3 (Winter 2010)
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- Protecting Parentage with legal Connections.* Joyce **Kauffman**, ABA FAM ADVOCATE, Vol. 32, No. 3 (Winter 2010)
- The Law & Living Together.* Jeanne M. **Hannah**, ABA FAM ADVOCATE, Vol. 32, No. 3 (Winter 2010)
- Taxation of Same-Sex Marriage and Live-Ins.* Melvyn B. **Frumkes**, ABA FAM ADVOCATE, Vol. 32, No. 3 (Winter 2010)
- Why Can't My Wife Get a Green Card?.* Virginia E. **Carstens**, ABA FAM ADVOCATE, Vol. 32, No. 3 (Winter 2010)

Ask the editor

Dear Editor: I just got hired in a case where the judgment was entered on **December 15, 2009**, but my client, who had represented himself pro se, didn't get a copy of the judgment from the court or have actual notice of the judgment until **January 10, 2010**, and did not come see me until **January 25, 2010**. Since it is too late for me to file a Motion for New Trial, is there anything I can do to help him? *Ruminating in Round Rock.*

Dear Ruminating in Round Rock: Actually, it is not too late for you to file a Motion for New Trial, but you need to move quickly. Under [TRCP 306a\(4\)](#), if your client did not receive either a copy of the order or acquire actual knowledge of the order within 20 days of the order being signed, then the time limit for filing a Motion for New Trial or other plenary power extending post-trial motions began to run on the date that your client received notice of the judgment or acquired actual knowledge of the signing of the judgment, whichever occurred first, but in no event more than 90 days after the original judgment or other appealable order was signed. Under [TRCP 306a\(5\)](#), in order for your client to benefit by this rule, he is required to prove in the trial court, on sworn motion and notice, the date on which he received notice of the judgment or acquired actual knowledge of the signing of the judgment and that date was more than 20 days after the judgment was signed. Here, it looks like your client didn't get notice of the judgment until 26 days after the judgment was signed, so the date by which a Motion for New Trial or other post-judgment motion must be filed is **February 9, 2010**. In addition to the Motion for New Trial, you will need to file a sworn motion to extend post-judgment deadlines.

THERAPY TO GO

Quick and useful advice from a real, live, licensed professional counselor and licensed marriage and family therapist—Melanie Wells, LPT, LMFT

Dear TTG,

Okay, I'm concerned about one of my clients. She is 43 years old, in the middle of a child custody battle (12 year old boy, 10 year old twin girls) with a guy who is the biggest jerk I've ever met in my life. And I'm sure you realize that's quite a contest. My concern is not with the jerky husband (who consistently defies his lawyer's advice, btw) but with my client's response to him. I've seen people fold in the face of opposition before, but "Cheryl" seems completely defeated. She's lost a significant amount of weight, has bags under her eyes, has dark roots that used to be "naturally" blonde, and shows little interest in her own well-being or that of the kids she's trying to protect. At the end of my last phone call with her, I got the distinct feeling that it might be my LAST phone call with her. Like she may be thinking of killing herself. I can't put my finger on why. It's just a feeling. How would you assess this situation and what would you suggest, given the fact that I'm her lawyer and not her shrink?

Thanks – Not "1-800-SUICIDE" Sam

Dear "1-800-YOU'RE RESPONSIBLE ANYWAY" Sam,

Kudos to you for paying attention to the well-being of your client. Even seasoned clinical professionals, when pushing a full load of clients up the hill, often miss subtle signs of depression and suicidal thoughts.

You probably know the criteria for diagnosing major depression, but here's a review, for those of you who were so depressed that day in law school that you skipped class. Symptoms of sub-clinical and clinical depression include the following:

- difficulty concentrating, remembering details, and making decisions
- fatigue and decreased energy
- feelings of guilt, worthlessness, and/or helplessness
- feelings of hopelessness and/or pessimism
- insomnia, early-morning wakefulness, or excessive sleeping
- irritability, restlessness
- loss of interest in activities or hobbies once pleasurable, including sex
- overeating or appetite loss
- persistent aches or pains, headaches, cramps, or digestive problems that do not ease with treatment
- persistent sad, anxious, or "empty" feelings
- thoughts of suicide, suicide attempts

(See what I mean about law school?)

Four or more of these symptoms may indicate clinical depression, ranging from mild to severe/suicidal to psychotic. Any one of these symptoms can be a clue that something is awry.

You were astute enough to notice that your client is losing weight, seems listless and uninterested in major motivating elements in her life (her appointments with her colorist, and of course, her kids), and appears not

to be sleeping. My guess is that she also gave you some subtle clues that she might be thinking of checking out of The Give-A-Hooter Motel. Possibly she said her most recent goodbye in an unusually final way? Has she recently called you out of the blue to update her children's caregiver in her will? Does she show an unusual amount of distress during your conversations? Maybe she's even said something like, "I just wish this could all be over. I wouldn't mind if I got hit by a car on the way home."

That last clue – the passive "I just wish I'd get hit by a car," is a common expression of depression and suicidal ideation, especially in women. Though a person who sighs this sentence in your office will often say in the next breath, "Of course, I'd never do anything to hurt my kids," or something to that effect, it's important for those of us in the room who are sane today to remember a couple of key points about depression and suicide.

First (and this may seem obvious), people who are depressed are not thinking straight. In the mind of a depressed person, scale, proportion and duration are skewed. Normal tasks, like making it to the colorist or picking the kids up from school, seem overwhelming. A minor task takes on the scale of an impossible one (helping kids with homework = learning tort law in one evening). The same task crowds out larger tasks in the depressed person's life (helping kids with homework > keeping myself reasonably healthy by eating and sleeping well.) This same task, which is in reality a discreet chore in a discreet period of time – seems like it will go on forever (helping kids with homework = a lifetime of overwhelming parental responsibility and drudgery).

These distortions are key to understanding suicidal ideation. Notice I'm referring to ideation rather than intent. Intent is an odd word, as any criminal defense attorney knows. Intent suggests a purposefulness that takes into account the magnitude of the act. Ideation, oddly enough, is often more purposeful than intent. People fantasize about suicide (indulging in suicidal ideation) with no *intention* of completing it, though their *purpose* in thinking about it is relentless, overwhelming and rooted in circumstance: they want to be out of pain. *Most suicidal people do not want to die. They want to be out of pain.* Important distinction, yes?

Statistics on "planned suicides" vs. "impulsive suicides" are revealing.* Most planned suicides are unsuccessful. Typically, planners use methods such as pills or cutting that offer opportunity for second thoughts. Impulsive suicides typically involve methods that are much more likely to "succeed," in that they offer no opportunity to reconsider: jumping, gunfire, and hanging. Having said this, I'd like to suggest that all suicides are impulsive, in that every person who attempts and/or completes suicide makes the decision to do so at some point in time. Whether they've thought about it for months or whether they decide to jump off a bridge on the way home from breaking up with a lover, there's a decision point for everyone.

While this may seem to go without saying, I point it out because it is this moment in time that provides the best opportunity for intervention. Studies on the "how" of suicide (rather than the "why") are striking. Those who use typically impulsive methods (jumping, etc) but are interrupted or survive the attempt, often report in hindsight that their perspective corrects just after the moment of decision – seconds after it is too late to reconsider. Researchers who study suicidal methods have interviewed suicide survivors or interrupted suicides who have reported astonishing and sometimes strangely amusing observations. One Golden Gate jumper, whose attempt was interrupted by drivers who called police when they noticed the man pacing the bridge's railing, reported that his distress was not about indecision, inner conflict or "working up the courage" as one might imagine. In point of fact, he wanted to jump from the other side of the bridge, but was afraid he'd get hit by a car if he crossed in traffic. Ridiculous – unless your thought process is distorted by seemingly unbearable pain. Another spoke poignantly that at the moment he let go of the Golden Gate railing, he knew he'd made a terrible mistake. Bad time for second thoughts. Survivors also note the interminable amount of time it takes to hit. Four seconds seems like forever. "Surely I'm about to hit," is a common thought for jumpers. Oddly rational and yet completely lacking in any real perspective or scale.

My point, and I do have one, is that according to researchers, you, Sam, can prevent suicide 90% of the time by intervening before the point of decision. Most people who survive or are interrupted do not repeat the attempt. Those who do repeat rarely succeed because they typically use less effective methods.

You will inevitably need to sort out your ethical obligations in this situation. But it is my belief that you have a moral obligation to see that your client lives through the day.

If a client gives you subtle or overt hints of inclination toward suicide, you can and should intervene. If you get off the phone with a weird feeling in your gut, remind yourself that you're (presumably) the rational one in the conversation and call the client back. Tell her that you suspect she's suicidal and ask her how she really is. She will probably tell you. Chances are, you will be the only person who has the guts to bring it up.

My suggestion is that your consent forms include an exception clause for suicide or homicide – (surely they already do?). And then be prepared to intervene by doing one of the following:

- Don't leave a severely depressed person alone, figuratively or literally. If a person you know seems suicidal, find a way to ensure that the individual is not alone for long periods of time. Depressed people typically isolate, but will often submit to companionship if strongly urged to do so.
- Try to remove or suggest removing method and opportunity - especially guns and/or ammunition. Don't be afraid to ask your client if she has a gun in the house, for example. Don't be afraid to suggest she give her gun to someone else for safekeeping until she's through her crisis.
- Ask the client to call her physician and then get consent to talk to the doctor yourself. If she refuses, be willing to make the call anyway. Chances are a person who is in great distress has made a recent visit to a medical professional. If so, and especially if the person is in counseling or under any level of psychiatric care, the clinician should be called immediately and apprised of the situation. A suicidal person should be hospitalized and treated for depression if at all possible.
- In extreme cases, consider legal intervention. As I'm sure you know, if a person is a danger to self or others, he or she can be involuntarily hospitalized for up to 72 hours. Often this short period of time can be the necessary wedge between ideation and attempt.

Your client is fortunate enough to have a lawyer who is concerned about her. Don't squander your better instincts. And don't gamble with your client's life by failing to pick up the phone and call her back. If you don't make the call and your client chooses to address temporary pain with a permanent solution, you will carry the burden of your passivity for the rest of your life, as will her children. In such moments of indecision, it's helpful to remind yourself that pain is temporary but suicide is permanent.

*Much of the research cited in this article is nicely summarized in NY Times Magazine, July 6, 2008 "The Urge to End it All," by Scott Anderson.

Melanie Wells saw her first therapy client when Ronald Reagan was President. She holds two masters degrees and is a licensed psychotherapist and licensed marriage and family therapist, as well as an LPC supervisor and LMFT supervisor. She is a clinical member of AAMFT and has taught counseling at the graduate level at Our Lady of the Lake University and Dallas Theological Seminary. Melanie is the founder and director of The LifeWorks Group, P.A., a collaborative community of psychotherapists with offices in Dallas and Ft. Worth (www.wefixbrains.com). Her clinical specialties are family therapy and last-ditch marital therapy. You can contact her at mwells@wefixbrains.com

In brief

Family Law From Around the Nation

by
Jimmy L. Verner, Jr.

Agreements: A Connecticut appellate court upheld a trial court's ruling excluding evidence that a premarital agreement was unconscionable when the party attacking the premarital agreement failed to plead unconscionability. [*McKenna v. Delente*, 2 A.3d 38 \(Conn. App. 2010\)](#). Although in California the obligation to pay support to an ex-spouse ceases upon the death of either spouse, such an obligation survives the payor's death if a marital settlement agreement so provides, such that a decedent's widow, as executor, must pay support to the decedent's first wife upon the decedent's death and is personally liable to the first wife to the extent that the widow received property held as joint tenants with the decedent upon his death. [*Kircher v. Kircher*, 189 Cal.App.4th 1105 \(Cal. 2010\)](#).

Appreciation: The Florida Supreme Court held that appreciation in a separate-property marital home's value can be marital property when marital funds were used to pay the mortgage or the non-owner spouse made contributions to the property. [*Kaaa v. Kaaa*, -- So.2d --, 2010 WL 3782031 \(Fla. 2010\)](#). The South Carolina Court of Appeals applied this principle when it remanded a case with instructions to the trial court to determine the value of the wife's contributions (helping to install fans, add a bedroom, hang siding, replace the kitchen floor, install glass in the sunroom, and paint and install flooring in the master bedroom) to the appreciation in value of the marital home that was owned by the husband as his separate property. [*Pruitt v. Pruitt*, 697 S.E.2d 702 \(S.C. App. 2010\)](#).

Characterization: A California appellate court held that to the extent a post-separation partnership distribution is based on pre-separation performance by the partner, it is marital property. [*In re Marriage of Foley*, 189 Cal.App.4th 521 \(Cal. 2010\)](#). An Ohio wife introduced sufficient evidence for the trial court to find that shares of stock transferred to her during marriage were gifts when the wife's father testified that the gifts of stock were always made to the wife alone, that the stock was in family-owned businesses, and that the gifts were made for estate planning purposes. [*Hook v. Hook*, -- N.E.2d --, 2010 WL 3448584 \(Ohio App. 2010\)](#).

Child support: The Alaska Supreme Court held that the cost of purchasing, shipping, and handling nutritional supplements can be a reasonable health care expense, "particularly when purchased from, and recommended by, a clinic treating a medical problem." [*Millette v. Millette*, 240 P.2d 1217 \(Alaska 2010\)](#). A Florida trial court abused its discretion when nothing in the record showed that it had considered the expenses incurred by the wife for her teenage daughter from a prior marriage for whom the wife apparently was not receiving child support. [*Needham v. Needham*, 39 So.3d 1289 \(Fla. App. 2010\)](#). An Oregon court erred when refusing to enforce an agreement to pay child support past age 21 when the parties so stipulated in their divorce judgment because, even though child support ends at age 21 under Oregon law, a court "may enforce an agreement to do what the court could not otherwise order." [*In re: Reeves*, 238 P.3d 427 \(Ore. App. 2010\)](#).

Commingling: A New York trial court properly concluded that certain realty bought and improved with a husband's inheritances was not his separate property because the husband commingled the inheritances with marital funds in a joint account and failed to prove that the parties established the joint account "solely for the purpose of convenience." [*Richter v. Richter*, 908 N.Y.S.2d 518 \(N.Y. App. 2010\)](#). A Mississippi trial court erred when it characterized the remaining \$542,000 of a \$900,000 distribution to a husband from his separate property corporation as marital property. [*McKissack v. McKissack*, 45 So.3d 716 \(Miss. App. 2010\)](#).

Family violence: A New York trial court erred by dismissing a mother's request to vacate an acknowledgment of paternity when the mother claimed she signed it under duress, testifying that the man she named as the father had "burned her with cigarettes, dragged her across the floor, . . . forced her to have sex with him, . . . forced her to give him her earnings, prevented her from talking to and visiting with friends and, after she ended their relationship, broke into her house." [*Jeannette GG. v. Lamont HH.*, 909 N.Y.S.2d 2010 \(N.Y. App. 2010\)](#). The Maine Supreme Court approved a trial court's decision not to require mediation when the husband had been "incarcerated since July 2002, as a result of convictions for gross sexual assault, kidnapping, and other crimes he committed" against the wife, holding that "[m]ediation may be declined in a case with a history of domestic violence." [*Rega v. L.S.R.*, 5 A.3d 666 \(Me. 2010\)](#).

Imputing income: A New Jersey court held that distributions to a wife from a discretionary support trust settled upon her by her parents could not be considered “in the alimony calculus” because the trust was not an asset held by her. [*Tannen v. Tannen*, 3 A3d. 1229 \(N.J. App. 2010\)](#). A New York trial court did not abuse its discretion by imputing \$45,000 in income to a plumber for child support and alimony purposes when the New York State Department of Labor reported the average salary of a plumber to be \$45,000 and the plumber consistently underreported his income and worked “under the table.” [*Sharlow v. Sharlow*, 908 N.Y.S.2d 287 \(N.Y. App. 2010\)](#). The Pennsylvania Supreme Court held that a trial court properly assigned a father “an earning capacity greater than his pension for child support purposes, where he voluntarily retired two years after accumulating his fully vested pension benefits in good health at age fifty-two.” [*Smedley v. Lowman*, 2 A.3d 1226 \(Pa. 2010\)](#). The District of Columbia Court of Appeals reversed a trial court’s imputation of income to an involuntarily unemployed attorney because her ex-husband failed to meet his burden of showing that work currently was available to her. [*Prisco v. Stroup*, 3 A.3d 316 \(D.C. App. 2010\)](#).

Relocation: In a pair of decisions, the New Hampshire Supreme Court upheld trial court decisions not to allow mothers to relocate children. In [*In re Martin*, -- A.3d --, 2010 WL 3269773 \(N.H. 2010\)](#), the trial court found the mother’s primary reason to move was “to avoid ongoing interaction with the father and to get away from him” even though there was no evidence that the father was any threat to the mother or had conducted himself in such a way as to cause her to be fearful for her safety. In [*In re Heinrich*, -- A.3d --, 2010 WL 3619527 \(N.H. 2010\)](#), the record showed that the former husband “was an involved, caring father. His family gathers together regularly at his parents’ house on Sundays to relax, play games, and swim. He is involved in extra-curricular activities as an assistant coach, helps the children with their homework, and attends school activities.” An Indiana court denied a father’s request in a later motion to modify his child support obligation to require the mother to pay half his travel expenses when the father failed to request that relief in the original relocation suit. [*Ashworth v. Ehrgott*, 934 N.E.2d 152 \(Ind. App. 2010\)](#).

columns

WHEN EXPERTS RELY ON EXPERTS by John A. Zervopoulos, Ph.D., J.D., ABPP¹

Professional and legal demands that testifying psychologists adequately support their opinions and recommendations seem straightforward. Professionally, the Texas State Board of Examiners of Psychologists requires that psychologists base their “opinions, reports, assessments, and recommendations ... on information and techniques sufficient to provide appropriate substantiation for each finding.” The American Psychological Association’s Ethics Code echoes this strict requirement. While ethics codes of licensed professional counselors and social workers are not as specific, trial courts should tie all experts to a similar standard. Legally, caselaw holds that expert testimony is not reliable merely because the expert personally vouches for it. Rather, the testimony must have “a reliable basis in the knowledge and experience of the discipline.” [*Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 \(Tex. 1998\)](#).

Despite these clear standards, psychologists who conduct forensic evaluations may not apply these demands in the same manner to all the information on which they rely for their opinions. Applying these standards is easiest with information that psychologists develop themselves and control—their own interview notes, testing, phone conversations with employers, teachers, doctors, etc.

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But psychologists may also rely on information from other professionals to support their evaluation-based opinions. For example, the psychologist may review profiles of a parent's MMPI-2 and Rorschach technique that another psychologist administered 18 months earlier. A problem arises, however, if these tests were administered or scored improperly. For instance, directions for administering the MMPI-2—an inventory in which examinees mark “True” or “False” to test questions on an answer sheet—are uncomplicated. But some psychologists may improperly allow examinees to complete the test at home rather than in a quiet office setting or offer examinees too much help to understand the test questions. The Rorschach technique—a “test” in which examinees verbalize their descriptions of ten inkblot pictures—may present other problems: there are different methods for administering the Rorschach and several scoring systems. Further, administering and scoring the Rorschach is heavily dependent on the examiner's experience with the technique. These differences may compromise the validity of past test results. Should testifying psychologists, when supporting their opinions, vouch for the reliability of information from other professionals? The American Psychological Association's Division 41 *Specialty Guidelines for Forensic Psychologists* sets a benchmark: “The forensic psychologist bears a special responsibility to ensure that such data (collected by others), if relied upon, were gathered in a manner standard for the profession.”

A different aspect of this problem arises in family courts when a nonpsychologist conducts a social study and, before completing the investigation, refers the parties to a psychologist for testing in order to assess emotional problems in one or both parties that might compromise the children's best interests. The social study investigator will base her recommendations on the psychologist's input with little, if any, knowledge or training about the reliability of the psychologist's methods or testing instruments that produced the psychologist's information. The same concern applies if a testifying psychiatrist relies on a psychologist's testing.

Lawyers have two options to address this scenario. First, they may challenge the nonpsychologist social study investigator to vouch for the reliability of the psychologist's methods and opinions. If the investigator will not do so, the legal basis for the social study recommendations may be compromised—a court should not accept the reliability of expert testimony merely on the unsubstantiated word of the expert. But if the investigator offers to vouch for the psychologist's testing methods, then question the investigator about her training in administering and interpreting psychological testing and in her ability to properly integrate test results into other social study data. The investigator should be challenged to show how she reliably incorporated the psychologist's information into the social study recommendations.

The second option in this case is to call the psychologist who administered the testing to testify about the precise referral question the social study investigator provided, as well as about any other conversations with the investigator. Also ask the psychologist about the methods and testing she used to address the referral question, and about the conclusions she reported to the social study investigator. In addition, ask the psychologist if she provided the investigator with any opinions about the parties before she submitted the final report to the investigator. Such preliminary opinions may not have taken into account the total information that the psychologist originally contemplated would be necessary to develop a reliable opinion to the investigator. This may signal biased interpretations of the test results, if not an opinion based on incomplete information. If the social study investigator incorporated the psychologist's preliminary opinion into her recommendations to the court, the investigator's recommendations may be compromised.

In sum, make sure that you subject information from other professionals that the testifying expert uses to support his or her opinion to the same reliability scrutiny to which you subject the expert's opinion. Attention to this issue is required, professionally and legally.

***PROVIDING FINANCIAL INDEPENDENCE
FOR DEPENDENTS WITH SPECIAL NEEDS***
by Christy Adamcik Gammill, CDFA²

² This article is provided by Christy Adamcik Gammill, CDFA. Christy Adamcik Gammill offers securities and investment advisory services through AXA Advisors, LLC (member FINRA, SIPC) 12377 Merit Drive, #1500, Dallas, Texas 75209 and offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC and its subsidiaries.

Those who care for loved ones who are physically or mentally disabled understand how much time and attention are required to maintain their quality of life. And, they worry about what will happen to their dependents when they are no longer there. For women, who are more likely to be primary care givers¹, this can be an even greater concern.

Nationwide, more than 90 percent of families with special needs children have additional expenses when compared to families who do not.² The extra costs stem, in large part, from therapy, medication, and other necessary treatments.

Planning for the future can help alleviate some of this worry. An important item to consider is establishing a special needs trust (sometimes called a Supplemental Needs Trust or SNT). Most people with physical and mental disabilities depend on government assistance in the form of Social Security, Medicaid and other government benefits, to fund education and training programs. Establishing an SNT can help preserve their rights to continue receiving governmental assistance.

Without an SNT, your dependent could be inadvertently cut off from government assistance. The Federal law stipulates that a special needs individual cannot have assets of more than \$2,000 in total. That means they should not be named as a beneficiary in a will, life insurance, or retirement fund. Instead, all benefits should be assigned to the SNT.

An SNT should be drawn up by an attorney who specializes in this type of estate planning tool and it should be reviewed by the Social Security Administration for compliance with all special needs trust law. Such a trust will require a trustee who can be either an individual or an institution. The trustee will oversee the funds in the trust and determine how the money is to be used. If the special needs individual cannot make medical and lifestyle decisions for him or herself, then the caregiver must also appoint a guardian.

FUNDING FOR SPECIAL NEEDS DEPENDENTS

Working with your financial professional and other professionals, you will need to determine how much money is required to fund the SNT. While basic living and medical expenses will most likely be covered by government benefits, the trust will provide quality of life items, including personal care attendants, out of pocket expenses, rehabilitation, as well as goods and services that can make life more pleasant. One way to determine how much funding is necessary is to estimate current expenses related to the dependent and projected future costs, along with his or her life expectancy.

After establishing the approximate size of the trust, the next question is how to fund it. One common way to fund an SNT is with life insurance. Your financial professional can help you decide the best type of policy for this purpose. For example, if there are two caregivers (a mother and father, for example), a second to die or survivorship policy, which only pays out when both named policyholders die, may be an appropriate choice for you to consider.

An SNT can also be funded with investments, retirement plans, real estate and other assets but you need to be careful not to drain assets you may need yourself. It's important to assure your own financial well-being, since you will continue to be the caregiver. However you fund the plan, you should review it regularly, particularly after major life events, such as births, death, divorce and marriage.

In addition to your plan for your special needs beneficiary, it is also important to meet with your legal advisor and draft a letter of intent with instructions to trustees and guardians outlining such issues as health care, education, living arrangements and other items.

Careful planning is a must in order to reach any financial goal. For those who care for dependents with special needs, planning for the future is more critical since failure to establish provisions could actually be detrimental to the person you want to help. That's why planning now will help ensure a brighter future for loved ones who are dependent on your care.

For more information about preparing for your financial future, visit the [AXA Equitable Online Learning Center](#).

1) U.S. Department of Health & Human Services, "Caregiver Stress," May 2008.

2) 2008 *Pediatrics* Journal, Paul T. Shattuck, Ph.D., professor of social work at Washington University in St. Louis

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CLIENTS AND THOSE PESKY ELECTRONIC COMMUNICATIONS

By Virginia “Ginger” Dvorak Smith³

In the last 5-10 years, one of the additions to our early contact with a new client is the admonition against emailing or texting or Facebook posts to or about the divorce and the spouse....or soon to be ex-spouse. But, in today’s world of electronic communications, people have a compulsion to stay in contact with one another daily, even hourly, about every detail of their lives. So, in spite of those sometimes fiercely worded litigation rules we give our clients, they are going to communicate with their family, friends and that spouse by email, text and Facebook. Really. They just are. So, helping them learn how to communicate is a significant step in managing their case, including preparing the client for discovery responses, deposition or trial. Or, more importantly, for life after divorce.

Since your paralegal is already likely to spend a great deal of time listening to the client as he/she tries to figure out how to manage day-to-day issues with the spouse, you can utilize your paralegal’s skills working with the client to coach them on how to communicate with their spouse in a simple, respectful manner. Your paralegal can help teach the client about email protocols with their spouse and friends, as well as with your office. You can’t handle what the other client says, how they respond, or what they do with your client’s written messages, but you and your paralegal can help your client manage their own communications. There shouldn’t be anything in the emails or texts from your client that could cause a judge or a jury to raise an eyebrow or question your client’s judgment. The messages, or responses to messages, should be short, sweet, and to the point. And, if at all possible, keep any Facebook postings (including pictures!!) to a bare minimum.

Often we have the client draft their email and send it to me to review and edit. When there are concerns about privileged information being sent to the other spouse or about legal issues, my attorney helps edit the response. After editing, the email is sent back to the client to send on to their spouse. Step one is to keep every communication simple and brief, only addressing the issue/question at hand. Step two is to eliminate anything that has the hint of criticism, anything that can make the receiving party feel defensive, anything that might provoke an in-kind attack. I once went round in circles with a client who couldn’t understand why the following message might sound critical: “I don’t know where your blue jacket is. When you walked out on us, I think you took it with you.” I edited the message to read, “I don’t know where your blue jacket is.” Tacky and/or hate-filled emails will show up as exhibits at trial. With any luck, they won’t be from your client.

When people are in an emotional period of their lives, they can say the most abominable things to and about each other through emails, text messages and on Facebook. You and your paralegal can help them learn the truth of the old adage....less is more....and it can be one of the most significant lessons they take out of the divorce. They usually appreciate the help and eventually develop the skills to handle such communications on their own.

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articles

EVERYTHING IS BIGGER IN TEXAS EXCEPT THE COMMUNITY PROPERTY ESTATE – MUST TEXAS REMAIN A DIVORCE HAVEN FOR THE RICH?

By J. Thomas Oldham⁴

I. INTRODUCTION

Only eight states have traditionally applied the community property system as a default rule for married couples. Wisconsin, a recent convert, is now the ninth. Although only a small number of states accept community property, many of these states are states in the southwest and west where an increasing number of Americans want to live. For example, more than 10% of all Americans live in California and almost 10% live in Texas. Almost a third of all Americans now live in a community property state. So, the community property system impacts a large number of American families.

As noted, nine states now apply the “community property system.” Although eight states have applied the community property system for a century, and over that period have had the opportunity to clarify important rules, it is perhaps surprising that there is a significant lack of uniformity among the states. The different rules applied can have a significant impact on the size of the community estate.

In this article I compare certain important rules now applied in the eight states. I show that there is a significant variation in these rules. In fact, when comparing rules applicable in Texas and California, the rules almost always differ. The rule chosen by California leads to larger community estate in almost all instances, while the rule in Texas almost always diminishes the size of the community estate. The other six states sometimes agree with the California approach and in other instances follow the Texas view. So, one might say that, when comparing the eight states, California is “progressive” in the sense that it has chosen rules that lead to a larger shared marital estate, while Texas is more conservative. In addition to the differences in community property rules, certain other aspects of Texas divorce law make it more likely that a needy divorcing spouse will be inadequately provided for after divorce. The major reasons for this are the shockingly restrictive spousal support laws now in effect, coupled with rules that make it very difficult to challenge a premarital agreement. I therefore contend that, compared to other community property states, and particularly California, Texas is a divorce haven for wealthy divorcing spouses.

II. TEXAS RULES THAT EXPAND THE SIZE OF THE COMMUNITY ESTATE

A. Income from Separate Property is Community Property

Texas is one of the three states that have adopted the rule that income from separate property during marriage is community.⁵ In the five other states, income from separate property is separate.⁶

⁴ John Freeman Professor of Law, University of Houston Law School. The author would like to thank Bill Reppy for comments to an earlier draft of this article, and Staci Griffin, Jacquelyn Plaia and Mary Beth Taylor, 2009 and 2011 graduates of the University of Houston Law School, for research assistance in connection with this article. This article first appeared in the Fall 2010 Family Law Quarterly.

B. When Spouses Stop Accumulating Community Property

Texas is one of four states in which spouses continue to accumulate community property until the divorce decree is entered.⁷ In the other four states, spouses stop accumulating community property at some earlier date. In California, spouses stop accumulating community property upon permanent separation.⁸ The Washington rule is similar, as long as both spouses realize there is no hope of reconciliation.⁹ In Arizona and Louisiana, community property is not accumulated after the divorce action is filed.¹⁰

III. TEXAS RULES THAT REDUCE THE SIZE OF THE COMMUNITY ESTATE

A. Separate Property Businesses to Which a Spouse Contributes Time, Toil, and Talent

The contribution of a spouse's time, toil, and talent to a separate property business creates a community claim. States calculate the amount of the claim in different ways.

1. The Texas View – Apply Only *Van Camp v. Van Camp*¹¹

Texas is one of the few states that calculates the community claim solely based on the “value” of the spouse's efforts contributed during marriage, minus the community income derived from the business during marriage.¹² This approach is derived from a very old California case, *Van Camp v. Van Camp*.¹³

Washington has also applied *Van Camp*.¹⁴ However, in a recent case, the community was awarded all of the appreciation in value of the business during marriage because the non-owner proved that all of the increase was due to the owner's efforts.¹⁵ Idaho also only applies *Van Camp*.¹⁶

The amount of the community claim under this approach (the value of the services under *Van Camp*) is quantified by establishing how much the business would have paid a third party with no ownership interest and who had the same experience and training as the spouse. The amount by which the business increases in value is not directly relevant.¹⁷

Texas applies *Van Camp* in an unusual way. The community is said to have a claim for the value of contributed services, but only to the extent the services exceed the effort needed to manage and preserve the property.¹⁸ It is unclear how much effort is necessary to “manage and preserve” property. But it has been considered reversible error for the court to grant a reimbursement claim in favor of the community in such a situation if no evidence was introduced about the value of the time needed to manage and preserve the business.¹⁹

2. The Opposing View--Give the Court Discretion to Apply *Van Camp* or *Pereira v. Pereira*²⁰

Four states give courts discretion between two different approaches for calculating the community claim. One option is *Van Camp*. The other available option derives from another old California case, *Pereira v. Pereira*.²¹

⁵ See [LA. CIV. CODE ANN. art. 2339](#); [TEX. FAM. CODE ANN. § 3.002](#); [IDAHO CODE § 32-906](#). The Texas rule derives from the Texas Supreme Court's construction of Article XVI, § 15 of the Texas Constitution in [Arnold v. Leonard](#), 273 S.W. 799 (Tex. 1925).

⁶ See [ARIZ. REV. STAT. ANN. § 25-213](#); [CAL. FAM. CODE §§ 5107, 5108](#); [NEV. REV. STAT. § 123.130](#); [N.M. STAT. § 40-3-6](#).

⁷ See [Beasley v. Beasley](#), 758 P.2d 695 (Idaho 1988); [Forrest v. Forrest](#), 668 P.2d 275 (Nev. 1983); [Zaruba v. Zaruba](#), 498 S.W.2d 695 (Tex. App.—Corpus Christi 1973, writ dismissed).

⁸ See [CAL. FAM. CODE § 771](#).

⁹ See [WASH. REV. CODE § 26.16.140](#); [Seizer v. Sessions](#), 940 P.2d 261 (Wash. 1997).

¹⁰ See [ARIZ. REV. STAT. ANN. § 25-211](#); [LA. CIV. CODE ANN. ART. 159](#).

¹¹ [Van Camp v. Van Camp](#), 199 P. 885 (Cal. App. 1921).

¹² See [TEX. FAM. CODE ANN. § 3.402](#).

¹³ [Van Camp](#), 199 P. at 888.

¹⁴ See Washington State Bar Assn., [Washington Community Property Deskbook § 2.3\(2\)](#) at 3-119 to 3-121 (3d. ed. 2003).

¹⁵ See [Marriage of Lindemann](#), 94 Wash. App. 64, 960 P.2d 966 (1998). This is not an application of *Van Camp*.

¹⁶ See [Speer v. Quinlan](#), 525 P.2d 314 (Idaho 1973).

¹⁷ See Oldham, *Separate Property Businesses that Increase in Value During Marriage*, 1990 WISC. L. REV. 585, 593.

¹⁸ See [Jensen v. Jensen](#), 665 S.W.2d 107, 109 (Tex. 1984); [Vallone v. Vallone](#), 644 S.W.2d 455 (Tex. 1983).

¹⁹ See [Lifshutz v. Lifshutz](#), 199 S.W.3d 9 (Tex. App.—San Antonio 2006, pet. denied).

²⁰ [Pereira v. Pereira](#), 156 Cal. 1, 103 P. 488 (1909).

²¹ *Id.*

Under *Pereira*, the separate property claim is calculated by valuing the business as of the date of marriage, and adding to that a “reasonable annual rate of return.” Any increase in value during marriage in excess of that amount is community.²²

The value of the community claim can vary greatly based on which approach is selected. For example, if the business did not increase in value significantly during marriage, there would be no community claim under *Pereira*, but there could be some community claim under *Van Camp*. In contrast, if the business did increase in value substantially during marriage, the application of *Van Camp* would normally result in a relatively small community claim, while applying *Pereira* would generally result in a much larger claim. In addition, *Van Camp* requires proof of the value of the spouse’s services before there is a community claim, a requirement that some spouses in Texas divorce cases have not been able to satisfy.²³

To help courts determine which approach to select, one court has suggested that the choice should depend “on whether the character of the capital investment in the separate property or the personal...ability...of the spouse is the chief contributing factor in the realization of income and profits.”²⁴ In another, the court proposed that *Van Camp* was the approach to use when the “spouse’s efforts had a minor influence on the growth of the investment.”²⁵ A third court has suggested that *Pereira* is the preferred method “unless the owner of the separate property can establish that a different allocation is more likely to accomplish justice.”²⁶ Yet another view considers whether the separate property capital or the owner-spouse’s efforts were the chief contributing factor to the success of the business. If the former is established, *Van Camp* should be used; if the latter is the case, *Pereira* should be selected.²⁷

In those instances where efforts are perceived to be the chief contributing factor to the increase in value of the separate property, and the property does increase in value substantially during marriage, the application of *Pereira* rather than *Van Camp* generally will result in a substantially larger community claim. For example, in *Jensen* the husband bought shares of a business for \$1.56 per share three months before the wedding. The couple divorced after fewer than five years of marriage, when the shares were worth between \$13.48 and \$25.77 per share.²⁸ The application of *Pereira* would give the community almost all the appreciation. Under *Jensen*, the claim would be limited to a claim for the value of his services, less income received during marriage.

Compared to California, New Mexico, Arizona, and Nevada, where *Pereira* is available, the lack of acceptance of *Pereira* in Texas significantly reduces the size of the community claim in certain situations.

3. A Review of Dividend Policy

In states applying *Van Camp* and where income from separate property is community, earnings retained in a separate property corporation remain separate; these earnings will become community only to the extent they are paid out as dividends. The concern arises when the owner spouse limits dividends to reduce the community claim. For this reason, Idaho courts have held that when the owner spouse controls the company’s dividend policy, the divorce court should review whether that spouse defrauded the community by inappropriately reducing dividends.²⁹ If the court finds that the owner did fraudulently restrict dividends, the community should have a claim to the dividends that should have been distributed. Texas courts have not addressed this issue.

