SECTION REPORT
FAMILY LAW

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IN THIS MONTH'S REPORT

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MESSAGE FROM THE CHAIR

I have just returned from the State Bar's Advanced Family Law Drafting Course in Dallas, and, like most of you, am looking forward to a holiday break from the daily practice of family law. As the holiday season and a new year approach, I find myself both looking back at the year that is ending and looking forward to the challenges facing family lawyers in the coming year.

First, I am proud that the Family Law Section of the State Bar of Texas has grown to include over 5,300 members. Our section continues to be on the cutting edge of continuing education for our members, both by providing excellent legal services to our clients, and by seeking ways of providing *pro bono* services to those persons who have the greatest need.

In order to continue our history of service to indigent clients and those clients who, though perhaps not "indigent," simply cannot afford to pay the legal fees necessary to secure competent representation in a family law case, the Family Law Section will conduct approximately eight seminars around the state in 2012. These one-day seminars are designed to train non-specialists in good family law practices, so that they will be able to offer reduced-fee and *pro bono* services to those persons in their own counties who need legal help. Watch for these seminars in your area, support them with your attendance, and encourage young lawyers and general practitioners to attend and improve their family law skills. The Family Law Section will waive the tuition fee for any lawyers who will agree to take two *pro bono* family law cases in the coming year.

I continue to be amazed at the quality of the speakers and papers we are privileged to share at our Family Law Section events. Many thanks to Cindi Barela Graham for her excellent recruiting and planning for last week's Advanced Family Law Drafting Course. The Planning Committee is pleased that 25% of the attendees were paralegals. The State Bar will continue to offer this advanced drafting course in alternating years, following each Legislative session, so that our members will be informed of new laws and changes to the Texas Family Code, and how those changes affect our drafting practices.

We all are looking forward to the Texas Association of Family Law Specialists' (TAFLS) Fabulous Trial Institute in Las Vegas, Nevada on February 17-18, 2012. The Course Directors, JoAl Cannon Sheridan of Austin and Steven King of Fort Worth, have put together an outstanding "cast," who will present a hands-on trial. You will be able to hone your trial skills as the sad story of Elvis and Priscilla unfolds. Along with receiving approximately nine hours of CLE credit, you will see the direct and cross-examination of a tracing expert, and the use and exclusion of social media evidence. This is one of the best trial seminars in the country, and I encourage you to attend.

Finally, I hope that you will close your offices for at least a few days during the holiday season. Family law, though rewarding and interesting, can be one of the most stressful areas of the law. Please take some time to re-charge your batteries and rest your hearts and minds during this season that is intended to bring peace and goodwill to all. I pray for peace, prosperity, and good will for all of you, your families, your staffs, and your clients in this holiday season and in the new year.

----------**Thomas Ausley, Chair**

EDITOR'S NOTE

Winter is almost here and another section report has arrived. I wish to thank my law clerk, Elizabeth Hearn, who has provided not only the summaries of the cases, but has also provided a very interesting article regarding class action suits filed on behalf of abused and neglected children. I also want to thank and extend my appreciation to the folks who each quarter contribute columns for this report: Jimmy Verner, John V. Zervopoulus, Christi Gammill Adamcik, Jeff Coen, and Melanie Wells.

--------- **Georganna L. Simpson, Editor**

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ASK THE EDITOR

Dear Editor*:** I represent a respondent in a divorce suit. I filed a summary judgment regarding the separate property characterization of some of my client's oil and gas rights. Although there were some aspects of our claim that the other side could have challenged, they didn't do a very good job on their response. We won. Unfortunately, I had not filed a counter-petition and now the other side has non-suited the divorce case to try and get rid of the summary judgment. Short of re-filing a motion for summary judgment and hoping the other side doesn't do a better job on their response, is there any way to save my client's summary judgment. ***Humble in Humble.

***Dear Humble in Humble*:** Yes, in Texas the general rule is that plaintiffs have the right to take a nonsuit at any time until they introduce all evidence other than rebuttal evidence. Such a nonsuit may have the effect of vitiating earlier interlocutory orders. A decision on the merits, such as a summary judgment, however is not vitiated. This includes partial summary judgments. *Hyundai Motor Co. v. Alvarado*, 892 S.W.3d 853, 854-55 (Tex. 1995). Accordingly, here your summary judgment survives your opponent's attempt to get rid of it.

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,

I have a very tricky problem. Seriously. I have a colleague who is… just the worst. This person is dragging out divorce and child custody actions out f-o-r-e-v-e-r just to make more money. I know you probably think we all do that, but really, it's frowned upon. And to add to that, this person also routinely uses kids as pawns to squeeze the other parent to get whatever the client wants – no matter how unreasonable or unnecessary. I've watched this for years and my conscience can't take it anymore (don't tell anyone!). What do you think of this person and what do you think I should do about it? He or she is a senior partner, btw. I am a nobody junior partner. I'm not sure what to do.

Thanks for your help,
Nobody Junior Partner in Distress

Dear NJPD,

You're in what we call a pickle, NJPD. Not only is this person (let's call him or her "Pat" for the sake of simplicity) behaving immorally, but you have enough of a conscience that this behavior actually bothers you! Do your colleagues know? About your conscience, I mean. Not about Pat's behavior. Because if you listen to your conscience, you're going to have to take some risks. Which can lead to an even bigger pickle. But I'll get to that in a minute.

I had lunch with a family law attorney not too long ago. It was one of those lunches where everyone's sucking up to everyone else to get referrals. Between bites of chicken enchilada with mole' sauce, I asked the lawyer (let's call her Cruella) who her ideal client would be, so I would know what type of cases to send her. Cruella put her fork down, took a dainty sip of iced tea, thanked me for asking and said – and I'm quoting verbatim here – "Nasty divorce, lots of money, kids." As my eyebrows hit the ceiling, she added, "I'm a pit bull. I'm in it for the fight. And the money of course. Those cases are a dream come true." If we had not been in a public place, I would have jammed her iced tea glass down her throat after disabling her with a whack from the 30lb handbag I carry. I know a good defense attorney. It would have been worth the mug shot and the night in the pokey until I could post bond.

Now I realize that most lawyers really do have ethics AND morals. And that every case is not The War of the Roses. But I have to mention this or I would be remiss in my role as a mouthpiece for our profession. You say Pat's behavior is frowned upon, but I have to tell you that most of us out there on the other side of the line of scrimmage (the ones trying to keep families together) don't believe you. It's sad, but it's the truth.

Here's why. Your profession and mine are strangely similar. Both of us have an incentive not to help our clients. If we help them, they get better and stop coming and there goes our paycheck. If we can't pull out a victory, they end up in your office and it's your turn.

If you help them, they get wise and crucial legal intervention at a time that is characterized by upheaval and disorientation. And then they move on with their lives. There goes YOUR paycheck. Ouch. As you are certainly aware, ethical standards demand that we ignore this obvious conflict of interest and actually do what's in the best interest of our clients.

Now let's think about that phrase for a second. Sometimes that answer is less than obvious. Getting a bigger settlement seems like a good thing, right? But what's the 12-year old going to say to his therapist when he's 25? Is he going to talk about the extra $5 million in the settlement? Um, no. All of us should think about that

as we are deciding what's in the best interest of our client. The truth is, getting more money for your client or swiping kid time from the other parent are not necessarily best for anyone but you. Or Pat and Cruella, more specifically.

Unfortunately, Cruella and Pat make the world a worse place for all of us: you, me, and most importantly, for the families they are grinding into the dirt in the name of "doing what's best for their clients."

As to how to handle Pat – that depends almost entirely on your personality. If you're not risk averse, I'd say LEAVE. Now. Go start a firm or join a firm and create an environment in which the clients' welfare is the driving force of your work. Your business will thrive. I promise. We've been living on a policy of "clients-first" for a decade now at LifeWorks. We've learned that if we sacrifice a paycheck in the name of good client care, it comes back to us eventually in goodwill and referrals from the community.

Another option is to confront Pat. If you do it directly, you could get ground up and spit out by The Man. If you do it indirectly, you risk an ugly confrontation and possibly jail time. Egging Pat's house is illegal, right? So is the iced tea thing I mentioned earlier. There go a couple of really good options.

As I see it, NJPD, the best way to get out of the pickle you're in is to follow that conscience of yours and practice law like a grown-up person of character. Your clients will benefit, certainly. And you and your conscience will coexist comfortably. Of this I am certain. I, however, will need to retire early because that wave of damaged kids Cruella and Pat are sending our way will be pitifully small. I'll be out of a job. Can you imagine?

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.

Child support: The Georgia Supreme Court reversed a trial court that refused to modify child support by lowering it below the "floor" set forth in the agreement that settled the parties' divorce, holding that the settlement agreement lacked a "clear and express waiver" of the right to seek a later modification of child support. *Dean v. Dean*, 715 S.E.2d 72 (Ga. 2011). In Wisconsin, an appellate court affirmed a trial court's finding that a handyman's annual earning capacity equalled $34,320 when the trial court imputed income to him of $12 per hour and the man's father forgave rent of $780 per month in exchange for remodeling services. *Thistle v. Thistle*, 2011 WL 4389141 (Wis. App. 2011).

Maintenance: The Missouri Supreme Court rejected an ex-husband's motion to terminate agreed maintenance payments to his ex-wife of $12,000 per month for fifteen years upon her remarriage five years after divorce because the parties' martial settlement and separation agreement stated that maintenance would terminate "only in the event of the death of either party." *Simpson v. Simpson*, -- S.W.3d --, 2011 WL 4582458 (Mo. 2011). A Virginia court of appeals found no error in a trial court's decision not to reduce spousal support of $2,100 per month, even though the ex-husband had retired from his oral surgery practice and the ex-wife had voluntarily left her job, because the ex-husband held some $3.5 million in assets and might receive

additional money from the sale of his practice. *Driscoll v. Hunter*, 716 S.E.2d 477 (Va. App. 2011). When a husband agreed to pay his wife $4,900 per month in maintenance for ten years, then died six years later, a Wisconsin appellate court held the ex-wife entitled to make a claim against her ex-husband's estate for the remaining four years of maintenance because the parties' agreed divorce judgment stated that "maintenance payments shall not be modifiable in either duration or amount under any circumstance." *Wagner v. Sobczak*, 2011 WL 5061616 (Wis. App. 2011).

Modification – Custody: A New York appellate court found the trial court's decision to change custody to the father to be "supported by a sound and substantial basis in the record" when the record showed, among other things, that in response to a child protective caseworker's criticism that the mother squirted liquid dish soap into her children's mouths to discipline them, the mother switched to a different type of soap. *Brown v. Brown*, 931 N.Y.S.2d 764 (N.Y. App. 2011). The Alaska Supreme Court held that res judicata did not bar a trial court from considering domestic violence incidents that occurred in 1999 and 2004 when asked to modify custody agreements entered into in 2005 and 2007 because the Alaska Supreme Court has "relaxed" the change-of-circumstances requirement in custody matters involving domestic violence when the initial child custody determination did not adequately address prior domestic violence. *McAlpine v. Pacarro*, 262 P.3d 622 (Alaska 2011).

Modification – Visitation: In a "classic, high conflict postdissolution litigation regarding family matters," a Connecticut appellate court was "not persuaded" by the mother's argument that because the father did not introduce evidence demonstrating his ability to parent, the trial court abused its discretion by "speculating" as to the father's parenting abilities. *Balaska v. Balaska*, 25 A.3d 680 (Ct. App. 2011). The Nevada Supreme Court held that a trial court abused its discretion when it terminated a grandmother's visitation rights by relying upon the presumption that a parent's decisions are in a child's best interest, *see Troxel v. Granville*, 530 U.S. 57 (2000), because that presumption applies only to the initial determination of a nonparent's visitation rights, not to later modifications of visitation. *Rennels v. Rennels*, 257 P.ed 396 (Nev. 2011). On a related *Troxel* note, a California Court of Appeals remarked that a surviving parent may not use denial of visitation as "Big Bertha" in that parent's "personal war" with a grandparent, holding that terminating visitation out of spite rebuts the presumption that the parent acted in the children's best interest. *Hoag v. Diedjomahor*, No. 199 Cal.App.4th 1321, 132 Cal.Rptr.3d 256 (Cal. App. 2011).

Paternity: A New York appellate court rejected the argument that a court "has no jurisdiction to determine paternity of a child born to a married woman," holding that a person who pleads merely that he is a child's father may attempt to establish paternity. *Nathan O. v. Jennifer P.*, 931 N.Y.S.2d 198 (N.Y. App.). A California appellate court held a man claiming to be a child's biological father without standing to pursue a paternity claim against a married woman because, under the Uniform Parentage Act, the man could not be presumed the father and the mother's husband enjoyed two presumptions of paternity. *Neil S. v. Mary L.*, No. 199 Cal.App.4th 240, 313 Cal.Rptr.3d 51 (Cal. App. 2011).

Relocation: An Oregon appellate court did not abuse its discretion when it allowed the mother, upon divorce, to move from Oregon to San Francisco when the mother's family lived there, had been heavily involved in raising the children, and the father's job as an emergency room doctor limited the time he could spend with the children. *Maurer v. Maurer*, 262 P.3d 1175 (Ore. App. 2011). In *Nelson v. Nelson*, -- P.3d --, 2011 WL 5107108 (Alaska 2011), the Alaska Supreme Court reiterated that an anticipated out-of-state move constitutes a substantial change of circumstances as a matter of law, holding that the father's signing of a parenting plan in 2009 when he knew he faced possible military reassignment in 2011 did not prevent him from requesting modification of the parenting plan when the time for reassignment drew near.