B. Instances Where a Spouse Buys a House before Marriage and Community Funds Are Used for House Payments During Marriage While They Live There

²² See generally, J. Thomas Oldham, *Separate Property Business that Increases in Value during Marriage*, 1990 WISC. L. REV. 585, 600.

²³ See *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App.—Ft. Worth 2003, no pet.); *Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App.—Austin 1999, no pet.); *Rogers v. Rogers*, 754 S.W.2d 236 (Tex. App.—Houston [1st Dist.] 1988, no writ).

²⁴ *Beam v. Bank of America*, 490 P.2d 257, 261 (Cal. 1972).

²⁵ *Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58, 66 (Cal. App. 1974).

²⁶ *Lucini v. Lucini*, 97 Nev. 213, 214, 626 P.2d 269, 270 (1981).

²⁷ See *Logan v. Foster*, 114 Cal. App. 2d 587, 250 P.2d 730 (1952); *Schulman v. Schulman*, 92 Nev. 707, 711 n.2, 558 P.2d 525, 528 n.2 (1976); *Marriage of Lopez*, 38 Cal. App. 3d at 106, 113 Cal. Rptr. at 66.

²⁸ See *Jensen v. Jensen*, 665 S.W.2d 107, 108 (Tex. 1984).

²⁹ See *Speer v. Quinlan*, 525 P.2d 314 (Idaho 1973); *Neibaur v. Neibaur*, 125 P.3d 1072 (Idaho 2005).

1. Reimbursement – the Current Texas View

If a spouse buys a house before marriage via a credit purchase and community funds are used to make house payments during marriage while the spouses live in the house, the community has a claim for its contribution. In Texas (as of September 2009), the claim is one of “reimbursement” measured by the amount by which the principal balance of the mortgage note is reduced during the marriage, if the house is a “principal” or “secondary” residence.³⁰ Any appreciation of the house during marriage remains the separate property of the spouse who originally bought the house. This general reimbursement approach is also accepted in Louisiana and Idaho.³¹ Washington apparently also accepts this view.³²

This reimbursement approach can result in the community having a relatively small claim, even in situations where substantial funds have been advanced. For example, assume the house payment is \$2,500, out of which \$400 is for real estate taxes, \$100 is for insurance, \$1,900 is for interest, and \$100 is for principal reduction. The community would be entitled to a reimbursement claim in this case of \$100 per month (which would gradually increase monthly as the amount allocated to principal per month increases).

2. The Opposing View -- The Pro Rata Approach

Others might look at the reimbursement approach and point out that, if the spouse had bought the property shortly after marriage rather than shortly before marriage, the house normally would be 100% community property and all increase in value during marriage would be community. From this perspective it seems fair to give the community some portion of the appreciation during marriage upon a showing that community funds were used for house payments during marriage even, if the property was bought by a spouse before marriage.

Arizona, New Mexico, California, and Nevada have developed an approach whereby this occurs. There is some disagreement among these states in terms of how the community claim should be calculated. In all of these states, a portion of the community contribution is perceived to be the amount by which the principal balance of the mortgage loan was reduced during marriage.

a. Appreciation During Marriage

In contrast to Texas, however, in Arizona, Nevada, California, and New Mexico the community is entitled to the principal reduction during marriage plus a portion of the appreciation during marriage.³³ In New Mexico, Arizona, and California the fraction of the appreciation during marriage due to the community is the ratio of the aggregate principal reduction during marriage paid with community funds compared to the original purchase price.³⁴ So, if the house costs \$200,000, and the principal reduction during marriage was \$40,000, the community would be allocated 20% of the appreciation during marriage.

Nevada has adopted a similar but more complicated formula, which gives the community a greater share of appreciation during marriage. It stems from the decision of *Malmquist v. Malmquist*.³⁵

³⁰ See [TEX. FAM. CODE ANN. § 3.402](#); see generally, J. Thomas Oldham, *Texas Abolishes Economic Contribution – Now What?*, State Bar of Texas, Family Law Section Report, Volume 2009-5 (Fall), at 16.

³¹ See [Gapsch v. Gapsch](#), 76 Idaho 44, 53, 277 P.2d 278, 283 (1954); [Fisher v. Fisher](#), 86 Idaho 131, 383 P.2d 840 (1963).

³² See [Marriage of Harshman](#), 18 Wash. App. 116, 567 P.2d 667 (1977); cf. [Marriage of Carrillo](#), 2003 Wash. App. LEXIS 450.

³³ See [Barnett v. Jedynek](#), 219 Ariz. 550, 554 (2009); [Drahos v. Rens](#), 149 Ariz. 248, 249 (Ariz. App. 1985); [In re Marriage of Marsden](#), 130 Cal. App. 3d 426, 436-37 (1982); [Marriage of Moore](#), 168 Cal. Rptr. 662 (Cal. 1980); [Malmquist v. Malmquist](#), 106 Nev. 231, 239 (1990). See generally, William A. Reppy, *Acquisitions with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or a Right of Reimbursement*, 31 IDAHO L. REV. 465, 999-1005 (1995).

³⁴ See [Drahos v. Rens](#), 717 P.2d 927 (Ariz. 1985); [Marriage of Frick](#), 181 Cal. App. 3d 997, 1008 (1986); [Marriage of Marsden](#), 130 Cal. App. 3d 426 (1982); [Dorbin v. Dorbin](#), 731 P.2d 959 (N.M. App. 1986).

³⁵ [Malmquist v. Malmquist](#), 106 Nev. 231, 792 P.2d 372 (1990). In this case, the husband bought a house for \$36,500 more than three years before marriage. He paid \$2,500 in cash and borrowed \$34,000. At the time of marriage he had made 41 monthly payments, reducing the principal amount of the loan by \$1,037. During marriage, the parties made 183 monthly payments, reducing the principal balance was further reduced by \$14,463, leaving an outstanding balance at divorce of \$18,500.

Malmquist suggests a different way to determine how to allocate appreciation during marriage. Of 224 monthly payments that have been made through the date of divorce, 41 (18.30%) were made before marriage and 183 (81.70%) were made during marriage with community funds. The court multiplies these percentages times the outstanding loan balance at divorce. The

b. Premarital Appreciation

Under this pro rata view all premarital appreciation is allocated to the separate estate.³⁶

c. The Texas Experiment with the Pro Rata Approach

Texas adopted a statutory version of the pro rata approach in 1999. This new approach attempted to allow the community to share in any appreciation in value of the house during marriage.³⁷ This “economic contribution” doctrine was abolished by statute in 2009.³⁸ No formal rationale was given for this repeal, but the informal explanation given was that the economic contribution statute was “too complicated.”³⁹ Adding to the complexity may have been the attempt to incorporate both capital improvements and secured debt payments in the statutory economic contribution calculation.

It is interesting to note that California courts fashioned a similar pro rata doctrine in the early 1980’s without the aid or stimulus of any statute. By 1990, this basic view had also been adopted in Arizona, New Mexico, and Nevada. Texas did not respond to these developments until 1999 (when it adopted the economic contribution statute) and, unlike the other four states, it now has repealed by statute its pro rata approach after a relatively brief trial period. Texas now finds itself in a situation where its courts cannot develop a pro rata approach if they wanted to, because there is now an express statute mandating application of the reimbursement rule.

3. Applying Pereira to Real Estate Purchases

A third approach to dealing with premarriage realty purchases that increase in value is applied in New Mexico. If it is shown that community labor or funds increased the value of the realty, the separate property claim is the equity in the property as of the date of marriage, plus a reasonable annual rate of return on that initial equity. To the extent the equity in the property at dissolution exceeds that amount, the excess is community property.⁴⁰

C. Valuing Community Personal Service Businesses and Professional Practices

1. The Texas View -- Personal Goodwill Should Be Excluded from the Community Claim

For more than thirty years, Texas has adhered to the view that, to the extent the goodwill of a community property business or practice is “personal” to the spouse it should be ignored when calculating the value of the business at divorce.⁴¹ Personal goodwill is perceived to be a part of the spouse’s post-divorce earning capacity, something that should not be part of the community estate. Louisiana also adopts this view.⁴² Indeed, in Texas it appears to be accepted that, even in those situations where there is commercial goodwill independent of the spouse, if the spouse has no way to realize that goodwill value other than by continuing to work, there should be no community claim to that goodwill.⁴³

The requirement that Texas courts must exclude personal goodwill when valuing a practice can have a substantial effect upon the value of a small professional practice at divorce. For example, in *Nail v. Nail*

separate property component is 18.30% of \$18,500 or \$3,386, and the community component is 81.70% of \$18,500 or \$15,114. Other separate were down payment (\$2,500) and principal reduction before marriage (\$1,037) totally \$3,537. This amount is added to the \$3,386 computed above to get \$6,923. This is 18.97% of the original purchase price.

The community contribution was principal reduction of \$14,463. If this is added to the \$15,114 computed in the preceding paragraph, it totals \$29,577, or 81.03% of the original purchase price of \$36,500. The separate and community estates would share the \$178,500 appreciation during marriage in these proportions. The separate and community estate would be repaid for its contributions, as set forth above. The separate estate contributed \$3,537 and the community estate contributed \$14,463.

³⁶See *Barnett v. Barnett*, 219 Ariz. 550, 200 P.3d 1047 (2009); *Marriage of Frick*, 181 Cal. App. 3d 997; *Malmquist*, 106 Nev. 231.

³⁷ See generally Aubrey Connatser & Emilia Pirgova, *Economic Contribution in a Nutshell*, State Bar of Texas, Advanced Family Law Course (2007), Ch. 15.

³⁸ Oldham, *Texas Abolishes Economic Contribution*, *supra* note 27.

³⁹ This was the explanation given during conversations between the author and committee members.

⁴⁰ See *Trego v. Scott*, 125 N.M. 323, 961 P.2d 168 (App. 1998); *Dorbin v. Dorbin*, 105 N.M. 263, 268, 731 P.2d 959, 964 (App. 1986).

⁴¹ See *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972); *Rathmell v. Morrison*, 732 S.W.2d 6 (Tex. App.—Houston [14th Dist.] 1987, no writ).

⁴² See *Rao v. Rao*, 927 S.W.2d 356 (La. App. 2005).

⁴³ See *Finn v. Finn*, 658 S.W.2d 735 (Tex. App.—Dallas 1983, writ ref’d n.r.e.).

the wife's expert testified that Dr. Nail's practice, including goodwill, was worth \$131,024. Dr. Nail contended that, once his personal goodwill was subtracted, his practice was worth \$735 for purposes of the divorce property division. The court sided with Dr. Nail.⁴⁴

2. The Opposing View -- Personal Goodwill Should Be Included in the Community Estate

All other community property states other than Louisiana disagree with the Texas view regarding personal goodwill. In those six states, the spouse's post-divorce earning capacity is perceived to be limited to what a person with that spouse's education and experience but no clients would earn.⁴⁵ All goodwill accumulated during marriage, even personal goodwill, is included in the community estate.⁴⁶

In these states, a common way to calculate the value of goodwill is the "excess earnings" approach. Under this approach, the court considers what a person with the spouse's education and experience would earn as an employee. If the spouse earns more than this salary from his ownership interest in the firm and his clients, the professional is said to have "excess earnings." The present value of this stream of excess earnings is the value of the goodwill.⁴⁷

This method of calculating the value of goodwill at divorce could not be used in Texas if it included a component of personal goodwill.

D. Calculating the Community Claim to a Pension Benefit When the Employee Is Married for Only a Portion of His Career

1. Defined Contribution Pension Plans

a. *The Texas View – Subtract the Account Value at Marriage from the Account Value at Divorce.* A defined contribution pension plan maintains an account for each employee.⁴⁸ In Texas divorce cases when the employee worked before marriage, the community claim at divorce to such a plan has been calculated by subtracting the account balance at marriage from the balance at divorce.⁴⁹ This approach is sensible during those periods when stock values appreciate at roughly the same rate. After the 2008 crash, however, one could imagine that if a court employed this approach today the community could have little or no claim to the pension even in instances where the marriage was of significant duration.

b. *Alternative Valuation Methods.* A Louisiana court has calculated the community's claim to a defined contribution account at divorce based on the portion of the employee's career he was married.⁵⁰ An alternative approach would be to compare this aggregate amount of contributions to the account during marriage to the total contributions made through the date of divorce.⁵¹

2. Defined Benefit Pension Plans

⁴⁴ See [Nail, 486 S.W.2d at 761](#). For a general discussion of business valuation rules in Texas, see generally, Patrice L. Ferguson, *Business Valuation – Concepts, Issues, and Trends*, State Bar of Texas, Advanced Family Law Course (2006), Ch. 43.

⁴⁵ See [Marriage of Lukens, 558 P.2d 279 \(Wash. App. 1976\)](#); [Marriage of Lopez, 113 Cal. Rptr. 58 \(Cal. App. 1974\)](#).

⁴⁶ See [Gerow v. Cavill, 192 Ariz. 9, 960 P.2d 55 \(Ariz. App. 1998\)](#); [Marriage of Lopez, 113 Cal. Rptr. 58](#); [Marriage of Lukens, 558 P.2d 279](#); [Stewart v. Stewart, 152 P.2d 544 \(Idaho 2007\)](#); [Ford v. Ford, 105 Nev. 672, 782 P.2d 1304 \(1989\)](#); [Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 \(1980\)](#).

⁴⁷ See [Marriage of Hargrove, 209 Cal. Rptr. 764 \(Cal. App. 1986\)](#); [Stewart, 152 P.2d 544](#); [Ford, 105 Nev. 672](#); [Hurley, 94 N.M. 641, 615 P.2d 256](#); [Marriage of Hall, 103 Wash.2d 236, 692 P.2d 175 \(1984\)](#).

⁴⁸ See J.T. Oldham, *DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY* (2009) § 7.10[5][b] at pages 7-86 et. seq.; § 7.10[2][a] at page 7-63; Stephen R. Brown, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in Berry v. Berry*, 37 BAYLOR L. REV. 107, 112 (1985).

⁴⁹ See [Baw v. Baw, 949 S.W.2d 764 \(Tex. App.—Dallas 1997, no writ\)](#); see also [Hatteberg v. Hatteberg, 933 S.W.2d 522, 531 \(Tex. App.—Houston \[1st Dist.\] 1994, no writ\)](#); [Pelozig v. Berkebile, 931 S.W.2d 398, 402 \(Tex. App.—Corpus Christi 1996, no writ\)](#); [Smith v. Smith, 22 S.W.3d 140, 149 \(Tex. App.—Houston \[14th Dist.\] 2000\)](#) (rejecting a *Taggart* apportionment based on time for a defined contribution plan). Some other community property courts have used the same approach. See [McCoy v. McCoy, 868 P.2d 527 \(Idaho App. 1994\)](#). In Texas, the party claiming the separate property interest can attempt to trace natural enhancement of premarriage investments during marriage. See [TEX. FAM. CODE § 3.007](#).

⁵⁰ See [Alford v. Alford, 653 So. 2d 133 \(La. App. 1995\)](#); [Thibodeaux v. Thibodeaux, 640 So. 2d 713 \(La. App. 1994\)](#).

⁵¹ See [Marriage of Daniele, 854 S.W.2d 489 \(Mo. App. 1993\)](#).

a. The Current Texas View – Taggart v. Taggart⁵² and Berry v. Berry⁵³

Defined benefit pension plans do not keep separate accounts for each employee.⁵⁴ This complicates the method of calculating the community claim to an employee's pension at divorce. (The employer maintains one large pension fund from which all pension benefits are paid.)

One approach that a number of courts have used to calculate the community portion of the plan is an allocation based on the fraction of the employee's career that the employee was married, an approach sometimes referred to as "the time rule." Texas accepted this approach in *Taggart v. Taggart*.⁵⁵ In this case the employee was in the military for thirty years (360 months) and married for 246 of those months. Some period of service while unmarried occurred before marriage and some occurred after divorce. The Texas Supreme Court concluded that 246/360 of the total defined benefit pension received by the employee after retirement was community property, and that the non-employee spouse should get 50% of that amount.

This approach assumes all months of employment were of equal value. In *Taggart* it didn't matter whether the years of employment were during the beginning, middle, or end of the employee's career. Also, the community claim is calculated from the actual retirement benefit the employee receives, even if the employee was still working at the time of divorce (as the employee was in *Taggart*).

Six years after *Taggart*, the Texas Supreme Court announced its decision in *Berry v. Berry*.⁵⁶ In that case, the employee worked for the first twenty-six years of his career while married. After the couple divorced, he worked an additional twelve years before retiring. The issue was what portion of the defined benefit retirement was community property. The Court of Appeals applied the *Taggart* approach, calculating the community portion of the actual benefit received as 26/38, or 68.42%, because that was the portion of his career he was married. The wife was awarded 50% of that amount.

The Supreme Court reversed. The Court held that, in this instance, later years of employment contributed more to the pension than earlier years, so the community should not share in those post-divorce increases. The Supreme Court affirmed the trial court's ruling that the community claim should be limited to the value of the accrued benefit as of the date of divorce (which was approximately 33% of what the non-employee spouse would have received under *Taggart*).⁵⁷ The Court also held, in a statement that deserves a place in any collection of the most unfortunate statements ever made by the Texas Supreme Court, that "we reject the concept of inflation as a factor for our consideration as it relates to the current value of retirement benefits."⁵⁸ This statement was made in 1983, a time when the U.S. inflation rate was at its highest level in forty years!

The Court did not clarify why it determined that the community should not share in post-divorce increases. It did note that the employee spouse received annual post-divorce salary raises and that the pension benefits were improved post-divorce due to union contract negotiations. The Court reiterated its holding in *Berry* in *Grier v. Grier*,⁵⁹ where the Court held that the community should not share in post-divorce retirement enhancements that resulted from a post-divorce promotion.

Berry has been construed to require divorce courts, when dealing with a defined benefit pension and a spouse still working at divorce, to value the accrued benefit as of the date of divorce.⁶⁰ Some wondered whether it abolished the rationale for allocating pension benefits based on a time rule altogether, because it seemed to reject the assumption that all periods of employment were of equal value. A litigant in at

⁵² [Taggart v. Taggart, 552 S.W.2d 422 \(Tex. 1977\).](#)

⁵³ [Berry v. Berry, 647 S.W.2d 945 \(Tex. 1983\).](#)

⁵⁴ See Oldham, DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY *supra* note 45, at § 7.10[2][b]; see also Brown, *supra* note 45, at 115.

⁵⁵ [Taggart, 552 S.W.2d 422.](#)

⁵⁶ [Berry, 647 S.W.2d 945.](#)

⁵⁷ [647 S.W.2d at 947.](#)

⁵⁸ *Id.* This holding was later backed away from in [Grier v. Grier, 731 S.W.2d 931 \(Tex. 1987\)](#), where the Court stated that the community should share in post-divorce "increases which may occur other than increases attributable to...services rendered by the spouse." The court has never clarified how such a calculation should be made.

⁵⁹ [Grier, 647 S.W.2d 931.](#)

⁶⁰ See [May v. May, 716 S.W.2d 705 \(Tex. App.—Corpus Christi, 1986, no writ\).](#)

least one case argued that the community claim should, after *Berry*, be calculated by subtracting the accrued value of the monthly benefit as of the date of marriage from the accrued benefit as of the date of divorce. This claim was rejected.⁶¹

So, this construction of *Berry* substantially reduced the community claim from what it would have been under *Taggart* for those spouses married early in the employee's career, but did not increase it above *Taggart* when the marriage was late in the employee's career.

b. The 2005 Legislation

Somewhat incredibly, there was no legislative response to this unfortunate state of affairs for more than two decades. In 2005 a statute was adopted, adding new Section 3.007 to the Texas Family Code. The additions to 3.007, among other things, attempted to change how to calculate a community claim to a defined benefit plan. It appeared to intend that the community claim should equal the difference between the employee's accrued benefit as of the date of marriage and the accrued benefit as of the date of divorce (the argument rejected in *Hudson*). There were some drafting ambiguities, however.

In 2009, rather than try to fix these drafting ambiguities, the State Bar Family Law Section supported the repeal of this ambiguous provision. The Texas legislature adopted the proposed repeal, apparently leaving *Berry* as the governing authority.

So, in 2010, almost thirty years after *Berry* was decided, it remains the law of Texas. It is amazing that such a wrongheaded decision should enjoy such a substantial period as governing authority regarding a very important aspect of Texas community property law, and quite surprising that the Family Law Section opposed an attempt to modify the *Berry* result.

c. The View in Other States

Texas is the only community property estate that has adopted a general rule that, when valuing the community claim to a spouse's unmaturing defined benefit pension plan at divorce when the spouse is still working, and applying a deferred payment approach, the court must value the community claim as of the divorce date. Some courts flatly reject the argument that the post-divorce years of employment are worth more than early years, and allow the community to share in post-divorce enhancements.⁶² These courts conclude that the early career years are a "strong foundation" for later years, and conclude that it is not unfair to let the community share in post-divorce increases.⁶³ The time rule is said to "[internalize] the notion that the highest earning salary realized by an employee is the product of all prior years."⁶⁴ Courts in some other states have merely said it was "not an abuse of discretion" to apply the reserved jurisdiction approach and the time rule in such circumstances.⁶⁵

Louisiana and Nevada also generally accept the "time rule" as a way to divide an unmaturing defined benefit pension plan interest at divorce. However, these courts have concluded that, in certain unusual instances, the employee can do something exceptional after divorce which has a substantial impact on the employee's salary and retirement benefits.⁶⁶ In such an instance, it is unfair to the employee to allow the community to share in such post-divorce increases.⁶⁷

Nevada courts have stated that, in most instances, an employee "gradually moves up the corporate ladder." In this normal situation, it is not perceived as unfair to allow the community to share in post-divorce increases and apply the time rule.⁶⁸ However, in some instances the increase in the employee's

⁶¹ See [Hudson v. Hudson](#), 763 S.W.2d 603 (Tex. App.—Houston [14th Dist.] 1989, no writ).

⁶² See [Marriage of Lehman](#), 18 Cal.4th 169, 74 Cal. Rptr. 2d 825, 955 P.2d 451, 458-62 (1998); [Marriage of Rockwell](#), 170 P.3d 572 (Wash. App. 2007); [Marriage of Bulicek](#), 800 P.2d 394 (Wash. App. 1990).

⁶³ [Marriage of Rockwell](#), 170 P.3d 572; [Sertic v. Sertic](#), 901 P.2d 148, 150 (Nev. 1995).

⁶⁴ [Shill v. Shill](#), 100 Idaho 433, 436, 599 P.2d 1004, 1007 (1979).

⁶⁵ See [Boncosk v. Boncosk](#), 167 P.3d 705 (Ariz. App. 2007) (where the employee's rights were not matured at divorce); [Hunt v. Hunt](#), 43 P.3d 777 (Idaho 2002). It should be noted that Idaho law is confusing. In [Shill v. Shill](#), 765 P.2d 140 (Idaho 1988), when dealing with an unmaturing defined benefit right at divorce the court rejects the time rule. Fourteen years later, in [Hunt](#), 43 P.3d 777, they say that applying the time rule is not an abuse of discretion. Go figure, as they say.

⁶⁶ Examples commonly given include the employee pursuing an advanced degree after divorce or receiving a significant promotion.

⁶⁷ See [Hare v. Hodgins](#), 586 So. 2d 118 (La. 1991); [Fondi v. Fondi](#), 802 P.2d 1264 (Nev. 1990).

⁶⁸ See [Gemma v. Gemma](#), 105 Nev. 458, 778 P.2d 429, 432 (Nev. 1989).

salary after divorce is more dramatic and due to the employee's post-divorce efforts. In such a situation it is not perceived to be fair to allow the community to share in these increases. Nevada courts have suggested that, if the employee at divorce feels such dramatic post-divorce increases are possible, the employee should ask the divorce court to retain jurisdiction and later evaluate whether any substantial enhancement in his earning as a result of post-divorce effort occurred.⁶⁹ A Nevada divorce court may not assume that all post-divorce increases will be due to extraordinary effort; it must retain jurisdiction and evaluate the claim when the employee retires.⁷⁰

Louisiana has adopted a similar approach. To qualify for an adjustment so the community does not share in post-divorce increases, the employee must show (i) the increase in post-divorce earnings must be fairly substantial, (ii) the increase can't be due to non-personal factors such as cost of living adjustments, and (iii) the increase must be due to the employee's post-divorce efforts.⁷¹ The employee has the burden of showing what portion of the increase is due to post-divorce efforts, and any doubt is to be resolved in favor of the community.⁷²

In one case, the wife was elected county tax assessor just before the divorce. During marriage, Louisiana significantly increased the salary of all tax assessors, thereby substantially increasing the wife's wages and retirement benefits. The appellate court concluded that, since these raises were for *all* tax assessors, this was not a raise received due to *her* personal post-divorce efforts, so no adjustment to the normal time rule was needed.⁷³

In another case, it was shown that the employee received salary raises of an aggregate of 45% in five years (1980 to 1985) between the date of divorce and retirement, thereby substantially increasing his pension benefit. However, he received no promotions and did not pursue any education. From 1970 to 1975, his salary had increased 43.5%, and from 1975 to 1980 the increase was 47.6%. The appellate court affirmed the trial court's conclusion that no deviation from the normal time rule was needed.⁷⁴

In a third case, the husband was an unmotivated policeman at the time of divorce. After divorce, the husband became more motivated and received numerous commendations and awards. He also received a number of promotions; witnesses testified that promotions were not ordinary for a policeman, and required extraordinary effort. The appellate court affirmed the trial court's conclusion that there were substantial post-divorce efforts so it would be appropriate to reduce the community claim from what it would have been based on the time rule.⁷⁵

In a New Mexico case, the husband was still working at divorce and retired five years later. The wife objected to the use of the husband's salary on the date of divorce to value the community claim to the husband's defined benefit pension rights. The appellate court affirmed the divorce court's use of the husband's salary at divorce, noting that, even under the Louisiana and Nevada rule summarized above, the community should not share in the husband's post-divorce enhanced salary because it was due to a substantial promotion the husband received after divorce.⁷⁶

E. Tracing

It is not uncommon for spouses to mix community funds and separate funds in a single account. Normally many deposits and withdrawals are made to an account during marriage. Sometimes the issue presented is whether any separate property funds remain in the account at the time of divorce. Whether such "tracing" will be possible may depend upon what the spouse must prove to allow the court to assume that community funds were withdrawn during marriage, not separate funds.

⁶⁹ See [Fondi v. Fondi](#), 802 P.2d 1264 (Nev. 1990).

⁷⁰ *Id.*

⁷¹ See [Hare](#), 586 So.2d at 128.

⁷² *Id.*

⁷³ See [Welker v. Welker](#), 954 So. 2d 225 (La. App. 2007).

⁷⁴ See [Killgore v. Killgore](#), 635 So. 2d 483 (La. App. 1994).

⁷⁵ See [Schlasser v. Behan](#), 722 So. 2d 1129 (La. App. 1998).

⁷⁶ See [Franklin v. Franklin](#), 859 P.2d 479 (N.M. App. 1993). The Court stated that it was not adopting this approach. *Id.* at 486.

In all community property states, it is considered fair to charge the community with “family living expenses.”⁷⁷ So, if the spouse can establish that a withdrawal was made to pay a family living expense, courts will assume that community funds were withdrawn for purposes of tracing. But what if the purpose of the withdrawal is unknown? This is where the Texas rules are unique. Texas has adopted the “community out first” rule, a tracing approach which assumes that, when funds are withdrawn from a commingled account, community funds always come out first.⁷⁸ Texas apparently assumes that all withdrawals during marriage are for family living expenses. This may be reasonable if the spouses have no separate property. If the person making the withdrawal has separate property, however, the assumption seems more open to question.

This Texas tracing approach makes it much easier for a spouse to trace separate funds in the account at divorce. The spouse merely needs to show that, at the time each withdrawal was made, there were community funds in the account that could have been withdrawn. The purpose of each withdrawal need not be shown.

It does not seem that any other community property state has embraced this tracing rule. It is curious that this tracing rule, which apparently originated in certain exceptional cases where strict tracing was perceived to be unfair,⁷⁹ has now been accepted as the governing rule by Texas courts of appeal and trial courts, without any prodding by the Texas Supreme Court.

One fairly recent court of appeals decision stated that, if there were not an established community out first rule in Texas, the court would apply the presumption that separate funds came out first (the normal “strict tracing” approach).⁸⁰ However, the court applied the community-out-first rule “because it seems to be established law.”⁸¹ Commentators have criticized the increasing acceptance of community out first tracing in Texas.⁸²

F. Summary

In this section, I have surveyed a number of Texas community property rules where the current Texas approach consistently leads to a smaller community claim when compared to approaches accepted in other community property states. The California rule differs from the Texas rule in all instances discussed. In at least a few instances, the rule accepted in Arizona, Nevada, New Mexico, Idaho, and Washington also differs from the Texas view. In contrast, Texas rules seem most similar to those accepted in Louisiana. The differences between the approaches accepted in California and Texas can have a significant impact upon the size of the community estate.

Perhaps most troubling is the position recently taken by the Texas Bar Family Law Section in connection with the 2009 legislative session. From 1999 to 2005, Texas Family Code amendments were adopted to attempt to ameliorate some of the most backward and wrongheaded aspects of Texas community property law. These new approaches were imperfectly drafted and perhaps in need of improvement or simplification to make the rules more clear and workable. The 1999 adoption of economic contribution was primarily due to the interest of an influential legislator, and the 2005 changes were initiated by one prominent Texas family lawyer; the Family Law Section had no role in connection with the enactment of either reform.⁸³ So perhaps it shouldn’t be surprising that the Family Law Section had little interest in

⁷⁷ See *See v. See*, 415 P.2d 776 (Cal. 1966); Ralph Ehrenpreis, *Community Property: Commingled Accounts and the Family-Expense Presumption*, 19 STAN. L. REV. 661 (1967).

⁷⁸ *Smith v. Smith*, 22 S.W.2d 140 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Welder v. Welder*, 794 S.W.2d 420 (Tex. App.—Corpus Christi 1990, no writ); *Snider v. Snider*, 613 S.W.2d 8 (Tex. App.—Dallas 1981, no writ).

⁷⁹ See Stewart W. Gagnon & Christina H. Patierno, *Reimbursement & Tracing: The Bread and Butter to a Gourmet Family Law Property Case*, 49 BAYLOR L. REV. 323 (1997); Stewart W. Gagnon et. al., *Tracing – Following the Yellow Brick Road...Brick by Brick by Brick*, State Bar of Texas, 1988 Advanced Family Law Course, Ch. M.

⁸⁰ See *Smith v. Smith*, 22 S.W.3d 140, 147 n.5 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

⁸¹ *Id.*

⁸² See Joseph W. McKnight, *Family Law: Husband and Wife*, 55 S.M.U. L. REV. 1035, 1048 n.87 (2002); Gagnon & Patierno, *supra* note 76.

⁸³ Conversations between the author and those active in the legislative process during those years.

supporting or improving the earlier reforms. In 2009, the Family Law Section urged the legislature to repeal these reforms, and the legislature agreed to do so.

These legislative changes leave Texas community property law farther out of the mainstream of developing community property doctrine. No other community property state accepts “community out first” tracing or the rigid approach to defined benefit pensions discussed above. Only one other state agrees with Texas that personal goodwill should be excluded from the community estate. Currently applicable Texas community property rules, reduce the size of the community estate in certain commonly encountered situations. One might argue that adopting rules which reduce the size of the community estate is not terrible, as long as the jurisdiction has a reasonable spousal support policy to provide for needy dependant spouses in appropriate situations. However, as described below, Texas has the most restrictive spousal support rules in the U.S.

G. OTHER RELEVANT ASPECTS OF TEXAS FAMILY LAW RULES

A. Premarital Agreements

1. The Texas View – It Should Be Very Difficult to Challenge the Validity of a Premarital Agreement

Texas has adopted the Uniform Premarital Agreement Act with no changes.⁸⁴ Under this act, the main way to challenge the validity of a premarital agreement is to establish that the agreement was signed “involuntarily.”⁸⁵ In all states, the issue of voluntariness or duress in connection with the execution of the agreement is an important aspect of determining whether to enforce a premarital agreement.⁸⁶ States have disagreed about what level of duress invalidates the agreement.

During the past two decades, Texas courts have always required a very high level of proof to establish involuntariness. Courts have consulted Black’s Law Dictionary for the view that “involuntary” means something “[n]ot resulting from a free and unrestrained choice.”⁸⁷ So, when an agreement was presented and signed the day before the wedding, and the prospective husband said he would not marry unless the pregnant woman signed the agreement, this was not considered an involuntarily signed agreement.⁸⁸

Another Texas court equated “involuntariness” with “duress” and said the following:

There can be no duress unless there is a threat to do some act which the party threatening has no legal right to do. Such threat must be of such character as to destroy the free agency of the party to whom it is directed. It must overcome his will and cause him to do that which he would not otherwise do. ... The restraint caused by the threat must be imminent.

It must be such that the person whom it is directed has no present means of protection.⁸⁹

Some other states, of course, have adopted a standard of “involuntariness” that is easier to satisfy.⁹⁰ However, given the Texas approach, it is perhaps not surprising that there is no appellate case in Texas to date which discusses why a premarital agreement should not be enforced. Numerous cases uphold premarital agreements.⁹¹ In most cases the appellate court is affirming a trial court’s decision to enforce the

⁸⁴ See [TEX. FAM. CODE ANN. § 4.001](#) et. seq.

⁸⁵ See [TEX. FAM. CODE ANN. § 4.006](#).

⁸⁶ See generally Oldham, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY*, *supra* note 45, at § 4.03[2][d].

⁸⁷ [Schwarz v. Schwarz](#), 2000 WL 1708518 (Tex. App.—Houston [1st Dist]); see also [Sudan v. Sudan](#), 199 S.W.3d 291 (Tex. 2006).

⁸⁸ See [Osorno v. Osorno](#), 76 S.W.3d 509 (Tex. App.—Houston [14th Dist] 2002, no pet.).

⁸⁹ [Matelski v. Matelski](#), 840 S.W.2d 124, 128 (Tex. App.—Ft. Worth 1992, no writ); see also [Sheshunoff v. Sheshunoff](#), 172 S.W.3d 686 (Tex. App.—Austin 2005, pet. denied) (discussing voluntariness in terms of overwhelming free will); [Hesmith v. Berger](#), 64 S.W.3d 110, 115 (Tex. App.—Austin 2001, no pet.) (same).

⁹⁰ See Oldham, *DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY*, *supra* note 45, at § 4.03[2][d].

⁹¹ See Richard Orsinger, *Premarital and Marital Agreements: Representing the Non-Married Spouse*, State Bar of Texas, 29th Advanced Family Law Course (Aug. 2003), Ch. 57 at 15.

agreement.⁹² When needed, the appellate court has reversed the trial court for failing to enforce the agreement.⁹³

In light of Texas precedent, it is difficult to imagine a factual scenario that would cause a Texas court to invalidate a premarital agreement. This may stem in part from the Texas view that prospective spouses generally do not have a confidential relationship.⁹⁴

2. Rules for Enforcing Premarital Agreements at Divorce in Other Community Property States

a. Washington

Of all the community property states, Washington has established the most rigorous standards for validating a premarital agreement. In general, the spouse being asked to waive rights (i) must be given full disclosure of the prospective spouse's financial situation, (ii) must have a reasonable opportunity to consult with independent counsel, and (iii) must have adequate time to consider whether to sign the agreement. If any of these requirements are not satisfied, the agreement is invalid and unenforceable.

For example, in one case the wealthy spouse began working with his lawyers in January 2000 to draft a premarital agreement. The prospective husband and his lawyer provided a draft of the agreement to the intended wife on June 20, eighteen days before the wedding. The intended wife met with her lawyer for the first time on July 5, at which time the prospective husband's lawyer forwarded to him a draft of the agreement that, the court found, was "substantially different" from the June 20 draft. The wedding date was three days later. The wife's lawyer testified that, due to time constraints he "did not have sufficient time to conduct a full review of the agreement." He also testified that "it was very difficult" to talk to his client, who was busy with guests, wedding details, and honeymoon preparations. The husband testified he would have called off the wedding had she not signed the agreement. The Washington Supreme Court concluded that:

There was not enough time for [the woman] or her attorney to adequately review the agreement as evidenced by the late date at which a working draft was provided and the several distractions present for [the woman] in the few days before the wedding. The evidence supports the trial court's finding that [the woman] did not sign the...agreement after receiving independent advice with full knowledge of its legal consequences.⁹⁵

In another case, a draft of a premarital agreement was presented to the prospective bride one day before the couple was to leave on the trip where they planned to marry. There had been episodes of domestic violence during the relationship. The woman testified that she feared violence from her partner if she did not sign the agreement. The Court of Appeals held that, in light of the timing of the negotiations and the fact that the woman did not have independent counsel, the woman did not fully understand the legal consequences of the contract, so it should not be enforced.⁹⁶

In a third case, the sophisticated party instructed his lawyer to draft a premarital agreement, which was presented to the prospective bride and signed three days before the wedding date in the office of the prospective husband's lawyer. The prospective husband's financial information was not disclosed, and the woman did not retain independent counsel. The agreement was not enforced.⁹⁷

In a fourth case, about a month before the wedding the wealthy spouse began discussing with this prospective bride his desire for a premarital agreement. They met with his lawyer four days before the wedding to discuss and review a sample premarital agreement. After that meeting, the man's attorney

⁹² See *id.*

⁹³ See [Fanning v. Fanning](#), 828 S.W.2d 135 (Tex. App.—Waco 1992), *aff'd in part and rev'd in part*, 847 S.W.2d 225 (Tex. 1993); [Pearce v. Pearce](#), 824 S.W.2d 195, 197 (Tex. App.—El Paso 1991, writ denied); [Chiles v. Chiles](#), 779 S.W.2d 127 (Tex. App.—Houston [14th Dist] 1989, writ denied); [Rathjin v. Rathjin](#), 1995 WL 379322 (Tex. App.—Dallas).