Valuation: When a husband fraudulently exercised stock options during the pendency of his divorce, and the trial court, unaware of the exercise, awarded the wife half the options, the trial court did not err when it later granted the ex-wife judgment against the ex-husband in the amount the ex-wife would have realized by exercising the options the day prior to their expiration rather than in the lesser amount that the ex-husband actually received when he exercised them. *Farmer v. Farmer*, 259 P.3d 256 (Wash. 2011). A Kentucky appellate court

held that a trial court properly valued the husband's interest in an anesthesia practice by rejecting the husband's expert's marketability discount of 45% because allowing such a discount, in effect, failed to include personal professional goodwill in the practice, which is a divisible marital asset in Kentucky. *Monaco v. Stewart*, 2011 WL 1330851 (Ky. App. 2011).

COLUMNS

HIGHLIGHT LIMITATIONS TO CLARIFY EXPERT TESTIMONY

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

Mr. Smith, preparing to take a psychologist's deposition, puzzled over the confidently asserted opinions offered in the expert's recently submitted evaluation report. Cast in psychological jargon, the opinions did not reflect the case's complicated facts and strident allegations. Further, the psychologist spun a list of inadequately supported, overly prescriptive recommendations. Mr. Smith knew that asking the psychologist "How do you know what you say you know?" would be the key question around which to structure his deposition inquiries. That approach, consistently applied, would expose the bases of the expert's opinions, giving Mr. Smith the opportunity to gauge the quality of the expert's testimony, if not to provide a foundation for arguments to the court about the testimony's legal relevance and reliability.

But when asking "How do you know what you say you know?", Mr. Smith should not be satisfied with answers that merely assert what the expert claims to know. Mr. Smith should also ask the expert about the limitations and boundaries of her opinions. The American Psychological Association's (APA) Ethics Code and Texas's psychology licensing board require psychologists to "indicate any significant limitations of their interpretations" and to "identify limits to the certainty with which diagnoses, judgments, or predictions can be made about people." This makes sense—from the perspectives of psychology and law. Explanations are always clearer when we understand what elements they include *and* exclude. Because an evaluation or review is a time-limited, inductive process, all resulting conclusions and opinions have limitations and alternative explanations that the expert should have considered. For example, under what conditions does dad's depression interfere with his ability to parent his children safely? What circumstances appear to trigger mom's angry outbursts? In what settings does the young child not show anxieties when interacting with the noncustodial parent? Legally, the expert's ability to clarify her opinions and recommendations by describing their limitations will also help the court to determine the testimony's relevance and reliability.

Because exploring limitations the expert's opinions and recommendations clarifies the expert's testimony, prepare to ask limitations questions in all examinations of experts. On direct, use the expert's willingness to discuss limitations to enhance her credibility—no expert can know everything. On cross, use the opinions' limitations to chip away at the expert's confident assertions.

To explore limitations in the expert's opinions and recommendations, ask the expert about her evaluation methods and then probe about whether her opinions and recommendations are adequately based on data derived from those methods. Competent, generally-accepted forensic psychological evaluations include three elements: examinee interviews; psychological testing; and reviews of collateral sources—interviews of other people with relevant information and reviews of relevant records and documents. Address each of the three evaluation elements when asking about the expert's limitations. For example:

• Interviewing:

- How might your evaluation have benefited from more interviews of the litigants?
- How might your opinions and recommendations be modified if you would have interviewed the litigants outside your office?

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

- Were your interviews scheduled so that you could address with the litigants questions that arose as you reviewed the testing and assessed collateral sources and information?

• Testing:

- Why did you administer the tests you used in this evaluation?
- How did you use the results of each test in this evaluation?
- What are the limitations of each test you used in this evaluation to address the evaluation's referral questions?

CHOOSING A RETIREMENT PLAN FOR A SMALL BUSINESS

by Christy Adamcik Gammill, CDFA[2]

Abstract: Defined benefit, defined contribution, non-qualified deferred compensation: which type of plan is right for your business?

If you're a business owner, chances are you will want to provide a retirement plan for yourself and your employees. With all of the responsibilities of running a small business, retirement planning may take a back seat to the day-to-day operation.

Several options are available to small business owners who want to start a company retirement program. Each has advantages and disadvantages. Selecting the plan best suited for your business takes time. Things to consider include funding costs, tax consequences, administrative requirements and, of course, the needs of your company and employees.

A qualified or tax-qualified plan is one in which contributions are tax-deductible and there is no tax on income earned by the plan's assets until the employee begins receiving payments.

A qualified plan can be a defined benefit or a defined contribution plan. A defined benefit plan is one in which the amount the participant will receive upon retirement is set or defined by a formula. The formula usually is derived from the retiree's length of service and average pay over the last several years of employment. One form of a defined benefit plan is the traditional company pension that pays retirees a guaranteed sum for life. Defined benefit plans can be expensive and administratively complex.

A defined contribution plan is more common. The amount of the employer/employee contribution is set or defined at a particular level, for example, using a percentage of compensation. Provided the employer selects investment options under the plan that meets its prudence requirement, it bears no responsibility for the performance of the investment options of the plan.

Defined contribution plans include profit-sharing, 401(k) plans, Owners 401(k), SEP-IRA and others. Generally, qualified retirement plans must be available to all full-time and certain part-time employees. The amount of annual contributions are limited by law.

Non-qualified deferred compensation plans are those that a business offers to only certain employees, usually the owners and other highly-compensated employees. The contributions to such plans are not tax-deductible in the year they are made.

As with other important financial decisions, selecting a suitable retirement program for your business requires careful examination of all options. This article is intended only to touch briefly on some of the options available to small business owners and those who are self-employed. You should consult appropriate professionals, including tax advisors or other financial and legal advisors before deciding what's best for you and your business.

A little planning today can make a world of difference tomorrow.

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[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 75251 or 972-455-9021 GE 51937 (10/09). She offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC and its subsidiaries. **GE-54591 (5/10)**

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EVIDENCE BYTES: AFFIDAVITS NO LONGER THE RULE, NOW YOU HAVE A CHOICE

By Jeff Coen[3]

A short column because of the holidays.

By now most of us have seen the changes and additions in the TEXAS FAMILY CODE visited upon us by the Legislature. All of the changes in the FAMILY CODE were either proposed by members of our Family Law Foundation or approved by them. But as we know and must keep reminding our civil law brethren, our practice encompasses just about every subject that is currently regulated by statute. I want to focus on one such aspect that has had little or no publicity in any legal circle and yet has profound effect on the way we routinely practice.

How many times have we scrambled to meet a deadline for exchanging interrogatories, filing affidavits of business records, or obtaining powers of attorney to transfer vehicle title and utility deposits? You have to track down the affiant and put them together with a notary and get it all done on short notice. Well, not any more.

As of September 1, 2011, the requirement of having sworn documents notarized in Texas has been legislated out of existence. House Bill 3674 was passed by the Legislature in May and signed into law by the governor in June. But it has been little noticed.

I admit that I didn't discover it, or even stumble across it in preparing several legislative updates. It was first brought to my attention by our illustrious editor. I have since included it in every discussion about what is new in 2011. What I have found, at least in North Texas, is that no one has the slightest clue it exists. Nor could anyone help me with its origin. Several opined that it must have come from the probate section. One bright, soon to be attorney, suggested it came from the financial industry, which is struggling with all their documentation as mortgages collapse. I finally went to the fount of all knowledge about new law, the Texas Legislature web page, and found that it was in fact proposed by our very own Texas Bar Committee on Admission of Rules of Evidence. The actual bill was introduced late in the session (March), and with a few changes made it swiftly to the uncontested calendar in both houses. Since the statute dispenses with the need for a notary in most cases (I'd say all, but someone will undoubtedly find an exception), where was the notary lobby, or more importantly the notary insurance bond lobby while their entire industry was being dismantled? The only person testifying in the legislative hearing was a representative of the Bar. But whatever the answer, they are too late.

How unknown is the new procedure? Not to cast aspersions, but when I called the Secretary of State to inquire about the use of the new form on an election petition, it was the first notice they had of the change. And the SOS is the state agency that registers and regulates notaries.

As of September 1, 2011, we now have an "Unsworn Declaration" which is found at TEXAS CIVIL PRACTICE AND REMEDIES CODE §132.001.

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Sec. 132.001. UNSWORN DECLARATION

(a) Except as provided by subsection (b), an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law.

(b) This chapter does not apply to an oath of office or an oath required to be taken before a specified official other than a notary public.

(c) An unsworn declaration made under this chapter must be in writing and subscribed by the person making the declaration as true under penalty of perjury.

(d)(1) Except as provided by subsection (d)(2), an unsworn declaration made under this chapter must include a jurat in substantially the following form:

"My name is (First:) _____ (Middle:) _____ (Last:) _____, my date of birth is _____, and my address is (Street:) _____, (City:) _____, (State:)_____, (Zip Code:) _____, and (Country:) _____. I declare under penalty of perjury that the foregoing is true and correct.

Executed in _____ County, State of _____, on the _____ day of (Month:) _____, (Year:) _____.

_____

Declarant"

(d)(2) An unsworn declaration made under this chapter by an inmate must include a jurat in substantially the following form:

"My name is (First:) _____ (Middle:) _____ (Last:) _____, my date of birth is _____, and my inmate identifying number, if any, is _____. I am presently incarcerated in (Corrections unit name:) _____ in (City:) _____ (County:) _____ (State:)_____ (Zip code:) _____. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the _____ day of (Month:) _____, (Year): _____.

_____

Declarant"

SECTION 2. Civil Practice and Remedies Code sections 132.002 and 132.003 are repealed.

We have been freed from the requirement of having a notary at our beck and call. The question will be how long will it take for the rest of Texas to recognize the new law and change all of the outdated forms. Until that happens, you may want to carry around a copy of the statute to explain to those charged with accepting and filing sworn documents and few blank copies of the new jurat so you can staple them to the old forms.

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ARTICLES

Reforming Foster Care: Class Action Suits Giving Abused and Neglected Children a Voice

by: Elizabeth Hearn*

I. Introduction

If you have had any involvement with foster care, you know that there are some wonderful stories about children being rescued from abusive and neglectful caregivers and placed with amazing and loving families. However, you have probably also heard horror stories of children who have been taken from one bad situation only to be placed into an equally bad or worse position. Over the past handful of years, the Texas legislature and child advocates have taken small steps to improve the foster care system. Despite these measures, there are those who believe that the state still has not met the minimum standard of care that is due to the children in the foster care system.

II. Texas Foster Children Seeking Reform

A class action suit has been brought on behalf of children in long-term foster care.[4] The petition listed nine named plaintiffs, who represent 12,000 similarly situated children.[5] The plaintiffs alleged that these children have suffered immeasurable and permanent harm while in the state's care.[6] The plaintiffs stated that once an abused or neglected child has been placed in the custody of the Texas Department of Family and Protective Services ("the Department"), the Department's custody is not intended to last more than one year.[7] The petition contended that when a child is brought into state custody, the state should, within one year, either find a new permanent family for the child or reunite the child with his family.[8] Allegedly, the state has made little effort to find permanent homes after the first year that a child has been in foster care.[9] Thus, children who have not been placed in a home within one year remain in custody for many years and allegedly suffer further abuse while in the foster care system.[10]

"As of 2009, children in the state's [care,] who have been in the Department's custody for more than three years have been in an average of *eleven* placements."[11] Children are placed in facilities that are outside of the children's home communities and provided with substandard care.[12] The petition complained of the Department's understaffing, high staff turnover, and inadequate planning for finding children permanent placements.[13] The Plaintiffs argued that the Department has given up on finding homes for these children and that the Department believes that many of the children in its care are "unadoptable."[14] Despite an awareness of the problems, the Department has not yet effectively taken adequate steps towards any solution.[15] The plaintiffs asserted that fundamental changes are needed to prevent further harm to these children.[16]

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[4] Plaintiff's Original Complaint for Injunctive & Declaratory Relief & Request for Class Action, 2011 WL 1134177 (No. 11CV00084-N) (Mar. 29, 2011), *MD v. Perry*, No. C–11–84.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 1:¶ 2.

[8] *Id.*

[9] *Id.* at 1: ¶ 3.

[10] *Id.*

[11] *Id.* at 2:¶ 5 (emphasis in original).

[12] *Id.* at 2:¶ 7.

[13] *Id.* at 3:¶ 9(a).

[14] *Id.*

[15] *Id.* at 3:¶ 10.

[16] *Id.* at 4:¶ 17.

III. The Named Plaintiffs

The petition included dismal stories of the nine named plaintiffs.[17] The first story described a young girl, M.D., who was abandoned by her father and neglected by her mother.[18] M.D. was sexually assaulted by her cousin before being placed in the Department system.[19] The Department moved her three times within six months.[20] At ten-years old, she became suicidal.[21] In response, the Department moved her to a special facility.[22] While living at this facility, she and another child walked to a nearby store, where M.D. was raped.[23] Rather than providing M.D. with counseling, the facility staff reprimanded M.D. for leaving the facility.[24] Even though the Department was convinced that M.D. could not be returned to her parents, she was not freed for adoption until three years after entering foster care.[25] Among other complaints, the plaintiffs assert that the Department failed to provide adequate foster supervision for MD and failed to identify a plan for permanent placement of M.D.[26]

Another named plaintiff, S.A., was a fourteen-year-old girl who had been in foster care since she was five.[27] S.A. had been in twenty-four different placements, twenty-one of which were after S.A. had been freed for adoption.[28] S.A. did not have any emotional or mental problems prior to being placed in the Department's care.[29] However, at the time of the complaint, she was taking medication for schizophrenia and clinical depression.[30] S.A. had twelve different caseworkers, but as of the time when the petition was filed, there was no plan to place her in a permanent home.[31]

Another child, J.S., was placed in the Department's care because he suffered from extreme neglect from his biological family.[32] Despite a lack of evidence that J.S.'s mother would be able to care for J.S., the Department did not seek to free J.S. for adoption.[33] One foster family wanted to adopt J.S., but they were unable to because J.S.'s mother's rights were still intact.[34] After expressing suicidal thoughts, J.S. was institutionalized and was prescribed powerful psychotropic medications.[35] On one occasion, J.S. asked his attorney ad litem for a hug because the facility's caregivers were not allowed to touch him.[36]

The remaining plaintiffs' stories include children who have been overmedicated, shipped to multiple group homes across the state, and suffered further physical and sexual abuse after being removed from their families' care.[37]

IV. The Pleadings

The plaintiffs explained that although Texas law requires a child to be represented by a guardian ad litem while in the Department's temporary care, there is no such requirement once the Department has become a permanent managing conservator.[38] The plaintiffs argued that once a child has been placed in the permanent managing conservatorship with the Department, there is less motivation to ensure that the child's safety,

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[17] *Id.* at 5–30.
[18] *Id.* at 6:¶ 22.
[19] *Id.*
[20] *Id.* at 6:¶ 23.
[21] *Id.* at 6:¶ 24.
[22] *Id.* at 6:¶ 25.
[23] *Id.* at 6:¶ 26.
[24] *Id.*
[25] *Id.* at 7:¶ 31.
[26] *Id.* at 8:¶ 33.
[27] *Id.* at 13:¶ 57.
[28] *Id.*
[29] *Id.* at 14:¶ 63.
[30] *Id.*
[31] *Id.* at 15:¶ 65–66.
[32] *Id.* at 19:¶ 84.
[33] *Id.* at 19:¶ 83.
[34] *Id.* at 20:¶ 88.
[35] *Id.* at 19–20:¶ 89–91.
[36] *Id.* at 19:¶ 85.
[37] *Id.* at 9–18.
[38] *Id.* at 38:¶ 168.

health, well-being, education, and permanency plans are adequately addressed.[39] The plaintiffs allege that the foster care system harms children because it:

(1) creat[es] great instability and inflict[s] ongoing emotional harm by frequently moving the [children] from one placement to another;
(2) plac[es] many of them for long periods in congregate care that cannot provide any permanency;
(3) plac[es] them in group placements that do not comport with reasonable professional standards;
(4) separat[es] them from siblings, significant family members, and their communities;
(5) fail[s] to provide them with necessary mental health services;
(6) expos[es] them to abuse and neglect in care; and
(7) leav[es] them to languish in foster care without planning for a permanent placement for them, until they age out of care unprepared for independent adult life.[40]

V. Relief Sought

The plaintiffs seek injunctive relief that would require the Department to ensure that caseworkers' caseloads do not exceed the national standards, to maintain permanency plans for all children in the foster system, and to seek the assistance of outside experts to assess whether children who have been in four or more placements are receiving the care they need. The plaintiffs also ask for licensing or verification for all substitute care providers and that the Department establishes placement standards consistent with national standards.[41] Additionally, the plaintiffs ask that a neutral party be placed in a position to oversee this effort to ensure the order is carried out.[42]

To provide a clearer picture of the plaintiffs' complaints, this Article gives an overview of the Department and the role of Texas courts in the foster care system. This Article then provides some information on a few other organizations that work in conjunction with the foster care system. Next, the Article addresses some advice and criticism of the foster care system. Finally, because this lawsuit is in federal court, this Article gives a brief overview of similar class action suits in other Circuits.

VI. Texas Department of Family and Protective Services

The Department provides service to Texas's children, youth, families, elderly, and disabled persons.[43] There are four programs within the Department: Child Protective Services (CPS), Adult Protective Services, Child Care licensing, and Prevention and Early Intervention. Offices for these programs are located in eleven regions of Texas.[44] As of the 2010 Annual Report, there were 11,451 employees within the organization.[45] In addition, in FY 2010, more than 1300 volunteers put in over 141,000 hours helping the Department serve the community.[46]

One of the goals of Child Protective Services (CPS), is to "[p]rovide *permanent* homes or living arrangements for children who cannot safely remain with their own families."[47] A Department Program Improvement Plan became effective in 2010 and included a number of objectives, including an effort to "[r]emove barriers to finding permanent homes for children, especially when they remain in state care but parental rights are not terminated."[48]

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[39] *Id.* at 40–41:¶ 176.
[40] *Id.* at 41:¶ 177.
[41] *Id.* at 81–83:¶ 355(c).
[42] *Id.* at 83:¶ 355(e).
[43] TEX. DEP'T OF FAMILY & PROTECTIVE SERVS. ANN. REP. 2 (2010), *available at* http://www.dfps.state.tx.us/About/Data_Books_and_Annual_Reports/default.asp (last visited Nov. 23, 2011). In the 2010 Annual Report, the Department provided information on its programs and services for September 1, 2009 through August 31, 2010.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 3.
[47] *Id.* at 4 (emphasis added).
[48] *Id.*

VII. What Happens When Abuse or Neglect is Reported

In an effort to end abuse, the Department provides the Texas Abuse Hotline.[49] If a person believes that a child is being abused or neglected, state law requires that person to report the situation.[50] If a report indicates actual abuse or neglect, the situation is assigned a priority based on the level of risk, and the situation is investigated.[51] CPS workers then interview the children, parents, and anyone else with potentially relevant information.[52] One of the primary focuses of the investigation is reaching a timely resolution.[53] CPS workers will determine whether the child is safe or at risk.[54] In some cases, the case worker may refer the family to therapy or other services, even if no abuse or neglect is identified.[55]

When there is some need for assistance, but the child can remain safely at home, Family-Based Safety Services are available to help the family stabilize the environment.[56] Services include family counseling, parenting classes, financial assistance programs, and domestic violence intervention.[57] Occasionally, the child may live somewhere else temporarily until it is safe for them to live at home.[58]

When an investigation reveals that an environment is unsafe for the child, CPS may place the child in kinship care[59], an emergency shelter, a foster care facility, or with a foster care family.[60] Foster families provide a safe, nurturing environment and receive financial reimbursement for the costs of caring for foster children.[61] In arranging care with a foster family, CPS and the family take into consideration the special need of the child in addition to educational and medical needs.[62] If a child's needs are too difficult for a foster family to address, the child may be placed in a specialized group home, residential treatment center, or another facility to meet the child's needs.[63] As long as the parental rights of the foster child's parents exist, CPS will provide services to the family.[64] CPS strives to improve the family situation so the child can be returned to his parents.[65] If a reunion is not possible, CPS will work to find permanent living arrangements for the child through the courts.[66]

VIII.Adoption

If a court determines that a child cannot safely return home, the court may terminate the parents' rights.[67] The child can only be adopted after the parents' rights have been terminated.[68] The number of adoptions increased between 2005 and 2010, which the Department attributes in part to an increase in relative adoptions.[69] Relative adoptions make up more than 40% of Texas adoptions.[70]

The Fostering Connections to success and Increasing Adoptions Act of 2008 aims to increase the number of placements of children and youth into permanent homes.[71] The Act focuses on adoption, relative care, and transition services for young adults who have aged out of care.[72] In an effort to comply with the Act, the De-

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[49] *Id.* at 2.
[50] *Id.* at 8.
[51] *Id.* at 3.
[52] *Id.* at 8.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 8–9.
[56] *Id.* at 9.
[57] *Id.*
[58] *Id.*
[59] Kinship care is when relatives of the child provide temporary placement for the child. The relatives may eventually adopt the child or become a permanent managing conservator of the child. *Id.* at 10.
[60] *Id.* at 9.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 10.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 5.
[72] *Id.*

partment began Permanency Care Assistance to aid youth who grew up in the foster care system.[73] Further, in the next few years, CPS will be focused on quality improvement in its decision making processes.[74] Specifically, the organization will be focusing on:

- [b]etter identify[ing] when children are safe vs. unsafe[;]
- [b]etter understand[ing] what family changes must occur to keep children safe and match[ing] them with the right services[;]
- [b]etter understand[ing] safety as it relates to permanency[;] . . .
- [s]upport[ing] and ingrain[ing] family-centered practices that put safety first[; and]
- [e]valuat[ing] the effectiveness of the changes.[75]

Studies show that adoptions are more successful when foster parents adopt children, as opposed to "strangers."[76] Thus, CPS encourages families not only to become verified to provide foster care, but also become approved to adopt children.[77] CPS reaches out to prospective families through various campaigns, including Foster Care Month, Adoption Awareness Month, the "Why Not Me?" campaign, and other recruitment drives.[78] CPS also uses the Texas Adoption Resource Exchange to seek out prospective foster care families.[79]

The Department cares for thousands of children, who have been victims of abuse and neglect.[80] If an adopted child has suffered abuse or neglect, CPS works with private agencies to provide services to the adopted child and the adoptive families to cope with the effects of the child's experiences.[81] The Department meets three or four times a year with other organizations to discuss methods for promoting the safety and well-being of children.[82]

IX. The Courts and the Foster Care System

Texas courts play a key role in the foster care process.[83] Courts decide where and with whom foster children live.[84] The Permanent Judicial Commission for Children, Youth, and Families ("Children's Commission") was created in November 2007 to improve child protection courts.[85] The Children's Commission is comprised of judges, elected officials, attorneys, Department employees, and members of other child-oriented organizations.[86]

Court Appointed Special Advocates ("CASA") is a national program that recruits and trains volunteers to serve as advocates for abused and neglected children.[87] National CASA CEO has an initiative to "provid[e] a CASA volunteer to every child in care by the year 2020."[88] This initiative is likely a result of the legislative goal "to ensure that by January 1, 2010, a court-appointed special advocate shall be available to every victim of child abuse or neglect in the United States that needs such an advocate."[89]

X. Texas Young Lawyers Reaching Out

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[73] *Id.*
[74] *Id.* at 6.
[75] *Id.*
[76] *Id.* at 10.
[77] *Id.*
[78] *Id.* May is National Foster Care Month. For more information, go to http://www.fostercaremonth.org. November is Adoption Awareness Month. Many counties celebrate National Adoption Day in November. For more information, and to find an event near you, go to http://www.nationaladoptionday.org/. The "Why not me?" campaign focuses on finding adoptive parents for older children. For more information, go to http://www.theDepartment.state.tx.us/adoption_and_foster_care/why_not_me.
[79] *Id.* TARE provides information and resources for potential foster families, families considering adoption, and families that have already taken in foster children or adopted children. *Texas Adoption Resource Exchange*, www.adoptchildren.org.
[80] *Id.* at 13.
[81] *Id.* at 11.
[82] *Id.* at 13.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *CASA for Children: Organizational Profile*, CASAFORCHILDREN.ORG, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5453887/k.7340/Organizational_Profile.htm, last visited Oct. 31, 2011.
[88] Michael S. Paraino, *From the CEO: A Life Cut Short*, THE CONNECTION (Summer 2011) 9, located at http://nc.casaforchildren.org/files/public/site/communications/Summer_2011_Connection.pdf.
[89] Victims of Child Abuse Act, 42 USC 13012 (2006).

In 2009, the Texas Young Lawyers Association ("TYLA") teamed up with Texas Lawyers for Children to provide legal counsel for children who experience abuse and neglect in the foster care system.[90] From the beginning of the partnership, TYLA understood that volunteer attorneys were needed to help children who had been placed in the permanent care of the state.[91] One year later, after being involved with the organization, TYLA reached out again to the legal community for help.[92] Where the 2009 message was generally hopeful, the 2010 message explicitly noted the flaws in the foster care system. TYLA's description of the children's position in the system reads similarly to the description in the Plaintiffs' petition. TYLA notes that an attorney is required by law in the first phase of a child's case.[93] However, once it has been determined that a child cannot return to his family, the Department "no longer requires that the child have an attorney or even a lay advocate appointed."[94] Unlike the plaintiffs' petition, TYLA acknowledges the Department's limited resources and asks for volunteers.[95] TYLA has offered its help in providing training for any attorneys who are willing to help.[96]

XI. Commentary, Reports, and Suggestions from Interested Parties

Some have suggested that attorneys should be appointed to protect children's constitutional rights while in the state's care.[97] For instance, plaintiffs in a class action suit in Georgia argued that more attorneys were necessary to ensure children received adequate attention.[98] The plaintiffs contended that failure to provide effective representation violated the due process clause of Georgia's constitution.[99] Georgia law only requires legal representation for the children in initial termination proceedings but not in subsequent proceedings.[100] The court held that children in the custody of the state need separate counsel because of inherent conflicts of interest between the foster care system and the child.[101] While the foster care system representative would likely be considering the needs of the system in general and how to manage overcrowded facilities, those concerns could be contrary to the needs of the child.[102] Additionally, the court noted that when liberty or property interests are at stake, children are entitled to "constitutionally adequate procedural due process" to protect those interests.[103] The court found that a child's liberty interests are still at stake after the initial termination proceeding.[104] Without counsel for the child, the judge is forced to rely on the facts as presented and interpreted by the foster care system's representative.[105] Thus, the court held that the child's interests must be protected by representation of an attorney in any placement hearing while the child is in the state's care.[106] Finally, the court noted that if the "foster children's right to counsel is being violated, then it is the obligation of the Court to order an appropriate remedy even if such an order requires the state to appropriate additional funds to hire more child advocacy attorneys."[107]

Texas Appleseed ("Appleseed") is a public interest law center that recently conducted interviews to analyze the effectiveness of the Department.[108] Appleseed found that almost a third of foster children are in the system for at least three years.[109] Additionally, the study discovered that once a child reaches nine years' of

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[90] *Teaming Up to Help Texas Children*, 72 TEXAS BAR JOURNAL 764 (2009) [hereinafter *Teaming Up*].
[91] *Teaming Up*, *supra* note 87.
[92] *Texas Foster Children Need Your Help*, 73 TEXAS BAR JOURNAL 758 (2010) [hereinafter *Texas Foster Children*].
[93] *Texas Foster Children*, *supra* note 89.
[94] *Texas Foster Children*, *supra* note 89.
[95] *Texas Foster Children*, *supra* note 89.
[96] *Texas Foster Children*, *supra* note 89.
[97] Barbara J. Elias-Perciful, *The Constitutional Rights of Children*, 73 TEXAS BAR JOURNAL 750 (2010).
[98] Kenny v. Perdue, 356 F. Supp. 2d 1353, 1355 (N.D. Ga. 2005).
[99] *Id.*
[100] *Id.* at 1357.
[101] *Id.* at 1359 n.6.
[102] *Id.*
[103] *Id.* at 1359.
[104] *Id.* at 1360.
[105] *Id.* at 1361.
[106] *Id.*
[107] *Id.* at 1364.
[108] Rebecca Lightsey & Marcy Hogan Greer, *The Role of the Judicial System in Improving the Lives of Texas' Foster Children*, 73 TEXAS BAR JOURNAL 746 (2010).
[109] Lightsey & Greer, *supra* note 105.