⁹⁴ See [Marsh v. Marsh](#), 949 S.W.2d 734, 739 n.4 (Tex. App.—Houston [14th Dist] 1997, no writ); cf. Laura Morgan & Brett Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS (2001) § 10.01 at 395-97 (describing the Texas view as "clearly in the minority"). But see [Andrews v. Andrews](#), 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ) (finding that a fiduciary relationship existed between an engaged couple in that situation).

⁹⁵ [Marriage of Bernard](#), 165 Wash. 2d 895, 906, 204 P.3d 907 (2009).

⁹⁶ See [Marriage of Foran](#), 67 Wash. App. 242, 834 P.2d 1081 (1992).

⁹⁷ See [Estate of Crawford](#), 107 Wash. 2d 493, 730 P.2d 675 (1986).

drafted a premarital agreement, which was signed the day before the wedding. The woman was not advised to seek independent counsel and did not do so. She was not given a copy of the agreement after it was signed. The Washington Supreme Court concluded that she had no reasonable opportunity to consult independent counsel and did not enforce the agreement.⁹⁸

b. California, New Mexico, and Nevada

Like Texas, California, New Mexico, and Nevada adopted the Uniform Premarital Agreement Act. Unlike Texas, some modifications were made to it in each state. In Texas, to invalidate an agreement based on unconscionability, you also have to show inadequate disclosure.⁹⁹ In Nevada, either unconscionability or inadequate disclosure is a ground for invalidating the agreement.¹⁰⁰ Nevada courts have invalidated premarital agreements on the ground of inadequate disclosure alone.¹⁰¹

The Texas version of the UPAA does not define how a court should determine whether an agreement was voluntarily signed. In contrast, the California provision gives some guidance. To be considered a voluntary agreement, the court must find all of the following: (1) the party against whom enforcement is sought either was represented by independent counsel or waived in writing in a separate document the right to such representation; (2) the party against whom enforcement is sought had at least seven days between the time the agreement was first presented and the person was advised to seek independent counsel and the date of execution; and (3) the party against whom enforcement is sought, if unrepresented by counsel, was fully informed of the terms and basic effect of the agreement.¹⁰²

The California statute also imposes limits on alimony waivers. An agreement impacting a right to alimony is unenforceable if (i) the party waiving rights was not represented by independent counsel in connection with the signing of the agreement or (ii) the provision is unconscionable at the time of enforcement.¹⁰³

In contrast to Texas, the New Mexico statute omits the language broadly authorizing spousal support waivers.¹⁰⁴ Except for this deletion, the New Mexico statute is identical to that of Texas. One New Mexico appellate court has announced how courts should determine whether there was duress or undue influence in connection with the signing of the agreement; this standard closely resembles the currently applicable Texas rules.¹⁰⁵

c. Arizona, Idaho, and Louisiana

Like Texas, Arizona and Idaho adopted the UPAA without any changes.¹⁰⁶ There has been little appellate litigation in either of these states to help clarify how the statute will be construed. One Arizona case considered an agreement signed before the UPAA was adopted. The court concluded that the agreement was unenforceable because it was not established that the party waiving rights entered into the agreement understanding the rights she was giving up by signing the agreement.¹⁰⁷ A more recent Arizona case applying the UPAA seems more inclined to uphold premarital agreements.¹⁰⁸ An Idaho court, in a case decided regarding an agreement signed before the UPAA was adopted, construed the “duress” issue much like Texas courts have construed the issue of “involuntary” execution.¹⁰⁹ The Louisiana Supreme Court has stated that parties may waive the right to community property and post-divorce alimony in a premarital agreement.¹¹⁰

⁹⁸ See [Marriage of Matson](#), 107 Wash. 2d 479, 730 P.2d 668 (1986).

⁹⁹ See [TEX. FAM. CODE ANN. § 4.006](#).

¹⁰⁰ See [NEV. REV. STAT. ANN. § 123A.080](#).

¹⁰¹ See [Fick v. Fick](#), 109 Nev. 458, 851 P.2d 445 (1993); [Sagg v. Nevada State Bank](#), 108 Nev. 308, 832 P.2d 781 (1992) (also emphasizing the late presentation of the agreement and the threat to call off the wedding if the agreement was not signed).

¹⁰² See [CAL. FAM. CODE § 1615](#).

¹⁰³ See [CAL. FAM. CODE § 1612](#); [Marriage of Rosendale](#), 199 Cal. App. 4th 1202, 15 Cal. Rptr. 3d 137 (2004).

¹⁰⁴ Compare [TEX. FAM. CODE ANN. § 4.003](#), with [N.M. STAT. § 40-3A-4](#).

¹⁰⁵ See [Lebeck v. Lebeck](#), 118 N.M. 367, 881 P.2d 727, 734 (App. 1994).

¹⁰⁶ See [ARIZ. REV. STAT. § 25-202](#); [IDAHO CODE ANN. § 32-925](#).

¹⁰⁷ See [Hess v. Hess](#), 1993 Ariz. App. LEXIS 244.

¹⁰⁸ See [Marriage of Pownall](#), 197 Ariz. 577, 5 P.3d 911 (App. 2000).

¹⁰⁹ See [Liebelt v. Liebelt](#), 118 Idaho 845, 801 P.2d 52, 55 (App. 1990).

¹¹⁰ See [McAlpine v. McAlpine](#), 679 So. 2d 85 (La. 1996).

B. Spousal Support Rules

1. The Texas View – Substantially Restrict the Power of the Court to Award Support

Until 1997, Texas divorce courts did not have the power to award post-divorce spousal support. Current Texas law gives Texas divorce courts the right to award a limited amount of support in certain instances.¹¹¹ Spousal support is possible if the duration of the marriage exceeds ten years or the spouse from whom maintenance is requested has been convicted of family violence.¹¹² The amount of this maintenance may not exceed the *lesser* of \$2,500 or 20% of the obligor's monthly gross income.¹¹³ The maximum duration is *three years* (regardless of the marriage duration), unless the recipient has a permanent physical or mental disability or is the custodian of a young child.¹¹⁴

2. Rules in Other States

A few other states restrict either the amount¹¹⁵ or duration of the spousal support. Some states create a rebuttable presumption in some instances that support duration should not exceed 50% of the duration of the marriage.¹¹⁶ A few states have established a maximum support duration.¹¹⁷ Yet even in these states that create some limits upon a divorce court's discretion regarding the award of spousal support, in no state do these restrictions approach the level of restrictions imposed in Texas.

In stark contrast with Texas, many states have adopted the rule that indefinite term alimony is appropriate when spouses divorce after a marriage of long duration, the parties' incomes are quite different, and the recipient cannot realistically be trained for an adequate new career.¹¹⁸

C. Summary

Section III above outlines how a number of Texas community property rules result in a smaller community estate than would result applying the rules applicable in California and some other community property states. Section IV shows that in Texas it is more difficult to challenge premarital agreements than in some other states (such as California, Nevada, and Washington) and that a court's power to award spousal support is more limited in Texas than in any other U.S. state.

Premarital agreements are almost always vehicles used by the spouse with more property to limit the rights of the poorer spouse if the parties divorce. Thus, when a premarital agreement is enforced, this almost always means that the poorer spouse will have fewer rights than he or she would have enjoyed under normal Texas community property principles.

It is not uncommon for divorcing spouses to have accumulated little property at the time of divorce.¹¹⁹ This can leave a spouse with low earning capacity at divorce in a precarious financial situation. To the extent such a party's rights have also been limited via a premarital agreement, this can increase the

¹¹¹ See Acts 1997, 75th Leg., Ch. 7.

¹¹² See [TEX. FAM. CODE ANN. § 8.051](#).

¹¹³ See [TEX. FAM. CODE ANN. § 8.055](#).

¹¹⁴ See [TEX. FAM. CODE ANN. § 8.054](#).

¹¹⁵ See [LA. CIV. CODE ANN. Art. 112\(6\)](#) (support amount may not exceed one-third of obligor's income).

¹¹⁶ See [CAL. FAM. CODE § 4320 \(West 2002\)](#) (except for marriages of long duration); [13 DEL. CODE ANN. Tit. 13, § 1512\(d\)](#) (2008) (except for marriages exceeding 20 years duration); [ME. REV. STAT. ANN. Tit. 19-A, § 951-A](#) (except for marriages exceeding 20 years duration).

¹¹⁷ See [KAN. STAT. ANN. § 60-1610\(b\)\(2\) \(2007\)](#) (term may not exceed 121 months); [UTAH CODE ANN. § 30-3-5 \(2008\)](#) (term may not exceed the length of the marriage, absent extenuating circumstances).

¹¹⁸ See generally [Hammer v. Hammer](#), 991 P.2d 195 (Alaska 1999); [Gripshover v. Gripshover](#), 2008 WL 465435 (Ky. 2008); [Bernier v. Bernier](#), 873 N.E.2d 216 (Mass. 2007); [Holley v. Holley](#), 969 So. 2d 842 (Miss. 2007); [Christian v. Christian](#), 742 N.W.2d 819 (N.D. 2007); [Craig v. Craig](#), 617 S.E.2d 359 (S.C. 2005); [Fausch v. Fausch](#), 697 N.W.2d 748 (S.D. 2005); [Sloan v. Sloan](#), 632 S.E.2d 45 (W.Va. 2006); [Chamberlain v. Chamberlain](#), 615 N.W.2d 405 (Minn. App. 2000); [Cox v. Cox](#), 762 A.2d 1040 (N.J. Super. 2000).

For cases from community property states, see [Rainwater v. Rainwater](#), 177 Ariz. 500, 869 P.2d 176 (App. 1994); [Leathers v. Leathers](#), 216 Ariz. 374, 166 P.3d 929 (App. 2007); [Baker v. Baker](#), 3 Cal. App. 4th 491, 4 Cal. Rptr. 2d 553 (1992); [Marriage of Vomacka](#), 36 Cal. 3d 459, 683 P.2d 248, 204 Cal. Rptr. 568 (1984); [McNelis v. McNelis](#), 119 Idaho 349, 806 P.2d 442 (Idaho 1991); [Sprenger v. Sprenger](#), 110 Nev. 855, 878 P.2d 284 (1994); [Rabie v. Ogaki](#), 116 N.M. 143, 860 P.2d 785 (App. 1993); [Marriage of Taver](#), 55 Wash. App. 697, 780 P.2d 863 (1989); [Marriage of Morrow](#), 53 Wash. App. 579, 770 P.2d 197 (1989).

¹¹⁹ See, e.g., [Marsha Garrison, Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes](#), 57 BROOKLYN L. REV. 621, 633 (1991).

likelihood that a spouse with low earning capacity will not be able to be economically self-sufficient after divorce.

In many states, this situation could be addressed via spousal support. However, given the severe restrictions upon the award of spousal maintenance in Texas, in most instances a divorce court will not be able to adequately address the post-divorce needs of a dependent spouse via spousal support.

H. CONCLUSION

This article compares important community property rules now applied in the eight traditional community property states. It establishes that states often apply different rules. Rules applicable in Texas and California often vary; in almost all instances the California rule causes the community estate to increase, while the Texas rule almost always reduces its size.

Compared to a number of other community property states, Texas applies rules to issues frequently encountered at divorce that can significantly reduce the size of the community estate at divorce. Texas now applies a rule accepted in no other state regarding tracing and the division of unmatured defined benefit pension rights. Only Louisiana agrees with Texas regarding the treatment of personal goodwill. There is about an equal split among community property states regarding how to deal with premarriage credit purchases, as well as whether *Periera* can be used. As to these last two issues, Texas opts for the view that reduces the community claim. These differences between Texas law and the rules in other community property states make it more likely that a Texas divorcing spouse with a low earning capacity will not have adequate property to be self-sufficient after divorce.

It is extremely difficult in Texas to successfully challenge the enforcement of a premarital agreement at divorce. Premarital agreements are almost always used to reduce the rights of the party with a lower income if the parties divorce. This aspect of Texas law, coupled with the increasing use of such agreements, also increases the likelihood that a party with a low earning capacity at divorce will have inadequate property to be self-sufficient after divorce.

These problems are exacerbated by the severe restrictions placed upon a Texas divorce court's ability to award post-divorce spousal maintenance. Due to these limitations, a court generally cannot adequately provide for a dependent spouse after divorce with spousal maintenance.

All these reasons make Texas in 2010 an uninviting place for a divorcing spouse with a low earning capacity. In contrast, it can be the most attractive community property state for a spouse with a high income to obtain a divorce without having to transfer as much money to the other spouse as would be required in other community property states.

It does not appear that any significant political force in Texas is interested in changing this situation. The 2009 legislative session suggests that the State Bar Family Law Section has little interest in reforming the aspects of Texas family law discussed above. The Texas State Legislature has a legendary aversion to any expansion of the spousal maintenance statute. Members of the Texas Supreme Court rarely have experience with family law or community property issues; in any event, in recent times they have shown little interest in reviewing important Texas community property rules even if they seem out of step with developments in other states.

So, is Texas destined to remain a divorce haven for the rich? The smart money would probably bet on a continuation of the status quo. But if America can elect a Black president, who knows? Perhaps Texas can reform its community property system.

CHARACTERIZING TRANSACTIONS INVOLVING CLOSELY HELD ENTITIES By Jim Wingate¹

¹ The author thanks Dawn Fowler of Keane, Fowler and Donohue for her helpful review of a draft of this article.

I. Introduction. This article is a survey and comment upon Texas law regarding the characterization of transactions involving closely held entities in the context of the dissolution of marriage, including the acquisition of an interest in an entity, the contribution of assets to form an entity, distributions from entities, the reorganization of entities and the assertion of reimbursement claims with respect to closely held entities.

Following are the main conclusions:

- The total consideration conveyed in return for an ownership interest in an entity, and not simply the recital(s) in the organizing documents, determines the character of the interest received. *See* Section II, “Characterization of Entities at Time of Formation.”
- Contributions to an entity can be characterized differently depending on the form of the contributions as either consideration for stock or as additional paid-in capital. *See* Section III, “Acquisition of an Interest in an Existing Entity.”
- Proceeds received in complete liquidation of an entity will have the character of the interest held in the entity, but the characterization of a partial liquidation depends upon the form of the transaction. *See* Section IV.B., “Liquidation, Partial Liquidations and Redemptions.”
- Interests received as a result of both mergers and divisive reorganizations (spin-offs, split-offs and split-ups) are a mutation in form of the original interests held and take the character of the original interest held. *See* Section V, “Business Reorganizations.”
- Both contributions to separate property entities and amounts expended in payment of fees to acquire an interest in separate property entities create claims for reimbursement, but are subject to reductions for offsetting benefits. *See* Section VI, “Reimbursement Claims.”

The characterization of distributions from partnerships was discussed in a separate article. *See* Jim Wingate, *Whose Money Is It? The Characterization of Partnership Distributions*, 6 State Bar of Tex. Family Law Section Report, 10 (2009).

II. Characterization of Entities at Time of Formation. If a spouse can prove that he or she contributed the separate property assets of his or her sole proprietorship to form an entity, then that spouse will hold a separate property interest in the entity in proportion to the value of separate property assets contributed to the value of total assets contributed in formation of the entity. *See* [Vallone v. Vallone, 618 S.W.2d 820, 822](#) (Tex. Civ. App.—Houston [1st Dist.] 1981, rev’d on other grounds, 644 S.W.2d 455 (Tex. 1982)). The spouse claiming separate property must prove by clear and convincing evidence that the assets were contributed for an ownership interest, not just that they were contributed. [Vallone, 618 S.W.2d at 822](#). In *Vallone*, the husband was able to prove that assets of his sole proprietorship restaurant were contributed to Tony’s Restaurant, Inc. upon its incorporation in return for shares of stock in that corporation. However, because he was only able to prove by clear and convincing evidence that 47% of the assets he contributed came from his separate property proprietorship, only 47% of the shares were received by him as his separate property. *See also* [Koss v. Koss, 2005 WL 1488070, *2](#) (Tex. App.—Waco 2005, no pet.) (mem. op.) (shares capitalized entirely with separate property are separate property).

In a factually simpler case, the husband was a partner with his father in a separate property partnership that owned and operated two helicopters. *See* [Hunt v. Hunt, 952 S.W.2d 564](#) (Tex. App.—Eastland 1997, no pet.). The partnership in *Hunt* was terminated upon the death of the husband's father, and the helicopters were distributed to the husband. The husband subsequently capitalized a new corporation, contributing the helicopters in return for shares in the company. The trial court confirmed the new corporation as the husband’s separate property. Noting that there was nothing in the record to show that the husband either used community assets or incurred community debt to form the corporation, the Eastland court of appeals upheld the characterization of the corporate stock as husband’s separate property as a mutation in form of the helicopters.

Frequently in divorce cases in which a spouse has transferred proprietorship assets to an entity, an issue arises as to whether those assets were contributed in return for an ownership interest. This issue can arise with respect to the formation of virtually any entity. For example, it can occur when a sole proprietorship is incorporated. On occasion, corporations are formed by a contribution of sole proprietorship assets to form the cor-

poration. Sometimes the incorporation is accomplished without any written acknowledgment that the assets of a previously existing sole proprietorship are being contributed to the formation of the corporation. The owner of the business simply has an attorney prepare articles of incorporation, and the attorney uses his or her standard form, which frequently recites that the corporation was formed by the contribution of \$1,000.00 of funds or services.² This recitation creates an issue as to whether the former proprietor received shares of the newly-formed corporation in return for the contribution of his or her proprietorship assets to the corporation, or, alternatively, received the shares in exchange for \$1,000.00 plus those assets.

For example, assume that a husband's existing proprietorship is incorporated as a limited liability company ("LLC"), and that the proprietorship held mineral leases, all of which were owned prior to his marriage. He wants to develop the leases, but he also wants to avoid personal liability for any accidents that might occur during the drilling of wells on the leases. Therefore, for purposes of avoiding personal liability, he forms an LLC, and contributes the leases to it. The husband has a business associate who will also contribute his mineral leases to the LLC.

The operating agreement provides that the husband and his associate each hold a 50% interest in the LLC. It is not unusual for the operating agreement of a LLC to recite the respective percentage ownership interests that are allocated to each member, without indicating what, if anything, was contributed by the member(s) in return for that interest. Assume that this is the case in this example, and there is no recitation in the LLC's operating agreement that the husband is contributing his leases in return for his interest in the LLC. On the same day that the husband forms the LLC, he also executes assignments conveying his interest in each of the leases to the LLC. Does the failure of the operating agreement to recite that the husband is receiving his one-half interest in the LLC in return for the contribution of his leases result in his interest in the LLC being characterized as community property? If an inquiry regarding the characterization of an interest in an LLC is limited solely to an examination of an operating agreement that is silent as to the capital contributed, then this would be the case because the interest received is not tied to the contribution of the separate property. For the reasons discussed below, I do not believe that this is the case.

Some attorneys and forensic CPAs believe that if the articles of incorporation recite that the initial capitalization is \$1,000, shares received upon incorporation of a proprietorship are community property absent clear and convincing evidence that the \$1,000 initial capital that is recited in the articles of incorporation is separate property, in spite of the fact that there was clearly an incorporation of an existing proprietorship. The basis for their belief is that, based upon the inception of title rule, a recitation in the articles of incorporation that \$1,000 was contributed to the corporation conclusively establishes the character of the shares received.

There do not appear to be any Texas cases that hold that an inquiry as to the character of shares received upon incorporation is limited exclusively to an examination of the character of the \$1,000 that is stated as the initial capital in the articles of incorporation. The Fort Worth court of appeals is clearly of the opinion that a recitation in the articles of incorporation that certain funds were contributed in formation of the corporation does not prevent a spouse from giving evidence that separate property assets of a proprietorship were also contributed in return for shares. See [Allen v. Allen, 704 S.W.2d 600 \(Tex. App.—Fort Worth 1986, no writ\)](#).

In *Allen*, the wife owned a beauty salon prior to the marriage, and she incorporated the business during the marriage. The court of appeal's opinion notes that \$1,000 was required for initial capitalization of the corporation, and, in the absence of evidence to the contrary, this amount was presumptively community property. The proprietorship had no tangible assets. However, the wife provided evidence that the management, employees and clientele were the same for the corporation as for the proprietorship, and asserted that she contributed her separate property commercial goodwill to the corporation. The Fort Worth court of appeals accepted the wife's theory that separate property commercial goodwill contributed to a corporation upon formation could be the basis for separate property ownership in shares received in spite of a recitation (presumably in the articles of incorporation) that there was only \$1,000 of initial capital contributed to form the corporation. However, because the wife offered no testimony regarding the value of the goodwill, she failed to prove her separate property interest in the shares. The difficulty with determining the views of the courts of

² Incorporation in Texas previously required that a corporation could not commence business until it had received at least \$1,000 in value as consideration for its shares. The composition of the \$1,000 consideration could at various times be cash, or cash, services or property. See [TEX. REV. CIV. STAT. ANN. ART. 3.05 \(Vernon 1956, 1980 and 2003 Supplement\)](#). This requirement was repealed effective September 1, 2003. See Acts 2003 78th Leg., ch. 238, § 44(2).

appeals on this issue is that the cases typically do not discuss what recitations may have been in the articles of incorporation regarding initial capital, but instead describe the assets contributed and the character of those assets.

The Houston court of appeals considered a somewhat analogous situation in a case involving the gifting of shares by the husband's father. See [Rusk v. Rusk](#), 5 S.W.3d 299 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). In *Rusk*, the husband's father transferred all shares of a corporation to him during the parties' marriage, and the share certificates recited that they were transferred for value received. The husband testified that no consideration was exchanged in return for the shares, and that all income generated by the corporation was distributed to him from the time it was incorporated five years prior to the marriage. Additionally, the wife presented no controverting evidence that the shares were obtained in return for either funds or the efforts of the spouses. The trial court found that the shares were community property.

In spite of the recitation on the shares that they were issued for consideration, the Houston court of appeals in *Rusk* held that the shares were the husband's separate property. In reaching its decision, the court of appeals held that "[t]he major consideration in determining the characterization of property as community or separate is the intention of spouses shown by the circumstances surrounding the inception of title."³ [Rusk](#), 5 S.W.3d at 303. The Fort Worth and El Paso courts of appeal also have adopted this approach. See [Boyd v. Boyd](#), 131 S.W.3d 605, 612 (Tex. App.—Fort Worth 2004, no pet.); [Scott v. Estate of Scott](#), 973 S.W.2d 694, 695 (Tex. App.—El Paso 1998, no pet.). These cases support an inquiry into the full circumstances under which a spouse received an interest in an entity.

There is also another basis for extending the characterization inquiry beyond a mere examination of the document forming the entity. In construing contracts, separate documents that are executed "at the same time, for the same purpose, and in the course of the same transaction are to be construed together." [Jim Walter Homes, Inc. v. Schuenemann](#), 668 S.W.2d 324, 327 (Tex. 1984). Thus, in *Jim Walter's Homes, Inc.* the Texas Supreme Court held that three documents, all executed on the same day, constituted the entire contract. *Id.* See also [Frost National Bank v. Burge](#), 29 S.W.3d 580 (Tex. App.—Houston [14th Dist.] 2000, no pet.); [Bris-tol-Myers Squibb Co. v. Barner](#), 964 S.W.2d 299, 302 (Tex. App.—Corpus Christi 1998, no pet.) (construing documents together even though not signed contemporaneously). Thus, in [Bush v. Brunswick Corp.](#), 783 S.W.2d 724 (Tex. App.—Fort Worth 1990, pet. denied), the Fort Worth court of appeals construed a merger agreement with a shareholder agreement in concluding that seven controlling shareholders were third-party beneficiaries of the merger agreement. The Fort Worth court of appeals also noted that application of this rule of construction applies to instruments that are executed at different times and that do not refer to each other. *Id.* at 728 – 729.

To the extent that an entity's formation document can be considered a contract, then the above rule of construction would apply, and all related documents should be read together as constituting the entire agreement. As an example, consider the formation of an LLC. An LLC is formed upon the filing of a certificate of formation, as is true for all entities governed by the Texas Business Organizations Code ("TBOC"). See TBOC § 3.001(c). The operations of the company are governed by an operating agreement and, to the extent the operating agreement does not otherwise provide, are also governed by Title 3 (Limited Liability Companies) of the TBOC and by the provisions of Title 1 (General Provisions) that are applicable to limited liability companies.⁴ See TBOC § 101.052(a) and (b). Generally, the operating agreement will state the relative ownership interests of the various members. If the operating agreement does not identify the assets contributed by each member, then the rule of construction that allows separate documents to be construed together if they deal with the same transaction would permit consideration of related documents such as assignments and other transfer documents in determining the character of the interest acquired by the members. If formation documents cannot be considered a contract, then the holding in *Rusk* would apply, and would permit an examina-

³ However, mere intention alone, without supporting facts, will not affect the character of property. See [Matter of Marriage of York](#), 613 S.W.2d 764, 769 (Tex. Civ. App.—Amarillo 1981, no writ); see also, [Holloway v. Holloway](#), 671 S.W.2d 51 (Tex. App.—Dallas 1983, writ dismissed) (unilateral intention of spouse insufficient to establish separate character of borrowed funds).

⁴ An operating agreement (referred to in the TBOC as a "company agreement") can either be in writing or can be oral. The fact that there is only one member of an LLC does not cause the operating agreement to be unenforceable. See TBOC § 101.001(1). Any provision permitted in an operating agreement can alternatively be included in the certificate of formation of an LLC. See TBOC § 101.051(a).

tion of the circumstances of the formation of the entity.

III. Acquisition of an Interest in an Existing Entity. Frequently, closely held entities will change owners or add additional owners. This circumstance usually presents factually simpler characterization issues than the formation of a new entity. The same tracing concepts apply in these situations as in the case of interests acquired in any public entity. That is to say, if the assets used to purchase an interest in a closely held entity are separate in character, then the interest acquired is separate. See [*Estate of Hanau*, 730 S.W.2d 663 \(Tex. 1987\)](#).

However, acquisitions of additional interests in closely held entities can create unforeseen characterization issues. Assume for example that a husband owns shares of a closely held corporation. The corporation owns unimproved land that is being held for investment, and the shareholders make payments pro rata based on their respective ownership interests to the corporation each year for a number of years to cover the carrying costs of the land. There are two possible treatments by the corporation for the additional amounts contributed: either shares are issued to the shareholders in return for their contributions or no shares are issued, and, instead, additional paid-in capital is credited for the amount of the contributions to the corporation. Assume further that the original shares are the separate property of the husband, and all subsequent contributions to the corporation are made from community funds.

Regardless of which of the above two methods of funding the carrying costs of the land is used, all shareholders would continue to hold the same relative interests in the corporation because their contributions are all made on a pro rata basis, but the two methods of funding operations will result in entirely different outcomes with respect to the character of the husband's interest in the corporation. When the husband is issued shares in return for his additional investment in the corporation, those shares will be community property because they represent a mutation in form of the community cash contributed to the corporation. On the other hand, if no shares are issued and the corporation classifies the contribution as additional paid-in-capital, then the husband's entire interest in the corporation remains his separate property because he holds the same number of shares both before and after the contribution to the corporation. In that circumstance, the community estate has only a reimbursement claim against the husband's separate estate. Is it a breach of fiduciary duty for the husband to structure the contribution to the corporation as additional paid-in-capital so that the community estate will not acquire an interest in the corporation in return for the funds remitted?

Post-formation contributions of additional capital to partnerships create a somewhat more complex issue. Such contributions are especially common in limited partnerships that are organized for purposes of the development of either real estate or natural resources. Unlike corporations, there typically are no share certificates issued evidencing ownership, and the concepts of share capital and additional paid-in capital are not applicable to partnerships.⁵ There is simply a capital account, and partners normally are entitled to repayment of their capital contributions in accordance with the terms of the partnership agreement.

To the extent, then, that a contribution to a capital account increases a partner's ownership of capital, there could be mixed title in the ownership of that capital, part separate and part community, depending on the contributions by each estate to the capital of the partnership. Even though a partner's percentage ownership in partnership capital may not change as a result of a contribution of capital subsequent to the formation of a partnership, the community estate should nonetheless have a claim with respect to community funds that are contributed to the partnership because these funds are repayable to the partner spouse in accordance with the terms of the partnership agreement. If community funds that are contributed as additional capital also result in the partner spouse receiving an additional interest in partnership profits, then that additional interest in profits should also be characterized as a community interest. It is worth noting that the sharing ratio for profits does not necessarily directly correlate to the ownership of capital, and is dependent upon the terms of the partnership agreement. However, as discussed below, Texas courts have treated post-formation contributions of community funds to a separate property partnership as reimbursement claims, and not as claims to partnership capital.

IV. Distributions: Dividends, Liquidations, Partial Liquidations, and Redemptions. Corporate distribu-

⁵ Public limited partnerships, also known as master limited partnerships, are the exception to this. Since they are registered with the SEC and traded on securities exchanges, ownership units are issued. The issuance of certificates of ownership by a partnership is authorized by the TBOC § 3.201(e)(1).

tions are defined under TBOC Title 2 (Corporations), § 21.002(6)(A), as including three categories of transfers of property by a corporation: a dividend, a purchase or redemption of a corporation's own shares, and payments in liquidation of all or a portion of its assets. The board of directors may authorize distributions, but distributions may not violate the corporation's certificate of formation, and are limited in other respects. *See* TBOC §§ 21.302 and 21.303. If made in dissolution of a corporation, distributions must comply with the requirements of TBOC Chapter 11 (Winding Up and Termination of Domestic Entity). *See* TBOC § 21.303. Distributions that are not made pursuant to a plan of dissolution may not be made if they would result in the corporation becoming insolvent or if they exceed the amount of corporate surplus (i.e., the excess of net assets over stated capital). *See* TBOC §§ 21.303, 21.301(1)(B) and §21.002(12). There are also other limitations on corporate distributions that apply in certain very narrow circumstances. *See* TBOC § 21.301.

A. Cash Dividends, Stock Splits and Stock Dividends. It is hornbook law that cash dividends paid on stock are community property absent an enforceable agreement between spouses to the contrary, regardless of the character of the underlying stock. *See, e.g., Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). The characterization of stock splits is similarly intuitive. Stock splits occur when the corporate directors decide to reduce the market value of their shares by issuing additional shares. A 2-for-1 split is one of the more common ratios. This results in each shareholder holding double the number of shares that he or she originally held. On the corporate books of record, the effect of the split is to reduce the per-share par value in proportion to the number of additional shares being issued.

For example, in a 2-for-1 stock split the par value of each share would be one half that of the par value prior to the split, resulting in the same total amount of capital reported on the books after the split as was reported prior to the split. Shares received in a stock split simply represent smaller pieces of the same pie, resulting in a mutation in the form of the shares previously held. As such, the additional shares have the same character as the original shares. *See Tirado v. Tirado*, 357 S.W.2d 468, 473 (Tex. Civ. App.—Texarkana 1962, writ dismissed).

The treatment of stock dividends, i.e., dividends paid in the form of shares of stock, is counterintuitive. Since they are styled as dividends, you might believe that they represent income, and therefore would constitute community property upon their receipt. On the books of record of the corporation, the issuance of a share dividend is recognized by debiting (reducing) retained earnings and crediting (increasing) capital and/or paid in capital. Thus, the effect of the issuance of a share dividend is similar to the issuance of a cash dividend in that both are charged to retained earnings.

However, dividends paid in stock are not actually dividends. Under TBOC § 21.002(6)(A)(B)(ii), the transfer of a corporation's own shares is excluded from the definition of "distribution," which is the category that includes dividends. Thus, since a share dividend is not a distribution, it cannot be a dividend, in spite of the fact that it reduces the retained earnings of a corporation. Texas courts have consistently held that stock dividends take the character of the shares with respect to which they are paid. *See, e.g., Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.—Corpus Christi 1997, no pet.) (holding that stock received as dividends on stock purchased prior to marriage remains the separate property of the spouse owning the shares); *Wohlenberg v. Wohlenberg*, 485 S.W.2d 342 (Tex. Civ. App.—El Paso 1972, no writ); and *Johnson v. First Natl. Bank of Fort Worth*, 306 S.W.2d 927 (Tex. Civ. App.—Fort Worth 1957, no writ).

In perhaps the only case in which there is any legal analysis regarding characterization of stock dividends, the Fort Worth court of appeals observed in *Johnson* that there was no increase in the husband's proportionate ownership interest in the corporation as a result of a stock dividend, and any increase in value of the stock was attributable to retained earnings, which are not regarded as community property. *See Johnson*, 306 S.W.2d at 930. Although not controlling with respect to the characterization of property under Texas law, it is worth noting that stock dividends generally are not treated as income under the [Internal Revenue Code](#). *See* 26 U.S.C.A. § 305.

B. Liquidations, Partial Liquidations and Redemptions. A corporate dividend is defined as "[a] portion of a company's earnings or profits distributed pro rata to its shareholders, usually in the form of cash or additional shares." BLACK'S LAW DICTIONARY 547 (9th ed. 2009). Liquidating distributions of a corporation, on the other hand, include "a transfer of money by a corporation to its shareholders in liquidation of all or a por-

tion of its assets.” [*Le-Grand Brock v. Brock*, 246 S.W.3d 318, 322](#) (Tex. App.—Beaumont 2008, pet. denied) (citing BLACK’S LAW DICTIONARY 508 (8th ed. 2004)). Liquidating distributions can be made with respect to all owners of an entity or with respect to fewer than all. They can be in complete liquidation of an entity, or in partial liquidation. There have been only a few Texas cases in which courts have considered the issue of the character of liquidating distributions.

1. The Early Cases. [*Wells v. Hiskett*, 288 S.W.2d 257](#) (Tex. Civ. App.—Texarkana 1956, writ ref’d n.r.e.), was one of the earliest cases, if not the earliest case, to consider the issue of the characterization of a liquidating distribution received by a shareholder with respect to shares held in a dissolving corporation. In *Wells*, the husband held shares of a corporation as his separate property, and the corporation distributed interests in an oil and gas lease to both him and the other shareholders in complete liquidation of the corporation and in consideration of the cancellation of their shares. The Texarkana court of appeals held that the leases were received by the husband as his separate property. [*Id.* at 259.](#)

In the year following *Wells*, the El Paso court of appeals considered the issue of the characterization of a liquidating distribution in [*Fuhrman v. Fuhrman*, 302 S.W.2d 205](#) (Tex. Civ. App.—El Paso 1957, writ diss’m’d). In that case, the husband, Fred Fuhrman, owned shares of Fuhrman Petroleum Company (“Fuhrman Company”) prior to the parties’ marriage. During their marriage, Fuhrman Company was liquidated, and shares of Fuhrman Petroleum Corporation (“Fuhrman Corporation”), a wholly-owned subsidiary of Fuhrman Company, were distributed to the shareholders in proportion to their ownership. The trial court held that the shares of Fuhrman Corporation distributed to Fred in liquidation of Fuhrman Company were community property.

The El Paso court of appeals held, however, that “there is no question but what said stock was the separate property of Fred Fuhrman by virtue of his ownership of the stock in the company which was acquired prior to his marriage.” There is no analysis of the law in this decision other than the foregoing holding. Also, there were presumably other assets distributed in liquidation of Fuhrman Company, but no mention is made of any other assets being distributed pursuant to the plan of liquidation.