age, the child's prospects for adoption decreases dramatically.[110] Only 20% of children over nine are adopted.[111] The study found that there is a disturbing lack of urgency from the Department to find permanent homes for children in the state's permanent care.[112] When a child first enters into the temporary care of the state, there is pressure to quickly determine whether the child will be returned to his family or become a permanent ward of the state.[113] Once that decision has been made, the pressure is off.[114] Almost 20% of children end up "aging out" of the system.[115]

Casey Family Programs ("Casey") is an organization that focuses on improving the foster care system.[116] Casey consults with foster care programs and the legislature in an effort to create better policies and reduce the number of children in the foster care system.[117] Casey reported that children who age out of the foster care system are extremely likely to have difficulty finding stability in their adult lives.[118] These children are more likely to drop out of school, have mental disabilities, live in poverty, lack health insurance, report early pregnancies, have difficulty maintaining employment, and end up in prison.[119]

Unfortunately, while it appears clear that these children are underrepresented, there are simply insufficient resources to adequately aide the children in the foster care system.[120] While national standards recommend a caseload of fifteen to seventeen cases, most caseworkers in the Department handle an average of thirty cases at one time.[121] Additionally, there are often so many cases on a judge's docket that the judge may only be able to spend ten to fifteen minutes reviewing each case.[122] There needs to be a person or entity monitoring each child's health and development.[123] Each child's interest needs individualized consideration, but the caseworkers carry such a large load, it is difficult to provide the necessary attention.[124]

One suggestion has been that the procedural approach to these cases should be redesigned.[125] Instead of treating the case as an advisarial proceeding, it should be a collaborative effort that seeks the best interests of the child.[126] In some cases, the child's extended and foster family, as well as caseworkers, who are familiar with the child, should receive notice of any hearings so they may attend and offer relevant testimony.[127] The children should be invited to participate in the hearings in order to allow them to feel that they have some control over their lives.[128] Appleseed has recommended implementing a two-year pilot program of a restructured system.[129]

Even if the system were so improved that each child had adequate representation within the foster care system, permanent homes cannot be found without willing adoptive families.[130] The Department has stories of families that were changed for the better after adopting a child in need.[131] Additionally, the Department has attempted to dispel false beliefs about adopting children, including the notion that it is prohibitively expensive.[132] There are a number of resources for adoptive families, including tuition assistance.[133]

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[110] Lightsey & Greer, *supra* note 105.
[111] Lightsey & Greer, *supra* note 105.
[112] Lightsey & Greer, *supra* note 105.
[113] Lightsey & Greer, *supra* note 105.
[114] Lightsey & Greer, *supra* note 105.
[115] Lightsey & Greer, *supra* note 105.
[116] Casey Family Programs: About Us, CASEY.ORG, http://www.casey.org/AboutUs/ (last visited Aug. 18, 2011).
[117] *Id.*
[118] Lightsey & Greer, *supra* note 105.
[119] Lightsey & Greer, *supra* note 105.
[120] Lightsey & Greer, *supra* note 105.
[121] Lightsey & Greer, *supra* note 105.
[122] Lightsey & Greer, *supra* note 105.
[123] Lightsey & Greer, *supra* note 105.
[124] Lightsey & Greer, *supra* note 105.
[125] Lightsey & Greer, *supra* note 105.
[126] Lightsey & Greer, *supra* note 105.
[127] Lightsey & Greer, *supra* note 105.
[128] Lightsey & Greer, *supra* note 105.
[129] Lightsey & Greer, *supra* note 105. A full discussion of Appleseed's recommendations can be found at www.texasappleseed.net.
[130] Lightsey & Greer, *supra* note 105.
[131] *See, e.g.*, Denise Brady, *Wanted: Loving Homes for Children*, 73 Texas Bar Journal 766 (2010).
[132] Brady, *supra* note 128.
[133] Brady, *supra* note 128. For more information, go to www.adoptchildren.org.

XII. Class Actions Seeking Reform Across the Country[134]

Class action suits similar to the Texas suit have been filed in other states.[135] Because the suits are all in federal court, these cases should provide some indication for how the Texas lawsuit will proceed. There are active cases in Massachusetts, Oklahoma, and Rhode Island.[136] There have also been a number of other cases that have already reached a final judgment or court-ordered settlement.[137] Other class actions have affected the foster care system by increasing the number of foster families and the number of adopted children, decreasing the number of children in institutionalized group homes, improving the reporting process for children suffering from abuse or neglect, and establishing a child's constitutional right to effective counsel.[138]

As with any case brought in federal court, one of the first hurdles the plaintiffs in these cases face is establishing that they have Article III standing to bring the suit.[139] In order to establish Article III standing, the plaintiffs must show that they have suffered a concrete, particularized injury in fact that is actual or imminent, that there is a causal connection between the injury and the defendants' conduct, and that their injury is redressable by judicial relief.[140] In addition, a federal court cannot hear a case that would be more appropriately addressed in state court.[141] The *Younger* Doctrine requires abstention when a plaintiff is involved in an ongoing state proceeding that involves important state interests, and the plaintiff's claims can be adequately addressed in state court.[142] The *Rooker-Feldman* Doctrine requires a federal court to abstain when a plaintiff attempts to use the federal court as an appellate court to overrule a judgment that was properly adjudicated in state proceedings.[143]

Because these class action suits are against governmental agencies, the plaintiffs also must establish an exception to governmental immunity.[144] One exception allows a plaintiff to compel a state official to comply with a federal right.[145] If this exception applies, the plaintiff may only seek future injunctive relief, not damages for prior harm.[146]

In the 1st Circuit, suits are ongoing in Rhode Island and Massachusetts. In Rhode Island, the plaintiffs included ten-named plaintiff children and their "Next Friends."[147] The defendants attempted to have the Next Friends dismissed from the lawsuit. Initially, the district court held that the Next Friends lacked standing to represent the children in the litigation.[148] However, the circuit court reversed this decision and reinstated the Next Friends as parties to the suit.[149] The district court had held that because the state had already appointed attorneys for the named plaintiffs, it would be inappropriate for the children to also be represented by Next Friends in the suit.[150] Further, the district court held that the Next Friends did not show that they had significant relationships with the children in the suit.[151] However, on appeal, the circuit court held that the district court erred in finding that the guardians appointed by the state family court would be sufficient representatives of the children in federal court.[152] Rhode Island law granted the guardian ad litem and CASA attorneys

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[134] It is beyond the scope of this Article to provide a complete analysis of these cases. This Article merely provides certain highlights of the cases thus far.
[135] *Children's Rights: Reform Campaigns: Class Actions*, CHILDRENSRIGHTS.ORG, http://www.childrensrights.org/reform-campaigns/legal-cases/, last visited Nov. 13, 2011.
[136] *Id.*
[137] *Id.*
[138] *Children's Rights: Reform Campaigns: Results of Reform*, CHILDRENSRIGHTS.ORG, http://www.childrensrights.org/reform-campaigns/results-of-reform/, last visited Nov. 14, 2011.
[139] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).
[140] *Id.* at 560–61.
[141] *See* Younger v. Harris, 401 U.S. 37 (1971); Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).
[142] Connor B. v. Patrick, 771 F. Supp. 2d 142, 153–58 (D. Mass. 2011).
[143] A v. Nutter, 737 F. Supp. 2d 341, 358 (E.D. Pa. 2010).
[144] *See* Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly, 572 F.3d 644, 660 (9th Cir. 2009).
[145] *Id.*
[146] *Id.*
[147] Sam M. v. Chafee, No. 07 241 ML, 2011 WL 2899213, *1 (D.R.I. 2011).
[148] *Id.*
[149] *Id.*
[150] Sam M. v. Carcieri, 610 F. Supp. 2d 171, 184 (D.R.I. 2009).
[151] *Id.* at 183.
[152] Sam M. v. Carcieri, 608 F. 3d 77, 87 (1st Cir. 2010).

with the authority to represent the children in all family court proceedings.[153] The circuit court held that this grant of authority did not extend to federal cases.[154] Moreover, the appointed attorneys and the children's families did not request to represent the children in the federal lawsuit.[155] Thus, the state's appointment of attorneys for the children in state family court did not bar the Next Friends from bringing suit on behalf of the children in this federal lawsuit.[156]

In a later proceeding, the Rhode Island district court dismissed the claims of five of the named plaintiffs because the children had been adopted, making their claims moot.[157] The court rejected plaintiffs' argument that the claims were "inherently transitory."[158] The court held that because those children had been adopted, there was no live case or controversy.[159]

In addition, the district court dismissed the following claims because they would be more appropriately brought in state court: "increasing the rate of adoptions, and decreasing the rate of institutionalization, the number of placements per child, and the length of time in foster care."[160] The court declined to dismiss the plaintiffs' claims "with respect to requested remedies of caseload caps for [foster care] workers, adequate training of [foster care] workers, and [an] increase in the array of placement options."[161] Rhode Island law gives family courts exclusive jurisdiction regarding adoptions and the care of children who are "(i) delinquent; (ii) wayward; (iii) dependent; (iv) neglected; or (v) mentally disabled."[162] The court reasoned that the state courts have the power to address adoptions and the placements of children in foster care; however, those courts could not provide the plaintiffs with adequate relief with respect to their claims regarding caseloads and training.[163]

In Massachusetts, the district court found that the plaintiffs had standing to bring their claim in federal court because the plaintiffs' injuries were "fairly traceable" to the defendants' conduct.[164] Additionally, the plaintiffs would likely face ongoing harm, as they were still in the custody of the state.[165] Further, there was no need for the federal court to abstain from hearing the case because there was no ongoing proceeding in the state court with which a holding in the federal case would conflict.[166]

The court also found that the governor was not immune from the plaintiffs' claims despite that the fact that he "play[ed] a detached, supervisory role."[167] The Massachusetts court noted that there is a special relationship between the state and the foster children in its care.[168] "Once the state assumes custody of a person, it owes him a rudimentary duty of safekeeping no matter how perilous his circumstances when he was free."[169] Although more discovery would be required to conclusively establish plaintiffs' claims, the court held that the plaintiffs' pleadings were sufficient to survive the defendants' motion to dismiss.[170]

> Plaintiffs have alleged that Defendants abdicated their duty to use professional judgment by placing Plaintiffs in foster homes that presented known risks of harm, failing to monitor these improper placements, shuttling them among foster families without any hope of finding a permanent home, preventing visitation with parents and siblings, and failing to provide various forms of essential treatment.[171]

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[153] *Id.*
[154] *Id.*
[155] *Id.* at 88.
[156] *Id.* at 94.
[157] Sam M. v. Chafee, No. 07 241 ML, 2011 WL 2899213, *7 (D.R.I. 2011).
[158] *Id.*
[159] *Id.*
[160] *Id.* at *15.
[161] *Id.*
[162] R.I. GEN. LAWS § 14-1-5 (West, WestLaw through chapter 407 of the January 2011 session).
[163] *Sam M.*, 2011 WL 2899213, at *15.
[164] Connor B. v. Patrick, 771 F. Supp. 2d 142, 151–52 (D. Mass. 2011).
[165] *Id.* at 153.
[166] *Id.* at 153–58 (discussing why the *Younger* doctrine did not require abstention).
[167] *Id.* at 159.
[168] *Id.* at 160.
[169] *Id.* (quoting K.H. v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990)) (internal quotes omitted).
[170] *Id.* at 159–63.
[171] *Id.* at 163.

If the plaintiffs' allegations are proven to be true, the plaintiffs would be entitled to relief.[172]

In Oklahoma, in the 10th Circuit, the litigants have brought many procedural issues before the court. The district court dismissed the case with respect to the governor of Oklahoma, holding that an injunction against the governor would not serve to redress the plaintiffs' claims.[173]

In a later proceeding, the district court held that the plaintiffs did not have a valid § 1983 right of action.[174] The plaintiffs asserted a claim under the federal Adoption Assistance and Child Welfare Act of 1980 (AACWA), but the court held that this Act did not "confer rights on individual plaintiffs."[175] Additionally, the court held there was not a valid third party beneficiary claim.[176] The plaintiffs argued that the AACWA created a "contract" between the federal government and the state for the benefit of the children.[177] However, because there was no private right of action, this claim could not proceed.[178]

In another judgment, the district court held that when a child was adopted and, thus, no longer in the state's care, the child's claims became moot.[179] Contrary to the plaintiffs' contentions that the defendants sped up the child's adoption in direct response to the law suit, this was not a situation in which the plaintiffs were being "pick[ed] off" by purposeful action of the defendants.[180] Even after that adoption, there were still eight named plaintiffs in the suit.[181]

In one of many discovery disputes in the Oklahoma case, the district court rejected the defendants' assertion that a report commissioned by the House of Representatives was protected by the work product doctrine.[182] A draft of the report was provided by an independent auditing firm to the attorneys for the defendants, and the defendants prepared a memo to correct inaccuracies in the report.[183] Although the memorandum included corrections prepared by the defendants' attorneys, that document was not provided in anticipation of litigation and could not be classified as attorney work product.[184] Because the report was prepared to aid the legislature, it was reasonable to presume the report would be widely circulated.[185]

In a later proceeding, the district court ordered the defendants to determine whether the DHS supervisors had reports detailing "secondary assignments" taken on by its caseworkers.[186] Plaintiffs claimed that by designating certain cases as "secondary assignments," DHS was understating the caseloads of its caseworkers.[187] The Defendants countered that any "secondary assignments" were already included in reports that had been provided to the plaintiffs.[188] The court held that because the issue of caseloads was a central concern, a reasonable inquiry into the existence of these reports was warranted.[189]

In an attempt to broaden the scope of the suit, the Oklahoma plaintiffs argued that the tragic death of a child, who was never actually in the state's care, should be incorporated into the class action.[190] The plaintiffs sought to depose DHS employees regarding this incident and prior referrals of the family to the state.[191] The plaintiffs contended that the defendants' tried to reduce caseworkers' caseloads by reducing the number of children in the state's custody and that the state's inaction led to the child's death.[192] However, the court held

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[172] *Id.*
[173] D.G. v. Henry, 591 F. Supp. 2d 1186, 1191 (N.D. Okla. 2008).
[174] D.G. v. Henry, 594 F. Supp. 2d 1273, 1280 (N.D. Okla. 2009).
[175] *Id.*
[176] *Id.* at 1281.
[177] *Id.*
[178] *Id.*
[179] D.G. v. Henry, No. 08-CV-074-GKF-FHM, 2009 WL 1011595, *2 (N.D. Okla. 2009).
[180] *Id.*
[181] *Id.*
[182] D.G. v. Henry, No. 08-CV-74-GKF-FHM, 2010 WL 1257583, *3 (N.D. Okla. 2010).
[183] *Id.* at *1.
[184] *Id.* at *2.
[185] *Id.* at *3.
[186] D.G. v. Henry, No. 08-CV-74-GKF-FHM, 2010 WL 2079710, *2 (N.D. Okla. 2010).
[187] *Id.* at *1.
[188] *Id.*
[189] *Id.* at *2.
[190] D.G. v. Henry, No. 08-CV-74-GKF-FHM, 2011 WL 1104091, *3 (N.D. Okla. 2011).
[191] *Id.*
[192] *Id.*

that the plaintiffs' claims only extended to children actually in the state's custody, and, thus, this incident was outside the scope of the lawsuit.[193]

XIII. The Texas Litigation to Date[194]

In Texas, the Department complained that if the court found in favor of the plaintiffs, the court "would effectively require the Court to takeover and administer the Texas' foster care system despite the fact that regular and competent oversight of Texas' foster children has already been entrusted to the Texas district courts by the Texas Legislature."[195] The district court held that the *Younger* doctrine was inapplicable because this suit would not interfere or conflict with any pending case in Texas state courts.[196] The court held that the plaintiffs were seeking an injunction of an administrative organization, as opposed to enjoining judicial proceedings.[197] Because the plaintiffs did not seek to interfere with any court proceeding, the *Younger* doctrine did not apply.[198]

The defendants also argued that the federal court should abstain from hearing the case under the *Burford* doctrine.[199] However, the court held that *Burford* abstention only applies in very narrow circumstances, and it was not applicable in this case.[200] *Burford* requires abstention when complex, unsettled case law would be better left to the state courts.[201] The court noted that it would be counterintuitive to allow the state's initiatives to fix the foster care system to act as a bar to the plaintiffs' suit complaining of the ineffectiveness of these initiatives.[202] The court acknowledged that the state had a significant interest in creating a coherent policy, but because the state did not provide a forum in which the plaintiffs could seek state-wide reform, it was appropriate to allow the lawsuit to continue in federal court.[203]

Despite the defendants' best efforts to have the case thrown out of federal court, it appears the litigation will continue in that forum. Meanwhile, the Children's Rights advocates will continue to push for a settlement.[204]

The foster care system strives to protect children from abuse and neglect. There are both success stories and horror stories resulting from the Department's interventions. The question is whether the system is doing everything it reasonably can do to protect children from future harm. It appears likely that this class action will not disappear without some changes being required of the Department, whether the changes are imposed by a judgment or a settlement. Only time will tell whether the state will be able to adhere to the new requirements and whether the changes will measurably improve the foster care system. It is undeniable that the children in foster care would benefit from more individualized attention and from finding permanent homes more quickly. It is also true that the resources necessary to make these goals a reality are scarce. The problem is a difficult one with no easy answer. Perhaps this suit will steer Texas in the right direction.

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[193] *Id.* at *2.
[194] As of November 19, 2011.
[195] M.D. v. Perry, No. C-11-84, --- F. Supp. 2d ---, 2011 WL 2618894, *1 (S.D. Tex. 2011).
[196] *Id.* at *2–10.
[197] *Id.* at *9.
[198] *Id.*
[199] *Id.* at *13.
[200] *Id.* at *12.
[201] *Id.* at *11.
[202] *Id.* at *14.
[203] *Id.*
[204] *Children's Rights: Reform Campaigns: Reforming Child Welfare*, CHILDRENSRIGHTS.ORG, http://www.childrensrights.org/reform-campaigns/phases-of-reform/, last visited Nov. 19, 2011.

LIMITED SCOPE REPRESENTATION
By Phillip C. Friday, Jr.[205]

What is Limited Scope Representation (LSR)? Limited Scope Representation ("LSR") is the practice of providing specific legal services to a client instead of handling an entire case. LSR is also sometimes referred to as "unbundled legal services," or "unbundling. By way of example, in a family case, a lawyer might agree to draft necessary documents and provide consultation, but not make any court appearances.

Why has it developed? LSR has developed largely in response to the extraordinary growth of *pro se* litigation. The number of *pro se* litigants in Family Law cases now exceeds fifty percent (50%) in most urban counties. The majority of these litigants do not believe they can afford conventional representation. Others could afford representation but are simply trying to save money. But in all cases, cost is a barrier to hiring a lawyer.

The *pro se* phenomenon has negatively impacted the entire judicial system. Some see it as a failure of our judicial system. Editorialists have decried the "justice gap" in our courts. Lawyers regret the loss of business. Judges and court administrators struggle with the inefficiencies of *pro se* cases.

Benefits of LSR. By increasing the availability of legal services, LSR offers benefits to all participants in the judicial system:

- **Clients.** The obvious benefit to clients is the availability of legal services at lower costs. Clients in uncontested cases may be able to manage pleadings on their own, but would prefer to hire a lawyer for their final order. Others may feel capable of handling all documents, but would prefer the "coaching" of a lawyer at one or more stages of the process. Clients in contested cases may choose to hire a lawyer to conduct their hearing(s).
- **Lawyers.** The obvious benefit to lawyers is more business. The *pro se* "market" is large and untapped. LSR practice is well-suited to young lawyers attempting to build their practices, and to lawyers seeking to build a high-volume practice. In addition, LSR is well-adapted to "pay-as-you-go" fee arrangements. Many clients who cannot afford a retainer measured in the thousands-of-dollars could nevertheless afford to pay in advance for specified services.
- **Judges.** The greatest benefit to Judges is likely to come from a decrease in the number of *pro se* litigants struggling to conduct contested hearings. This will save court-time and reduce docket congestion. And in uncontested cases, LSR offers the prospect of better-drafted orders. Lawyer-prepared orders will increase the likelihood of enforceability. They may also save time now devoted by judges and court staff to reviewing *pro se* orders before signing.

LSR is ethical in Texas. LSR is specifically authorized by Texas Disciplinary Rule of Professional Conduct 1.02(b), which states, "A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation." As with full-scope representation, LSR must be reasonable under the circumstances, and is subject to all other ethical rules.

LSR is covered by malpractice insurance. The Texas Lawyers' Insurance Exchange has advised that the standard Texas malpractice policy would cover LSR. However, lawyers should verify this with their carrier. Experience in other states indicates that LSR does not increase the risk of malpractice claims. Across the nation, the rate of malpractice claims for LSR is statistically lower than those for full-scope representation.

LSR Rules. At least twenty states now have special rules for LSR. As of yet, Texas does not. However, local rules are under consideration in Travis County.

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Withdrawal of counsel. For LSR to function properly, it is essential that a lawyer who has made a formal appearance in a case be permitted to withdraw after s/he has completed the agreed services. Of the twenty States which have LSR rules, all but one specifically provides that a lawyer may withdraw without leave of court, provided the lawyer has completed the agreed services. The typical rule requires the lawyer to give notice of withdrawal to the client and opposing counsel, and provides the client with a right to object if the lawyer has not completed the agreed services.

Under current Texas Rules, withdrawal requires a formal motion and order. Hence, until Texas adopts special rules, local judges should be consulted in advance of undertaking LSR, and an effort should be made to secure their agreement not to require a lawyer to perform more services than s/he has contracted to do. Judges are more likely to permit withdrawal if the lawyer agrees to obtain a written order on rulings handed-down in hearings in which the lawyer participated.

Practice tips to common pitfalls. LSR is not without challenges. Certain steps are vital to conducting a successful and safe practice.

- **Realistic assessment.** Obviously, not all cases are suitable for LSR. The greater the level of conflict and decree of complexity, or the weaker the skills of the client, the greater the risk that LSR may not be suitable. Moreover, it is important to be realistic in apportioning tasks between lawyer and client. By way of example, if it appears that a case will involve formal discovery, the client will find it difficult to meet the technical requirements of responding without the assistance of counsel.
- **Written service agreement.** A written contract is absolutely essential to LSR. The written agreement needs to spell out clearly what tasks the lawyer will undertake, and for what tasks the client will remain responsible. If the scope of services changes during the case, a written amendment is essential.
- **Setting client expectations.** Wise lawyers understand the importance of setting expectations in any case, and the need for clear explanations is even greater in LSR. It is important to discuss all aspects of the case, not just those included in the LSR agreement. Delineating the client's responsibilities is the most important issue, as is explaining how the client's tasks will fit together with the lawyer's. As in all cases, the lawyer needs to lay out the order of proceeding, the degree of difficulty, and the uncertainties that will arise if the case becomes contested.

Conclusion: Less is More. No one disputes that full-service representation is preferable to LSR. But the reality of our current economy is driving our system toward *no representation* for increasing numbers of litigants. LSR offers the realistic prospect of reducing the number of *pro se* litigants, while increasing business for lawyers and easing the burden on the courts.

Resources available to help lawyers begin offering LSR:

- "Expanding Your Practice Using Limited Scope Representation" training session: www.pli.edu/Content.aspx?dsNav=Rpp:1,N:4294964525-167&ID=54234
- ABA Unbundling Resources website: http://www.americanbar.org/groups/delivery_legal_services.html
- The Lawyer Referral Service of Central Texas has a Family Law LSR panel and a variety of resources. More information available at: www.austinlrs.com/

Guest Editors this month include Jimmy Verner (*J.V.*), Christopher Nickelson (*C.N.)*, Rebecca Tillery (*R.T.*), Sallee S. Smyth (*S.S.S.*)

DIVORCE

STANDING AND PROCEDURE

COUPLE DID NOT ESTABLISH AN INFORMAL OR COMMON-LAW MARRIAGE BECAUSE THEY DID NOT HAVE A REPUTATION IN THE BROADER COMMUNITY AS A MARRIED COUPLE; OCCASIONAL INTRODUCTIONS AS HUSBAND AND WIFE ARE NOT SUFFICIENT

¶11-6-01. ***Small v. McMaster,*** -- S.W.3d --, 2011 WL 5008412 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (10/20/11).

Facts: Wife brought suit to establish an informal or common-law marriage to Husband and to obtain a divorce and a property division. Trial court found the existence of an informal marriage and divided the marital estate. Husband appealed, arguing that the evidence was legally and factually insufficient to support trial court's judgment that Wife was informally married to Husband.

Holding: Reversed and Remanded

Opinion: To show an informal or common-law marriage, the party wishing to establish the existence of a marriage must show that the couple (1) agreed to be married, (2) lived together in Texas after the agreement, and (3) held themselves out to others as a married couple. Here, there was sufficient evidence to establish that the couple agreed to be married and that they lived together in Texas after the agreement. Although Husband introduced evidence that there was no agreement, the jury was entitled to find that Wife's testimony was more credible. Even though the first two requirements were satisfied, Wife did not present sufficient evidence that the couple held themselves out to others as married. Wife brought multiple witnesses who testified that the couple introduced each other as "husband" and "wife" and that Wife referred to herself as "Mrs. Small" without any objection from Husband. Husband presented evidence to the contrary, but trial court found Wife's evidence more credible. However, even with a finding that Husband and Wife held themselves out to family and friends as married, there was insufficient evidence to support trial court's finding. There was no evidence that the couple had a reputation in the broader community as a married couple. Wife did not register for or receive wedding gifts, and the couple did not have a party to celebrate their marriage. Wife did not change her name, and the couple had separate checking accounts. Wife admitted that she probably did not tell her neighbors she was married. Wife did not have a copy of Husband's life insurance policy and did not know if Husband's will had been changed to reflect her as his Wife. Additionally, the couple did not file taxes jointly, and Wife lost her health insurance coverage because Husband refused to tell the insurance company that they were married. When one of Husband's children got married, the wedding announcements listed Husband as "Father of the Groom," but Wife was not included. When another of Husband's children passed away, Wife signed the memorial book in the general "Relatives and Friends" section, rather than with Husband. Finally, sometime after the alleged agreement to be married, Husband married another woman, and Wife did not file bigamy charges.