2. *Le-Grand Brock I.* The issue of the character of a liquidating distribution from a corporation was more recently considered in [*Legrand-Brock v. Brock*, 2005 WL 2578944](#) (Tex. App.—Waco 2005, no pet.) (unreported) (hereafter “*Le-Grand Brock I*”). In that case, the husband, Roy, owned 740.5 shares of BTH Holdings, Inc. (“BTH”) prior to his marriage to his wife, Stace. Within one month of the parties’ marriage, the shareholders of BTH voted to dissolve the corporation. The corporation was chartered under Delaware law, which allows the dissolution process to continue over a three-year period. Roy received four payments from BTH totaling approximately \$7 million over a thirty-two month period. During the trial, Stace’s expert attempted to offer testimony regarding the character (separate or community) of the corporate distributions. The trial judge ruled that, as a matter of law, the liquidating distributions were received by Roy as his separate property, and therefore excluded Stace’s expert’s testimony. Stace preserved error by making an offer of proof. As shown by the offer of proof, Stace’s expert was prepared to testify that BTH paid “liquidation dividend distributions” to Roy from its retained earnings.

Stace subsequently appealed on numerous grounds, including an argument that the exclusion of her expert’s testimony was reversible error. Under a docket equalization order, Stace’s appeal was heard by the 10th Circuit Court of Appeals in Waco. The Waco Court of Appeals held that there was a fact issue as to whether the payments to Roy represented proceeds from the sale or exchange of his stock (separate property) or were dividends (community property). Therefore, the court of appeals held that it was error to exclude the testimony of Stace’s expert. Chief Justice Gray dissented, noting that liquidating distributions retain the character of the stock with respect to which they are paid. Since it was undisputed that the BTH shares were Roy’s separate property, Chief Justice Gray believed that, as a matter of law, the liquidating distributions were Roy’s separate property.

3. *Le-Grand Brock II.* In the second trial, the trial judge once again concluded that BTH’s payments to Roy were liquidating distributions made under BTH’s plan of liquidation, and therefore “were in redemption or cancellation of his separate property stock.” [*Le-Grand Brock v. Brock*, 246 S.W.3d 318, 320](#) (Tex. App.—Beaumont 2008, pet. denied) (hereafter, *Le-Grand Brock II*). As such, the payments were received by Roy as

his separate property.

Stace again appealed, contesting the trial court's characterization of the liquidating distributions. The second appeal, however, was heard by the Beaumont court of appeals. The issue to be decided by the Beaumont court of appeals was whether the distributions of retained earnings by the corporation were simply dividends paid to Roy, and therefore income from separate property, or whether the distributions to Roy were an exchange of the corporate assets for his stock, and therefore were received as a mutation in form of the stock.

The Beaumont court of appeals noted that the controlling facts in the case were uncontroverted by Stace's expert on remand, and it held that the characterization of the liquidating distributions based on uncontroverted evidence was a matter of law for the court to decide. Citing both [Black's Law Dictionary and TEX. BUS. CORP. ACT ANN. Art. 1.02\(A\)\(13\)\(c\) \(Vernon Supp. 2007\)](#) (now codified as TBOC § 21.002(6)(A)(iii)), the court of appeals further held that a liquidating distribution includes the transfer of funds to shareholders in complete or partial liquidations of the corporation. The Beaumont court of appeals then held that "[i]t is immaterial to the characterization of the property in this case that the assets distributed on dissolution were the corporation's retained earnings." [Le-Grand Brock II, 246 S.W.3d at 322](#). The court of appeals therefore held that the liquidating distributions were exchanged for Roy's separate property stock, and were consequently received as his separate property.

In its decision, the Beaumont court of appeals cited the earlier cases of *Wells*, 302 S.W.2d, and *Fuhrman*, 288 S.W.2d, as well as a case dealing with a buyout of a partnership interest (*Harris*, see [infra](#)) in support of its position, and also observed in a footnote that the Internal Revenue Code, although not controlling, treats liquidating distributions as payments received in exchange for stock. The Beaumont court of appeals also cited a U.S. Supreme Court case from 1927 that drew a distinction between liquidating distributions and dividends.

4. Summary of the Current State of the Law on Complete Liquidations. In the three Texas cases that address the issue of the complete liquidation of a corporation (*Wells*, *Fuhrman* and *Le-Grand Brock II*), the courts of appeals of Texarkana, El Paso, and Beaumont all take the position that amounts distributed in total liquidation of a corporation have the character of the underlying shares. *Le-Grand Brock I*, heard by the Waco court of appeals, is the only case in which there is any indication of even a possibility that the character of a liquidating distribution might be community property regardless of the character of the cancelled shares. As noted above, in *Le-Grand Brock I* the Waco court of appeals held that there was a fact issue as to whether the liquidating distributions received by Roy were in exchange for his stock or were received by him as dividends. However, in *Le-Grand Brock II*, the Beaumont court of appeals held that the fact that the assets distributed to Roy represented the retained earnings of the corporation was not relevant to the characterization of the liquidating distributions. Additionally, there is a memorandum opinion from the Dallas Court of Appeals holding that funds received in liquidation of the husband's separate property company were his separate property. See [Moore v. Key, 2003 WL 194725 \(Tex. App.—Dallas 2003, no pet.\) \(mem. op.\)](#) (characterizing checks received in total liquidation of husband's separate property company as separate property). The weight of Texas cases clearly favors the treatment of distributions in total liquidation of a corporation in cancellation of its shares as a mutation in form of those shares.

5. Example Comparing Complete Liquidation to Sale of Shares. The treatment of complete liquidations of interests in corporations as a mutation in form for those entities is entirely consistent with the treatment of the sale of an interest in an entity as a mutation in form. For example, assume that a spouse owns one-half of the issued and outstanding shares in a closely held corporation that has net equity of \$1,004,000.00, consisting of retained earnings of \$1,000,000 and share capital of \$4,000.00. One half of the net equity is therefore \$502,000.00. Assume further that the spouse owned the shares prior to marriage, and that he or she, with the other shareholder's agreement, arranged to sell his or his or her shares for \$802,000. The law is clear that the proceeds of sale would be the spouse's separate property because they are a mutation in form of the original shares, which were separate. Now assume that instead of selling his or her shares, the corporation liquidated, and the spouse received his or her one-half interest in the net equity of the corporation, which would be \$502,000.00, and the shares were canceled. In both examples, the spouse is receiving payments related to retained earnings. In the first scenario, the value of the retained earnings is factored into the purchase price. In

the second, retained earnings are being paid directly to the spouse by the corporation. In both instances, whether it is a sale of shares or a liquidation of the corporation, the spouse receives payments that derive at least in part from the retained earnings of the corporation. It is entirely consistent, then, to characterize both liquidating distributions and sales proceeds as a mutation in form of the related stock. This same analysis applies to liquidations of other forms of entities.

6. Complete Liquidations of Partnerships. There do not appear to be any Texas cases in which the courts of appeal consider the characterization of the proceeds received by the partners in complete liquidation of a partnership. However, the Houston court of appeals has considered the issue of the characterization of a liquidation of a single partner's interest in a law partnership. In 1988, that court considered the character of a liquidating distribution paid by a partnership to a partner. See [*Harris v. Harris*, 765 S.W.2d 798](#) (Tex. App.—Houston [14th Dist.] 1988, writ denied). In *Harris*, the Houston Court of Appeals considered the character of a payment by a partnership to redeem a partner's interest. The court of appeals held that payments to the husband in total liquidation of his interest in a partnership were his separate property because they represented a mutation in form of his partnership interest. If the redemption of a single partner's interest results in a mutation in form of his partnership interest, then the redemption of all partners' interests in total liquidation of the partnership would also represent a mutation in form, and the proceeds of liquidation would have the same character as the partnership interests surrendered. This would be consistent with the Beaumont court of appeals' treatment in *Le Grand Brock II* of liquidating distributions from a corporation.

7. Partial Liquidations of Corporations. Although there have been several Texas cases dealing with the characterization of liquidating distributions received by the shareholders in total dissolution of a corporation, there do not appear to be any that deal with the characterization of funds received in partial liquidation of a corporation. Do partial liquidations paid with respect to shares that are separate in character represent a mutation in form of the underlying shares, as is the case for complete liquidations, or do they represent a dividend, and therefore are income from separate property? The definition of "distribution" under TBOC § 21.002(6)(A)(iii) includes both partial and total liquidating payments ("a payment by the corporation in liquidation of all or a portion of its assets"). Also, the TBOC distinguishes liquidation payments, both partial and total, from dividends. See TBOC § 21.002(6)(A)(i) and (iii). In order to be characterized as income from separate property, and hence a community asset, does a payment in partial liquidation of a corporation have to qualify as a dividend? If partial liquidations are not dividends, then what does a partial liquidation represent?

a. Partial Liquidations Accompanied by a Redemption of Shares. For federal income tax reasons, partial liquidations have historically been accompanied by a redemption of shares in order to qualify for capital gains treatment under [26 U.S.C.A. §302](#).⁶ It would seem that when a partial liquidation is in redemption of all of the shares of a single shareholder, it is a mutation in form of those shares, and the liquidating proceeds would have the character of the redeemed shares. This conclusion is reached from a reading of *Le-Grand Brock II* and the other cases discussed above that hold that distributions in total liquidation of a company represent a mutation in form of the underlying shares. The holding in *Le-Grand Brock II* is based on the premise that a liquidating distribution of assets accompanied by the cancellation of all corporate shares represents a mutation in form of those shares. What constitutes a mutation in form for all shareholders should also constitute a mutation in form for a single shareholder who redeems all of his or her shares in return for a liquidating distribution.

As noted by Richard Orsinger and Patrice Ferguson in their comprehensive article written for the 2008 Advanced Family Law Course, some attorneys and forensic CPAs believe that it is necessary to trace assets within a corporation in order to characterize a distribution from a corporation in partial liquidation as separate property. See Richard R. Orsinger and Patrice L. Ferguson, *Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law*, 2008 Advanced Family Law Course, Ch. 30, p. 15. Those attorneys and CPAs further reason that, because corporate assets are not owned by the

⁶ Although capital gain treatment has been less important during the era of the Bush tax cuts due to the reduction of the tax rate for dividends, this treatment still matters for those who have capital losses to offset against capital gains. Also, those tax reductions are due to expire at the end of 2010.

shareholders, they cannot be characterized as either separate or community property, and therefore you cannot trace “through” a corporation. *Id.*; see also [Mandell v. Mandell, 310 S.W.3d 531, 539](#) (Tex. App.—Fort Worth 2010, pet. denied) (holding that property held by a corporation is neither separate nor community property of the shareholders).

Their reasoning is based on the premise that in order to prove the separate character of a liquidating distribution, it is necessary to trace inside a corporation. This is essentially the holding of the Dallas court of appeals in *Marshall*, which concluded that because it was impossible to trace assets inside a partnership, it was impossible to prove the separate property character of any partnership distributions. See [Marshall v. Marshall, 735 S.W.2d 587](#) (Tex. App.—Dallas 1987, writ ref’d n.r.e.). However, an argument can be made that tracing inside an entity is not needed in order to characterize distributions from an entity. See Jim Wingate, *Whose Money Is It? The Characterization of Partnership Distributions*, 6 State Bar of Tex. Family Law Section Report, 10 (2009).

b. Partial Liquidations Unaccompanied by a Redemption of Shares. There is no requirement, however, that a partial liquidation be accompanied by a redemption of shares. Implicit in the definition of a partial liquidation as stated in the TBOC is a sale by an entity of part of its assets, followed by the distribution of the proceeds of liquidation to the owners. See TBOC § 21.002(6)(A)(iii) (“a payment by the corporation in liquidation of all or a portion of its assets”). A typical fact pattern involves a corporation that has disposed of a line of business by selling the assets of that line and then distributing the proceeds of sale to the shareholders. When the sales proceeds are ultimately distributed to the shareholders, the corporation will charge retained earnings, thereby reducing retained earnings in the same manner as it would be reduced by the payment of a dividend. If no shares are redeemed, there is obviously no mutation in form of the shares of the corporation because the same shares are held both before and after the partial liquidation.

There are two possible sources for a payment in partial liquidation of a corporation: retained earnings and stated capital. However, there are only certain conditions under which stated capital of a corporation can be reduced. See LAWRENCE G. NEWMAN, TEXAS CORPORATION LAW, § 9.7 (Release #9, 2009). Except in the case of shares without par value, reduction of stated capital must involve either an amendment of the certificate of formation or cancellation of shares. *Id.* For shares without par value, stated capital can be reduced only by the affirmative vote of a majority of the shareholders. *Id.* Thus, there can be a reduction of stated capital in the context of a partial liquidation only if there is a concurrent redemption of shares, amendment of the certificate of formation or the approval of the majority of shareholders. If any of the foregoing conditions are met, it would be possible for a partial liquidation to include a return of capital to the extent of a reduction in the stated capital of the corporation. Any return of stated capital of the corporation to its shareholders would represent a mutation in form of the investment held in the corporation. If the shares are separate, the capital returned would also be separate.

A partial liquidation unaccompanied by a redemption of shares creates something of an anomaly for purposes of the characterization of marital property. As noted above, dividends appear to be excluded from the category of liquidating payments under the three categories of distributions in the TBOC. If a liquidating payment is not a dividend, can it be classified as income from separate property for purposes of marital property characterization? To the extent that it is not a return of the invested capital, every partial liquidation is a distribution of retained earnings. The only reason that the receipt of a distribution of retained earnings in redemption of shares is treated as separate property is because it is viewed as an exchange of the shares in return for the distribution, and therefore a mutation in form. Without an exchange, there can be no mutation in form, and without a mutation in form, any distribution of retained earnings, regardless of whether it is characterized as a dividend or a partial liquidation, represents income from separate property.

V. Business Reorganizations: Name Changes, Mergers, Conversions, Spin-offs, Split-Offs and Split-ups.

A. Name Change. Perhaps the simplest of all reorganizations is a name change. Texas courts have recognized the obvious: the change of an entity’s name does not create a new entity. See [Northern Natural Gas Company a Div. of Enron Corp. vs. Vanderburg, 785 S.W.2d 415,421](#) (Tex. App.—Amarillo 1990, no writ)

(changing the name does not change the identity of a corporation). Obviously, a change in name does not change the entity in which a spouse has invested, and the character of the property remains the same.

B. Mergers. A merger occurs when one entity merges into another. Under the TBOC, any entity formed under or governed by the TBOC can merge with any other form of entity created under the TBOC. *See* TBOC §§ 1.002(55) and 10.001. Thus, all the various forms of entities—corporations, limited liability corporations, partnerships, limited liability partnerships, etc.—can participate in a merger. With large corporations, the methods for accomplishing mergers can become quite complex, employing techniques such as reverse triangular mergers in which a subsidiary of the acquiring corporation merges into the target corporation with the shareholders of the target corporation receiving shares of the acquiring corporation. This results in the target corporation surviving the merger as a subsidiary of the acquiring corporation. For most closely held entities, however, the circumstances of the merger are much simpler—one entity (the acquired entity) merges into another (the acquiring entity), with the shareholders of acquired entity receiving an ownership interest in the acquiring entity.

Horlock was one of the earliest Texas cases to consider the effect of a merger on the characterization of shares received in a merger. [*Horlock v. Horlock*, 533 S.W.2d 52 \(Tex. Civ. App.—Houston \[14th Dist.\] 1976, writ dismissed w.o.j.\)](#). In that case, the husband owned stock in the corporation prior to the parties' marriage. During the marriage, the corporation in which the husband originally held shares merged with two other corporations, and the husband received shares in the surviving corporation. Surprisingly, the trial court found that the shares of stock that the husband received in exchange for his old shares were community property. The Houston court of appeals overturned the trial court, holding that the shares received in exchange for the original shares were a mutation in form of the original shares, and therefore had the same character as the original shares.

More than just an exchange of shares can be involved in the merger. In a case heard in 2010 by the Amarillo court of appeals, the husband received not only shares of stock in the merger but also cash, and the amount of cash was based upon post-merger performance of the surviving company under an "earnout agreement." *See* [*In re Marriage of Watson*, 2010 WL 346153 \(Tex. App.—Amarillo 2010, no pet.\) \(mem. op.\)](#). The wife in *Watson* argued that the earnout cash was community property either because it was compensation paid to her husband for services to the company or because it was income from his separate property shares. The trial court ruled that the earnout cash was the husband's separate property, and the Amarillo court of appeals upheld this ruling. In its opinion, the court of appeals pointed to several factors as evidence of the fact that the earnout cash represented a mutation in form of the shares and not compensation or income from separate property. These were that it was paid to each of the former shareholders in proportion to their ownership, it was not conditional on continued employment and it was consistent with a conditional share price based upon future performance of the merged entity.

Although *Horlock* dealt with the characterization of shares received pursuant to a merger, there is no reason for not applying its rationale to an interest received in the merger of any other forms of entities.

C. Conversions. Conversions of entities from one form to another are governed by Chapter 10, Subchapter C of the TBOC. *See* TBOC §§ 10.101 *et seq.* Any form of entity governed by the TBOC can convert to any other form. The Texas Secretary of State's office has promulgated forms for each type of conversion.⁷ TBOC § 10.106 governs the effects of a merger. For the purposes of this article, the most important characteristic of a conversion is that the "converting entity continues to exist without interruption" as the new entity. *See* TBOC § 10.106. Clearly, the converted entity is simply a mutation in form of the original entity.

D. Spin-Offs. In a spin-off, an existing corporation (the distributing corporation) transfers some part of its operating assets to a new corporation (the controlled corporation), and then immediately distributes the stock of the controlled corporation to its shareholders on a pro rata basis, with the foregoing transactions treated as a tax-free divisive reorganization under the [Internal Revenue Code of 1986](#) if certain requirements are met. *See*

⁷ *See* http://www.sos.state.tx.us/corp/forms_boc.shtml (Sept. 10, 2010).

[26 U.S.C.A. § 355](#); see also BORIS I. BITTKER and JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS*, § 11.01[1][e], at 11-5 (6th ed. 1996).

Spin-offs are perhaps not a common occurrence for a closely-held corporation, but are definitely a more common occurrence with large conglomerates, which divest themselves of underperforming assets by transferring operations to a newly created, wholly owned subsidiary, and then distributing shares of the controlled corporation to its shareholders. For example, in 2006, Verizon transferred its print and Internet yellow pages operations to a wholly-owned corporation (Idearc, Inc.) that it then spun off to its shareholders, in a transaction that was later described in a 2010 lawsuit brought by Idearc shareholders against both Verizon and its bankers as an attempt to off-load Verizon debt.⁸ The distribution of shares of the controlled corporation is treated as a dividend by the distributing corporation.⁹

There are two Texas cases that mention stock spin-offs in the context of a divorce, but neither addresses the issue of characterization of the shares. In the first case, *Flores*, the trial court ruled that, as a discovery sanction, the wife could not offer into evidence her Sears retirement account statements that would evidence shares of Dean Witter and Allstate that she received during the marriage as a spin-off from her ownership of Sears shares. [Flores v. Flores, 2001 WL 837527 \(Tex. App.—Houston \[14th Dist.\] 2001, no pet.\) \(mem. op.\)](#). The wife offered some vague testimony at trial that she might have received shares in Allstate as a spin-off with respect to the shares that she held in Sears. The Houston court of appeals held that her testimony was “incomplete, confusing, equivocal, and contradictory,” and therefore would not support a separate property claim. In the second case, *Le-Grand Brock I*, the husband received shares of stock in a spin-off from a company that was his separate property, but the wife conceded at trial that these shares were received by her husband as his separate property. See [Le-Grand Brock I, 2005 WL 2578944](#) at 1.

As with any transaction involving a distribution from an entity, the determination of the character of shares received in a spin-off centers on whether the transaction should be characterized as income from separate property or a mutation in form of the ownership interest held in the distributing entity. All of the assets held in corporate solution just prior to a spin-off are still held in corporate solution subsequent to the spin-off, the only difference being that they are now held within two corporations instead of one. From this viewpoint, the shares of the controlled corporation distributed to the shareholders do appear to be a mutation in form, with the operations of a single corporation now being split between two corporations, and with shares in the controlled corporation being issued to reflect this new reality. This analysis would indicate that the distribution of the shares of the controlled corporation is essentially the equivalent of a stock dividend, but with shares of the controlled corporation being substituted for the shares of the distributing corporation.

As discussed [supra](#), the Fort Worth court of appeals based its holding in *Johnson* that stock dividends were a mutation in form of the underlying stock on the fact that there was no increase in the husband’s proportionate ownership interest in the corporation as a result of the stock dividend, and that any increase in value of the stock was attributable to retained earnings, which are not regarded as community property. See [Johnson, 306 S.W.2d at 929](#). That same analysis applies to shares received in a spin-off when the spin-off transaction is viewed at the consolidated level. The total assets, liabilities, and retained earnings of the distributing corporation are divided between it and the controlled corporation, with no broadening of the owning spouse’s total interest in the combined corporations as a result of the receipt of shares in the controlled corporation. Consistency in the characterization of similar transactions would seem to require that distributions of shares from a corporation, whether as a stock dividend or as a stock split, should be accorded the same treatment.

However, an analysis that emphasizes the dividend nature of a spin-off results in a different conclusion. As noted [supra](#), a dividend is defined as “[a] portion of a company’s earnings or profits distributed pro rata to its shareholders, usually in the form of cash or additional shares.” BLACK’S LAW DICTIONARY at 547. There is no requirement that a dividend be paid in cash, and it can be in the form of any type of asset, including shares of stock of a subsidiary. Therefore, the distribution of shares of a controlled corporation by the distrib-

⁸ See http://currents.westlawbusiness.com/Articles/2010/04/20100427_0027.aspx (Sept. 10, 2010).

⁹ See, e.g., the spin-off of Allstate from Sears in 1995 (<http://www.secnfo.com/d9Nxn.a2a.htm>) (September 10, 2010) and the spin-off of AOL from Time Warner in 2009 (<http://www.timewarner.com/corp/newsroom/pr/0,20812,1939809,00.html>) (Sept. 10, 2010).

uting corporation takes the form of a dividend. When viewed simply as a dividend, shares received in a spin-off represent income from separate property, and therefore would be considered community property.

To conclude that stock splits should be characterized as income from separate property simply because they are accomplished by means of a dividend is to exalt form over substance. The substance of the transaction is a division of the operations of a single corporation into two separate corporations, with no resulting increase in the overall ownership interests of the shareholders of the distributing corporation. However, as with anything in the financial arena, it is possible for companies to attempt to characterize as a reorganization a transaction that is simply a dividend. This is why the U.S. Treasury has promulgated page after page of regulations and hypothetical examples that establish the boundaries for what will qualify as a tax-free reorganization. See [26 C.F.R. § 1.355-2](#). Taking their cue from the U.S. Treasury, Texas courts should closely scrutinize any transaction that purports to be a spin-off.

E. Split-Offs and Split-ups. A split-off is a form of reorganization in which some or all of the shareholders of a parent corporation surrender their shares in return for shares of a subsidiary of the parent. See BORIS I. BITTKER and JAMES S. EUSTICE at 11-6. Viacom Inc.'s 2004 split-off of the shares it held in Blockbuster, Inc. is a good example of a split-off. Viacom's shareholders exchanged a portion of their shares for shares of Blockbuster.¹⁰ A split-up, on the other hand, involves the exchange of shares in one or more subsidiaries of a parent corporation for the stock of the parent corporation, resulting in a total liquidation of the parent. See BITTKER AND EUSTICE at 11-6. Perhaps the most famous corporate split-up in American history was the split-up of Standard Oil that was ordered by the [Supreme Court in 1910](#). See [Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1 \(1910\)](#). Standard Oil split into thirty-four separate companies. *Id.* Both split-offs and split-ups involve an exchange of shares, and both are treated as tax-free exchanges under the [Internal Revenue Code of 1986](#) provided they meet the requirements of [26 U.S.C.A. § 355](#). See BITTKER AND EUSTICE at 11-5 – 11-6. In the case of a split-off, shares of the parent corporation are exchanged for shares of the subsidiary. *Id.* And in a split-up, shares of the liquidating parent corporation are exchanged for shares of one or more subsidiaries. The receipt of shares in exchange for shares previously held that occurs in both split-offs and split-ups is directly analogous to the shares received by the husband in *Horlock* as a result of the merger of his separate property company into another company. In all three instances, there is a mutation in form of the parent corporation's shares. Therefore, the shares received in exchange for the parent's shares take the character of the parent's shares. See [Horlock, 533 S.W.2d at 60](#). The same logic that applies to the receipt of shares as a result of a split-off or split-up would apply to similar transactions involving other forms of entities.

VI. Reimbursement Claims. Reimbursement claims can arise between estates as a result of both the operations of closely held entities and the acquisition of interests in these entities.

A. Funds Expended to Benefit a Separate Estate Entity. Typically, a claim for reimbursement is brought by the community estate for funds expended for the benefit of a separate property interest held by a spouse in a closely held entity. This occurs when funds are transferred to an entity as additional contributions of capital, but with no resulting increase in ownership. There are numerous examples of reimbursement claims asserted for contributions to entities. With respect to corporations, a reimbursement claim arises when amounts are remitted to a corporation without the issuance of additional shares. For example in *Horlock*, the husband owned separate property stock, and he expended community funds for the "maintenance" of the stock. [Horlock, 533 S.W.2d at 60](#). No indication is given as to the purpose of the payments to the corporation, but presumably they were reported on the books of the company as additional paid-in-capital, and not as a loan. The Houston court of appeals held that the community estate was entitled to reimbursement from the husband's separate estate in the amount of the funds expended for "maintenance" of his separate property stock. *Id.* Of course, contributions to capital must be distinguished from payments that are in the nature of a loan, which represent a community asset and are not subject to the rules regarding offset for benefits received.

Texas courts have treated post-formation contributions of capital by one estate to a partnership that is held as the property of a different marital estate as a reimbursement claim. For example, in *Jacobs*, the Hou-

¹⁰ See <http://www.secinfo.com/d14D5a.14Wgb.htm#1stPage> (Sept. 10, 2010).

ston court of appeals upheld the trial court's award of a \$21,000 reimbursement claim for contributions made by the husband to his separate property real estate partnership. [*Jacobs*, 669 S.W.2d 759](#) (Tex. App.—Houston [14th Dist.] 1984, *rev'd on other grounds*, [687 S.W.2d 731 \(Tex. 1985\)](#)). For the reasons stated in the above analysis of post-formation contributions to partnerships, it can be argued that contributions of additional capital to partnerships can be characterized as a claim to capital instead of as a reimbursement claim.

However, I am not aware of any cases in which the courts of appeal have treated a community contribution to a separate property partnership as a community interest in the capital of the partnership. I believe that the reason for this is that the only two cases to have considered the issue of the characterization of partnership distributions, *Marshall* and *Lifshutz*, have held that it is not possible to trace “through” a partnership. *Marshall*, 735 S.W.2d; [*Lifshutz v. Lifshutz*, 199 S.W.3d 9](#) (Tex. App.—San Antonio 2006, *pet. denied*). The premise in my earlier article, which discusses the characterization of partnership distributions and analyzes both *Marshall* and *Lifshutz*, is that capital invested in a partnership can be traced, and capital distributed to a partner has the character of the capital contributed. See Wingate, *Whose Money Is It? The Characterization of Partnership Distributions*. If that analysis is correct, then community cash contributed by a spouse to a partnership in which that spouse holds a separate property interest should create a community estate interest in the spouse's capital account to the extent of the additional cash contributed, and not a reimbursement claim.

C. Professional Fees Paid in Conjunction with Acquisition of an Interest. Reimbursement claims can also arise as a result of professional or other fees that are paid from community funds and that are related to the acquisition of shares purchased using separate property funds of a spouse. The stock is characterized as separate property because it was purchased with separate property, even though the professional fees incurred in the acquisition were paid from community funds. An example of this is seen in a Houston case, where professional fees of approximately \$30,000 were paid from community funds to acquire shares of stock that were the husband's separate property. [*Jacobs*, 687 S.W.2d at 763](#). The trial court awarded the community estate reimbursement for the funds expended by the husband to pay these fees, and this was upheld by the court of appeals.

D. Offsetting Benefits Received. In that same opinion, however, the court of appeals upheld the trial court's failure to award the community reimbursement for amounts expended for repairs and improvements the wife made to her separate property real estate. The Houston court of appeals upheld the trial court on the basis that the husband had failed to show that the community estate had not received any offsetting benefit. There is no mention by the court of appeals in *Jacobs* of the requirement for proving there were no offsetting benefits to the community with respect to the contributions made to husband's corporation and partnership. However, *Jacobs* was decided prior to the Supreme Court's decision in [*Penick v. Penick*, 783 S.W.2d 194 \(Tex. 1988\)](#).

Prior to the Texas Supreme Court's decision in *Penick*, the law was unsettled as to whether the lack of an offsetting benefit had to be demonstrated in a claim for reimbursement for payment of expenses benefitting another estate. Before, *Penick*, the courts of appeal drew a distinction between reimbursement for capital improvements versus payment of purchase money debt, requiring proof that there was no offsetting benefit for the former but not for the latter. The Texas Supreme Court ruled in *Penick* that lack of an offsetting benefit had to be shown in both instances in order for a marital estate to be awarded a reimbursement claim. The requirement to prove that no offsetting benefit has been received has undoubtedly impacted community reimbursement claims for contributions made to business entities. To the extent that income is received from an entity, then any claim for reimbursement will be reduced.

E. Payment of Taxes on Income from Pass-Through Entities. Another area that is fertile grounds for establishing reimbursement claims are taxes owed by a partner on partnership income or a shareholder on Subchapter S income of a corporation. For federal income tax purposes, neither a partnership nor a Subchapter S corporation is a taxable entity, but rather are “pass-through” entities. See [26 U.S.C.A. §§ 701](#) and 1366.¹¹

¹¹ By default, limited liability corporations are also treated as pass-through entities under the Internal Revenue Code. A single-member LLC is treated as a sole proprietorship (i.e., a disregarded entity), and a multiple-member LLC is treated as a partnership. However,

In a “pass-through” entity, the Internal Revenue Code “looks through” the entity to tax the owners directly on entity income. The effect of this is that the income, gains, losses, credits, etc. generated by the entity are reported on the personal income tax returns of the partners or shareholders. Even if absolutely no income is distributed by a pass-through entity, the owners will have to pay taxes on their pro rata share of income. There is therefore a disconnect between distributions to the partners/shareholders and the taxes paid on partnership or Subchapter S income. The former is totally unrelated to the latter. Upon divorce or death, this disconnect could be the basis for a reimbursement claim by the community estate for taxes paid on income that has been retained by the partnership or Subchapter S corporation. By way of example, if a spouse holds a separate property interest in a family limited partnership that fails to make any distributions to its partners, then that spouse will presumably be paying taxes on that undistributed income from community funds. The community estate would have a reimbursement claim to the extent that taxes owed on partnership income exceed the distributions from the partnership, which in this example would amount to the entire amount of the taxes paid.

An example analogous to this is found in [*Marshall v. Marshall*, 735 S.W.2d 587 \(Tex. App.—Dallas 1987, writ ref’d n.r.e.\)](#). In that case, the husband held a separate property partnership interest, and federal income taxes were paid by the partnership directly to the U.S. Treasury on behalf of the husband. Because taxes owed prior to marriage were paid from partnership income that accrued during the marriage, the wife asserted a community claim for reimbursement for the taxes paid by the partnership. The trial court denied the wife’s reimbursement claim with respect to the tax payments, but the court of appeals remanded the case back to the trial court for a determination on the community estate’s reimbursement claim with respect to the payment of the Husband’s pre-marital income taxes. *Id.* at 596. If the tax payments related to income received prior to marriage, there would be no offsetting benefit to the community.

F. Payments from Entities for the Benefit of the Community. In a case considered by the Waco court of appeals, the husband asserted a reimbursement claim for community liabilities paid by his separate property corporation, which the trial court had held was his alter ego. See [*Brooks v. Brooks*, 612 S.W.2d 233 \(Tex. Civ. App.—Waco 1981, no writ\)](#). The husband in *Brooks* was able to prove the amount of his claim simply by showing that his corporation had distributed both all current income and a portion of retained earnings held by the corporation as of the date of marriage. The trial court calculated the reimbursable amount by subtracting the net equity of the corporation as of the date of divorce from the net equity of the corporation as of the date of marriage. The judgment recited that the sum of \$48,020.88 “represents the loss in corporate assets suffered by the corporation during the marriage and used for the purchase and payment of the community assets now owned by the parties.” [*Brooks*, 612 S.W.2d at 237](#). The court of appeals upheld the trial court’s award. Obviously, this approach will not work if there is a book loss in any of the years of the marriage. The result in *Brooks* appears to be somewhat unusual. It would seem that the husband was awarded both a reimbursement claim for separate property funds expended to purchase community property as well as an interest in the property so purchased.

any LLC can elect to be treated as an association taxable as a corporation or as a Subchapter S corporation. See [26 C.F.R. § 301.7701-3](#).

INTERNATIONAL PARENTAL CHILD ABDUCTION: REMEDIES AND PREVENTION By Zachary Burd¹

I. Introduction

Current trends reflect a steady increase in the number of international parental child abduction (“IPCA”) cases.² IPCA cases have nearly doubled since 2006.³ Anti-abduction laws are comprised of interlocking and overlapping state, federal, and international laws and jurisprudence. This article will guide a practitioner through the judicial and non-judicial mechanisms for preventing abduction and obtaining return of an abducted child, while providing an overview of the current jurisprudence interpreting abduction law in Texas.

II. Overview of Statutory Law:

A. Texas Family Code

[Texas Family Code sections 153.501 through 153.503](#) provide the bedrock of child abduction law in Texas. [TFC Section 153.501](#) grants courts the power to take action when evidence shows a potential risk of international abduction. [TFC Section 153.502](#) lists the risk factors that courts should consider. [TFC Section 153.503](#) outlines the actions that courts may take to prevent abduction.

B. The Hague Convention

The United States implemented the Hague Convention through the International Child Abduction Remedies Act (“ICARA”) in 1988.⁴ To date, the United States partners with 68 other countries under the Hague Abduction Convention.⁵ The ICARA grants concurrent jurisdiction to federal district courts and state courts to hear cases arising under the Convention.⁶ It also establishes the procedures whereby a parent can petition for the return of a child who has been wrongfully removed from the child’s habitual residence to a foreign signatory nation.⁷

The primary goal of the Convention is to restore the pre-abduction factual status quo and to deter a parent from crossing international borders to find a more sympathetic court.⁸ Under the ICARA, courts in the United States are empowered “to determine only rights under the Convention and not the merits of any underlying child custody claims.”⁹ In other words, a Hague proceeding does not decide custody; it only decides in which country a custody determination should be made.¹⁰

C. Texas Penal Code

Interference with a child custody order, including a temporary order, constitutes a state jail felony under [Texas Penal Code section 25.03](#). Three types of offenses fall under the purview of section 25.03: (1) Knowingly taking or retaining the child against the express terms of a judgment or order; (2) A non-custodial taking

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² Letter from Janice Jacobs, Assistant Secretary of State for Consular Affairs, Preface to Hague Abduction Convention Compliance Report Sent to Congress, June 1, 2010, available at <http://www.state.gov/r/pa/prs/ps/2010/06/142445.htm> (last visited Nov. 19, 2010); see also <http://travel.state.gov/pdf/2010ComplianceReport.pdf> (last visited Nov. 19, 2010).

³ *Id.*

⁴ 42 U.S.C.A. §§ 11601-11610 (1988).

⁵ See http://travel.state.gov/abduction/solutions/hagueconvention/hagueconvention_3854.html (last visited 11/16/10).

⁶ 42 U.S.C.A. § 11603(a) (1988).

⁷ *Id.*

⁸ *In re J.G. and C.G.*, 301 S.W.3d 376, 379 (Tex. App.—Dallas 2009, no pet.); *In re S.J.O.B.G.*, 292 S.W.3d 764, 780 (Tex. App.—Beaumont 2009, no pet.) (citing *England v. England*, 234 F.3d 268, 271 (5th Cir. 2000, no pet.).

⁹ *In re S.J.O.B.G.*, at 774 (citing 42 U.S.C.A. § 11601(b)(4)).

¹⁰ http://travel.state.gov/law/legal/testimony/testimony_801.html (last visited 11/1/10).

of a child out of the court's geographic area without knowledge of the court, with the intent to deprive the court of authority over the child, with knowledge that a suit addressing custody has been filed; and (3) A non-custodial parent knowingly enticing or persuading the child to leave the custodial parent.

D. The International Parental Kidnapping Prevention Act

The International Parental Kidnapping Prevention Act ("IPKPA") makes the international abduction of a child (under the age of 16) by a parent a federal crime.¹¹ Violations of the IPKCA are punishable by imprisonment and fines. Unfortunately, both the Texas Penal Code and the IPKCA often prove to be toothless remedies in international child abduction cases for two reasons. First, they provide no enforceable mechanism for return of the child.¹² Second, the taking parent typically cannot be extradited to the U.S. for criminal proceedings. Nevertheless, if the taking parent needs to return to the United States for business or other reasons, the threat of imprisonment provides significant leverage to secure the return of the child. The U.S. Department of Justice is responsible for pursuing IPKPA charges and the FBI has sole jurisdiction for any underlying investigations.¹³ FBI Legal Attaché Offices are stationed throughout the world (in both Hague Countries and non-Hague countries) and investigators act as liaisons between the United States embassy and foreign law enforcement agencies.¹⁴

E. UCAPA

The Uniform Child Abduction Prevention Act ("UCAPA") was drafted after Texas enacted child abduction legislation.¹⁵ Texas has not adopted the UCAPA.¹⁶ Nonetheless, at least one Texas court of appeals found the UCAPA strongly persuasive because of the lack of Texas jurisprudence interpreting the Texas statutes.¹⁷ The UCAPA closely resembles the Texas statutes, but provides a few risk factors that the Texas statutes do not mention (i.e., stalking, child abuse/neglect).

III. Preventative Measures:

Texas blazed the path for the uniform drafters with the passage of anti-abduction legislation in 2003, and in many ways, Texas still sets the curve for judicially implemented preventative measures.¹⁸ Under Texas law, the court must first consider the following four factors: (1) Texas public policy and best interests of the child; (2) any obstacles to locating, recovering and returning the child if the child is abducted abroad; (3) the potential harm to the child if abducted to a foreign country; and (4) the risk of international abduction.¹⁹ The best interests of the child analysis is performed under the familiar Holley factors analysis.²⁰ To determine whether there is a risk of international abduction, the court may consider financial resources of the potential taking parent, prior threats to take the child, and any history of criminal activity, domestic violence, or violations of court orders.²¹ Additional persuasive risk factors can be found in the UCAPA (above) and in a highly regarded study on child abduction (including parents who are suspicious and distrustful due to a belief that abuse has occurred and have social support for these beliefs; parents who are paranoid, delusional, or sociopathic; and parents who feel disenfranchised from the legal system (i.e., poor, minority, victim of abuse)).²²

If the court finds that there is credible evidence showing a risk of abduction, they must evaluate the level of risk based on a different set of factors: (1) whether the potential taking parent has strong ties in a foreign

¹¹ 18 U.S.C. § 1204(a)-(b) (1998).

¹² Ericka A. Schnitzer-Reese, *International Child Abduction to Non-Hague Convention Countries: The Need For an International Family Court*, 2 N.W. U. J. Int'l Hum. Rts. 7, 22 (2004).

¹³ <http://www.justice.gov/oig/reports/FBI/a0908/chapter3.htm> (last visited Nov. 20, 2010).

¹⁴ *Id.*

¹⁵ *In re Sigmar*, 270 S.W.3d 289, 296 (Ct. App.—Waco 2008, no pet).

¹⁶ http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucapa.asp (last visited Nov. 19, 2010).

¹⁷ *Sigmar*, 270 S.W.3d at 297.

¹⁸ Deborah M. Zawadzki, *The Role of Preventing International Child Abduction*, 13 *Cardozo J. Int'l & Comp. L.* 353, 382 (2005).

¹⁹ Tex. Fam. Code Ann. 153.502(b)(1)-(4) (2008).

²⁰ See *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976); *In re T.N.F.*, 205 S.W.3d 625, 632 (Tex. App.—Waco 2006, pet. denied); *In re Sigmar*, 270 S.W.3d at 304.

²¹ *Id.*

²² Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies*, American Bar Association Center on Children and the Law, 13 (2000), available at <http://www.abanet.org/child/pkprevrem.pdf> (last visited Nov. 20, 2010).

country or lacks ties to the United States; (2) whether the nation to which a child might be abducted is a signatory to the Hague Convention, and if so, whether that nation is compliant with the Convention; (3) the taking parent's status with INS; (4) misrepresentations made by the taking parent to the U.S. government; (5) the potential difficulty of recovering the child; (6) laws of the foreign nation; (7) whether the U.S. Department of State has either deemed the nation a sponsor of terrorism or issued a travel warning for U.S. citizens visiting that nation (8) whether there is an embassy in the foreign nation; (9) whether the foreign country is at war; (10) whether the foreign nation provides for extradition of a taking parent and return of the child; and (11) human rights violations known to take place in the foreign nation that could endanger the child (including arranged marriages, lack of religious freedom, lack of child abuse laws, and female genital mutilation).²³

If a court determines that these risks rise to a level warranting prophylactic action, the court has a panoply of powers to intervene. The court may appoint sole managing conservatorship, require supervised visitation, order passport and travel restrictions (including mandatory filing with the Federal Children's Passport Issuance Alert Program),²⁴ order a writ *ne exeat*, order a parent to execute a conditional bond as financial deterrence to leaving, direct law enforcement to "accompany and assist" a left-behind parent in the event of an abduction, and prohibit unauthorized pick up of the child.²⁵ Notably, a Texas court may act *sua sponte* in a prevention case (unlike most other states).²⁶

IV. Obtaining Return of a Child That Has Been Abducted to a Hague Convention Signatory Nation

A. General Rules

At least in theory, the Hague Convention provides a straightforward mechanism for obtaining the return of a child that has been wrongfully abducted to a signatory nation. To initiate judicial proceedings for the return of a child from a Hague signatory nation, an individual, institution or other legal body may file a petition "in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."²⁷ Typically, the U.S. Department of State's Office of Children's Issues files this petition and acts as a liaison between the left behind parent and the foreign central authority. The Office of Children's Issues also assists in locating abducted children, answering legal questions about foreign laws, and facilitating third party resources for left behind parents.²⁸

Under the Convention, the petitioner seeking return of the child must establish by a preponderance of the evidence that the child has been wrongfully removed or retained.²⁹ Removal is wrongful under the Convention when:

- (a) it is done in breach of custody rights of a person, institution, or other body, under the law where the child habitually resided immediately before removal; and
- (b) those rights were actually being exercised at the time of the removal or retention, or would have been exercised but for the removal or retention.³⁰

Rights of custody under the Convention are interpreted more broadly than those generally associated with the right to physical possession of a child in the United States.³¹ In American courts, we tend to think of custody rights primarily in the sense of physical custody of the child.³² The Convention defines "rights of custody" as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" and defines "rights of access" as "the right to take a child for a limited period of

²³ [Tex. Fam. Code Ann. 153.502\(b\)-\(c\) \(2008\)](#).

²⁴ Hoff, *Parental Kidnapping*, 13.

²⁵ Zawadzki, *The Role of Preventing International Child Abduction*, 384; Hoff, *Parental Kidnapping*, at 16-22.

²⁶ Zawadzki, *The Role of Preventing International Child Abduction*, n.26.

²⁷ *In re S.J.O.B.G.*, at 774. (citing [42 U.S.C.A. § 11603\(b\)](#)).

²⁸ http://travel.state.gov/abductions/solutions/opencase/opencase_3849.html (last visited November 18, 2010).

²⁹ *In re S.J.O.B.G.*, at 775 (citing [42 U.S.C.A. § 11603\(e\)\(1\)\(a\)](#)).

³⁰ Hague Convention on the Civil Aspects of International Child Abduction, art. 3, Oct. 25, 1980.

³¹ *In re S.J.O.B.G.*, at 775.

³² *Id* (citing [Furnes v. Reeves](#), 362 F.3d 702, 711 (11th Cir. 2004, cert. denied)).

time to a place other than the child's habitual residence."³³ Notably, the Convention does not require that there be an existing enforceable custody order to obligate a court to order the return of a child.³⁴

Once a petitioner has established that the retention or removal was wrongful, "the court must order the child's return to the country of habitual residence unless the respondent demonstrates that one of the [Convention's] exceptions apply."³⁵ Before looking at exceptions, it is vital to understand how courts determine the country of habitual residence.

1. Habitual Residence and Parental Intent:

The ICARA and the Hague Convention are premised on the principle that the country of the child's habitual residence is best suited to determine questions of child custody and access.³⁶ Habitual residence is not defined in the Convention or in the ICARA. Although Texas and Federal courts have applied varying standards for determining a child's habitual residence, the Beaumont and Dallas courts of appeals recently adopted what appears to be the emerging test in Texas.³⁷ Under their two-step analysis, the court first looks to the last shared intent of those entitled to establish the child's residence.³⁸ The court next inquires whether the child has acclimatized to a new location and thus established a new habitual residence.³⁹ In analyzing acclimatization, the courts attempt to determine whether the child's new domicile has a "degree of settled purpose from the child's perspective."⁴⁰ For this determination, courts look to a wide range of factors such as the age of the child, the social network of the child, medical needs and available treatments for the child, enrollment in school or daycare, family ties, the stability of the residences, regular attendance at a church or temple, and stability of the parents' employment.⁴¹ Both the Dallas and Beaumont courts relied heavily on the Ninth Circuit Federal Court of Appeals case *Mozes v. Mozes* for analyzing "settled purpose":⁴²

The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is [sic] a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

[T]he first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind. Otherwise, one is not habitually residing; one is away for a temporary absence of long or short duration. Of course, one need not have this settled intention at the moment of departure; it could coalesce during the course of a stay abroad originally intended to be temporary. Nor need the intention be expressly declared, if it is manifest from one's actions; indeed, one's actions may belie any declaration that no abandonment was intended. If you've lived continuously in the same place for several years on end, for example, we would be hard-pressed to conclude that you had not abandoned any prior habitual residence. On the other hand, one may effectively abandon a prior habitual residence without intending to occupy the next one for more than a limited period. Whether there is a settled intention to abandon a prior habitual residence is a question of fact . . .

Although both the San Antonio and Dallas Courts of Appeal have stated that the degree of settled purpose should be viewed from the child's perspective,⁴³ they also cite *Mozes* for the proposition that children "normally lack the ability and capacity to decide when and where they will reside . . . [and] therefore . . . the

³³ *In re S.J.O.B.G.*, at 777 (citing Hague Convention, art. 5).

³⁴ [Amita Aiyar, Comment: International Child Abductions Involving Non-Hague Convention States: The Need For a Uniform Approach](#), 21 *Emory Int'l L. Rev.* 277, 285 (2007).

³⁵ *In re S.J.O.B.G.*, at 775-76 (citing *In the Interest of A.V.P.G.*, 251 S.W.3d 117, 123 (Tex. App.—Corpus Christi 2008, no pet.)).

³⁶ *In re J.G. and C.G.*, 301 S.W.3d at 379.

³⁷ *Id.*; *In re S.J.O.B.G.*, at 780.

³⁸ *In re J.G. and C.G.*, at 379; *In re S.J.O.B.G.*, at 780.

³⁹ *In re J.G. and C.G.*, at 379; *In re S.J.O.B.G.*, at 780.

⁴⁰ *In re S.J.O.B.G.*, at 778 (citing *In re J.J.L.-P.*, 256 S.W.3d 363, 372 (Tex. App.—San Antonio 2008, no pet.)).

⁴¹ *In re J.G. and C.G.*, at 379; *In re A.V.P.G. and C.C.P.G.*, at 125.

⁴² *In re S.J.O.B.G.*, at 778-79 (citing *Mozes v. Mozes*, 239 F.3d, 1067 (9th Cir. 2001)).

⁴³ *In re S.J.O.B.G.*, at 778; *In re J.J.L.-P.*, 256 S.W.3d 363, 372 (Tex. App.—San Antonio 2008, no pet.).

intent or purpose to be taken into account is that of the person or persons entitled to fix the place of a child's residence."⁴⁴ Furthermore, "courts should be slow to infer that a prior residence has been abandoned solely based on the child's contacts with a new country."⁴⁵ Nevertheless, the factual circumstances of a child's life can override parental intentions to the contrary.⁴⁶

Even when there is no settled intent on the part of the parents to abandon the child's prior habitual residence, courts should find a change in habitual residence, if the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place. The question in these cases is not simply whether the child's life in the new country shows some minimal 'degree of settled purpose,' but whether we can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.'⁴⁷

In general, parental intent is only trumped by extreme circumstances. For instance, a child who has acclimated to a residence abroad over a fifteen-year period should not be required to return to his place of birth, even if there is unequivocal evidence that the parents' last shared intent was to return the child to the original domicile.⁴⁸

2. Full Faith and Credit

A court may defer to a decision from a foreign court based on the principles of full faith and credit.⁴⁹ Although judgments rendered in foreign nations are not entitled to full faith and credit, American courts will accord considerable deference to foreign adjudications as a matter of comity.⁵⁰ Generally, a foreign judgment will be given the same degree of recognition to which sister State judgments are entitled if the judgment is valid under the rule of section 92 of the Restatement (Second) of Conflict of Laws.⁵¹ Under section 92, a judgment is valid if (a) the state in which it is rendered has jurisdiction to act judicially in the case; and (b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and (c) the judgment is rendered by a competent court; and (d) there is compliance with such requirements of the State of rendition as are necessary for the valid exercise of power by the court.⁵² An American court must believe that "there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment."⁵³

3. Defenses to Mandatory Return of Child after Finding of Wrongful Removal or Retention.

Even when a court finds that a child has been wrongfully removed from his or her habitual residence, the taking parent may invoke one or more of the seven available defenses to mandatory return. Five of these defenses must be established by a preponderance of evidence:

- (1) the person [or institution] having care of the child was not exercising custody rights at the time of the removal or retention; or
- (2) the person [or institution] having care of the child acquiesced in the removal or retention of the child[;] or

⁴⁴ *In re S.J.O.B.G.*, at 779, n.10. (Citing [Mozes](#), 239 F.3d at 1076; see also [Gitter v. Gitter](#), 396 F.3d at 124, 132 (2d Cir. 2005, no pet.); [Van Driessche v. Ohio-Esezeoboh](#), 466 F.Supp.2d at 828, 842-43 & n.18. (S.D. Tex. 2006, no pet.); see also [Flores v. Contreras](#), 981 S.W.2d 246 (Ct. App.—San Antonio 1998, no pet.) (applying ICARA to children under one year old)).

⁴⁵ *In re S.J.O.B.G.*, at 779 (Citing [Mozes](#), 239 F.3d at 1078-79).

⁴⁶ *In re S.J.O.B.G.*, at 779 (Citing [Mozes](#), 239 F.3d at 1080-81).

⁴⁷ *In re S.J.O.B.G.*, at 779 (Citing [Mozes](#), 239 F.3d at 1080-81).

⁴⁸ *In re S.J.O.B.G.*, at 780

⁴⁹ [Velez v. Mitsak](#), 89 S.W.3d 73 (Ct. App.—El Paso 2002, no pet.).

⁵⁰ *Id.* at 82.

⁵¹ *Id.* at 82.

⁵² *Id.*; [Restatement \(Second\) of Conflict of Laws § 92 \(1971\)](#).

⁵³ *Id.*; [Restatement \(Second\) of Conflict of Laws § 98 cmt. 3 \(1971\)](#) (citing [Hilton v. Guyot](#), 159 U.S. 113, 202 (1895)).

- (3) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views[;] or
- (4) the proceeding was commenced more than one year after the removal of the child and the child has become “well settled” in his or her new environment; or
- (5) the person seeking return has consented or subsequently acquiesced in the removal or retention.⁵⁴

The following two defenses must be established by clear and convincing evidence:

- (1) that there is a “grave risk” that the return of the child would expose him or her to physical or psychological harm; or
- (2) that the return of the child would not be permitted by fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.⁵⁵

Texas jurisprudence has clarified three of the statutory defenses. The Corpus Christi Court of Appeals discussed the “well settled” defense and the “grave risk” defense in *In re A.V.P.G.*⁵⁶ In that case, Mother was a Mexican citizen and Father was a Belgian citizen. The couple married in Mexico and moved back and forth between Belgium and Mexico numerous times. They had two children. When the children were six and three years old, Mother abducted them to Mexico. Father sought sole custody and return of the children through the Belgian court system. Mother was arrested crossing the border into the United States and CPS took the children into custody. At trial, Mother won custody of the children, arguing that the children were “well settled” and that there was a risk of potential psychological or physical harm if the children were returned to Belgium. The Court of Appeal reversed the trial court on the grounds that a removing parent must not be allowed to abduct a child and then complain that the child has grown used to the surroundings to which they were abducted.⁵⁷ The Court of Appeals held that only severe potential harm to the child will trigger the “grave risk” defense.⁵⁸

Mere separation from a parent or repatriation is usually not considered severe enough to trigger the defense.⁵⁹ The “grave risk” defense should only come into play when the child would (1) be returned to a zone of war, famine or disease or (2) would be subject to serious abuse or neglect.⁶⁰ However, the Austin Court of Appeals has found that abduction could cause psychological harm sufficient to require protective action by the court.⁶¹ The Austin decision seems to be an anomaly to the general rule that a grave risk of harm should arise from more than the abduction itself.

In re J.J.L.P. addressed the defense of consent.⁶² In that case, Mother and Father had a child in Mexico and later moved to Texas. Father moved back to Mexico and the child visited Father regularly. When the child was four years old, Mother agreed to let the child live with Father in Mexico. About a year later, Mother drove to Mexico to pick the child up for an ordinary visit, and subsequently refused to return the child. The trial court ordered that the child be returned to the Father. On appeal, Mother argued that Father consented to Mother’s retention by surrendering the child’s travel documents to Mother when she picked up the child. The court held that consent is based on the custodial parent’s subjective intent at the time of the pickup and affirmed the trial court’s decision.⁶³

B. Non-Compliant Signatory Nations

Compliance with the Convention varies among foreign jurisdictions.⁶⁴ The State Department currently lists three nations as “non-compliant”: Mexico, Brazil and Honduras.⁶⁵ All three nations show patterns of de-

⁵⁴ *In re. S.J.O.B.G.*, at 776 (citing *In the Interest of A.V.P.G.*, 251 S.W.3d at 123 (citing Hague Convention, arts. 12, 13)); see also [42 U.S.C.A. § 11603\(e\)\(2\)\(B\)](#).

⁵⁵ *In re S.J.O.B.G.*, at 776 (citing *In re A.V.P.G.*, 251 S.W.3d at 123-24 (citing Hague Convention, arts. 13b,20)); see also [42 U.S.C.A. § 11603\(e\)\(2\)\(A\)](#).

⁵⁶ *In re A.V.P.G.*, 251 S.W.3d 117 (Ct. App.—Corpus Christi, 2008, no pet.).

⁵⁷ *In re A.V.P.G.*, at 126.

⁵⁸ *In re A.V.P.G.*, at 127-28.

⁵⁹ *Id.*

⁶⁰ *Id.*, at 128.

⁶¹ *Kogel v. Robertson*, 2005 WL 3234627 (Tex. App.—Austin 2005, no pet.).

⁶² *In re. J.J.L.-P.*, 256 S.W.3d 363 (Ct. App.—San Antonio 2008, no pet.).

⁶³ *Id.* at 375.

⁶⁴ See http://travel.state.gov/law/legal/testimony/testimony_801.html (last visited 11/16/10).

lay in judiciary branches and law enforcement agencies.⁶⁶ These delays often lead to rulings that children should not be returned because they have become “settled” in their new environment.⁶⁷

In particular, appeals in Mexican courts delay Convention proceedings. Under Mexican law, citizens are entitled to a constitutionally based appeal, or “*amparo*.” When the taking parent alleges in his appeal that the Convention procedure violates his due process rights under the Mexican Constitution, a Mexican judge will often freeze Convention proceedings until the Constitutional issue is resolved. The United States government is currently working to educate Mexican judges about the compatibility of Convention procedures with due process guarantees in the Mexican Constitution, but delays are still the norm.⁶⁸

In 2009, reported abductions to Mexico accounted for more than one-third of the total reported abductions from the United States.⁶⁹ At least one Texas court has recognized the numerous obstacles to the return of a child from Mexico and demonstrated willingness to implement significant preventative measures to guard against abduction to Mexico.⁷⁰ In *In re Sigmar*, the Waco Court of Appeals denied a father unsupervised visitation of his child because evidence indicated a risk of abduction to Mexico.⁷¹ The father in *Sigmar* liquidated assets, was unemployed, had strong ties to Mexico, and sought the renewal of the child’s passport.⁷² In finding that supervised visitation was proper, the court took judicial notice *sua sponte* of the potential difficulties of obtaining return of the child from Mexico.⁷³ The court noted the frequent delays caused by *amparos* in Mexico.⁷⁴ The court noted local laws and practices that would allow the father to prevent the mother from contacting the child, restrict the mother’s ability to travel, and potentially restrict the child’s ability to leave the country when she reaches the age of majority.⁷⁵ The *Sigmar* court also strongly considered the U.S. State Department’s travel warnings as evidence of a potential risk to the child’s physical health and safety, noting human rights violations committed against children in Mexico such as child labor and lack of child abuse laws.⁷⁶ *Sigmar* seems to have set the tone for increased preventative measures when there is a threat of abduction to Mexico.

V. Children Abducted to Non-Signatory Nation

There are few legal structures in place to provide for the return of a child who has been abducted to a non-Hague country.⁷⁷ Courts are well aware of the fact that non-Hague countries may regard American decrees as worthless, and make the return of a child virtually impossible.⁷⁸ As a result, U.S. courts have grown increasingly reluctant to grant comity or surrender jurisdiction to non-Hague countries for substantive custody determinations.⁷⁹ Similarly, preventative measures are more readily available to parents fearing abduction to non-Hague countries than they are to parents fearing abduction to Hague-countries.⁸⁰

A. Countries Governed by Islamic Law

Abductions to countries governed by Islamic law present some of the most difficult challenges for a left-behind parent. Islamic law is embodied in the Shari’a, a patriarchal legal system that derives largely from the

⁶⁵ Hague Abduction Convention Compliance Report Sent to Congress, June 1, 2010, at 22-23 <http://travel.state.gov/pdf/2010ComplianceReport.pdf> (last visited Nov. 20, 2010).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*, at 68.

⁷⁰ *Sigmar*, 270 S.W.3d at 302-03.

⁷¹ *Sigmar*, at 289.

⁷² *Sigmar*, 294-95.

⁷³ *Sigmar*, at 302.

⁷⁴ *Sigmar*, at 303.

⁷⁵ *Id.*

⁷⁶ *Sigmar*, at 303-04.

⁷⁷ Schnitzer-Reese, *International Child Abduction to Non-Hague Convention Countries*, 13.

⁷⁸ Lexi Maxwell, *The Disparity in Treatment of International Custody Disputes in American Courts: A Post-September 11th Analysis*, 17 *Pace Int’l L. Rev.* 105, 121 (Spring 2005).

⁷⁹ *Id.* at 123.

⁸⁰ *Id.*

Qur'an.⁸¹ Islamic law is enforced in over 30 countries, particularly in the Near East, but also in Central and South Asia, and Africa.⁸² Countries that rely heavily on Shari'a law include Iran, Pakistan, Saudi Arabia, Nigeria, Sudan, Iraq, Egypt, Indonesia, India, and Malaysia.⁸³

A cursory glance at some of the underlying rules of Shari'a law reveals the extent of patriarchy in these nations. Under Shari'a law, fathers have ultimate custody of their children, and it is considered to be in the best interests of the child to be raised by a Muslim.⁸⁴ Women are granted guardianship rights during "the age of dependence" (anywhere from seven years old for a son and nine years old for a daughter to nine and eleven respectively).⁸⁵ After the age of dependence, a mother can retain guardianship rights of a daughter if the father agrees, but she may not retain guardianship of the son.⁸⁶ Shari'a law forbids children to leave an Islamic country without the father's permission, even if the children have American citizenship.⁸⁷ U.S. consular officers have very limited power to aid an American woman who wishes to leave an Islamic country with her children.⁸⁸ Under Shari'a law, a husband may divorce his wife with little difficulty and without a court hearing.⁸⁹ Typically, a father who abducts a child to a nation governed by Islamic law has little difficulty procuring a divorce decree that favors his custodial interests, irrespective of existing foreign decrees or orders to the contrary.⁹⁰

B. Remedies

Unfortunately, there are few options for securing the return of a child from a non-Hague country. As with abductions to Hague signatory nations, the first step is to contact the U.S. State Department's Office of Children's Issues. The Office of Children's Issues has demonstrated some success securing the return of children abducted to non-Hague countries, including the return of children from Shari'a nations.⁹¹ Although the State Department is working to establish bilateral treaties to secure the return of abducted children from non-Hague nations, none currently exist.⁹² Parents sometimes turn to political forces to exert pressure on foreign governments. In one case, diplomatic intervention by Congress led to the return of three children abducted from Vermont to Egypt.⁹³

As stated above, the IPKCA can pressure a taking parent if the taking parent needs to return to the United States. However, the IPKCA does not provide a mechanism to reunite the left-behind parent with the children. It only punishes the taking parent upon reentry. Nevertheless, in IPKCA proceedings, U.S. courts have rejected the defense that the taking parent was acting under the authority of a valid foreign order.⁹⁴

Registration with the Children's Passport Issuance Alert Program can prevent a potential taking parent from acquiring a U.S. passport. However, passport restrictions are often unhelpful because most nations governed by Islamic law grant automatic citizenship to children of Muslim nationals.⁹⁵ Nevertheless, a court can order a parent to notify his embassy or consulate of a court order prohibiting that parent from applying for a new or replacement passport for the child, and require the parent to provide the court with an acknowledg-

⁸¹ Kristine Uhlman, *Overview of Shari'a and Prevalent Customs In Islamic Societies – Divorce and Child Custody*, Prepared for the California State Bar 2004 Winter Section Education Institute/ International Law/ Family Law Workshop on International Custody Abduction: Non-Hague, Islamic Countries (2004), available at http://www.expertlaw.com/library/family_law/islamic_custody.html (last visited Nov. 23, 2010); Asma Barlas, *The Qur'an, Shari'a, and Women's Rights: Re-imagining the Shari'a: Theory, Practice, and Muslim Pluralism*, University of Warwick in Venice, Italy (2009), available at http://www.asma-barlas.com/TALKS/2009_venice.pdf (last visited Nov. 23, 2010).

⁸² See <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited Nov. 23, 2010).

⁸³ See <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited Nov. 23, 2010).

⁸⁴ *Id.* at 293.

⁸⁵ http://travel.state.gov/abduction/resources/resources_557.html (last visited Nov. 23, 2010).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ http://travel.state.gov/abduction/resources/resources_557.html (last visited Nov. 23, 2010).

⁹⁰ Zawadzki, *The Role of Preventing International Child Abduction*, 366.

⁹¹ Statement of Maura Harty, Assistant Secretary of State for Consular Affairs, Senate Foreign Relations Committee, June 26, 2003, available at http://travel.state.gov/law/legal/testimony/testimony_801.html (last visited Nov. 23, 2010).

⁹² Aiyar, *International Child Abductions Involving Non-Hague Convention States*, at 295-96.

⁹³ *Id.* at 295.

⁹⁴ See *United States v. Amer*, 110 F.3d 873, 876 (2d Cir. 1997); See also *United States v. Fazal*, 203 F. Supp. 2d 33 (D. Mass. 2002).

⁹⁵ *Id.*

ment letter from the foreign embassy or consulate.⁹⁶ These types of orders may lead a foreign government to comply voluntarily.⁹⁷

Some parents consider re-abduction when faced with the stark reality of permanent loss of their children and inadequate legal mechanisms to secure return or visitation. The State Department vehemently discourages re-abduction.⁹⁸ Parents who attempt to re-abduct children risk being imprisoned in the foreign nation, prejudicing legal remedies in the foreign nation, and endangering the child.⁹⁹

Because remedies are so limited, an ounce of prevention is worth more than a pound of cure in non-Hague abductions. It is relatively easy to trigger the 153.502(b) risk analysis in non-Hague cases. All a concerned parent need show is the potential difficulty of recovering the child.¹⁰⁰ Then, under the risk analysis, the very fact that the foreign nation is not a Hague signatory is sufficient to invoke preventative action.¹⁰¹ Courts often do look to a host of additional risk factors,¹⁰² but they need not do so for a threshold finding that would warrant preventative action. Any risk, however small, can invoke the court's protective power.¹⁰³

On the other hand, a court may decline to impose preventative measures under certain facts, even when there is a risk of abduction to a non-Hague country. In *Micklethwait v. Micklethwait*, the Austin Court of Appeals refused to prohibit international travel even though it found that Mother posed a risk of abduction, had previously threatened to abduct the child to Russia, had strong ties to Russia, had visa problems with INS, was unemployed, and lacked financial reasons to stay in the United States.¹⁰⁴ The court reasoned that Father's abduction concerns were mitigated by evidence showing that he paid for Mother to travel to Russia with the child two days before he filed for divorce.¹⁰⁵ *Micklethwait* demonstrates that preventative measures are not automatically granted upon showing a risk of abduction to a non-Hague country. The court has discretion to decline to impose preventative measures when there is strong factual evidence that mitigates the need for such measures.

VI. Summary

During the creation of this article, numerous Texas family law attorneys related to me their difficulties and concerns regarding international abduction cases. The typical concerns seem to center around a general fear of the unknown—and the unknown is usually international law. These fears are very real as failure to assist a parent in seeking preventative measure can be considered malpractice.¹⁰⁶ Hopefully this article can remove some of those concerns by showing that most of the steps for preventing abduction or petitioning for the return of a child are straightforward.

Attorney representing clients in abduction cases must have a firm grasp of certain key concepts rather than a vast knowledge of the Hague Convention or foreign law. This grasp must include an understanding of the potential obstacles to return of a child from the foreign nation, the habitual residence analysis, the criminal statutes that supplement and often coerce civil remedies, and very often the “grave risk” analysis. The State Department's Office of Children's Issues is a valuable resource for obtaining return of abducted children and should be a starting point for any effort to secure the return an abducted child. Even though international parental abductions are on the rise, Texas is leading the way in providing preventative measures, and juridical trends indicate that courts are very willing to protect children from international abduction.

⁹⁶ Hoff, *Parental Kidnapping*, 25.

⁹⁷ *Id.*

⁹⁸ http://travel.state.gov/abduction/solutions/reabduction/reabduction_3867.html (last visited Nov. 23, 2010).

⁹⁹ *Id.*

¹⁰⁰ *Tex. Fam. Code* § 153.502(b) (2008).

¹⁰¹ *Tex. Fam. Code* § 153.503(c) (2008).

¹⁰² See *Boyo v. Boyo*, 196 S.W.3d 409 (Ct. App.—Beaumont 2006, no pet.); see also *Osoji v. Osojie*, 2009 WL 2902743 (Ct. App.—Austin 2009, no pet.).

¹⁰³ See *Elmakiss v. Elmakiss*, 2008 WL 2358221 (Tex. App.—Tyler 2008, no pet.); see also *Kareneva v. Kareneva* 2008 WL 755285 (Tex. App.—Fort Worth 2008, no pet.).

¹⁰⁴ *Micklethwait v. Micklethwait*, 2007 WL 1852609, 4 (Tex. App.—Austin 2007, no pet.).

¹⁰⁵ *Id.* at 5.

¹⁰⁶ See *Shehade v. Gerson*, 500 N.E.2d 510 (Ill. App. Ct. 1987, pet. denied).

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

GROUND AND PROCEDURE

TRIAL COURT SETTING A HEARING ON FATHER'S MOTION BY ITSELF DOES NOT EVIDENCE INTENT BY TRIAL COURT TO DENY MOTION TO TRANSFER.

¶10-5-01. [*In re Thorpe*, No. 07-10-00341-CV., 2010 WL 3619552 \(Tex. App.— Amarillo 2010, orig. proceeding\) \(mem. op.\) \(9/17/10\).](#)

Facts: On June 10, 2010, mother filed a motion to modify the divorce decree requesting modification to father's access to or possession of child. Contemporaneously, mother filed a motion to transfer the case to Dallas County. On August 5, father filed a motion for enforcement asking the trial court to find mother in contempt for failing to surrender the child for visitation. On that same day, trial court set a hearing on father's motion for August 31 by an order stamped with the signature of the presiding judge.

On August 13, mother delivered a letter addressed to the trial court, noting her pending motion to transfer and requesting the judge to sign an enclosed order transferring the case. On August 20, mother filed this original proceeding seeking an order directing trial court to grant her motion to transfer the case to Dallas County.

Holding: Petition for writ of mandamus denied

Opinion: [Under TFC 155.201\(a\),\(b\)](#), the transfer of a SAPCR to a county where the child has resided for more than six months is a mandatory ministerial duty.

Here, trial court failed or refused to transfer the case, mother relies on trial court's August 5 setting of father's motion for enforcement hearing and the delivery of her August 13 letter and proposed order to trial court. But nothing shows that trial court had any knowledge of mother's motion to transfer on August 5 when the order setting father's hearing was stamped. Additionally, the mere passage of seven days between mother's August 13 delivery of her letter to trial court and the filing of her mandamus petition on August 20, does not demonstrate that trial court failed or refused to transfer the case to Dallas. Accordingly, mother's petition for writ of mandamus is denied.

***Editor's Comment:** To get mandamus relief the relator has to prove that the trial court refused to perform a ministerial act or abused its discretion in making a ruling. To do this the relator must present a copy of the order granting or denying relief or a copy of the record where the court rules or refuses to rule. The court of appeals will not issue a writ absent this proof. C.N.*

***Editor's Comment:** To obtain a writ of mandamus, you have to show that you made a request of the trial judge who then either denied relief or failed to act. J.V.*

TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO TRANSFER FATHER'S MODIFICATION SUIT BECAUSE MOTHER ALLEGED SUFFICIENT FACTS THAT CHILD RESIDED IN TRANSFEREE COUNTY FOR SIX MONTHS PRIOR TO SUIT AND FATHER FAILED TO TIMELY FILE CONTROVERTING AFFIDAVIT.

¶10-5-02. [In re Leyva](#), -- S.W.3d --, 2010 WL 3774042 (Tex. App.—San Antonio 2010, orig. proceeding) (9/29/10).

Facts: Father filed a suit to modify parent-child relationship. Mother filed an answer and a motion to transfer on June 21, 2010. The same day, mother served her motion to transfer on father. In her motion, mother alleged child's principal residence was in Lubbock County and that child had resided in that county for six months preceding the suit. On August 3, 2010, father filed a controverting affidavit. Afterward, mother requested trial court to transfer venue due to father's failure to timely file a controverting affidavit. The trial court denied the transfer. Mother sought a mandamus.

Holding: Mandamus relief conditionally granted

Opinion: In a suit to modify a parent-child relationship, the trial court has a mandatory ministerial duty under [TFC 155.201\(b\)](#) to transfer the suit to a county where the child has lived for six months or longer. Under 155.204(d), a party seeking to contest the motion to transfer venue must file a controverting affidavit denying that grounds for the transfer exist "[o]n or before the first Monday after the 20th day after the date of notice of a motion to transfer is served." Under [TFC 155.204\(c\)](#), if a timely motion to transfer has been filed and no controverting affidavit is filed within the specified period, the trial court must transfer the proceeding without a hearing no more than 21 days after the period allowed for the filing of the controverting affidavit.

Here, mother served father with her motion to transfer venue on June 21, 2010. Therefore, father was required to file his controverting affidavit by July 12, 2010, but he did not file his controverting affidavit until August 3, 2010. **The trial court filed a response**, in which it argued that transfer was not mandatory because mother failed to provide sufficient facts to support a transfer. Specifically, trial court argued that mother only stated child's "principal residence" was in Lubbock County instead of asserting child had resided in Lubbock County for six months or longer. Trial court argued further that mother failed to specify the date child began living in Lubbock County. Trial court contended that, as a result, mandamus was premature because it had not denied mother's motion to transfer venue, and that it needed to hold a hearing to determine if transfer was mandatory.

However, [TFC 155.203](#) directs the court to look at the child's "principal residence" to determine the county of the child's residence when determining if venue must be transferred. Mother's motion alleged child's principal residence was in Lubbock County and that the child "has been in that county during the six-month period preceding the commencement of this suit. These factual allegations sufficiently comply with [TFC 155.201\(b\)](#). Therefore, in light of father's failure to timely file a controverting affidavit, trial court was required to transfer venue. Accordingly, mandamus relief is appropriate and not premature.

Editor's Comment: *The trial court filed a response to the mandamus taking an advocacy position?? M.M.O.*

Editor's Comment: *Mother gets mandamus relief because she provided proof that the trial court refused to perform a ministerial act. C.N.*

APPELLATE COURT DENIED MANDAMUS PETITION ORDERING TRIAL COURT TO RESCIND TRANSFER ORDER BECAUSE TRIAL COURT LOST JURISDICTION UPON PLACEMENT OF CASE ON TRANSFEREE COURT'S DOCKET.

¶10-5-03. [*In re Dozier*, -- S.W.3d --, 2010 WL 3810016 \(Tex. App.—Amarillo 2010, orig. proceeding\) \(per curiam\)](#) (9/30/10).

Facts: In this SAPCR case, the Cottle County court signed an order transferring the case from the Cottle Court to the Childress County court on May 11, 2010. In response, the Childress court accepted the transfer on May 18, 2010. Thereafter, the Childress court clerk assigned a cause number to the proceeding on June 7, 2010. On August 30, 2010, mother filed this mandamus petition to direct the Cottle court to vacate its transfer order.