Editor's comment: *Much of the evidence on which the court relied to reverse the jury's verdict is consistent with ceremonial marriage: Not changing the wife's surname, having separate bank accounts, filing taxes separately and in some marriages, running around on the other spouse. The court also placed great emphasis on the parties' neither announcing their informal marriage nor celebrating it with a party. But by its very nature, an informal marriage does not take place at a point in time. It is evidenced over a period of time. J.V.*

Editor's comment: *I find this Court's reasoning a little dubious. On the first requirement of "an agreement to be married" the court finds, although the evidence is conflicting, it turns on the witnesses' credibility and demeanor, and therefore was within the jury's purview to resolve. Yet, when it comes to the next requirement of "holding out in public," the court finds conflicting evidence as well but decides it amounts to no evidence, stressing the fact that a "reputation in the broader community as a married couple" is paramount. This case is a prime example of the fact that, perhaps more than any other single area of family law, common law marriage questions are incredibly fact-specific. This case will prove helpful to read again when faced with a common law marriage situation to either defend or attack. R.T.*

DIVORCE
DIVISION OF PROPERTY

COURT MAY CONSIDER EACH SPOUSE'S CONTRIBUTION TO THE COMMUNITY ESTATE IN ITS DIVISION OF THE MARITAL ESTATE; *MURFF* FACTORS NEED NOT BE CONSIDERED; *MURFF* FACTORS ARE NOT EXCLUSIVE

¶11-6-02. ***Monroe v. Monroe,*** -- S.W.3d --, 2011 WL 2348453 (Tex. App.—San Antonio 2011, no pet. h.) (09/07/11) replaces opinion issued on 06/15/11.

Facts: Husband and Wife divorced. They had signed pre- and post-marital agreements that had converted most of Husband's separate property to community property. The community property included interest in Husband's companies, a house, Wife's jewelry, and other valuable assets. In its division of the property, trial court awarded Wife the house and her jewelry, and it awarded Husband stock in his companies. Trial court also ordered Husband to pay Wife's attorney's fees and the mortgage and maintenance of the house for ten months. Wife appealed contesting the legal and factual sufficiency of certain findings by the trial court—primarily, the valuation of certain assets. Wife also argued trial court abused its discretion in its division of the community estate and that it was inequitable and unreasonable based on the *Murff* factors.

Holding: Affirmed

Majority Opinion: (J. Barnard, C.J. Stone, J. Angelini)

There was sufficient evidence to support trial court's finding that without Husband's contributions of his separate property, the value of the community estate would be minimal and that an unequal division of the property was justified because virtually all of the community estate was property owned by Husband prior to marriage. Further, Wife did not provide sufficient evidence to support an argument that the stock was not contingent on Husband's personal involvement with the company. There was evidence showing Husband ran a subsidiary company, held patents made by the company, and was an integral part of the company. Finally, Wife did not provide trial court with an alternative valuation method for certain pieces of furniture within the house. Thus, she could not challenge the value of the furniture on appeal.

Trial court did err in finding Wife's jewelry was community property. Husband did not contradict Wife's testimony that her jewelry was her separate property. However, "[r]eversal is not required if the mischaracterization has only a *de minimus* effect on the trial court's just and right division." The jewelry was valued at $150,000, and the entire estate was valued at over $9 million. Since the jewelry only amounted to less than 2% of the entire estate, the trial court's mischaracterization of the jewelry as part of the community estate had a *de minimus* effect on the division of the property.

Trial court's division of the estate is presumed to be proper. Wife had the burden to show the division was "so unjust as to constitute a clear abuse of discretion." Wife failed to meet this burden. A trial court may,

but is not required to, use the *Murff* factors in its consideration. These factors include "(1) the spouses' capacities and abilities; (2) benefits which the party not at fault would have derived from continuation of the marriage; (3) education; (4) business opportunities; (5) relative physical conditions; (6) relative financial condition and obligations; (7) disparity of ages; (8) size of separate estates; (9) the nature of the property; and (10) disparity in the spouses' income or earning capacity." A trial court may look to other factors, including tax liability. Husband was responsible for all tax liabilities and any unforeseen liabilities associated with his companies. Husband still had outstanding debts, while Wife's debts had been paid during the marriage. Wife testified that she had some earning capacity, and Husband only had slightly more education than Wife. Both were in good physical condition and were approximately the same age. Trial court also found that it was a no fault divorce. Although Husband was awarded more than two-thirds of the estate, Husband was also required to pay Wife's attorney's fees and mortgage and maintenance on the house for ten months. Trial court did not abuse its discretion in its division of the community estate.

Concurring Opinion: (C.J. Stone)

Although there may be some situations in which a court's discretion would be restricted by the terms of a marital property agreement, there was no such restriction here. Wife failed to establish trial court abused discretion by not restricting its division on the community estate to the terms of the premarital and marital agreements. While the agreements estopped the parties from claiming upon divorce that property converted into community property was separate property, the agreements did not prevent trial court from considering the genesis of the community estate as one of many factors in ordering a just and right division of the marital estate. Wife's separate debt was paid during the marriage, but Husband still had separate debt after the divorce. Husband contributed to increasing the estate, but Wife did not. The value of the corporations within the community estate was contingent on Husband's continued participation. Trial court considered these facts in its order, and thus, did not abuse its discretion in its division of the estate.

Editor's Comment: *Drafting tip: if you represent the non-moneyed spouse, and you actually can get the moneyed spouse to convert his or her separate property into community property (which doesn't happen very often), then you better get an agreement that the trial court must divide any community property at least in a 50-50 manner. C.N.*

Editor's Comment: *This case is troubling for those who enter into marriage seeking some financial security should the marriage end in divorce. Chief Justice Stone, concurring, acknowledged the wife's argument that the court's decision "circumvents the law related to marital property agreements, defeats the state's public policy regarding enforcement of such agreements, and constitutes an abuse of discretion." Under the facts of this case, Chief Justice Stone did not credit that argument. Nevertheless, the case highlights negotiating and drafting issues: The non-affluent fiancé or spouse should request language in pre- and post-marital agreements setting forth not only what the community estate consists of but how the community estate shall be divided upon divorce. Even so, in a case like this one, would such an agreement bind the court? J.V.*

Editor's Comment: *I wish this opinion had elaborated further on the wife's interesting public policy argument that the court's disproportionate division of the community property in favor of husband was, in effect, undermining the terms of the parties' marital property agreements. This case also suggests that if converting one spouse's separate property into community property in a marital property agreement, it would be beneficial (if you represent the non-moneyed spouse) to prohibit the court on divorce from considering the genesis of the community property in its just and right division. R.T.*

TRIAL COURT'S FINDING OF CRUEL TREATMENT WAS SUPPORTED BY A FINDING OF ADULTERY, BY WIFE'S TESTIMONY THAT SHE HAD CAUGHT HIM MASTURBATING WHILE LOOKING AT PORNOGRAPHY, AND BY EVIDENCE THAT HUSBAND USED A NEW EMAIL ADDRESS TO HOLD HIMSELF OUT AS AVAILABLE TO ANOTHER WOMAN

¶11-6-03. ***Newberry v. Newberry,*** -- S.W.3d --, 2011 WL 4062505 (Tex. App.—El Paso 2011, no pet. h.) (09/14/11).

Facts: Husband and Wife married and lived in Tuscon while Wife earned an MBA. Wife's parents offered them each a job in Texas, which they accepted. They kept their Tuscon house as a rental home and purchased a new home in Texas. Subsequently, Wife filed for divorce, and Husband filed a general denial and a counter-petition in which he sought a disproportionate division of the estate based on fault grounds. After many hearings, trial court entered a final divorce decree and granted Wife a divorce based "on the grounds of insupportability, adultery, and cruelty" and awarded Wife a disproportionate division of the marital estate. Husband appealed, challenging the legal and factual sufficiency of trial court's findings of adultery and cruelty and the trial court's division of the marital estate was not a just and right division.

Holding: Affirmed

Opinion: Adultery can be shown by circumstantial evidence. Here, Wife testified that Husband admitted that he went to a room with his old girlfriend with the door shut and the lights off for twenty minutes. Wife testified that this occurred after Husband and Wife were no longer sexually intimate. Trial court was within its discretion to determine this question of fact and find that Husband had committed adultery.

Abuse is not limited to bodily injury. Adultery may be sufficient to support a cruelty finding. Moreover, multiple acts of cruelty may be sufficient to support grounds for divorce. Wife testified that she caught Husband masturbating while viewing pornographic materials on numerous occasions. After therapy, Wife believed that Husband had stopped this habit. However, Wife later discovered that Husband had a new laptop with a new email address, which he had used to communicate with another woman. Husband had indicated to this woman that he was "available." This evidence combined with trial court's finding of adultery was sufficient to support a finding of cruelty.

A court must divide a marital estate in a manner that it deems just and right, but it does not necessarily need to divide the community property equally. A court may consider a variety of factors in making a division. Here, during the marriage, Husband closed a savings account and took the entire balance. Husband initated a line of credit and incurred over $20,000 without Wife's knowledge. During the marriage, Husband withdrew all the funds from a 401(k) in his name. Husband was fired by Wife's family's company because of allegations that he stole computers from the company. Wife had a debt with the IRS, with whom she had reached a settlement agreement. Husband testified that his credit report had not been affected by this debt. While Husband claimed the community estate paid for Wife's education, Wife testified that her father had paid. Additionally, Wife's father agreed to help her get the spouses' properties out of foreclosure. Although Husband claimed to be having financial difficulties, he also testified that he had been traveling across the country since the separation. A trial court is free to evaluate witnesses' credibility in determining questions of fact. In addition, trial court could consider the evidence of Husband's adultery and cruel treatment in making its division. Trial court did not clearly abuse its discretion in making a disproportionate division of the marital estate.

Editor's Comment: *There are not many reported decisions that discuss what "adultery," means, so I imagine this case will be oft-cited in the future. R.T.*

SAPCR
STANDING AND PROCEDURE

MANDATORY TRANSFER OF VENUE DID NOT INVALIDATE JURY VERDICT DESPITE TRIAL HAD BEEN HELD IN IMPROPER VENUE BECAUSE MOTHER FAILED TO REQUEST A STAY OF THE PROCEEDINGS WHILE SHE SOUGHT MANDAMUS RELIEF FOR THE TRANSFER

¶11-6-04. ***Cooper v. Johnston*,** No. 11-11-00110-CV, 2011 WL 4137731 (Tex. App.—Eastland 2011, no pet. h.) (mem. op.) (09/15/11).

Facts: Mother and Father were named JMCs in their divorce decree. Mother was granted the exclusive right to designate the primary residence of the Child within Upshur County and surrounding counties. Father later agreed to a modified decree that would allow Mother to move to Travis County. Mother paid the expenses that would be needed to get the modified order. Mother moved, but Father failed to get the modified decree. More than six months later, Father filed a SAPCR in Upshur County seeking the right to primary possession. Mother filed a motion to transfer the cause to Travis County. Trial court denied Mother's motion. Mother filed a petition for writ of mandamus, but she did not request COA to stay the proceedings in the Upshur County trial court. On the same day, a jury trial commenced on the SAPCR. After the jury reached a verdict but before a judgment was entered, COA held that transfer was mandatory. The cause was transferred to Travis County, and the Travis County trial court entered a final order finding "that the jury verdict [was] not invalidated by the subsequent transfer. Mother filed a motion for new trial, arguing that a trial should have been held in Travis County and that she had been prevented from receiving a fair trial. In her motion, Mother named ten potential witnesses who lived outside the subpoena range of Upshur County. Trial court denied Mother's motion, and she appealed.

Holding: Affirmed

Opinion: Tex. Civ. Prac. & Rem. 15.064(b) states that if venue is improper, there is reversible error. However, in a SAPCR, venue is governed by TFC and Tex. Civ. Prac. & Rem. does not apply. TFC 155.201 requires a transfer upon a timely motion to transfer "if the child has resided in the other country for six months or longer." Further, TFC 155.206(a) states that, once a case has been transferred, the transferee court "becomes the court of continuing, exclusive jurisdiction and all proceedings in the suit are continued as if it were brought there originally." Here, Mother failed to file a motion to stay the proceedings while she sought a venue transfer. Mother allowed the jury trial to take place prior to the transfer. When the cause was transferred, the transferee court acquired jurisdiction of "all proceedings in the suit . . . as if [the cause] were brought there originally." There is no provision requiring the transferee court to nullify or invalidate the verdict.

Although Mother named ten potential witnesses if trial were held in the proper venue, she did not provide any other evidentiary support indicating the trial might have been different if those witnesses had testified. More importantly, Mother failed to request the original court to stay any proceedings when she filed her writ of mandamus. Mother allowed the jury trial to proceed and did not show that she did not receive a fair trial.

Editor's Comment: *Ouch! Mandatory transfer waived because the relator did not seek an order staying the trial. C.N.*

Editor's Comment: *The court also noted that the mother "did not provide any evidentiary support" showing what the testimony of her ten potential witnesses might have been. J.V.*

GRANDPARENTS HAD STANDING TO FILE AN ORIGINAL SAPCR BECAUSE EVIDENCE INDICATED FATHER HAD ABUSED THE CHILDREN IN THE PAST AND NO EVIDENCE SHOWED THAT THE PRESENT CIRCUMSTANCES HAD CHANGED SINCE THE REPORTED ABUSE

¶11-6-05. ***In re McDaniel,*** --_S.W.3d --, 2011 WL 4926002 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding) (10/11/11).

Facts: Mother had a Child with an abusive man. Then, Mother lived with her parents ("Grandparents") for a few years before she met Father. After some time, Mother had a Child with Father, Father adopted Mother's older Child, and Mother and Father were married. Although Grandparents initially supported Father's adoption of the older Child, subsequent events led Grandparents to believe that Father was mistreating the Children. One weekend, Mother, Father, and the Children stayed with Grandparents. During this visit, Grandparents saw Father spank the older Child excessively and with excessive force. At one point, Father became so angry with the older Child that the Child was "grounded" for the remainder of the weekend and was forbidden to leave his room. When Father discovered that Grandmother allowed the Child to leave his room to use the restroom, Father threw open the bathroom door, damaging the wall behind the door, and dragged the Child out of the bathroom spanking him all the way back to the Child's room. Grandparents contacted CPS in the hopes that CPS would order parenting classes. After its investigation, CPS could not confirm the abuse. Father forbid Grandparents from having contact with the Children. Mother initially maintained contact with Grandmother and arranged a visit between the Children and Grandparents. However, when Father found out about the visit, he became very angry, and Mother ended all contact with Grandparents. Subsequently, Grandparents filed an original SAPCR seeking managing conservatorship, or alternatively, possession and access. Parents file a motion to dismiss for Grandparents' lack of standing to file an original SAPCR. During the temporary orders hearing, Grandparents offered testimony of other incidents of alleged abuse as well as photos of bruises left on the older Child. Additionally, Grandfather, who had been a licensed pharmacist for 32 years, testified that Father's dosage of Adderall was twice the recommended maximum and that Father showed typical Adderal abuse symptoms, including insomnia, paranoia, and irrational behavior. After the hearing, trial court denied Parents' motion to dismiss for lack of standing and appointed Grandparents temporary managing conservators and appointed Parents temporary possessory conservators. At a later hearing, the Parents testified that they had taken online parenting and anger management classes. A social worker testified that Father had been properly diagnosed with ADHD and that his prescription was appropriate. After this hearing, trial judge stated that while it might be in the Children's best interest to be eventually returned to Parents, trial judge was not convinced that the safety of the Children was not still a present concern. The parents sought mandamus relief, arguing that trial court abused its discretion by denying their motion to dismiss.

Holding: Petition for Writ of Mandamus Denied

Opinion: A party cannot appeal from temporary orders or from an order denying a motion to dismiss for lack of standing to file a SAPCR, so mandamus relief was an appropriate remedy to be sought. TFC 102.004(a)(1) gives standing to a grandparent to file a SAPCR if it can be shown that "the child's present circumstances would significantly impair the child's physical health or emotional development." Here, Grandparents offered testimony and photographic evidence indicating past physical abuse of the Children. While this evidence described incidents that occurred nine months before Grandparents filed suit, there was no indication that the "present circumstances" had changed during that time. No evidence showed that Father's ideas about discipline had changed. Father was still taking the same dosage of Adderall. Additionally, Father had sent hostile email and text messages to Grandparents filled with vulgarities and expletives, showing that he was prone to

overreact when upset. A factfinder could reasonably infer that Father refused to let Grandparents have contact with the Children because Father did not want Grandparents to witness and report further abuse. Moreover, Mother had told Grandmother that the older Child was having problems in school, and Grandfather testified that older Child's personality had changed such that older Child appeared "beat down, [and] very cautious." Grandparents met their burden to show that they had standing to file an original SAPCR.

PATERNAL AUNT WITH JOINT MANAGING CONSERVATORSHIP OF THE CHILD WAS DENIED DUE PROCESS NOTICE WHEN TRIAL COURT SUA SPONTE MODIFIED TEMPORARY ORDERS WITHOUT NOTICE PRIOR TO A HEARING

¶11-6-06. ***In re Chester,*** -- S.W.3d --, 2011 WL 4863711 (Tex. App.—San Antonio 2011, orig. proceeding) (10/12/11).

Facts: Mother and Paternal Aunt were both parties in a SAPCR to determine conservatorship of the Child. Mother had objected to Paternal Aunt's standing to intervene in the suit, but trial court had overruled Mother's objections. Mother filed a motion to strike Paternal Aunt's plea to intervene. Trial court denied Mother's motion. Mother filed a motion for reconsideration of the motion to strike, and a hearing was set before the trial court. At the hearing, trial judge stated that she was considering *sua sponte* whether to modify the temporary orders. Paternal Aunt objected to lack of notice regarding the modification. Trial court did not rule on the motion to strike. Instead, trial court revoked Paternal Aunt's right to designate the primary residence of the Child, giving the right to another party involved in the SAPCR. Trial court also ordered that the Child be immediately removed from Paternal Aunt's care, and it did not grant Paternal Aunt any visitation rights. Paternal Aunt asked for a stay pending the filing of a petition for writ of mandamus. This request was denied. However, COA granted a motion for emergency stay. In her petition for writ of mandamus, Paternal Aunt argued that trial court abused its discretion by modifying the temporary orders without notice and a hearing.

Holding: Petition for Writ of Mandamus Conditionally Granted

Majority Opinion: (J. Banard, J. Marion, C.J. Stone)

Because temporary orders in a SAPCR are not appealable, mandamus is an appropriate remedy. A temporary order for conservatorship may not be rendered without notice and a hearing. Here, the only motion set for hearing was the reconsideration of the motion to strike Paternal Aunt's plea for intervention. Mother did not file any pleading seeking custody of the Child. Further, nothing in the record indicated that the order was prompted by an emergency. Because there was no notice that the temporary orders were to be modified, Paternal Aunt had no reason to object to lack of notice. Moreover, without notice, Paternal Aunt was not afforded an opportunity to prepare evidence regarding the safety and welfare of the Child. Trial court clearly abused its discretion in failing to provide Paternal Aunt with proper notice prior to modifying the temporary orders.

Concurring Opinion: (C.J. Stone)

It was clear from the record that trial judge desired to do the right thing by Mother and the Child. However, due process notice is the most basic of legal principles. The goal to determine the best interests of the child cannot override the fundamental right to notice. Without notice, the parties cannot be prepared with the research and evidence to properly address the issues. Mother did not waive her right to produce evidence at the hearing because Mother made a clear objection to the lack of notice and Mother was not provided with an opportunity to prepare evidence for the hearing. Finally, the only requirements for a writ of mandamus to issue are (1) a clear abuse of trial court's discretion; and (2) no adequate remedy by appeal. Thus, it was not necessary to establish whether the error was harmful.

Editor's Comment: *At the hearing on the motion for reconsideration, the trial court stated: "This is actually my motion for temporary orders and would you agree or disagree that at any time the Court can modify, change in any way - rearrange the temporary orders that are now in place?" The San Antonio Court of Appeals answered, "Disagree." Chief Justice Stone, concurring, wrote that the trial court failed to uphold "the most basic of legal principles - due process notice." J.V.*

EVEN THOUGH THE FINAL DIVORCE DECREE STATED THAT THE CHILD'S RESIDENCE WAS TEMPORARY, TRIAL COURT HAD A MANDATORY DUTY TO TRANSFER THE SUBSEQUENT SAPCR TO THE COUNTY WHERE CHILD HAD RESIDED FOR MORE THAN SIX MONTHS PRIOR TO FILING OF THE SAPCR

¶11-6-07. ***In re Lawson,*** -- S.W.3d --, 2011 WL 5298488 (Tex. App.—San Antonio 2011, orig. proceeding) (11/04/11).

Facts: Mother and Father divorced, and each were appointed joint managing conservators. Mother was granted "the exclusive right to designate the primary residence of the child within Waco, Texas until August 1, 2011. On and after August 1, 2011 . . . the child's primary residence shall be within 100 miles of [Father's residence]." On August 3, Mother filed a SAPCR and sought to transfer the proceeding to McLennan County, where the Child had been living for at least six months prior to the filing. Father filed a Motion for Enforcement of Possession or Access and Order to appear, seeking to enforce the divorce decree. After a hearing, the trial court denied Mother's motion to transfer. Mother filed a petition for writ of mandamus. No response was filed.

Holding: Mandamus Conditionally Granted

Opinion: When a trial court fails to transfer venue, mandamus is an appropriate remedy. TFC 155.201(b) states that "the court *shall* . . . transfer the proceeding . . . if the child has resided in the other county for six months or longer." The Child lived in McLennan County for six months or longer. The statute's mandatory requirement could not be negated by the provision in the divorce decree. "To hold otherwise would defeat the legislature's intent that matters affecting the parent-child relationship be heard in the county where the child resides." Trial court had a mandatory duty to transfer the proceedings.

Editor's Comment: *Although not relevant to the court's ruling, this case raises the question whether a trial court can order a change in restrictions on a child's residence to be effectuated in the future - in this case by divorce decree signed in November 2009 with the change to take place August 1, 2011. How can a court know what the child's circumstances and best interests will be nearly two years into the future? Can an agreed, but prospective, change in restrictions on a child's residence be binding on the parties or the court? J.V.*

Editor's Comment: *Yes, the family code's mandatory transfer of venue statute is really, really mandatory. R.T.*

MEXICAN COURT'S ORDERS AFFECTING CUSTODY WERE NOT ENFORCEABLE IN A TEXAS COURT BECAUSE FATHER FAILED TO PROVIDE MOTHER WITH ADEQUATE NOTICE OF THE MEXICAN HEARING

¶11-6-08. ***Razo v. Vargas,*** -- S.W.3d --, 2011 WL 5428956 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (11/10/11).

Facts: Mother and Father married in Mexico and had one child while residing in Mexico. A Mexican court signed a mutual consent judgment of divorce, which incorporated a child custody agreement. The custody

agreement included a clause that stated that, if one parent breached the terms of the agreement, the non-breaching parent would get sole custody of the Child. At the time of the custody agreement, Mother lived in Houston with the Child. When it was time for Father to come get the Child for his period of visitation, Father testified that he was told that Mother was no longer living at that address. Father went to the Mexican Consulate to report that he could not locate the Child and that Mother had breached the custody agreement. Father then returned to Mexico, where he served Mother by publication. Mother did not appear, and the trial court granted Father sole custody of the Child. Father then registered the Mexican court's orders in Harris County to have the orders confirmed and enforced. Mother requested an evidentiary hearing to question the validity of the Mexican court's orders. Mother also filed a supplemental petition asking the court to appoint her as the sole managing conservator of the Child. Trial court held a non-evidentiary hearing, during which Mother asked to be allowed to put on testimony. Trial court refused. Mother filed a bill of exceptions detailing the witnesses she would call and their proposed testimony. Mother explained that witnesses would testify that "at the time in question," she still lived at the same address. Further, after she moved, some of her family remained in that home. Mother claimed that the family who lived in the house would testify that if Father had served Mother at that address, her family would have given the documents to Mother. After the non-evidentiary hearing, trial court signed an order enforcing the Mexican court's orders. Trial court dismissed with prejudice Mother's motion to modify conservatorship. Mother appealed. She argued that trial court erred in ruling on and in enforcing the Mexican court's orders without allowing her to present evidence that the orders were void. Mother also argued that trial court erred in dismissing her motion for conservatorship with prejudice.

Holding: Modified in part; Reversed and Remanded in Part

Opinion: In order to have a foreign child custody determination enforced in this state, the party seeking the enforcement must meet certain filing requirements detailed in TFC 152.305. If the requirements are met, the registering court must serve notice on all interested parties, providing them with an opportunity to contest the registration. The registering court must confirm the order unless a contesting party shows that the foreign court did not have jurisdiction, the determination had been vacated, stayed, or modified by a court with jurisdiction to do so, or that the person contesting the registration was entitled to notice, but notice was not given. When serving notice, if personal service is not available, a court may grant permission to leave a copy with anyone over 16 at the specified location. Only when other means of service are not effective may service be made by publication. Whether service could have been successful by leaving a copy with someone at Mother's prior address was a question of fact. Because the question of adequate notice was determinative of whether trial court was required to confirm the Mexican court's order, trial court erred in refusing to allow an evidentiary hearing.

A court that makes the initial child custody determination retains exclusive continuing jurisdiction over future child custody disputes. Here, a Texas court would only have subject matter jurisdiction if the Mexican court determined it no longer had exclusive continuing jurisdiction, the Mexican court determined Texas was a more convenient forum, or Father no longer resided in Mexico. Because Mother failed to establish any of these requirements, trial court did not err in dismissing Mother's motion to modify custody determinations. However, a claim should only be dismissed with prejudice after being adjudicated on its merits. Here, Mother's motion was dismissed on a jurisdictional technicality. Because the jurisdictional defect could be remedied, the motion should have been dismissed without prejudice.

MOTHER FAILED TO PROPERLY SERVE FATHER WITH NOTICE OF HER HAGUE/ICARA ACTION BECAUSE SHE DID NOT SERVE HIM THROUGH MEXICO'S "CENTRAL AUTHORITY"

¶11-6-09. ***In re J.P.L.,*** -- S.W.3d --, 2011 WL 5869456 (Tex. App.—San Antonio 2011, orig. proceeding) (11/23/11).

Facts: Mother and Father were divorced in Mexico. The final divorce decree awarded custody of their Child to Father. However, Mother claimed that a subsequent Mexican court's order awarded custody to her. Father, a Mexican resident, filed a petition in Texas to enforce custody. At the time, the Child and Mother were living in San Antonio. Trial court granted Father's request for a warrant, and ordered a hearing. Prior to the hearing, the warrant was executed, and the Child was placed in Father's custody. Father and the Child did not appear at the hearing. Father filed a motion to nonsuit his petition to enforce custody. Soon after, Mother filed a petition under the Hague Convention and the ICARA, seeking the Child's return. Seven months later, trial court ordered a consolidation of Mother's case and Father's nonsuited case. Trial court held a hearing, and Father did not appear. Trial court signed a default order ("the August judgment") granting Mother's petition. Father filed a notice of appeal challenging the August judgment. Father also filed a verified special appearance and a plea to the jurisdiction, in which he argued that Mother did not obtain proper service of process over him, making the August judgment void. After a hearing, trial court signed an order ("the October judgment") denying Father's special appearance and plea to the jurisdiction. Father then filed an amended notice of appeal, stating his intention to appeal both the August and October judgments. Father argued that trial court should have granted his special appearance for lack of service of process and that trial court lacked subject matter jurisdiction. Father also argued that even if trial court had subject matter jurisdiction, it either exceeded the scope of its jurisdiction, or it was required to decline to exercise its jurisdiction. Additionally, Father contended that Mother's pleadings were insufficient to trigger the trial court's Hague/ICARA jurisdiction and that Mother impermissibly asked the trial court to rule on the merits of the custody dispute. Father argued that Mother could not ask for enforcement of the Mexican orders because she did not attach them to her pleadings. Finally, Father argued that trial court erred in modifying the controlling custody order and that trial court should not have exercised its jurisdiction because of the existence of "simultaneous" custody proceedings in Mexico.