Holding: Petition for writ of mandamus denied

Opinion: While an order to transfer is interlocutory as far as the litigants are concerned, it is final as to the transferring court. More importantly, under [TFC 155.005\(b\)](#), once the case has been placed on the transferee court's docket, the transferor court's jurisdiction over the matter ends.

Here, the Childress court accepted the transfer on May 18, 2010, and the clerk assigned the matter a cause number on June 7, 2010. Afterward, the proceeding was placed on the transferee court's docket no later than June 7, 2010. This means that the Cottle court's jurisdiction over its order transferring venue lapsed on June 7, 2010. Accordingly, because the Cottle court cannot rescind a transfer order once its jurisdiction ends, this court cannot order it to do something which it has no jurisdiction to do.

WIFE WHO HAD NOT SOUGHT PERMANENT RESIDENCY IN TEXAS, ALLOWED TO PURSUE DIVORCE.

¶10-5-04. [Palau v. Sanchez](#), 2010 WL 4595705 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (11/10/10).

Facts: Wife first filed for divorce in Mexico, which was subsequently denied. Wife then filed for divorce in Texas on May 23, 2006. In her petition, she asserted that she had been a domiciliary of Texas for the preceding 6 month period; and a resident of the county for the preceding 90 days. On November 5, 2008, the day before the trial, husband filed a plea in abatement. Husband alleged that wife's statements were untruthful, that wife had traveled back and forth from Texas to Mexico during the 6 months before the divorce petition, that wife's border-crossing card and copies of her immigration documents explained that visa with which she entered the United States was issued for Mexican citizens who were temporarily visiting the United States as tourists. Additionally, husband attached an affidavit in which wife stated: "I am a Mexican citizen. I am domiciled in Texas but I have not sought permanent residency status in the United States." During cross examination, wife conceded that her visa was a "tourist visa." She also testified that at the time she filed her visa application, she informed government officials that he residence was in Mexico. The trial court denied husband's plea in abatement, finding that the plea was untimely under a local rule.

Holding: Affirmed.

Opinion: [TFC 6.301](#) requires only that a petitioner be a domiciliary of Texas and a resident of the county in which the suit is filed, not that she be a citizen of the United States or carry a certain type of visa. See [TFC 6.301](#). Black's Law Dictionary defines "domiciliary" as "[a] person who resides in a particular place with the intention of making it a principal place of abode." Black's Law Dictionary 559 (9th ed.2009). Wife testified that she had lived in a house in Austin since September 2005 and that at the time of moving there, she intended to live there. Thus, she satisfies the definition of "domiciliary." Black's Law Dictionary defines "resident" as "[a] person who lives in a particular place" or "[a] person who has a home in a particular place." *Id.* at [1424](#). Regarding the second definition of "resident," Black's Law Dictionary adds: "a resident is not neces-

sarily either a citizen or a domiciliary.” *Id.* As previously stated, Navarro testified that she had lived in a house in Austin since September 2005. She therefore also satisfies the definition of a “resident.”

*Editor’s Comment: This case is troubling and certainly opens the door to undocumented residents to seek a divorce in Texas. The court did not address the Texas Supreme Court case [Snyder v. Pitts, 241 S.W.2d 136, 139 \(Tex. 1951\)](#), which held that the elements of the legal concept of domicile are (1) an actual residence, and (2) the intent to make it the **permanent** home—not just an intention to make a principal place of abode. Because wife had nothing but a tourist visa and had not and was not seeking permanent residence, she could not form the intent necessary to establish a Texas domicile under *Snyder v. Pitts*. Accordingly, she could never meet the requirements necessary to obtain a Texas divorce. G.L.S.*

Editor’s Comment: This case holds that a state’s power to grant a divorce is not limited by a spouse’s immigration status. J.V.

DIVORCE

DIVISION OF PROPERTY

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING HUSBAND AN UNEQUAL SHARE OF COMMUNITY PROPERTY BECAUSE HUSBAND FAILED TO PROPERLY VALUE THE ENTIRE COMMUNITY ESTATE AT TRIAL.

¶10-5-05. [Hollis v. Hollis, 2010 WL 3440330 \(Tex. App.—Tyler 2010, no pet. h.\) \(mem. op.\)](#) (9/01/10).

Facts: After thirty-three years of marriage, husband and wife filed separate petitions for divorce. Before trial, wife filed an inventory and appraisal. However, wife failed to appear at trial. At trial, husband filed his own inventory and appraisal. Husband was the only one at trial who testified. Following trial, trial court awarded husband an unequal share of the total property including real property, livestock, and a Teacher Retirement System of Texas (TRS) account as his sole and separate property. Trial court awarded wife all the property disclosed on her inventory that it had not awarded to husband. Wife filed a restricted appeal.

Holding: Affirmed in part, reversed in part

Opinion: To prevail on a restricted appeal, an appellant must establish that it: (1) filed notice of the restricted appeal within six months after a trial court signs judgment; (2) was a party to the underlying lawsuit; (3) did not participate in the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. Here, wife satisfies elements one through three, the issue is whether wife can demonstrate that error is apparent on the face of the record.

Wife argued the trial court abused its discretion in dividing the community estate because the record was legally and factually insufficient to value either the community estate or the share awarded to husband. A trial court is charged with dividing the estate of the parties in a “just and right” manner, considering the rights of both parties. A trial court may order an unequal division of the community property when a reasonable basis exists for granting that relief. However, the division of property must not be so disproportionate as to be inequitable, and the circumstances must justify awarding more than one-half to one party.

Here, husband’s inventory did not value certain community property assets. For example, husband did not list livestock as a community property asset or testify regarding the value of any livestock. Additionally, husband’s inventory and appraisal stated the monthly amount that he received from the TRS, but he did not include the community estate value of that account. Finally, husband’s inventory listed real property as being community property and noted that sale of the property was pending. However, husband did not testify

regarding the sales price or how the proceeds of that sale should be divided. Husband merely asked trial court to award him that property.

Thus, the record lacks evidence identifying, describing, and valuing the entire community estate. Trial court's decree refers to the real property, livestock, and husband's TRS account as community assets awarded to husband as his separate property. However, there is no evidence identifying, describing, or valuing the livestock, and no evidence of the value of the proceeds from the sale of the real property. Moreover, there is no evidence that the real estate, livestock, or TRS account were husband's separate property. Because there is a lack of evidence valuing the entire community estate, the trial court did not have sufficient evidence to exercise its discretion in determining a just and right division of the community estate. Consequently, trial court abused its discretion in the division of the community estate.

Mother argued that the evidence was legally and factually insufficient to support trial court's award of attorney's fees against her. A court may apportion attorney's fees in a divorce action as part of a just and right division of property. A court may not grant an unconditional award of appellate attorney's fees. An appellee is entitled to appellate attorney's fees only if the appellant is unsuccessful on appeal. If the fees are unconditional, the trial court is, in effect, penalizing a party for taking a successful appeal.

Here, husband presented no evidence on the issue of attorney's fees he incurred as support. Nor is there any evidence presented to support appellate attorney's fees. Moreover, the award of appellate fees against wife was unconditional. Because there is no evidence to support the trial court's award of attorney's fees as support or the appellate attorney's fees and the award of appellate fees was unconditional, trial court abused its discretion in awarding judgment for husband's attorney's fees.

In conclusion, because husband presented insufficient evidence valuing the entire community estate and no evidence concerning attorney's fees awarded as support, trial court lacked sufficient evidence upon which to exercise its discretion in determining a just and right division of the community estate. Thus, there is error apparent on the face of the record.

***Editor's Comment:** This case underscores that the trial court has an affirmative duty to make sure it receives sufficient evidence of values of each asset upon which to base a "just and right" division. If the evidence is insufficient, the trial court has an affirmative obligation to refuse to rule until sufficient evidence is presented. Also, this case illustrates that in a default hearing where one side fails to appear for trial, the party seeking relief still must offer sufficient evidence to prove the case and support the judgment. M.M.O.*

***Editor's Comment:** Take note of this case. When taking a default make sure to admit your client's inventory and appraisal and, more importantly, make sure to offer testimony as to any asset which does not have a value in the inventory. C.N.*

***Editor's Comment:** From time to time, a case comes up where the record is insufficient to value and divide the community estate. This opinion does a nice job of collecting those cases. J.V.*

TRIAL EVIDENCE DID NOT ESTABLISH A SUBSTANTIAL DEBT AGAINST THE COMMUNITY ESTATE; THE EVIDENCE AT TRIAL, THEREFORE, WAS SUFFICIENT TO SUPPORT TRIAL COURT'S EQUAL DIVISION OF COMMUNITY PROPERTY.

¶10-5-06. [*Hernandez v. Hernandez*, No. 13-08-00722-CV, 2010 WL 3820900 \(Tex. App.—Corpus Christi 2010, no pet. h.\) \(mem. op.\) \(9/30/10\).](#)

Facts: Trial court entered a divorce decree dividing the community property including real property and family business assets between husband and wife. Trial court expressly found no liabilities of the community estate and accordingly divided the community estate in half. Because husband received a larger share of real property, trial court ordered husband to pay \$446,535 to wife to achieve a "just and right division." Husband appealed.

Holding: Affirmed

Opinion: Wife argued that husband's appeal should be dismissed under the acceptance of benefits doctrine. Under the acceptance of benefits doctrine, a litigant cannot treat a judgment as both right and wrong, and if the litigant voluntarily accepts the benefits of a judgment, the litigant cannot prosecute an appeal. However, the acceptance of benefits doctrine does not apply if reversal of the judgment could not possibly affect the litigant's right to the benefits already secured under the judgment.

Here, wife contends that because husband pledged real property awarded to him in the divorce decree to secure a loan and that he removed certificates of deposit awarded to him in the decree; that husband accepted the benefits of trial court's judgment. However, trial court divided the community property evenly between husband and wife. Husband does not contend that the property division was entirely erroneous; instead, he argues that trial court failed to acknowledge and divide a substantial community debt. By his appeal, husband seeks only further recovery in the form of a reduction of the \$446,535 that trial court ordered him to pay to wife. Thus, if we were to reverse the underlying judgment and remand to trial court for a just and right division, it is unlikely that trial court would re-divide all of the community property but instead would simply reduce the amount of husband's payment. Accordingly reversal of the judgment would not affect husband's right to the benefits already secured under it. Therefore, the acceptance of the benefits doctrine does not apply to husband's appeal.

Husband contends that the evidence is legally insufficient to support trial court's finding that there were no liabilities of the community estate because the evidence proved that the community estate included debt totaling \$656,548. A party seeking entitlement to an award of property in a divorce petition bears the burden in the trial court to adequately describe the assets and liabilities of the community estate and establish their respective values. The value of community assets and liabilities is generally determined at the date of divorce or as close to it as possible.

Here, husband argues that the trial evidence established a substantial community debt. Although, the family business's financial documents and tax returns offer evidence of its long-term liabilities in 2004 and 2005, the parties' divorce hearing was held in 2008. The financial documents and tax returns offer no indication of the existence or amount of community debt at the time of the divorce. Similarly, neither husband's sworn inventories nor his expert report adequately describe the existence or amount of community debt. Finally, during his opening statement, wife's trial counsel stated, that there was a substantial debt against the family business. Husband asserts that this "admission" by wife's counsel is proof of liabilities of the community estate. However, opening statements are not evidence. The trial evidence did not conclusively establish that the community estate owed a substantial debt. Thus, the evidence was legally sufficient to support the trial court's division of community property.

***Editor's Comment:** Another point about property divisions... if a party wants a trial court to consider an asset/debt in its division of the community estate, the party has the burden to offer evidence on that asset/debt. The trial court can only divide what the evidence shows in existence at the time of divorce. M.M.O.*

***Editor's Comment:** The acceptance of benefits doctrine still lurks in the dark corners of Texas law waiting to penalize the unwary. Tip to practitioners: get temporary orders pending appeal that allow parties to use identifiable property to live on during the pendency of any appeal. C.N.*

***Editor's Comment:** The court lays out the "narrow exceptions" to the acceptance-of-benefits doctrine. The doctrine does not apply if: "(1) reversal of the judgment could not possibly affect [appellant's] right to the benefits already secured under it, . . . ; (2) economic circumstances compelled [appellant] to accept benefits, . . . ; or (3) [appellant's] acceptance of cash benefits under the judgment was not prejudicial to [appellee]." J.V.*

DIVORCE

POST-DECREE ENFORCEMENT

TRIAL COURT ERRED BY MODIFYING DIVORCE DECREE TO CHANGE WIFE'S SEPARATE PROPERTY TO HUSBAND'S SEPARATE PROPERTY; TRIAL COURT DID NOT ERR BY HOLDING WIFE IN CONTEMPT FOR FAILING TO OBTAIN REFINANCING ON REAL PROPERTY AS REQUIRED BY THE DIVORCE DECREE.

¶10-5-07. [*Snodgrass v. Snodgrass*, -- S.W.3d --, 2010 WL 4745662 \(Tex. App.—Houston \[14th Dist.\] 2010, orig. proceeding\) \(11/23/10\).](#)

Facts: Husband and wife divorced in 2008. Trial court signed a divorce decree that dealt with two pieces of real property, “Pine Creek” and “Oakbrook.” Trial court unconditionally awarded Pine Creek to husband as his sole and separate property, and ordered wife to execute and deliver the deed to husband. Wife failed to execute and deliver the Pine Creek deed as ordered. Additionally, trial court awarded Oakbrook to wife as her sole and separate property upon the refinancing of Oakbrook on or before May 24, 2008. Trial court also ordered husband to pay wife \$25,000 at the closing of the new financing on Oakbrook. Wife did not obtain refinancing of the Oakbrook mortgage on or before the refinancing deadline. In October 2008, husband filed a petition to enforce the decree and hold wife in contempt.

Following trial, trial court determined that the Oakbrook conveyance was a nullity (husband was not obligated to pay wife \$25,000), Oakbrook was husband’s separate property, and trial court held wife in contempt for failing to obtain refinancing on Oakbrook. Trial court denied wife’s motion for clarification of the decree. Wife appealed trial court’s property determination and petitioned for a writ of mandamus regarding trial court’s contempt finding.

Holding: reversed and remanded; mandamus petition denied.

Opinion: As an appellate issue, wife argued that the divorce decree was ambiguous regarding the disposition of Oakbrook and husband’s obligation to pay wife \$25,000. Because wife did not obtain refinancing of the Oakbrook mortgage by the refinancing deadline, trial court determined that husband no longer had any obligation to pay wife \$25,000 and that husband was entitled to all right, title, and interest in Oakbrook, subject to the existing mortgage lien.

Under [TFC 7.001](#), in a divorce decree, the trial court “shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.” A trial court divides community property, but it cannot divide separate property. Here, under the unambiguous language of the decree, trial court characterized Oakbrook as community property and included it in the trial court’s just and right division of the community property. Additionally, if wife had obtained refinancing of the mortgage on Oakbrook, she would have been entitled to all of the community’s interest in Oakbrook as well as a \$25,000 contribution from husband towards the refinancing at the closing of the refinancing transaction. Thus, the issue is what the decree provided regarding Oakbrook if wife failed to obtain refinancing on Oakbrook.

Trial court awarded wife Oakbrook only if she obtained refinancing of the mortgage by the refinancing deadline. After reviewing the entire decree, it is clear that no language in the decree addresses the disposition of Oakbrook if wife fails to obtain refinancing of the Oakbrook mortgage by this date. The decree does not specify a general methodology for dividing the community property, and it does not contain any provision addressing the division of community property that is not specifically divided in the decree. However, a final divorce decree can be unambiguous even if a trial court failed to divide all of the community property under

the decree's unambiguous language. Here, the terms of the divorce decree are unambiguous. Thus, trial court did not err in denying wife's motion for clarification.

Wife argued trial court erroneously modified the final divorce decree to change the characterization of Oakbrook from community property to husband's separate property. Under [TFC 9.006\(a\)](#), a trial court has the power to render orders to enforce the property division in a divorce decree. But, per [TFC 9.007\(a\)](#), a trial court is not authorized to amend, modify, alter, or change a divorce decree's property division. Here, in its enforcement order, trial court determined that, under the decree, if wife failed to timely obtain refinancing of the Oakbrook mortgage, she was not entitled to any interest in Oakbrook. Trial court also determined that Oakbrook was husband's separate property, ordered wife to vacate Oakbrook, and sign a deed conveying to husband all of her interest in the property. Accordingly, trial court erred by impermissibly modifying the final divorce decree and by determining that Oakbrook is husband's separate property.

In her mandamus issue wife argued that trial court abused its discretion by holding her in contempt for her failure to obtain refinancing of the Oakbrook mortgage because the evidence established that she had no ability to do so. An involuntary inability to comply with a court order is a valid defense to contempt; however, the contemnor has the burden of proving this defense.

Here, at trial, husband testified that he contacted a mortgage broker friend in an attempt to assist wife obtain refinancing on Oakbrook. This friend, however, was unable to assist wife. Wife testified that, through her business, she only earned \$58,000 in 2007 and \$20,000 in 2008 and that she was experiencing economic difficulties. Wife testified further that she had not filed personal tax return since 2004 and did not file a business return in 2007. Wife also testified she attempted to obtain refinancing on Oakbrook on three separate occasions, but because of her financial condition, she was unable to obtain refinancing.

Although the record contains evidence that wife was experiencing economic difficulties, the record also contains evidence that she refused to sign the deed to Pine Creek in violation of trial court's order. In addition, though told that, as part of the refinancing process, she would need to document her past income to potential lenders through her income tax returns, she chose not to file a business return for 2007 and not to file personal returns from 2005 through 2007. Even if wife's business was not doing well throughout 2008, trial court reasonably could have concluded that wife did not make significant efforts to obtain other employment. Furthermore, wife testified that she made three attempts to obtain refinancing. However, she gave no details as to what these attempts entailed, nor did she identify any lenders from whom she sought to obtain credit. Thus, wife did not conclusively prove her involuntary inability to obtain refinancing of the Oakbrook mortgage. Accordingly, her mandamus petition is denied.

Editor's Comment: Wife's intentional failure to file tax returns surely hurt her chances for refinancing. But, should a court expect an unemployed person to "make significant efforts to obtain other employment" to enhance the likelihood of refinancing? The court also noted that wife "proffered no expert testimony that someone in her situation could not obtain refinancing no matter what she might do to try to obtain it." The scope of the evidence on which the court relied in upholding the contempt is troubling. J.V.

SAPCR

STANDING AND PROCEDURE

UNDER [TFC 154.303](#), OAG DID NOT HAVE STANDING TO FILE SUIT TO ESTABLISH SUPPORT FOR FATHER'S ADULT DISABLED CHILDREN.

¶10-5-08. [Office of Atty. Gen. of Texas v. Crawford](#), 322 S.W.3d 858 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (8/31/10).

Facts: Following divorce, trial court ordered father to pay child support for his two children until each turned eighteen. Subsequently, father fell behind on his support obligation. OAG, as the Title IV-D agency for Tex-

as, filed suit against father to enforce the child support order. Afterward, trial court signed an agreed order holding that father owed unpaid past child support through February 2006. In June 2007, OAG filed a new petition, seeking to modify the support order and confirm additional arrearage. Father responded by filing a motion to terminate child support because both children turned eighteen as of 2007. OAG then filed a supplemental suit for modification of the child support order. OAG claimed that because both adult children suffered from disabilities existing before each turned eighteen, they were entitled to continuing support. Father challenged OAG's authority to pursue the action in the absence of an assignment from a person with standing to sue under [TFC 154.303](#). Trial court ruled that OAG did not demonstrate its standing and dismissed the case without prejudice. OAG appealed.

Holding: Affirmed

Opinion: [TFC 154](#), Subchapter F, authorizes court-ordered support for adult disabled children. [TFC 154.303\(a\)](#) confers standing to file a suit under subchapter F “only” on a parent, guardian, or the child if mentally capable. Additionally under [TFC 154.303\(b\)](#), a party authorized to seek relief may assign that right to the OAG, in its capacity as the State's Title IV-D agency.

OAG argued it has standing under [TFC 102.007](#), which states that “In providing [Title IV-D] services authorized by Chapter 231, the Title IV-D agency ... may file a child support action authorized under this title, including a suit for modification or a motion for enforcement. However, [TFC 154.303](#) provides that a suit to obtain court-ordered support for a disabled adult child “may be filed only by” specified parties, of whom the OAG is not one. The use of the word “only” expressly excludes from the scope of statutory standing all persons other than those identified. Thus, the plain meaning of section 154.303(a) precludes OAG's arguments for standing to sue on more general principles. This reading is consistent with the rule of statutory construction that a more specific statutory provision controls over a more general provision.

Similarly, the fact that OAG had standing to file its original petition to enforce father's child support obligations does not mean that it maintained standing to file a subsequent petition to require continuing support payments for adult disabled children. A party may have standing to sue another for one purpose but not others; standing is not dispensed in gross. Here, OAG's standing cannot be inferred from its prior action to enforce support obligations because section 154.303 specifically provides that unless it has received an assignment, the OAG does not have standing to file suit for the purpose of establishing support for adult disabled children.

This result does not preclude OAG from assisting adult disabled children to obtain support. Our application of the statute merely enforces the legislature's expressly stated intent to require the OAG to obtain a specific assignment before doing so. The statutory scheme requires a specific assignment from a person listed in [TFC 154.303\(a\)](#) in order for OAG to have standing to sue to modify an existing child support order to provide support for adult disabled children. It is undisputed that OAG did not have such an assignment.

Editor's Comment: There are very few reported cases addressing adult disabled child support. This case reveals that only a parent, guardian, or child has standing to seek adult disabled child support on behalf of an adult disabled child. The state, through the OAG, is not one of those folks. The case is unclear about how the result would change if a parent assigned to the OAG the right to seek such. M.M.O.

EVEN THOUGH AUNT'S POSSESSION OF CHILD WAS NOT CONTINUOUS FOR SIX MONTHS PRIOR TO SAPCR, SHE HAD STANDING TO INTERVENE BECAUSE HER POSSESSION OF CHILD WAS CONSISTENT OVER A SUBSTANTIAL PERIOD OF TIME.

¶10-5-09. [Smith v. Hawkins](#), No. 01-09-00060-CV, 2010 WL 3718546 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (9/23/10).

Facts: Trial court named Grandmother as child's managing conservator in [1998 and ordered father to pay \\$150 per month in child support](#). In 2007, Father petitioned trial court to modify conservatorship and child support. Grandmother answered and counter-petitioned to modify, seeking an increase in child support. Ma-

ternal Aunt intervened, seeking to be named a joint managing conservator with Grandmother. The parties entered into a mediated settlement agreement on the issue of conservatorship. The agreement appointed Grandmother and Aunt as joint managing conservators and father as a possessory conservator.

Holding: Affirmed

Opinion: Father argued that Aunt lacked standing to intervene in the SAPCR because the evidence was insufficient to prove that Aunt had actual care, control, and possession of child for at least six months before Aunt's intervention. [TFC 102.003\(a\)\(9\)](#) provides that "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition" may file an original suit at any time." Nothing in [TFC 102.003\(a\)\(9\)](#) requires that care, custody, control and possession be exclusive.

Here, trial evidence established that Aunt and Grandmother joined households in 2000 and that Aunt used her income to provide for child. Additionally, the evidence established that Child's principal residence had been with Grandmother and Aunt since 2000. Aunt's care, custody, control, and possession, while not exclusive, had been consistent over a substantial period of time. Furthermore, Aunt testified that she lived in the household with Grandmother and provides for child by paying the mortgage and for child's health insurance. Accordingly, trial court's finding that Aunt had standing to intervene in the SAPCR was supported by a preponderance of the evidence.

Editor's Comment: Another case muddying the waters of nonparent standing. Here, an aunt is determined to have a substantial relationship with the child when she lived with the custodial grandmother over time and helped financially support the household. The Houston Court fails to comment on what actions the aunt took that demonstrated "care" of the child, "control" of the child, or "possession" of the child in the parental, decision-making sense that would support her standing. There's a difference between someone in a household participating in a child's life versus a person actually making parent decisions in control of the child. This opinion seems to imply that every live-in-lover and stepparent can sue for custody of a child. We know the saying, it takes a village to raise a child, but does that mean that every villager has the right to sue for custody? The line has to be drawn somewhere. The Texas Supreme Court desperately needs to clarify how we determine nonparent standing in light of the pendulum swings of opinions from the various courts of appeals. M.M.O.

Editor's Comment: How was father able to raise the issue of intervention if he, Grandmother and Aunt entered into a mediated settlement agreement "on the issues of managing and possessory conservatorship and visitation?" J.V.

TRIAL COURT ERRED IN DENYING FATHER'S SPECIAL APPEARANCE BECAUSE EVIDENCE THAT HE MAINTAINED A TEXAS BANK ACCOUNT AND THAT HE CONTACTED GOVERNMENT ENTITIES REGARDING CHILD FAILED TO ESTABLISH SUFFICIENT CONTACTS TO SUPPORT TRIAL COURT'S PERSONAL JURISDICTION.

¶10-5-10. [In re T.J.W., -- S.W.3d --, 2010 WL 4815873 \(Tex. App.—San Antonio 2010, no pet. h.\) \(11/24/10\).](#)

Facts: Mother gave birth to child in 1991 in Louisiana. Mother and father never married. Father, who is in the military, never resided in Texas. Mother and child moved to Texas in 1996. In 1997, mother petitioned trial court to adjudicate child's parentage and requested current and retroactive child support. Trial court denied father's special appearance, adjudicated him as the father, and signed an order confirming father owed \$25,000 in child support arrearages. Father appealed, arguing trial court erred in denying his special appearance because the evidence did not show that he had sufficient minimum contacts with Texas to support the exercise of personal jurisdiction over him.

Holding: Reversed and dismissed

Opinion: Federal constitutional requirements of due process limit the power of a state to assert personal jurisdiction over a nonresident defendant. To satisfy due process, the plaintiff must first show that the nonresident defendant has purposely established “minimum contacts” with the forum state. Thus, in order for a nonresident defendant to have purposely established “minimum contacts” with Texas, a substantial connection must exist between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas. The contacts between the nonresident defendant and Texas must be continuous and systematic. This requires a showing of substantial activities by the nonresident defendant in Texas.

Here, the evidence established only four contacts between father and Texas. First, father contacted the military services in Texas on one occasion to request information as to whether child was being mentally and physically abused. Second, father established a joint bank account in his and child’s name at a Texas bank. Third, father completed a form on two occasions that was faxed to Texas in order for child to obtain a military ID card. Finally, father paid wife child support payments while wife was residing in Texas.

Texas courts have held that a nonresident mailing checks in payment of an obligation to a person or company in Texas is not a sufficient contact to establish personal jurisdiction. Texas courts have also held that a non-resident’s deposits into a Texas bank account, if considered in isolation, is insufficient to establish sufficient contact with the forum state. Moreover, faxing a form to Texas does not establish minimum contacts. Even when all of father’s contacts with Texas are considered together, his contacts were not sufficient purposeful, continuous, and systematic contacts with Texas so as to establish personal jurisdiction. Because the evidence fails to establish a substantial connection between father and Texas, trial court erred in denying his special appearance.

Editor’s Comment: Had this case been affirmed, the “minimum contacts” doctrine would have lost any meaning. J.V.

SAPCR CONSERVATORSHIP

DESPITE MOTHER’S DRUG USE AND FELONY DRUG CONVICTIONS, TRIAL COURT ABUSED ITS DISCRETION BY APPOINTING APPELLEES AS JOINT MANAGING CONSERVATORS BECAUSE MOTHER CLEANED UP HER LIFESTYLE AND HAD NOT TESTED POSITIVE FOR DRUGS IN THE TWENTY MONTHS PRIOR TO TRIAL.

¶10-5-11. [*In re K.R.B.*, No. 02-10-00021-CV, 2010 WL 3928727 \(Tex. App.—Fort Worth 2010, no pet. h.\) \(mem. op.\) \(10/07/10\).](#)

Facts: Mother gave birth to child in September 2006. Mother started using drugs sometime in late 2005 before she became pregnant with child and continued using drugs for a period of time after child was born. In May 2007, CPS intervened in child’s care after mother was arrested on drug possession and drug manufacturing charges, and tested positive for methamphetamine. Pursuant to a child safety and evaluation plan, mother agreed to allow great aunt and great uncle (appellees) to take possession of child. But in December 2007, after mother had been arrested again, appellees filed a petition seeking to be appointed sole managing conservators of child.

Following trial, trial court found that mother had engaged in a lifestyle involving serious criminal conduct and had associated with persons who engaged in criminal conduct that created an unstable and harmful environment for child. Additionally, trial court found that while on deferred adjudication probation for multi-

ple felony offenses, mother knowingly engaged in conduct that violated the terms and conditions of those probations and her continued conduct would likely result in her being incarcerated. Trial court further found that mother's criminal conduct resulted in child being raised almost exclusively by appellees. Trial court concluded that appointing mother as the sole managing conservator of child would not be in the child's best interest because it would significantly impair the child's physical health and emotional development. Accordingly, trial court appointed appellees and mother as child's joint managing conservators, with appellees having the exclusive right to designate child's primary residence. Mother appealed challenging the legal and factual sufficiency of the evidence.

Holding: Reversed and remanded.

Opinion: [TFC 153.131\(a\)](#) provides that 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. The statute creates a "strong presumption" in favor of parental custody and imposes a "heavy burden" on a nonparent. The nonparent can rebut the parental presumption by showing that the appointment of the parent would significantly impair the child's physical health or emotional development. Impairment must be proved by a preponderance of the evidence indicating that some specific, identifiable behavior or conduct of the parent, demonstrated by specific acts or omissions of the parent, will probably cause that harm. This link between the parent's conduct and harm to the child may not be based on evidence that raises mere surmise or speculation of possible harm.

Acts or omissions that constitute significant impairment include, but are not limited to, physical abuse, severe neglect, abandonment, drug or alcohol abuse, or immoral behavior on the part of the parent. However, if the parent is presently a suitable person to have custody, the fact that there was a time in the past when the parent would not have been a proper person to have such custody is not controlling. Evidence of past misconduct may not by itself be sufficient to show present unfitness.

Here, the record shows that mother started using drugs in late 2005 and continued using drugs for some time after child was born. CPS removed child from mother's care in May 2007 because she failed a hair follicle test. Additionally, the record revealed extensive testimony detailing mother's criminal history. From December 2006 until December 2007, mother was charged with four felonies related to the possession, manufacture and transportation of methamphetamine or precursor chemicals used in the manufacture of methamphetamine. Trial court placed mother on deferred adjudicated probation for all four offenses. Mother stated that some of the individuals who were at the apartment where she was arrested in December, 2006, were drug users who had been involved in the criminal justice system. Mother admitted that child had been around some of these people on a number of occasions.

However, mother testified that she had changed her life and that she had not used illegal drugs since January 2008, when she was placed on probation. The record indicated that mother had submitted to hair four hair follicle drug tests between August, 2008, and September 2009; and each test result was negative. In March 2008, mother completed a twenty-eight day rehabilitation program and also completed parenting classes while at the program. Mother stated that she progressed uninterrupted through the visitation schedule that trial court set out and that she had not missed a visit with child since.

Additionally, trial court heard extensive testimony regarding mother's changed lifestyle. A probation officer testified mother passed several urinalysis tests. Probation officer testified further that during her visits to mother's home, mother never appeared to be under the influence and the officer never saw anything in the home to cause her concern. Mother's parents and mother's sister testified they had seen no signs that mother was using drugs again and they observed positive changes in mother's lifestyle.

Great aunt, on the other hand, testified she had concerns about child being under mother's care. Appellees primary concern regarded mother's former drug use and the people with whom she used to associate with who also used illegal drugs. Great aunt stated, however, that she did not think that mother posed any danger of physical harm or abuse on the child; rather, she was worried about the people that mother chose to associate with. Great aunt also expressed concern about disrupting child's stability because appellees had raised child for over two years and that child had bonded with them. Great aunt further testified that she was con-

cerned about dogs inside mother's house and smoke in the house before child came over for visits. Great aunt also recounted that mother was unable on one occasion to administer child's allergy medicine.

Appellees' concerns about child's physical health and emotional development fall into four categories: (1) mother's past criminal conduct and drug use; (2) the crowd that mother used to associate with; (3) child's emotional attachment to great aunt and uncle and child's difficulty adjusting to change; and (4) issues regarding smoke at mother's house and her ability to administer child's allergy medicine. Although relevant, the evidence of mother's past criminal conduct and drug use does not demonstrate that appointing mother as sole managing conservator at the time of trial would have significantly impaired child's physical health or emotional development. The evidence shows that since being placed on probation roughly twenty months before trial, mother had passed multiple drug tests, had complied with her probation requirements, and had given no person who testified any indication that she had been under the influence of drugs. Mother's testimony that she had not used drugs since being placed on probation was uncontroverted. There was no evidence that mother continued to associate with or was currently associating with anyone who uses or used to use illegal drugs.

Accordingly, while there is some evidence that placing child under the sole managing conservatorship of mother might significantly impair child's physical health and emotional development, the evidence is factually insufficient to support a finding of such impairment. Trial court abused its discretion by so finding.

Editor's Comment: What have you done to endanger the child lately? Another case in the long string of non-parent custody litigation this year, here the Mother's long untoward history was insufficient to rebut the parental presumption because she cleaned up her act right before trial. So, now we have a time-factor applied to the parental presumption. Where is the Texas Supreme Court on this stuff? M.M.O.

Editor's Comment: Conservatorship issues are subject to review for abuse of discretion. Under that standard, legal and factual insufficiency are not independent grounds for review but are relevant to whether a trial court abused its discretion. It is unusual for an appellate court to reverse a trial court's decision on conservatorship for factual insufficiency of the evidence. This standard of review requires the court of appeals to weigh the evidence supporting the trial court's ruling to determine whether it is "so weak, or so contrary to the overwhelming weight of all the evidence" that a judgment should be set aside and a new trial ordered. This is a close as an appellate court can come to disagreeing with a trial court over the facts of a case. J.V.

EVIDENCE OF MOTHER'S MILITARY DEPLOYMENT TOGETHER WITH CHILD'S CURRENT STABLE CONDITIONS SUPPORTED TRIAL COURT'S AWARD TO FATHER OF THE EXCLUSIVE RIGHT TO DESIGNATE CHILD'S PRIMARY RESIDENCE.

¶10-5-12. [*Bell v. Campbell*, -- S.W.3d --, 2010 WL 4366024 \(Tex. App.—El Paso 2010, no pet. h.\)](#) (11/03/10).

Facts: Mother and father married in 2004 and mother gave birth to the couple's child in February 2005. Mother enlisted in the Army and was stationed at Fort Bragg, North Carolina. Child remained with father in El Paso. In the latter part of 2005, mother petitioned for divorce. Trial court conducted the trial in mother's absence while she was deployed to Afghanistan. After considering the testimony of the parties and their relatives, the trial court granted the divorce, named father and mother joint managing conservators, and awarded father the exclusive right to designate child's primary residence. Mother appealed arguing the evidence demonstrated that such appointment was not in child's best interest.

Holding: Affirmed

Opinion: [TFC 153.002](#) and 153.134(a) authorize a trial court to name both parents JMCs if it finds such designation to be in the child's best interest. A trial court's conservatorship order is reviewed under an abuse-of-discretion standard. If some evidence of a substantive and probative character exists to support the trial court's decision, no abuse of discretion has occurred.

Here, the record evidence shows that after mother was deployed to Afghanistan, father permitted his girlfriend to stay overnight with him and the child in violation of trial court's temporary orders. Further evidence revealed that during both his separation from mother and the pendency of the divorce proceedings, father had not only been living with girlfriend but had fathered their two children as well. Trial court also considered evidence that since the parties' separation, father had worked several different jobs and had resided in several different locations. At the time of the final divorce hearing, father worked a graveyard shift and also held a part-time job, working more than 60 hours per week.

Father presented evidence that on several occasions, father paid for child's medical expenses out-of-pocket. Evidence also showed that father played with, cooked for and bathed child. Father stated that he had a special bond with child and he sought custody of her because he felt child would suffer if removed from the family members with whom she had been interacting since she was born.

Moreover, the evidence showed that mother had been an enlisted in the Army for several years, was stationed at Fort Bragg, North Carolina, and was in a stable work environment. As a result of her employment, mother provided child with medical, dental, and vision benefits. Mother also explained the opportunities and restrictions related to her requests to be stationed in or near El Paso, where child and all of the child's other family members lived. In support of her request to have the exclusive right to determine child's residence, mother argued she could work a shift that comported with child's schedule and would permit them to have more time together should the court award her the right to designate child's residence.

Based on the record, trial court's decision to appoint father joint managing conservator with the exclusive right to establish primary residence falls within the zone of reasonable disagreement. Trial court was aware of father's non-compliance with its temporary orders and the other complained-of evidence raised in mother's appeal. The evidence showed that, by residing in El Paso, child would have access to all of her family members, including mother when mother was able to return home. Accordingly, trial court did not abuse its discretion in appointing father to serve as the joint managing conservator with the exclusive right to establish child's primary residence.

TRIAL COURT ABUSED ITS DISCRETION BY APPOINTING GRANDMOTHER MANAGING CONSERVATOR BECAUSE SPECULATIVE EVIDENCE THAT UPROOTING CHILD FROM GRANDMOTHER'S HOME WOULD IMPAIR CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT WAS INSUFFICIENT TO OVERCOME THE PARENTAL PRESUMPTION.

¶10-5-13. [*Gray v. Shook*, -- S.W.3d --, 2010 WL 4910127 \(Tex. App.—Corpus Christi 2010, no pet. h.\) \(11/30/10\).](#)

Facts: Father filed a SAPCR seeking joint managing conservatorship of child and to be granted exclusive right to designate child's primary residence. Maternal grandmother intervened also seeking to be appointed joint managing conservator of child and to be granted the exclusive right to establish child's primary residence.

Grandmother testified child had lived with grandmother since she was born and that when mother moved out of grandmother's home approximately two years earlier, child continued living with grandmother. Grandmother stated that it was in child's best interest for father to be appointed possessory conservator and that it would significantly impair child's physical health if trial court appointed father managing conservator because grandmother's home is the only home child had ever known. Grandmother testified that since moving to Seattle, father visited child only a few time per year.

A licensed clinical social worker testified that she had been counseling child for two months prior to the trial due to child's separation anxiety. According to social worker, stability and consistency are very important to a child experiencing anxiety. Social worker explained that a child of child's age is not able to bond with a person who visits every three to four months and that for bonding to occur, more frequent contact is necessary. Social worker also testified that if child was removed from grandmother's home, she would "freak out," cling to grandmother, cry, scream, and throw up. According to social worker, if the visitation schedule "is too accelerated," there could be problems "such as the continued vomiting during visits ... bed-wetting ...

anxiety.... Maybe even she would become more controlling, more bossy, which could cause problems with her peer interaction.”

Trial court found that appointing father as joint managing conservator would not be in child’s best interest because the appointment would significantly impair the child’s physical health or emotional development. Trial court appointed grandmother managing conservator with the right to determine child’s residence and appointed father and mother as possessory conservators. Father appealed, arguing grandmother offered no evidence of any specific acts or omissions by father that would significantly impair the physical health or emotional development of child.

Holding: Reversed and remanded

Opinion: The presumption that the best interest of a child is served by awarding custody to a natural parent is deeply embedded in Texas law. Therefore, [TFC 153.131](#) requires that the parent be appointed sole managing conservator or both parents be appointed joint managing conservators unless the nonparent proves by a preponderance of the credible evidence 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.”

To rebut the presumption, the evidence must support a logical inference that some specific, identifiable behavior or conduct of the parent will probably cause significant physical or emotional harm to the child. In other words, the nonparent must usually present evidence affirmatively showing conduct of the parent which will have a detrimental effect upon the child, such as physical abuse, severe neglect, abandonment, drug or alcoholic abuse or very immoral behavior on the part of the parent. Here, the evidence presented shows that the only possible harm to child is the “uprooting” itself—not any specific, identifiable act or omission, conduct or behavior of father.

Furthermore, the statute requires that the harm to the child may not be based on evidence that raises a mere surmise or speculation of possible harm. Grandmother’s theory of harm can be summarized as follows: (1) social worker testified that child suffers from “some” separation anxiety; (2) this anxiety has caused “recurring vomiting” in the past, could affect her peer relationships in the future, and may lead to other long-term problems; and (3) these harms can be prevented if child remains with grandmother because child feels safe with grandmother and child has not bonded with father.

Evidence of sporadic, past vomiting and the *possibility* of negative effects on peer relationships is insufficient evidence to rise above a mere speculation of harm. Moreover, social worker testified that when a child is separated from a caretaker, depression can sometimes develop. These are the exact types of speculative harms that are prohibited from consideration. Without consideration of this speculative harm, there is no evidence whatsoever to rebut the parental presumption. Thus, trial court abused its discretion in appointing grandmother, a nonparent, as child’s sole managing conservator.

Dissent: A trial court does not abuse its discretion when there is some evidence of a substantive and probative character to support its decision. In some cases, the parental presumption can be rebutted by other evidence establishing the statutorily required negative effect on the child even when there is no evidence establishing any particular blameworthy act of the parent. Several Texas cases have concluded that the nonparent can rebut the parental presumption solely by producing evidence that the effect on the child of being removed from the only home the child had ever known would be “devastating.”

Here, social worker testified that child suffers from separation anxiety, a condition she defined as a fear of being separated from either the parent or person of significance. Social worker testified that child considers grandmother her “primary parent” and feels “safe” in grandmother’s home. The evidence showed that child has lived with grandmother since she was born and has never known another home. Additionally, according to social worker, child viewed father as a stranger, and father has not bonded with child because he has not spent enough time with child. Furthermore, social worker testified that after visiting father, child vomited due to her anxiety.

There was evidence presented that the danger of uprooting child from grandmother’s home would significantly impair child’s physical health and emotional development. Therefore, the trial court could have reasonably concluded from the evidence that appointing father managing conservator would have the statutorily-

required negative effect on child. Accordingly, trial court did not abuse its discretion by concluding that father's appointment as managing conservator would significantly impair child's physical health or emotional development. Trial court's judgment should be affirmed.

***Editor's Comment:** Another nonparent custody litigation case. Here the Corpus Christi Court clarifies that to rebut the parental presumption the evidence must support a logical inference that some specific, identifiable behavior or conduct of (by?) the parent will cause significant physical or emotional harm to the child. So, it isn't enough to say that separation from the grandmother, with whom the child has lived for a long-period of time, will cause the harm to the child. But, what about [Texas Family Code section 153.373](#), where the parental presumption is deemed rebutted when the parent voluntarily relinquishes actual care, control and possession of the child to a nonparent for a period of one year or more? That should make the question one of best interest, not parental presumption. M.M.O.*

SAPCR

POSSESSION AND ACCESS

☆☆☆ TEXAS SUPREME COURT ☆☆☆

TRIAL COURT ABUSED ITS DISCRETION BY GRANTING GRANDFATHER ACCESS TO CHILDREN BECAUSE GRANDFATHER DID NOT PROVE THAT FATHER FAILED TO ACT IN CHILDREN'S BEST INTEREST; TRIAL COURT'S APPOINTMENT OF A GUARDIAN AD LITEM DID NOT VIOLATE FATHER'S CONSTITUTIONAL RIGHT TO RAISE HIS CHILDREN AS HE SEES FIT.

¶10-5-14. [*In re Scheller*, -- S.W.3d --, 2010 WL 4371436 \(Tex. 2010\)](#) (orig. proceeding) (per curium) (11/05/10).

Facts: Mother passed away in 2007 and was survived by her two young children and the children's father. Following a dispute over access to the children, maternal grandfather petitioned trial court for temporary access to the children and for the court to appoint an expert to evaluate whether denying him access to the children would significantly affect the children's physical health or emotional well-being. Trial court rendered temporary orders awarding grandfather weekly telephone access and weekend possession for one weekend every other month. Trial court also appointed an expert to serve both as the children's guardian ad litem and as a psychological expert to evaluate the relationship between the children and the parties, and make recommendations regarding whether denying grandfather access to his granddaughters would significantly impair their physical health or emotional well-being. Father petitioned appellate court for mandamus relief, which the appellate court denied. Afterward, father petitioned the Texas Supreme Court for mandamus relief.

Holding: Mandamus conditionally granted

Opinion: Father argued that trial court improperly issued the temporary orders granting grandfather access to and possession of the children. Under [TFC 153.433\(a\)\(2\)](#), a trial court may award a grandparent access to a grandchild if the grandparent can overcome the presumption that a parent acts in the best interest of the parent's child by proving that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being. A grandchild's "lingering sadness" from lack of contact with grandparents does not sufficiently demonstrate significant harm to the child unless it rises to a level of significant emotional impairment.

The United States Supreme Court has held that a trial court's order for grandparent access unconstitutionally infringed on the parent's fundamental liberty interest where there was no evidence that the parent was unfit, that the children's health and well-being would suffer, or that the parent intended to exclude grandparent access entirely. [*Troxel v. Granville*, 530 U.S. 57 \(2000\)](#). The Court held that parents have a right to limit visitation of their children with third persons,' and between parents and judges, the parents should be the ones to choose whether to expose their children to certain people or ideas.

Here, grandfather argues that he met the hefty statutory burden to prove that his grandchildren's mental and physical health would suffer if he did not have access to them. Grandfather presented evidence regarding grandchildren's mental and physical health including: (1) displays of anger; (2) instances of isolated bed wetting and nightmares; (3) testimony that denying grandfather access would impair the children's physical or emotional development; and (4) the significant impact of loss of maternal family members on the children.

However, there is nothing in the record to indicate anything more substantial than the children's understandable sadness resulting from loss of their mother and, according to grandfather, missing their grandparents. In fact, the record shows that father has taken responsible measures to ensure that the children are able to cope with their grief, such as sending the children to counseling. Moreover, father has demonstrated a willingness to allow grandfather conditional access to the children. Accordingly, trial court abused its discretion in granting a temporary order for access to and possession because grandfather did not meet the hefty statutory burden required to prove that he is entitled to grandparent access rights.

Father argued that trial court's appointment of an expert psychologist to serve as guardian ad litem to the children violates his constitutional right to make child rearing decisions because it requires father to follow recommendations made by the expert. [TFC 105.001](#) vests considerable discretion in courts to issue temporary orders "for the safety and welfare of the child," however, a court cannot act to infringe on a party's constitutional rights. There is no reason to inject the State into the family realm when a parent adequately cares for his children.

Nevertheless, the Family Code provides the process by which a court may order an expert to serve as a guardian ad litem in a [SAPCR. Under TFC 153.002](#), the principle consideration in a SAPCR is the child's best interest. In SAPCRs, [TRCP 204.4\(a\)](#) provides that a trial court may appoint a psychologist to conduct a mental examination of the parties and children subject to the suit. Under [TFC 107.021\(a\)\(3\)](#), (b)(2), a trial court additionally has discretion to appoint a guardian ad litem in a suit for access to a child if it "finds that the appointment is necessary to ensure the determination of the best interests of the child." Psychologists are one class of professionals qualified under [TFC 107.001\(5\)\(B\)](#) and (5)(C) to serve as a guardians ad litem. In using these finite resources to determine the best interests of the children, the trial court did not abuse its discretion.

Father argued trial court's order appointing a guardian ad litem violates his constitutional rights because it orders his children to participate in counseling. Under [TFC 153.010\(a\)\(1\)](#), trial courts may order parties to participate in counseling with a mental health professional if they have a history of conflict in resolving disputes related to access to the child.

Here, it is clear from trial court's order that it did not intend to require counseling, but instead intended to have an expert psychologist assist the court in making factual determinations regarding whether depriving grandfather of access to and possession of his grandchildren would significantly impair their physical health or emotional well-being. Trial court only ordered the parties to follow the recommendations of the ad litem and otherwise cooperate in her evaluation of the circumstances surrounding the basis of the suit. Accordingly, trial court's appointment of an evaluative expert does not infringe on father's rights because such an appointment is allowed by law. Moreover, trial court's order does not interfere with father's rights, but rather seeks to determine the best interests of the children.

Editor's Comment: *The Supreme Court appears to be opening the door with this case by allowing the appointment of a guardian ad litem to assess the children's mental and emotional health, which would potentially have the effect of establishing the grandfather's burden of proof necessary for him to gain access and possession to the father's children. Here, there is no indication that there had been a divorce or that the father had ever invited the state into his marriage or that the father was unfit, which was the fundamental hurdle necessary for the state to insert itself into parental decision making in *Troxel v. Granville*. Nevertheless, the Supreme Court, without a showing of unfitness, now allows a grandparent access and possession case to*

move forward even though the grandparents have failed to establish a prima facie case. This seems to fly directly in the face of Troxel. G.L.S.

Editor's Comment: *The Texas Supreme Court finally weighs in on nonparent custody litigation and muddies the water even more. SCOTX says it is okay for a trial court to appoint a guardian ad litem to represent the child and order a social study into the best interest of the child before anyone rebuts the parental presumption—those actions are not in violation of a parent's right to parent. But, then SCOTX says the evidence necessary to rebut the parental presumption is only by preponderance of the evidence (not clear and convincing??). In this case, the grandfather failed to meet the burden to rebut the parental presumption to warrant access. The take-away here... SCOTX lightens the load for nonparents to pursue custody litigation—in direct violation of Troxel—by providing pretrial methods of proving a nonparent's case and by lowering the bar of proof to just a preponderance of the evidence. M.M.O.*

Editor's Comment: *Troxel holds that non-parents can intrude into the family only by showing that the parents are unfit. This case allows a significant intrusion into the family without such a showing, under the aegis of a discovery rule (Tex. R. Civ. P. 204.4(a)) and the ad litem statute (Tex. Fam. Code § 107.021(a)(3), (b)(2)). Grandfather's allegations would not have passed muster under [In re Derzapf, 219 S.W.3d 327 \(Tex. 2007\) \(per curiam\)](#). This case exemplifies the injection of the state "into the private realm of the family" that Troxel forbids. J.V.*



EVEN THOUGH MOTHER DID NOT PLEAD FOR RETROACTIVE CHILD SUPPORT, TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO HEAR EVIDENCE OF MOTHER'S ORAL REQUEST FOR RETROACTIVE SUPPORT BECAUSE FATHER HAD SPECIFIC NOTICE OF MOTHER'S REQUEST AND FAILED TO SPECIALLY EXCEPT.

¶10-5-15. [Taylor v. Taylor, -- S.W.3d --, 2010 WL 3618717 \(Tex. App.—Fort Worth 2010, no pet.\) \(9/16/10\).](#)

Facts: Mother and father both filed for divorce in April 2008. In her original petition, mother requested that father “be ordered to make payments for the support of the child.” At a hearing, the parties reached agreement on most issues with the exception of retroactive child support. When mother raised the issue at the hearing, father objected because mother did not specifically plead for retroactive child support. Trial court sustained father’s objection finding that retroactive child support must be pleaded in the face of an objection and that mother had not pleaded for retroactive child support. Following trial, mother appealed, arguing that trial court erred by refusing to hear evidence concerning retroactive child support because father waived any defect in her pleading by failing to specially except.

Holding: Reversed and remanded

Opinion: Texas follows a “fair notice” standard for pleading. Generally, a pleading provides fair notice of a claim when an opposing attorney of reasonable competence can examine the pleadings and ascertain the nature and basic issues of the controversy and the relevant testimony. [TRCP 90](#) provides that an opposing party must point out any defect in the pleadings by special exception in writing otherwise the defect is waived. In the absence of special exceptions, the petition should be construed liberally in favor of the pleader.

Here, mother's petition sought an order for child support, without clarifying whether the request was for future or retroactive child support. Father, however, had specific notice that mother sought retroactive child support. At a hearing, the parties announced to trial court that they had agreed to most issues but mother reserved the issue of retroactive child support to be litigated after the parties testified about the matters to which they agreed. To the extent that there was any ambiguity in the scope of mother's affirmative request for child support, father was obligated to file special exceptions and ask the trial court to order mother to replead with sufficient specificity. But trial court incorrectly found that special exceptions were not required. The trial court's erroneous legal conclusion and its refusal to allow mother to introduce evidence concerning retroactive child support were each abuses of discretion.

Dissent: Pleading rules require fair notice of a claim. [TFC 102.008\(b\)\(10\)](#) specifically requires parties to include a "statement describing what action the court is requested to take concerning the child and the statutory grounds on which the request is made."

Here, nowhere in mother's original petition or in any other subsequent pleading did she provide notice that she was specifically seeking retroactive child support. During the hearing on this issue, father objected due to the lack of notice or pleadings. Without some notice, we should not even reach the question of father's duty to specially except under [TRCP 90](#). Accordingly, trial court properly sustained the objection.

Editor's Comment: Does this case stand for the proposition that trial objections to evidence should be overruled if the objecting party knew or should have known what the other party meant to plead? J.V.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DEEMING FATHER'S PERSONAL INJURY SETTLEMENT AWARD, AND REAL AND PERSONAL PROPERTY PURCHASED WITH SETTLEMENT PROCEEDS, AS PART OF FATHER'S NET MONTHLY INCOME FOR CALCULATION OF HIS CHILD SUPPORT OBLIGATION.

¶10-5-16. [Smith v. Hawkins](#), No. 01-09-00060-CV, 2010 WL 3718546 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (9/23/10).

Facts: Trial court named Grandmother as child's managing conservator in [1998 and ordered father to pay \\$150 per month in child support](#). In 2007, Father petitioned trial court to modify child support. Grandmother counter-petitioned seeking an increase in child support. At trial, father testified that he had received a personal injury settlement totaling approximately \$900,000. Father stated that he had used the settlement proceeds to purchase a home for himself and his parents, an automobile, and a boat. Following trial, trial court increased father's monthly child support from \$150 to \$1,200. Father appealed.

Holding: Affirmed

Opinion: Father argued that trial court abused its discretion by increasing his monthly child support and that the evidence was insufficient to support trial court's order. Under [TFC 156.401\(a\)](#), modification of a child-support obligation is proper upon a showing that the circumstances of the child or a person affected by the order have materially and substantially changed since the order was signed. In a modification proceeding, the trial court compares the financial circumstances of the child and the affected parties at the time that the support order was entered with their circumstances at the time that modification is sought.

Under [TFC 154.062\(a\)](#), (b)(1) and (5), net resources for calculating child support include all wage and salary income and other compensation, including gifts and prizes. Additionally, [TFC 154.067\(a\)](#) provides that, when determining the net resources available for child support, the trial court may assign a reasonable amount of deemed income attributable to assets that do not currently produce income. [TFC 154.067\(a\)](#) also requires the trial court to consider whether certain non-income-producing property can be liquidated without an unreasonable financial sacrifice. [TFC 154.067\(b\)](#) provides further that the trial court may "assign a reasonable amount of deemed income to income-producing assets that a party has voluntarily transferred or on which earnings have intentionally been reduced." Finally, [TFC 154.123\(b\)\(3\)](#) permits a trial court to order

child support that varies from the TFC's child support guidelines and consider evidence of all relevant factors including "any financial resources available for the support of the child."

Here, father testified that he had received a net \$900,000 personal injury settlement award and that he had purchased a home, vehicle, and boat with the settlement award, as well as a home for his parents. Additionally, the record indicates that trial court found that in 1999, it ordered father to pay \$150 per month in child support and that now, child's monthly financial needs exceed \$1,872. Furthermore, trial court found that the amount of monthly net resources available to father include \$2,633 from his business activities, the house that he bought his parents, vehicles, equipment he purchased in relation to his business, and all of his expenditures. Based on its findings, trial court determined father should pay \$1,200.00 per month in child support.

Trial court's findings of fact and conclusions of law indicate that it took into account father's personal injury award in determining the net resources available for child support in accordance with [TFC 154.067](#). Thus, the record contains both probative and substantive evidence to support trial court's determination that the parties' circumstances had materially and substantially changed so as to warrant an increase in father's child support obligation. Accordingly, trial court did not abuse its discretion by increasing father's child support from \$150 to \$1,200.

***Editor's Comment:** The trial court took the personal injury settlement into account when it found that father's net resources included "income from his business activities," as well as the fact that he had purchased a home, vehicle, boat and equipment for his business plus bought his parents a home with proceeds from the settlement. J.V.*



TRIAL COURT HAD JURISDICTION TO HEAR AG'S MOTION TO CONFIRM FATHER'S ARREARAGES BECAUSE EVEN THOUGH CHILD NO LONGER LIVED WITH MOTHER, THE CHILD WAS NOT EMANCIPATED.

¶10-5-17. [In re C.P., -- S.W.3d --, 2010 WL 3770937 \(Tex. App.— El Paso 2010, no pet. h.\)](#) (9/29/10).

Facts: After mother and father divorced in 1986, trial court ordered father to pay child support. On November 2, 2006, AG filed a motion to confirm unpaid child support, alleging arrears. At trial before the associate judge, father testified that he paid the entire amount. Mother contested that father had paid the full amount. Mother testified, however, that when father turned 65, children received \$200 per month in Social Security benefits. Mother also testified that the youngest child ran away when he was 15 years old. During that time, however, father continued to support child. At the conclusion of the hearing, the associate judge determined that child became emancipated at age 15, and therefore, father's child-support obligation terminated, rendering AG's motion to confirm untimely filed. The trial court affirmed the associate judge. Mother appealed.

Holding: Affirmed

Opinion: Mother argued that father was not entitled to a credit for the social security paid to the children and that father not entitled to an offset because father had not filed a motion to modify his child support. Father argued that trial court never obtained jurisdiction over AG's motion to confirm arrearage because AG did not file the motion within ten years after the child-support obligation terminated. [TFC 157.005\(b\)](#) limits a trial court's jurisdiction to confirm an arrearage for past-due child support to motions filed no more than ten years after the date the child became an adult, where the obligation terminates under the order, or by operation of

law. Under [TFC 154.006\(a\)](#), when the decree is silent, the child-support obligation terminates at the removal of the child's disabilities.

Father contends that his child-support obligation terminated when child left home at age 15, thereby removing child's disabilities. Thus, father asserts that AG's motion to confirm child-support arrearage was not timely filed. Child was born on October 24, 1980. AG filed its motion to confirm on November 2, 2006. Therefore, if child was emancipated at age 15, the motion to confirm arrearage was due no later than October 24, 2005.

A minor's cessation of living with the managing conservator, without more, is insufficient to establish emancipation. Here, child left home at age 15, however, father continued to send money for child's support. Accordingly younger child was not emancipated when he left mother's home. Because child was not emancipated, any disabilities were not removed and AG's motion to confirm arrearage was timely filed. Accordingly, the trial court had jurisdiction to entertain AG's motion to confirm arrearage.

Mother argued that [TFC 157.009](#), now repealed, did not provide for an offset or credit, and even if the statute did, trial court could not grant the credit because father never filed a motion to modify. In rendering a final judgment for child-support arrearages, the trial court follows a two-step process. First, the trial court mechanically tallies the arrearage amount. At this point, the trial court has no authority to reduce or modify the arrearage amount. Second, after trial court calculates arrearage, it applies any statutory offsets, credits, or counterclaims before rendering the final judgment.

Here, trial court's judgment stated that it found arrears in the amount of "zero." If trial court found sufficient proof to support the arrearage claimed by the AG, the court would have entered that amount in its judgment. Trial court then would have credited the Social Security benefits and rendered judgment against father in the reduced amount. Because the trial court determined that there were no arrears to confirm, we cannot conclude that trial court credited any Social Security benefits to the absent arrears, much less that father was required to file a motion to modify before the trial court could credit any Social Security payments. Consequently, trial court did not abuse its discretion in finding no arrears.

FATHER'S HABEAS CORPUS GRANTED BECAUSE TRIAL COURT DENIED FATHER'S RIGHT TO A JURY TRIAL AND THEN SENTENCED FATHER TO JAIL FOR MORE THAN SIX MONTHS.

¶10-5-18. [In re McCray, -- S.W.3d --, 2010 WL 3895689 \(Tex. App.—Dallas 2010, orig. proceeding\) \(10/06/10\).](#)

Facts: Prior to the start of his criminal contempt proceeding, father requested a jury trial. Trial court denied the request because mother was not seeking more than six months in jail or more than a \$500 fine. Following the proceeding, trial court found father in contempt for failure to make court-ordered payments and ordered father to serve multiple six month sentences. Afterward, father filed this petition for writ of habeas corpus.

Holding: Petition for writ of habeas corpus granted.

Opinion: Trial court, in its orders, did not clearly state that the jail terms it imposed were to be served concurrently. Accordingly, father was sentenced to more than six months in jail and was entitled to a trial by jury.

Editor's Comment: The court requested responses to the petitions for habeas corpus from real party in interest and the trial court. The real party in interest filed a response that she no longer opposed relator's petitions. The trial court did not respond. J.V.

TRIAL COURT ABUSED ITS DISCRETION BY HOLDING FATHER IN CONTEMPT FOR FAILURE TO PAY PAST-DUE CHILD SUPPORT WHEN MOTHER'S TESTIMONY REVEALED THAT HER MOTION TO ENFORCE CAUSED FATHER TO PAY HIS PAST-DUE CHILD SUPPORT UP TO THE TIME MOTHER FILED HER MOTION, BUT THEN FELL BEHIND AGAIN BEFORE THE ENFORCEMENT HEARING.

¶10-5-19. [*In re Ezukanma*, -- S.W.3d --, 2010 WL 4644462 \(Tex. App.—Fort Worth 2010, orig. proceeding\) \(11/17/10\).](#)

Facts: After mother and father divorced, trial court ordered father to pay child support for the couple's five children. In June 2008, the Tarrant County DRO filed a motion to enforce by contempt asking that father be held in contempt for failing to make child support payments for March 1, April 1, and June 1, 2008. At a hearing on the motion to enforce, mother testified that as of September 1, 2008, father had paid all child support due up to that time in full, including the payments for March 1, April 1, and June 1, 2008. However, the payment history also showed that father had accrued a new arrearage on payments due in September 2008 through February 2009. Trial court found that father intentionally failed to obey trial court's child support order by failing to make payments on March 1, April 1, and June 1, 2008, held father in contempt, and sentenced him to serve 180 days' confinement.

Father filed a petition for writ of mandamus, contending that trial court abused its discretion by holding him in contempt and sentencing him to jail for failing to pay child support for March 1, April 1, and June 1, 2008, because he had made the payments for those months before the February 2009 hearing on the motion to enforce. Mother contended that even though father made the March 1, April 1, and June 1, 2008 child support payments before the hearing, because he did not make them timely on the dates they were due, "as ordered by the court" and because he had a new arrearage by the time of the hearing, [TFC 157.162\(d\)](#) did not prohibit the trial court from holding father in contempt for those payments.

Holding: Mandamus relief granted

Opinion: [TFC 157.162\(d\)](#) provides that "[t]he court may not find a respondent in contempt of court for failure to pay child support if the respondent appears at the hearing with a copy of the payment record or other evidence satisfactory to the court showing that the respondent is *current* in the payment of child support as ordered by the court." The word "current" means existing at the present time. The insertion of the word "current" into [TFC 157.162\(d\)](#) is important because it evidences a legislative intent that the nonmovant be caught up on court-ordered payments specified in the motion to enforce as of the date of the hearing. Moreover, the legislature included the present verb "is" current at the time of the hearing, rather than the past tense "was" current, which would suggest that the nonmovant would have to prove payment was current at the time of the filing of the motion to enforce.

The meaning of [TFC 157.162\(d\)](#) is clarified by considering [TFC 157.16\(e\)](#), which the legislature added to the statute in [2009. TFC 157.16\(e\)](#) provides that the court may award the petitioner court costs and attorney's fees if the court finds that: "(1) on the date the motion for enforcement was filed, the respondent was not current in the payment of child support as ordered by the trial court; and (2) the respondent made the child support payments described by Subsection (d) after the date the respondent was served notice of the motion..." The 2009 legislative history of [TFC 157.16\(d\)](#) shows the legislature originally intended to amend the statute to authorize the court to find a respondent in contempt of court for failure to pay child support *regardless of whether*, rather than if, the respondent appears at the hearing with a copy of the payment record or other evidence, rather than evidence satisfactory to the court. But that version of the bill was not passed; [TFC 157.16\(e\)](#) was added instead.

Thus, the legislative history makes it clear that [TFC 157.162\(d\)](#) prohibits a trial court from holding a nonmovant in contempt for failure to make specified child support payments if the motion to enforce causes him or her to make the missed payments in full, albeit late. The legislature has determined that it is more important that past due child support be paid-even in the face of a motion to enforce-than for nonmovant parents to be punished by criminal contempt in such situations. Accordingly, trial court abused its discretion by hold-

ing father in criminal contempt for failing to make the March, April, and June 2008 payments when he was current in those payments at the February 2009 hearing.

Dissent: [TFC 157.162\(d\)](#) is applicable to any matter relating to a contempt motion filed on or after the effective date of the 2007 version. The 2009 version of [TFC 157.162\(d\)](#) reads identically to the 2007 version. However, in 2009, the legislature added a new subsection, [TFC 157.162\(e\)](#). The majority improperly uses the new [2009 TFC 157.162\(e\)](#) to assist in its interpretation of [TFC 157.162\(d\)](#).

According to the legislative history, [TFC 157.162\(e\)](#) was added in 2009 and applies “only to a motion for enforcement that is filed on or after the effective date of the Act.” A motion to enforce filed before the effective date of the Act is governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose. Thus, because both versions of [TFC 157.162\(d\)](#) are the same, the result should be no different. The addition of [TFC 157.162\(e\)](#) should not affect subsection (d).

Moreover, the purpose of criminal contempt is to punish a contemnor for violation of a court order. Thus, interpreting [TFC 157.162\(d\)](#) to absolve the contemnor of responsibility for contempt just by curing a past due child support payment on or before the hearing date is nonsensical. The only reasonable interpretation is that the contemnor must be current in all child support payments at the time of the hearing on the motion for enforcement, or he foregoes this statutorily-created “free pass” to avoid criminal contempt for the past-due violations alleged in the motion to enforce. Otherwise, any and all contemnors would simply be able to cure the past allegations of contempt and avoid punishment.

Here, the majority’s interpretation precludes trial court from enforcing its own orders for payment of child support at a time when father was in arrearages of nearly \$30,000. Accordingly, this court should deny the father’s requested mandamus relief.

Editor’s Comment: This case opens a dangerous door and just encourages dilatory behavior. It is hard enough to collect a child support arrearage. A motion for rehearing is pending, hopefully, Fort Worth will fix this one. G.L.S.

SAPCR MODIFICATION

TRIAL COURT DID NOT ERR BY ENTERING AN ORDER MODIFYING PARENT-CHILD RELATIONSHIP THAT DEVIATED FROM SETTLEMENT AGREEMENT BECAUSE FATHER WAIVED OBJECTIONS TO DISCREPANCIES.

¶10-5-20. [Herndon v. Herndon](#), No. 04-10-00217-CV, 2010 WL 4243608 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (10/27/10).

Facts: Mother filed a motion to modify parent-child relationship and the parties reached a settlement agreement. Pursuant to the agreement mother’s attorney reduced the agreement to writing and on November 10, 2009 sent the proposed order to father’s attorney. Father’s attorney did not respond. On December 1, 2009, Mother’s attorney sent the proposed order to the trial court with a letter asking the trial court sign and enter the order within five days if father’s attorney lodged no objections. On that same day, mother’s attorney also sent a copy of the letter and the proposed order to father’s attorney. Fifteen days later, on December 16, 2009, the trial judge signed the order.

Afterward, father hired a new attorney and filed a motion for new trial, alleging discrepancies between the parties’ settlement agreement and the order actually entered. During a continuance hearing, the trial court stated on the record that a court coordinator called father’s attorney to make sure he had no objections to the proposed order, and that father’s attorney told the coordinator he had no objections.

Trial court denied father's motion for a new trial noting father had ample time to review the proposed order. Father appealed arguing order to modify impermissibly added to and modified the parties' settlement agreement.

Holding: Affirmed

Opinion: A party's express renunciation of a known right can establish waiver. Silence or inaction, for so long a period as to show an intention to yield the known right, is also enough to prove waiver. Waiver is a question of fact, unless the facts and circumstances are admitted or clearly established, in which case the question becomes one of law.

Here, father had at least two opportunities to object to the proposed order. First, father remained silent for fifteen days after receiving a copy of the proposed order along with a copy of the letter sent to the court asking the judge to sign it if father made no objections within five days. Second, father's former attorney expressly consented to the trial judge's signing of the order in a phone conversation with the court coordinator. Accordingly, if trial court erred, father waived his objection.

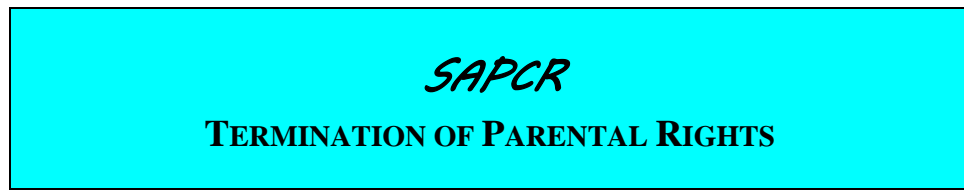
TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO APPLY TFC 153.131(a)'S "PARENTAL PRESUMPTION" TO STEPMOTHER'S MODIFICATION SUIT.

¶10-5-21. [In re R.T.K., -- S.W.3d --, 2010 WL 4312765 \(Tex. App.—Houston \[14th Dist.\] 2010, no pet. h.\) \(11/02/10\).](#)

This opinion was originally issued on August 31, 2010--see Fall Section Report. The court withdrew its earlier opinion and has substituted a new opinion. The case involved a custody dispute between child's biological mother and child's stepmother. Following the death of child's father, stepmother filed a modification suit seeking sole conservatorship of child. At the time of his death, father was child's sole managing conservator. The court's resolution of the issue turned on whether the trial court abused its discretion in refusing to apply the [TFC 153](#) parental presumption to stepmother's modification suit filed under the provisions of [TFC 156](#).

The reissued opinion reaches the same conclusion as the withdrawn opinion. The court added language to the reissued opinion drawing sharper distinctions between original custody suits filed under [TFC 153](#) and modification suits filed under [TFC 156](#). Ultimately, the court holds that the parental presumption does not apply to modification suits filed under [TFC 156](#). Thus, stepmother did not need to overcome the presumption in her modification suit seeking custody of child.

Editor's Comment: Another nonparent custody litigation case. Here, because it was a modification of prior orders – the parents had already sought governmental intervention into their lives via the prior orders – the parental presumption did not apply to stepmother's suit for SMC. M.M.O.



TRIAL EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT TRIAL COURT'S TERMINATION OF FATHER'S PARENTAL RIGHTS.

¶10-5-22. [In re C.J.O., -- S.W.3d --, 2010 WL 3505120 \(Tex. App.—Eastland 2010, no pet. h.\) \(9/09/10\).](#)

Facts: Mother and father were involved in a romantic relationship in Wyoming. The couple ended their relationship after four months, and in mid-December 2002, mother moved to Texas. Father knew that mother was pregnant when she left, and he suspected that he might be the father. On June 3, 2003, mother gave birth to the couple's child. In 2005, mother married stepfather. Mother and stepfather had lived together for approximately one year prior to their marriage, and they had a daughter together. Additionally, during this time, father married stepmother.

In 2007, father discovered that he was, in fact, child's biological father. Mother agreed to let child visit father in Wyoming. After a few visits, mother, stepfather and father arranged for child to spend a week with father in Wyoming. The plan was for wife to meet father at a halfway point to pick up child at the end of the week; however, wife died in a fatal car accident on her way to the exchange. Father refused to return child to stepfather. Stepfather filed a petition asking trial court to terminate father's parental rights. During the proceedings, father filed a motion to recuse and a judicial grievance. The visiting judge, assigned to hear the recusal motion, held an evidentiary hearing and afterward denied father's motion. Following trial, trial court terminated father's parental rights, and named stepfather as child's sole managing conservator. Father appealed on several grounds.

Holding: Affirmed

Opinion: Father argued that trial court's findings that father abandoned the child or endangered the child's emotional and physical well-being were not supported with legally and factually sufficient evidence. Before terminating a parent's rights, a trial court must first find by clear and convincing evidence that termination is based upon one or more of the grounds enumerated in [TFC 161.001\(1\)-\(2\)](#), and that termination is in the child's best interest. Under [TFC 161.001\(1\)\(H\)](#), a trial court may terminate the parent-child relationship if a parent voluntarily and knowingly abandons the mother of the child during pregnancy, fails to provide adequate support and medical care during mother's pregnancy, and fails to support the child after birth. The abandonment must be with knowledge of the pregnancy and must occur both during the pregnancy and after birth.

Here, father argued that he did not abandon child because he did not know that mother was pregnant with his child. Father testified at trial that, although he knew mother was pregnant when she left, Wyoming for Texas, he did not definitively know that she was carrying his child. Father testified further that, maternal grandmother told him that child was born in April 2003, a date that foreclosed father as child's biological father. Other evidence, however, conflicted with father's testimony. Maternal grandmother denied telling father that the child was born in April 2003. An acquaintance (acquaintance) of father and stepmother, testified that father told her that he had called mother shortly after child's birth and that she had confirmed he was the father. Due to the conflicting evidence on father's knowledge, trial court could disbelieve father and conclude that he knew mother was pregnant with his child and that he voluntarily abandoned mother and child.

Under [TFC 161.001\(1\)\(E\)](#), a trial court may terminate the parent-child relationship if a parent knowingly engages in conduct or places the child with a person that endangers the child's physical or emotional well-being. The offending conduct does not need to be directed at the child nor does the child actually have to suffer an injury to support a finding under [TFC 161.001\(1\)\(E\)](#). Domestic violence may be considered evidence of endangerment. If a parent abuses or neglects the other parent or other children, that conduct can be used to support a finding of endangerment even against a child who was not yet born at the time of the conduct.

Here, father admitted to one incident in which police escorted stepmother out of their home following an altercation in which stepmother bit him, and he acknowledged that he scratched her across the chest with a pair of keys. Further evidence at trial revealed that father and stepmother argued frequently, used foul language frequently and were involved in several bouts of domestic violence including an incident resulting in injury to stepmother. Accordingly, the evidence was legally and factually sufficient to support the trial court's finding that father endangered child's physical and emotional well-being.

TRIAL COURT DID NOT ABUSE ITS DISCRETION (1) IN FINDING FRIVOLOUS FATHER'S APPEAL OF ITS ORDER TERMINATING HIS PARENTAL RIGHTS, AND (2) IN REMOVING FATHER AS POSSESSORY CONSERVATOR OF STEP-CHILD.

¶10-5-23. [In re C.L.](#), 322 S.W.3d 889, 2010 WL 3583109 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (9/16/10).

Facts: Child and stepchild lived with mother until March 2006, when DFPS removed the children from mother's home and placed children in foster care. Trial court appointed DFPS sole managing conservator and father as a possessory conservator with visitation rights. Trial court strictly forbid mother any visitation with the children. Trial court terminated father's parental rights upon motion by DFPS after DFPS learned father allowed mother access to the children and after one of the children had been hospitalized with an asthma attack after father smoked during a visit. Father appealed.

Holding: Affirmed

Opinion: Father argued that trial court abused its discretion in finding frivolous his first appellate point that the evidence was insufficient to support the termination of his parental rights. If a trial court makes a frivolousness finding, the parent's appeal is initially limited to the frivolousness issue. An appellate court can review substantive issues only if it determines the trial court abused its discretion in determining appellant's appeal was frivolous. [TFC 161.001\(1\)\(F\)](#) provides for termination of parental rights if a parent fails to support the child in accordance with the parents ability for the period of one year. This one-year period must be twelve consecutive months.

Here, the evidence shows that in between March 4, 2007 and March 4, 2008, father gave no money in support of the children despite earning \$13,500 during that period. Father asserted that the ad litem told him not to pay support but instead to use that money to buy furniture for his apartment. However, any excuse for failing to provide support is irrelevant in assessing a violation under [TFC 161.001\(1\)\(F\)](#). Trial court could have properly concluded that father's sufficiency challenge to the termination of his parental rights lacked a substantial basis in law or fact. Thus, trial court did not abuse its discretion in finding father's first appellant point to be frivolous.

Father argued that trial court abused its discretion in removing his status as stepchild's possessory conservator because the evidence was insufficient to support the trial court's order. Under TFC 156.101(a)(1)(A), the trial court can modify an order establishing conservatorship upon a showing that the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the rendition of the prior order and that the modification would be in the child's best interest.

Here, during a visit with step-child, father allowed mother access to the child, which was forbidden by court order. Afterward, DFPS revoked father's visitation rights and father did not see or speak to step-child for over nine months. Accordingly, trial court did not abuse its discretion in determining that there had been a material and substantial change in circumstances since the prior order. Further, step-child had a severe asthma attack when father smoked during a visit with step-child. The evidence is sufficient to support a conclusion that removing father's possessory conservator status was in step-child's best interest. Accordingly, trial court did not abuse its discretion in finding that there had been a material and substantial change of circumstances and that removing father's status as possessory conservator would be in step-child's best interest.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING A DE NOVO HEARING DATE FOR MORE [THAN ONE YEAR AFTER TERMINATION PROCEEDINGS BEGAN BECAUSE A TRIAL ON THE MERITS COMMENCED BEFORE AN ASSOCIATE JUDGE PRIOR TO THE STATUTORY DISMISSAL DATE UNDER TFC 263.401.](#)

¶10-5-24. [In re L.R., -- S.W.3d --, 2010 WL 4053910 \(Tex. App.—Austin 2010, orig. proceeding\) \(10/15/10\).](#)

Facts: On June 16, 2009, DFPS filed the underlying suit to terminate the parental rights of mother and father in their three children. Trial court held a bench trial on the merits before an associate judge on April 27, 2010. Neither parent requested a jury prior to the bench trial nor did they specifically object at trial to proceeding without a jury. On June 22, 2010, associate judge issued a proposed order terminating the parental rights of both parents. On July 1, 2010, parents requested a de novo hearing of the associate judge's decision. During a July 27 hearing, parents requested a de novo hearing before a jury. Trial court granted parents' request and set the hearing to begin October 25, 2010. Afterward, parents and the children's ad litem petitioned for writ of mandamus.

Holding: Both petitions for writ of mandamus denied

Opinion: Mother argued that because trial court granted her request for a de novo hearing, and set the hearing for October 25, 2010, trial court failed to commence the trial on the merits before the statutory dismissal date of June 28, 2010. [TFC 263.401](#) mandates dismissal of a termination proceeding after one year if trial on merits has not commenced.

Mother's argument fails, however, because a trial on the merits commenced when the parties tried this case before the associate judge in April 2010, two months before the statutory dismissal date in June 2010. Mother characterized trial court's grant of her request for a de novo hearing as a granting of a new trial and argued that when trial court granted a new trial, the case was reinstated on the docket as if no trial had occurred. What mother actually requested and received, however, was a de novo hearing under [TFC 201.015](#). A de novo hearing under [TFC 201.015](#), unlike a new trial, is mandatory upon the filing of a request and is limited to the issues specified in the request. Thus, a trial court's granting of a de novo hearing under [TFC 201.015](#) does not, like the granting of a motion for new trial, reinstate the case on the court's docket as if no trial had occurred for purposes of the statutory deadline for commencement of trial.

ABSENT A FINDING THAT MOTHER COULD ADEQUATELY REPRESENT CHILD'S INTEREST IN MOTHER'S PETITION FOR TERMINATION OF FATHER'S PARENTAL RIGHTS, TRIAL COURT MADE REVERSIBLE ERROR BY FAILING TO APPOINT CHILD AN AMICUS ATTORNEY OR ATTORNEY AD LITEM.

¶10-5-25. [In re K.M.M., -- S.W.3d --, 2010 WL 4180755 \(Tex. App.—Amarillo 2010, no pet. h.\) \(10/22/10\).](#)

Facts: Mother petitioned trial court for divorce and termination of father's parental rights. In her petition, mother alleged that she could adequately represent child's interests and that her interests did not conflict with child's interests. Father generally denied mother's allegations and requested trial court to appoint child a guardian ad litem. However, trial court did not appoint child either a guardian ad litem, an amicus attorney, or an attorney ad litem. Following trial, trial court terminated father's parental rights. Father appealed, arguing that trial court erred by failing to appoint child an amicus attorney, or an attorney ad litem.

Holding: affirmed in part, reversed and remanded in part

Opinion: In termination suits filed by non-government entities, [TFC 107.021](#) requires the trial court to appoint an amicus attorney or an attorney ad litem, "unless the court finds that the interests of the child will be

represented adequately by a party to the suit whose interests are not in conflict with the child's interests." Texas courts have recognized that where parents are adversaries in a suit to terminate one parent's rights, the trial court can seldom find that one party adequately represents the interests of the children involved or that their interests are not adverse.

Here, the record contains no order appointing child either an amicus attorney, or an attorney ad litem. Furthermore, neither parent argues that trial court made such an appointment. Also missing from the record is any finding that mother could adequately represent child. This is problematic because absent such a finding, [TFC 107.021](#) requires trial court to appoint either an amicus attorney or attorney ad litem. Trial court's failure to comply with [TFC 107.021](#) is error that cannot be treated as harmless due to the serious nature of the proceedings involved. Accordingly, the termination portion of trial court's judgment is reversed and remanded for a new trial.

TRIAL COURT ERRED BY TERMINATING INCARCERATED FATHER'S PARENTAL RIGHTS BECAUSE THE FACT THAT HE FAILED TO SUPPORT CHILD WITH A PORTION OF THE \$30 IN GIFTS HE RECEIVED FROM FAMILY WAS INSUFFICIENT EVIDENCE TO SUPPORT TERMINATION.

¶10-5-26. [In re L.J.N., -- S.W.3d --, 2010 WL 4763113 \(Tex. App.—Corpus Christi 2010, no pet. h.\) \(11/23/10\).](#)

Facts: In December 2006, trial court designated great uncle and grandmother as child's joint-managing conservators and father as possessory conservator. In June 2007, father was incarcerated for drug possession. In July 2008, great uncle filed a petition to terminate father's parental rights and adopt child. Father answered and requested the appointment of an attorney. Because he was incarcerated at the time, father filed two declarations of indigency. In his declarations, father stated he had no source of income, \$0 credited to his inmate trust fund and that he received approximately \$10 per month from relatives and friends for toiletry expenses. Over the course of two hearings, father testified to the same. At trial, great uncle contended that, in father's declarations and testimony, father admitted he received approximately \$30 during his incarceration. Great uncle argued that father failed to support child in accordance with his ability. Trial court terminated father's parental rights in child. Father appealed.

Holding: Reversed and rendered

Opinion: Under [TFC 161.001](#), before terminating parental rights, the trial court must find (1) that the parent committed an act prohibited [TFC 161.001\(1\)](#) of the family code, and (2) that termination is in the best interest of the child. [TFC 161.001\(1\)\(F\)](#) provides that the trial court may terminate a parent's parental rights if it finds by clear and convincing evidence that the parent "failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the [termination] petition." One year means twelve consecutive months, and there must be proof the parent had the ability to support during each month of the twelve-month period. Thus, the person seeking to terminate a parent's parental rights bears a heavy burden to establish by clear and convincing evidence that the parent had the ability to pay support during each month of the twelve-month period considered by the trial court.

Here, attempting to satisfy the heavy burden, the only evidence great uncle provided was father's declarations of his inability to pay the costs associated with defending against the termination petition in which father stated that he received approximately \$10 per month as gifts from relatives and friends. Great uncle provided no other evidence of father's ability to pay support from June 2007 to the date of the hearing, which was the period of non-support trial court considered. Aside from father's indigency declarations, the only evidence in the record regarding his ability to pay child support was his testimony that he had no source of income since his incarceration, he had no property to sell to earn funds, that he was unable to borrow money, and that he had no opportunity to work during his incarceration. Although father testified that he had received

twenty to thirty dollars from friends and relatives for his commissary fund, there was no evidence that he received that assistance regularly or consistently.

Great uncle failed to produce clear and convincing evidence in support of the requisite statutory ground to meet his heavy burden. Based on father's declarations of indigency alone, no reasonable fact finder could have formed a firm belief that father both had the ability to support child and failed to pay—was true. Accordingly, the evidence supporting the only statutory ground for termination was therefore legally insufficient, and trial court erred in terminating father's parental rights on this basis.

FAMILY VIOLENCE

FATHER'S CHALLENGE TO TRIAL COURT'S RENDERING OF PROTECTIVE ORDER NOT SUBJECT TO MANDAMUS REVIEW BECAUSE IT DID NOT RENDER THE ORDER IN A DIVORCE OR A SAPCR; TRIAL COURT'S ISSUANCE OF PROTECTIVE ORDER IMPROPER BECAUSE MOTHER DID NOT PROPERLY SERVE NOTICE OF HEARING.

¶10-5-27. [*In re Keck*, -- S.W.3d --, 2010 WL 4467829](#) (Tex. App.—Houston [14 Dist.] 2010, orig. proceeding) (11/9/10).

Facts: In a 2003 divorce decree, trial court issued an order establishing father's parentage of child. In January 2009, mother filed a petition to terminate father's parental rights in the 245th District Court [still pending at the time of this appeal]. In November, 2009, mother filed a separate application for a protective order in the 280th District Court. At a December 8, 2009 hearing, the 280th District Court found that (1) family violence had occurred and was likely to occur in the future, and (2) the protective order should be granted permitting only supervised visitation between father and child. Afterward, the judge instructed the parties to return on December 16.

On December 16, mother's counsel appeared in the 280th District Court and announced that she had filed a motion to reconsider trial court's prior ruling. The record contained mother's motion to reconsider showing that she filed the motion and served father on that same date. Mother's counsel then presented testimony in support of the motion from a clinical psychologist who had been treating child for several years. According to the psychologist, child disclosed that father had sexually assaulted her. After the hearing, trial court signed a protective order, prohibiting father from having any contact with child. Neither father, nor his counsel appeared at the December 16 hearing. Father filed a petition for writ of mandamus and an appeal, arguing he did not receive proper notice of the December 16 hearing.

Holding: petition for writ of mandamus denied; reversed and remanded

Opinion: [TFC 81.009](#) states that “a protective order rendered under this subtitle may be appealed” unless it is (1) “rendered against a party in a suit for dissolution of a marriage,” or (2) “in a suit affecting the parent-child relationship.” If either of the exceptions apply, then appeal of the protective order must await the trial court's issuance of a final order.

Here, there was never a marriage between the parties, so the first exception does not apply. Mother's suit to terminate father's parental rights was pending at the time mother filed her for a protective order, and such a suit is indeed a SAPCR. However, mother filed her termination suit in a different court and with a different cause number than the protective order at issue. Thus, the 280th District Court did not issue mother's protective order “in” the termination suit. Because neither of the [TFC 81.009](#) exceptions apply, the protective order is appealable and not subject to a mandamus challenge. This court will consider the merits under father's appeal.

Under [TRCP 21](#), “[a]n application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.”

The record shows that father was not served with a copy of the motion to reconsider and did not receive notice that trial court was going to consider the motion or additional evidence until the very day of the hearing. Moreover, according to the reporter’s record of the December 8 hearing, the only stated purpose for the December 16 hearing was entry of an order reflecting the court’s December 8 findings. Consequently, the trial court’s holding of a hearing on December 16, in which it considered mother’s motion to reconsider along with new evidence, violated [TRCP 21](#). Accordingly, trial court’s protective order is reversed and remanded for further proceedings.

Editor’s Comment: If you want your protective order to be carried with your SAPCR, you must file for it in the SAPCR. J.V.

miscellaneous

TRIAL JUDGE IN PRIVATE TERMINATION PROCEEDING SHOULD HAVE BEEN DISQUALIFIED BECAUSE HE WAS A PARTNER IN A LAW FIRM IN WHICH MOTHER’S DIVORCE TRIAL COUNSEL ALSO WORKED.

¶10-5-28. [In re D.C., No. 07-09-00320-CV, 2010 WL 3718564 \(Tex. App.—Amarillo 2010, no pet. h.\) \(mem. op.\) \(9/23/10\).](#)

Facts: Mother and father divorced in 2002. In 2009, mother initiated a private termination proceeding against father. Afterward, trial court terminated father’s parental rights finding that father failed to support child in accordance with his ability; and knowingly engaged in criminal conduct that resulted in his conviction of an offense and confinement or imprisonment and inability to care for the child; and that termination of father’s parental rights was in the best interest of child. Father appealed, arguing that the trial judge in his termination proceeding should have been disqualified.

Holding: Reversed and remanded

Opinion: [TRCP 18b\(1\)](#) and Tex. Const. art. V, § 11 disqualify judges from proceedings in which they have served as a lawyer “in the matter in controversy,” as well as judges in which “a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter.” Unlike statutory recusal, disqualification cannot be waived, and may be raised at any time. The Texas Supreme Court has held that a divorce action and a subsequent modification proceeding involve the same matter in controversy, requiring a judge’s disqualification.

Here, the 2002 divorce decree recites that mother was represented by her attorney. By his address on the divorce decree, mother’s divorce attorney is shown as practicing with the law firm of which the trial judge, in the current termination proceeding, was a partner. Mother has not contradicted this evidence. Mother argues, however, that father did nothing to make trial judge aware of the potentially disqualifying circumstance. But the judge’s actual knowledge of disqualifying events under [TRCP 18b\(1\)\(a\)](#) is irrelevant.

Moreover, trial judge is disqualified from the termination proceeding because it involves the same “matter in controversy” as the divorce proceeding. The 2002 divorce proceeding dealt with the parent-child relationship, trial court named mother as sole managing conservator and father as possessory conservator. Trial court found that father had a history or pattern of committing family violence but found that his access to child would not endanger the child’s physical health or emotional welfare and would be in the best interest of the child. Similarly, the termination proceeding litigated father’s failing to support child in accordance with

his ability, knowingly engaging in criminal conduct causing his conviction, confinement and inability to care for child, as well as the issue of whether termination of the father's parental rights was in the child's best interest. Accordingly, trial judge should have been disqualified from the termination proceeding.

IN THE ABSENCE OF EVIDENCE OF A DISCREPANCY BETWEEN TRIAL COURT'S JUDGMENT AS RENDERED AND ITS JUDGMENT AS ENTERED, TRIAL COURT ERRED IN ENTERING A JUDGMENT NUNC PRO TUNC, CHANGING FATHER'S CHILD SUPPORT START DATE TO REFLECT A DATE CONSISTENT WITH THE DATE OF DIVORCE.

¶10-5-29. [Rawlins v. Rawlins](#), -- S.W.3d --, 2010 WL 3917237 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (10/07/10).

Facts: On January 9, 2007, trial court signed a final divorce decree ordering father to pay monthly child support. In the order, trial court ordered father to begin child support on January 5, 2006 rather than January 5, 2007. In January 6, 2006, the family was still intact and had not filed for divorce. On March 12, 2009, father filed a motion for judgment nunc pro tunc to correct the child support start date. Afterward, trial court signed an order for judgment nunc pro tunc, granting father's motion and ordering the child support start date changed from "2006" to "2007." Mother appealed (and filed a petition for writ of mandamus) arguing trial court erred by granting father's motion for judgment nunc pro tunc because the error was a judicial error, rather than a clerical error, and could not be changed after trial court's plenary power had expired.

Holding: Affirmed as modified, petition for writ of mandamus dismissed as moot

Opinion: [TRCP 329b\(f\)](#) permits the trial court, at any time, to correct a clerical error in the judgment by entering a judgment nunc pro tunc. A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered by the court, and does not arise from judicial reasoning or determination. A judicial error, on the other hand, occurs in the rendering, as opposed to the entering, of a judgment. A judgment is rendered when the decision is officially announced either orally in open court or by memorandum filed with the clerk. Errors in judgments are not ipso facto clerical errors merely because they are the result of an inadvertent error. Even if the trial court renders judgment incorrectly, the trial court has no nunc pro tunc power to correct or modify the entered judgment which precisely reflects the incorrect rendition after its plenary jurisdiction expires.

Here, neither party presented evidence at the hearing on the motion for judgment nunc pro tunc that trial court rendered a different judgment in writing or orally prior to signing the divorce decree. The only evidence in the record regarding the judgment trial court actually rendered is the signed divorce decree. Because nothing in the record shows that there is a discrepancy between the judgment as rendered and the judgment as entered, this court is compelled to hold that the error in the child-support start date was a judicial error and not subject to a judgment nunc pro tunc.

This outcome, while compelled by current Texas law, is admittedly a repugnant result. Because of an apparent typographical or drafting error, mother will receive a windfall of undeserved child-support payments encompassing a period of time when the family was still intact and living together. The fact that mother, a Texas attorney, is exploiting the error, makes the result even more intolerable. Nevertheless, this court is required to follow the law. Trial court erred in entering its order nunc pro tunc, changing the child support start date from January 5, 2006 to January 5, 2007. Accordingly, trial court's order must be modified to show father's child support obligation began on "January 5, 2006" rather than "January 5, 2007."

Editor's Comment: *Armchair appellate lawyer says "sounds like official mistake." Can you say "bill of review." C.N.*

HUSBAND’S COULD NOT ASSERT THE NONEXISTENCE OF A COMMON-LAW MARRIAGE BECAUSE IT CONSTITUTED A COLLATERAL ATTACK ON TRIAL COURT’S AGREED JUDGMENT.

¶10-5-30. [*Johnson v. Ventling*, No. 13-09-00563-CV, 2010 WL 4156459 \(Tex. App.—Corpus Christi 2010, no pet. h.\) \(mem. op.\) \(10/21/10\).](#)

This opinion was originally issued on July 15, 2010--see Fall Section Report. The court withdrew its earlier opinion and, following rehearing, has substituted this new opinion that alters the court’s instructions on remand. The case involved a common-law marriage that terminated in 1995. In the agreed divorce decree, husband contractually agreed to pay alimony and the agreement contained an acceleration clause upon default. In 1997, wife moved for enforcement and husband defended on grounds that the parties were never married and that wife deceived him into believing a common-law marriage existed. In 2004, this court held the decree was valid and not subject to collateral attack.

In 2007, wife initiated a second enforcement action and husband defended on similar grounds, concluding that the parties were never married, trial court vacated the 1995 decree. in its July 15, 2010 opinion, this court held that its 2004 holding was the “law of the case” and reversed and remanded with instructions for trial court to determine whether wife fraudulently induced husband to agree to the terms of the 1995 decree. this opinion is substantially similar, with the exception that on remand, the court instructs the trial court to grant wife’s motion for enforcement. the opinion provides no rationale for the change on remand.

Editor’s Comment: The old adage “if at first you don’t succeed, try try again” meets the “law of the case” doctrine. “Law of the case” 1, old adage, 0. C.N.

FATHER PROVIDED INSUFFICIENT EVIDENCE TO SUPPORT TRIAL COURT’S CHILD SUPPORT AND ACCESS ORDERS ISSUED AGAINST MOTHER IN A DEFAULT DECREE.

¶10-5-31. [*Hendley v. Lywiski*, No. 09-09-00485-CV, 2010 WL 4264251 \(Tex. App.—Beaumont 2010, no pet. h.\) \(mem. op.\) \(10/28/10\).](#)

Facts: Father filed for divorce and mother filed a counterpetition. When mother failed to appear at trial, it conducted a brief hearing and granted father’s petition for divorce by default. Afterward, mother filed this restricted appeal. Mother asserted twelve grounds for appeal including father presented no evidence to support trial court’s order for child support, life insurance, conservatorship and mediation.

Holding: Affirmed in part, reversed and remanded in part

Opinion: Mother argued that the child support provisions contained in the decree demonstrate error on the face of the record because no evidence from the hearing suggested whether she was employed or the whether she earned an income. Under [TFC 154.062](#), the trial court must calculate the obligor’s net resources for the purpose of determining child support liability. Absent evidence of wage and salary income, [TFC 154.068](#), requires the trial court to presume that the party has wages and salary equal to the federal minimum wage for a forty-hour week. A presumptive child support percentage based upon a parents wages and salary must be adjusted to account for any child who was not before the trial court.

Here, the decree orders mother to pay child support in the amount of \$1,000 per month for the support of the four children born of the marriage. However, mother had a child outside of the parties’ marriage. Father offered no evidence at the hearing regarding mother’s employment status or her income. Nothing in the record shows trial court accounted for mother’s child, who was not before trial court. Accordingly, there is no evidence to support trial court’s child support order of \$1,000 per month. Trial court’s improper child support order is shown on the face of the record.

Mother argued the evidence did not support trial court's arrearage order. A party taking a default judgment cannot be granted greater relief than that asked for in the pleadings. The absent party is not held to trial by implied consent of an unpleaded cause of action where fair notice of the cause of action is not in the pleadings. Here, based upon a mediated settlement agreement for temporary orders, trial court found that mother owed father past due child support and ordered mother to make monthly payments on the arrearage. However, the record does not contain the temporary orders authorized by the mediated settlement agreement. Moreover, father's pleadings neither allege an arrearage nor request trial court grant him a judgment for past-due child support. Accordingly, error appears on the face of the record because trial court granted greater relief than father requested.

Mother argued trial court abused its discretion by ordering her to pay for and maintain a life insurance policy with father as beneficiary for the children. [TFC 154.016](#) authorizes the trial court to order a child support obligor to obtain and maintain life insurance. The factors the trial court considers in determining the nature and extent of the child support obligation include the present value of the total amount of monthly periodic child support payments and health insurance premiums ordered in the decree. Here, father testified that he makes monthly health insurance payments on the children, but he offered no evidence relating to the present value of those payments and premiums. Furthermore, as previously discussed, trial court's child support order contains no evidence concerning mother's income. Thus, as with the other child support orders in the default decree, error appears on the face of the record.

Mother argued that father failed to present any evidence to support trial court's order that the parties mediate any future controversy regarding conservatorship, possession or access as a prerequisite to the filing of any suit for modification. In rendering an order appointing joint managing conservators, [TFC 153.134\(b\)\(5\)](#) mandates a trial court "if feasible, [to] recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency. However, 153.134(b)(5) does not permit a trial court to enter an order requiring joint managing conservators to mediate as a prerequisite to filing suit. Trial court named father the children's sole managing conservator. Here, father offered no evidence to justify the particular order entered in this case. Accordingly, the mediation order is erroneous.

Trial court found that mother had a history of substance abuse and was currently living with a convicted felon. Accordingly, trial court granted only supervised visitation on days and times agreed to by father. Evidence showed that mother's roommate had records for numerous convictions for cocaine, drug problems, drug delivery, and burglary. However, the nature and extent of mother's "drug problems" is not shown in the record, nor did father offer any evidence to show why the children could not be adequately protected by an order that restricted mother's roommate's access to the children, as opposed to mother's access to the children. Although there is some evidence in the record to support trial court's order limiting mother's possession of the children, there is insufficient evidence in the record to deny her access altogether.

In sum, father failed to provide sufficient evidence to support trial court's child support and access orders. Accordingly, those portions of the default decree are reversed and remanded. [The court additionally reversed the property division and award of attorney's fees to father. The court affirmed trial court's appointment of father as the sole managing conservator of children and mother as the possessory conservator.]

Editor's Comment: Another case where a party takes a default judgment and fails to provide evidence in support of the judgment. Wake up folks! M.M.O.

APPELLATE COURT LACKED JURISDICTION TO CONSIDER MOTHER'S MANDAMUS PETITION BECAUSE TRIAL COURT'S ORDERS WERE FINAL, AND BECAUSE TRIAL COURT DID NOT HOLD MOTHER IN CONTEMPT.

¶10-5-32. [In re Florey](#), -- S.W.3d --, 2010 WL 4848141 (Tex. App.—Eastland 2010, orig. proceeding) (11/30/10).

Facts: Following divorce, trial court appointed mother and father as joint managing conservators and gave mother the right to designate child's primary residence. Several years later, father asked trial court to decrease

his child support payment. During a hearing, mother revealed that she was living with a man to whom she was not married. This was in direct violation of a prior order. Trial court orally ordered mother to either marry her partner or to make him leave the house or it would give father primary custody of child. Mother complied with trial court's oral order, but failed to timely provide trial court with a copy of her marriage certificate.

Father moved trial court for contempt. At a hearing father requested trial court to modify the custody order by giving him the right to designate child's residence. Following the hearing, trial court noted that it could not hold mother in contempt for failing to timely provide a copy of her marriage certificate because that order had not been reduced to writing. Trial court did, however, modify child's conservatorship by giving father primary custody. Mother petitioned for mandamus relief.

Holding: Mandamus petition denied

Opinion: Mother argued that appellate court had jurisdiction because contempt orders that do not involve confinement may be reviewed only through mandamus. To obtain mandamus relief, a relator must show that the trial court committed a clear abuse of discretion or violated a duty imposed by law and that the relator has no adequate appellate remedy. When the ruling complained of is a final judgment, the aggrieved party will ordinarily have an adequate appellate remedy.

Here, trial court, did not find mother in contempt. In fact, trial court specifically denied father's motion for contempt. Moreover, mother's complaints do not challenge any contempt ruling but are a collateral attack on the trial court's decision to name father the primary conservator.

Mother also argued that mandamus was appropriate because the trial court's order was void. Void or invalid judgments rendered without jurisdiction may be challenged by mandamus even though an available appellate remedy was not pursued. But there is a distinction between a void order and a voidable order. A void order is one entered by a trial court that lacks jurisdiction over the parties or the subject matter, or is an order entered outside the trial court's capacity as a court. Voidable orders result from errors other than lack of jurisdiction, such as an action contrary to a statute or statutory equivalent.

Here, mother contends that the trial court's order was void because trial court was without authority to enter it. Mother reasons that father was required to file a petition requesting a modification of child's conservatorship and that she was entitled to notice of the petition by service of citation. Because these procedural steps were not followed, mother concludes that the trial court acted beyond its authority. Mother relies upon [*In re Parks*, 264 S.W.3d 59 \(Tex. App.—Houston \[1st Dist.\] 2007, orig. proceeding\)](#), for the proposition that trial court's order is reviewable by mandamus.

Parks, however, was a contempt proceeding in which parent-realtor was jailed for contempt. The Houston Court noted that it had jurisdiction because the relator was challenging a contempt finding and, therefore, that it also had jurisdiction to review the trial court's order "to the extent that it modifies or reforms previous orders of the trial court without proper pleadings and evidence." The Houston Court's jurisdiction to review the procedural challenges to the trial court's custody order flowed from its initial jurisdiction to review the trial court's contempt order.

Here, because mother was not held in contempt, this court lacks that initial grant of jurisdiction. Trial court's order was a final order because it disposed of all pending claims. This court lacks jurisdiction to consider a collateral attack on that judgment. Mother's petition is, therefore, denied.

Editor's Comment: *The deadline to appeal the May 27 modification order was June 28. "[Mother's] petition for writ of mandamus was not filed until October 5, over three months later. Mandamus is not a vehicle for extending appellate deadlines, and its use for that purpose in a child custody suit is counter to Texas public policy."* J.V.

HUSBAND’S TESTIMONY ALONE NOT SUFFICIENT TO SUPPORT SEPARATE PROPERTY CLAIM. BECAUSE WIFE DID NOT OBJECT TO EXPERT’S VALUATION METHODOLOGY BEFORE OR DURING TRIAL, SHE COULD NOT ASSERT A LEGAL SUFFICIENCY CHALLENGE PREDICATED ON ASSERTED FLAWS IN THE EXPERT’S METHODOLOGY BY WAY OF APPEAL. SANCTIONS MUST BE RELATED TO SPECIFIC CONDUCT, WHICH TRIAL COURT FAILED TO ENUMERATE.

¶10-5-33. [*Graves v. Tomlinson*, -- S.W.3d --, 2010 WL 4825624 \(Tex. App.—Houston \[14th Dist.\] 2010, no pet. h.\)](#) (11/30/10).

Facts: Husband and wife married in 1997. At that time, husband was engaged in farming and ranching; he continued those activities during the marriage. In 1997, wife formed a sole proprietorship providing home and community-based services for mentally handicapped and disabled persons. By 2000, wife’s business had grown and she created an LLC. Together, the sole proprietorship and the LLC employed about 100 people and serve more than 300 clients. Wife filed for divorce in June 2005, and protracted divorce proceedings ensued involving several expert valuations of wife’s business entities. The parties had numerous discovery disputes throughout the proceedings; they twice mediated discovery disputes and entered into settlement agreements regarding those. Following a jury trial, trial court issued a divorce decree assessing the value of wife’s business entities and dividing the marital estate. Additionally, the trial court identified numerous instances of litigation misconduct by wife warranting sanctions of \$250,000 in attorney’s fees. Wife appealed on numerous grounds.

Holding: Affirmed in part, reversed and remanded in part

Opinion: Wife argued that there was insufficient evidence to support the jury’s finding that 40 percent of the farm and ranch equipment was husband’s separate property. [TFC 3.003\(a\)](#) provides that all property possessed by either spouse during or upon dissolution of the marriage is presumed to be community property. Under [TFC 3.003\(b\)](#), to overcome the community property presumption, a spouse claiming assets as separate property must establish their separate character by clear and convincing evidence. The spouse claiming that certain property is ‘separate’ must trace and clearly identify the property claimed to be separate. As a general rule, the clear and convincing standard is not satisfied by testimony that property possessed at the time the marriage is dissolved is separate property when that testimony is contradicted or unsupported by documentary evidence tracing the asserted separate nature of the property.

Here, the trial court admitted wife’s inventory into evidence; her inventory listed the farm and ranch equipment as community property. Additionally, trial court admitted husband’s inventory into evidence; his inventory also listed all of the farm and ranch equipment as community property. However, during his testimony, husband characterized the farm and ranch equipment as his separate property. Husband’s testimony is contradicted by his own sworn inventory and by wife’s inventory. Husband offered no documents to support his characterization of these assets in his testimony. Therefore, no reasonable fact finder could find that husband’s unsupported testimony constitutes clear and convincing evidence necessary to overcome the community property presumption and establish that 40 percent of the farm and ranch equipment was husband’s separate property. Wife’s argument is sustained.

Wife argued that that the evidence was legally and factually insufficient to support the jury’s assessment of the value her businesses. Following a jury trial, a legal sufficiency challenge must be preserved in the trial court through one of the following procedural steps: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the question to the jury; (4) a motion to disregard the jury’s answer to a vital fact question; or (5) a motion for new trial.

Because wife’s sufficiency challenge focuses in significant part on expert testimony, this court must consider the difference between (1) a challenge to an expert’s methodology; and (2) a legal sufficiency challenge predicated on a contention that an expert’s testimony lacks probative value. When the expert’s underlying methodology is challenged, the court ‘necessarily looks beyond what the expert said’ to evaluate the reliability of the expert’s opinion. Alternatively, when the testimony is challenged as conclusory or speculative and therefore non-probative on its face, there is no need to go beyond the face of the record to test its reliability.

Therefore, when a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. However, when the challenge is restricted to the face of the record-when expert testimony is speculative or conclusory on its face-then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility.

Here, the jury assessed the value of Wife's businesses at \$1,250,000. Wife contended that her business valuation expert gave the only valuation testimony the jury could rely on. Wife's expert valued wife's business at \$200,000. Wife's expert explained that there are three approaches available to valuing a business: the asset approach, the market approach, and the income approach. Because of the uniqueness of wife's business, wife's expert applied the asset approach to value her business.

Wife contended that the testimony of husband's forensic accountant could not support the jury's \$1,250,000 valuation for the business because forensic accountant did not express an opinion as to the value of any of the business entities and was not hired to determine value. Instead, wife asserted, forensic accountant was hired to 'normalize' the accounting records of wife's businesses. Wife also argued extensively that the valuation of husband's valuation expert constituted no evidence because his methodology was flawed. Because husband's valuation expert's valuation was based on a flawed methodology, wife contends that her valuation expert's opinion was the only reliable valuation evidence the jury should have considered.

Wife asked the appellate court to evaluate the underlying methodology, technique, or foundational data used by husband's expert. Wife did not object before or during trial on grounds that husband's expert's valuation methodology was flawed. Because wife did not object to husband's expert's valuation methodology before or during trial, she cannot attack his methodology on appeal by way of a legal sufficiency challenge predicated on asserted flaws in his methodology. The jury was entitled to rely on husband's expert's testimony and report in assessing the value for her businesses just as it was entitled to rely on husband's forensic accountant's and wife's valuation expert's testimony and report. Accordingly, wife's argument is overruled.

Wife also contended that trial court erroneously assessed attorney's fees of \$250,000 against her as sanctions. Whether sanctions are just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanctions imposed; the sanctions must relate directly to the abuse that prompted them. Second, sanctions may not be excessive. An additional safeguard comes into play when sanctions are predicated on conduct during pre-trial discovery. The failure to obtain a pre-trial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of a claim for sanctions based on that conduct.

Here, in its conclusions of law, trial court imposed a global sanctions award of \$250,000 in attorney's fees for all of wife's collective misconduct during the divorce proceedings. However, the record indicates that at least some of the parties' discovery disputes resulted in pre-trial rulings. In its findings of facts, trial court referred to "numerous discovery violations and discovery abuses" but did not enumerate or specifically describe them. Therefore, this court cannot determine whether husband obtained pre-trial rulings on all of the unspecified discovery disputes encompassed by the finding of facts. Additionally this court cannot determine whether some or all of the discovery abuse encompassed by these findings was revealed for the first time during or after trial. Accordingly, this cannot determine whether the global sanction bears a reasonable relationship to the misconduct. Trial court's global sanctions award must be reversed and remanded for further proceedings consistent with appropriate standards. Wife's argument is sustained.

Editor's Comment: Failure to challenge an expert's methodology (i.e., make a Daubert challenge) prior to or during trial precludes legal sufficiency argument on appeal based on the problems with the expert's methodology. Because this was a jury trial, the legal sufficiency challenge had to be preserved via a specific challenge prior to appeal. (Contrast that a party may challenge legal sufficiency of a judge's decision following a nonjury trial without pretrial preservation issues.) Also, as to the award of attorney's fees, the appellate court found the findings of fact entered by the trial court insufficient to support the award. So, be very, very specific when drafting findings of fact. M.M.O.