Holding: Mandamus Conditionally Granted

Opinion: Appeals are only permitted after a final judgment, unless a statute expressly permits an interlocutory appeal. A final order in an enforcement proceeding may be appealed. Here the August judgment was abated in order to allow trial court to hold a contested hearing and reconsider Mother's petition. Thus, the August order was not final and not yet appealable. TFC does not permit an interlocutory appeal of an order granting or denying a special appearance. Thus, Father could not appeal the October order. COA lacked appellate jurisdiction over the challenged orders.

Tex. Sup. Court has held that rather than dismissing an interlocutory appeal for lack of jurisdiction, the appeal should be considered as a petition for a writ of mandamus. Mandamus relief is always available if the trial court's order is void. An order is void if the trial court had no jurisdiction over the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court. The Hague Service Convention was created to establish procedures for the prompt return of children wrongfully removed from the state of their habitual residence. The ICARA sets out the procedural requirements for implementing Hague. Under ICARA, notice to persons outside the state must "be given in accordance with the applicable law governing notice in interstate child custody proceedings." Mother's argument that service was not required on Father because of the consolidation order is without merit. A judgment granting a nonsuit becomes final thirty days after it is signed, and the court's plenary power expires at that time. Father moved to nonsuit, and trial court signed an order granting his motion. Mother filed a motion to reinstate the action, but even if that motion extended trial court's plenary power, Mother's motion was denied by operation of law. Trial court's order consolidating Mother's and Father's motions was not signed until at least four months after trial court's plenary power expired. Thus, the consolidation order was void because Mother was required to serve Father with notice. The Hague provides for service through a "Central Authority" designated by the country. Mexico does not have an internal law with respect to the service of documents coming from abroad. Therefore, the only way Mother could have served Father was by serving him through Mexico's Central Authority. Mother stipulated that this was not done. Moreover, the clerk's record does not contain a return of service proving service of process on Father. Because Father was not properly served, trial court had no authority to render the August judgment.

Under Hague/ICARA, a petitioner may bring suit to return a child who has been wrongfully removed in "any court that has jurisdiction . . . and which is authorized to exercise its jurisdiction in the place where the child is located." Mother's second amended petition was titled "Petition for Enforcement of Child Custody Determination Pursuant to the Hague Convention and the International Child Abduction and Remedies Act (ICARA)." Mother alleged that the Child had been wrongfully removed. Mother incorporated by reference all exhibits attached to her original petition. Mother's pleading sufficiently invoked trial court's subject matter jurisdiction under Hague/ICARA. Further, no authority required Mother to attach a custody order to her petition.

Trial court did not modify a controlling custody order. It merely concluded that the divorce decree was no longer in effect, and Mother had a right of custody under the Mexican court's subsequent order.

TFC 152.206(a) does not permit a Texas court to commence a child custody proceeding if there is an ongoing proceeding in another state, unless the proceeding in the other state has been terminated or has been stayed because Texas would be a more convenient forum. However, Mother's action in Texas was a Hague/ICARA action alleging Father had wrongfully removed the Child. Mother did not file a custody proceeding in Texas. Thus, 152.206(a) did not apply.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

A TRIAL COURT'S ENTRY OF A JUDGMENT ON AN MSA IS NOT MINISTERIAL; TRIAL COURT WAS WITHIN ITS POWER TO DETERMINE MSA WAS NOT IN THE CHILD'S BEST INTERESTS EVEN THOUGH NO FAMILY VIOLENCE INVOLVED.

¶11-6-10. ***In re Lee,*** No. 14-11-00714-CV, 2011 WL 4036610 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding) (mem. op.) (09/13/11).

Facts: Mother and Father entered an MSA regarding custody of the Child after Father had initiated a SAPCR. Mother moved to enter judgment on the agreement. Father objected, claiming the agreement was not in the best interest of the Child because Mother's husband was a registered sex offender. The associate judge refused to enter the agreement. After a hearing, trial court found the agreement was not in the child's best interest. Mother filed a petition for writ of mandamus. There are no facts in the opinion that hint at or suggest that there was any family violence.

Holding: Writ of Mandamus Denied

Opinion: Although the COA notes the exception under TFC 153.007(e-1) (a party was impaired as a result of family violence and the agreement is not in the child's best interest), it bypasses any discussion of this two prong exception (family violence creating impairment and no best interest) or its inapplicability to these facts. Rather, the COA states that although a trial court may not enter a judgment that varies from an MSA, it may completely refuse to enter any judgment at all if the court believes that the MSA (a contract) is illegal or against public policy, citing cases which hold that agreements not in the best interest of a child are against public policy and a case which holds that parties may not contract around the court's role in protecting the child's best interest. Determining that the trial court's duty to enter judgment on a MSA is NOT ministerial. Trial court was free to consider evidence that Mother's husband was a registered sex offender and that he had violated his deferred adjudication for his unsupervised visitation contact with the Child.

Editor's Comment: *This decision gives absolutely no deference to the limited exception of TFC 153.007(e-1)*

and appears to open up all SAPCR MSA's to ANY "best interest" challenge on public policy grounds. So much for the security of an SAPCR MSA if the trial court is authorized and willing to conduct a best interest hearing. S.S.S.

Editor's Comment: *TFC 153.0071 makes an MSA binding on the parties, but not necessarily on the court. See e.g., Garcia-Udall v. Udall, 141 S.W.3d 323, 330 (Tex. App.—Dallas 2004, no pet.). The interesting issue presented by TFC 153.0071's language is that the legislature is deemed to decide public policy whenever it speaks in a statute, and if the legislature says that an MSA is unenforceable on only one ground, then hasn't the legislature excluded other grounds from being considered? What about the doctrine of implied exclusion, meaning that since the legislature chose only one ground for declaring an MSA unenforceable, it therefore excluded other grounds by its silence? C.N.*

Editor's Comment: *TFC 153.0071(e) & (e-1) state that "a party is entitled to judgment" on an MSA "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law," unless "(1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and (2) the agreement is not in the child's best interest." This case is missing part (1) of the exception, so relator "is entitled to judgment." Sure sounds ministerial to me. Perhaps this opinion is not the final word on this case - relator has now filed in the Supreme Court, which has invited the solicitor general to file a brief "expressing the views of the State." J.V.*

SAPCR
CONSERVATORSHIP

GRANDPARENTS COULD NOT BE NAMED TEMPORARY MANAGING CONSERVATORS BECAUSE MOTHER NEVER RELINQUISHED AUTHORITY TO THEM, AND THERE WAS NO EVIDENCE THAT THE CHILD WAS IN DANGER IN PARENTS' CARE

¶11-6-11. ***In re Calkins,*** No. 09-11-00531-CV, 2011 WL 4975008 (Tex. App.—Beaumont 2011, orig. proceeding) (mem. op.) (10/20/11).

Facts: Mother and Father began dating while in high school. Soon after high school, Mother became pregnant. During the pregnancy, Mother lived with, and was supported by, her parents ("Grandparents"). Mother and the Child continued to live with Grandparents after the Child was born. Father visited a few times and gave Mother about $300 to help with caring for the Child. After Father graduated from trade school, Mother started to attend college. The Child stayed with Grandparents during the week, and Mother returned to Grandparents' home every weekend. Father found a job, and Mother and Father moved into an apartment together and got married. Grandmother visited the Child, who was excited to see Grandmother. Grandmother asked to be allowed to take the Child for a weekend, but Mother said no. The Child cried when Grandmother left. Grandmother filed a SAPCR seeking custody of the Child. At a hearing, evidence was introduced that Mother and Father's apartment was sparsely furnished, Father worked 60 hours a week earning $9 an hour, and Mother would likely not be able to return to college soon because they did not have enough money to pay for both tuition and rent. Trial court appointed Grandparents as temporary managing conservators of the Child. Mother and Father filed a petition for writ of mandamus.

Holding: Petition for Mandamus Conditionally Granted

Opinion: TFC 102.003 confers standing to file a SAPCR "on 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." Here, Mother had been participating in providing care for the Child, and when Mother went to school, she was gone for less than six months. Mother did not relinquish her

parental rights to Grandparents.

TFC 102.004 confers standing to grandparents to file a SAPCR if it can be shown that "present circumstances would significantly impair the child's physical health or emotional development." Evidence that the Child missed Grandparents did not satisfy this burden. Mother and Father were inexperienced parents, but no evidence showed that the Child was in danger under their care. Mandamus relief is appropriate to remedy temporary orders that divest fit parents of possession of their child.

The parties' pleadings were not part of the mandamus record, so COA could not rule on whether trial court should or should not dismiss Grandparents' suit.

Editor's Comment: *Being "inexperienced at parenting" and "living in relative poverty," by themselves, do not show a significant impairment of a child's physical health or emotional development. J.V.*

MOTHER WAS GRANTED RIGHT TO DETERMINE THE CHILDREN'S RESIDENCY WITHOUT A GEOGRAPHICAL RESTRICTION BECAUSE HER OUT-OF-STATE FAMILY COULD HELP SUPPORT THE CHILDREN

¶11-6-12. ***Yasin v. Yasin,*** No. 03-10-00774-CV, 2011 WL 5009895 (Tex. App.—Austin 2011, no pet. h.) (mem. op.) (10/21/11).

Facts: Mother and Father had two Children. The Younger Child had been diagnosed with autism. Although the Younger Child was 12 years old at the time of the divorce, she had the capacity of a three-year-old and required substantial care and supervision. Mother had stayed at home as the primary caregiver for both Children. Mother and Father filed for divorced. Initially Mother and Father agreed that Mother would have the primary right to designate the Children's primary residence with a geographical restriction. However, Mother later suggested that if she could return to Iowa, where her family resided, she would be able to have more help with raising the Children. In the final divorce decree, trial court granted Mother the right to determine the Children's primary residence without a geographical restriction. Trial court also ordered Father to pay child support and spousal maintenance. Father appealed, arguing that trial court abused its discretion in failing to impose a geographical restrict on Mother's right to determine the Children's residency. Father also contended that he did not receive fair notice of Mother's claim to spousal maintenance and that the evidence did not support the amount awarded.

Holding: Affirmed

Opinion: Tex. Sup. Court has provided some factors to consider when determining whether a geographic restriction on a child's primary residence is in the child's best interests. These factors include reasons for the move, opportunities afforded by the move, the effect on extended family, accommodations of the child's special needs, the effect of visitation with the non-custodial parent, and the ability of the non-custodial parent to relocate. Here, Mother had been the Children's primary caregiver and had tended to the Younger Child's special needs on a daily basis. Mother testified that the cost of child care would meet or exceed the amount she could expect to earn if employed. If Mother moved near her family, they would be able to help care for the Children, allowing Mother to work. The schools near Mother's family were good schools. Father had not always fully exercised his visitation rights, and Mother was not convinced he would provide help when she needed it. The Children loved Father. It would be difficult for Father to relocate, and he would only be able to visit a few times a year if they moved. As the finder of fact, trial court could have reasonably found that a geographic restriction was not in the child's best interests. Further, trial court could have reasonably found that, based on her testimony, Mother withdrew her consent to the geographical restriction.

Editor's Comment: *The father argued that he had no notice that mother sought maintenance because mother filed only an answer and general denial. She did not file a counter-petition for maintenance. The Court of Appeals disagreed, noting that (1) Texas courts have traditionally maintained liberal pleading requirements*

in family law cases; (2) mother received maintenance of $2,500 per month under temporary orders; and (3) mother's proposed disposition of issues, filed more than one month prior to trial, requested maintenance. J.V.

Editor's Comment: *I find both the trial court and the appellate court's reasoning pretty weak for allowing mother an unrestricted right to determine the primary residence of the child, especially in the face of mother's initial agreement, on the record, to a geographic restriction. I think the deciding factor in this case was likely the child's special needs, and I think this case could prove helpful for making similar arguments in other special needs situations. R.T.*

SAPCR
POSSESSION AND ACCESS

ABDUCTION PREVENTION MEASURES IMPOSED ON FATHER BECAUSE HE HAD WITHHELD THE CHILDREN FROM MOTHER, AND HE HAD STRONG TIES TO EGYPT, WHICH IS NOT A SIGNATORY COUNTRY OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

¶11-6-13. ***Elshafie v. Elshafie,*** No. 13-10-00393-CV, 2011 WL 5843674 (Tex. App.—Corpus Christi 2011, no pet. h.) (mem. op.) (11/22/11).

Facts: Mother and Father were married in Egypt. Then, they moved to Ohio, where Mother had one Child. Father accepted a job teaching in Texas, so they moved. They had a second Child while in Texas. Father went to Egypt to visit his dying father, and when he returned, Mother and Father separated. Both filed for divorce. Trial court issued temporary orders naming the parents as joint managing conservators of the Children. Father moved to Illinois, and Mother moved with him. The couple attempted to reconcile, and Mother had a third Child. However, Mother and the Children later moved back to Texas. After a hearing to consider several pending motions, trial court appointed Mother as sole managing conservator. Trial court granted Mother the right to obtain the Children's education and medical records, but did not grant this right to Father. Trial court found Father posed a risk of international abduction of the Children, and imposed measures to minimize the risk. Trial court granted Mother control over the Children's passports and enjoined Father from removing the Children from school or the United States. In addition, trial court awarded Mother attorney's fees. Father appealed, arguing that trial court abused its discretion by restricting his access to the Children's records and limiting his possessory conservator rights, in imposing abduction prevention measures, and in awarding Mother attorney's fees.

Holding: Affirmed in part; Reversed and Rendered in part

Opinion: Mother testified that after an argument with Father, he threw her out of the bedroom. The next day, when Father came home, Mother locked herself and the Children in the bedroom. When Father finally got into the bedroom, he hit her, causing her to hit the window. One of the Children's teachers testified that once, when Father came to pick up the Child and learned that the Child had already gone home with Mother, Father became so upset that the teacher thought that Father might "take a swing" at him. Father wrote a letter to the teacher asking for a detailed report of the Child's attendance, including the time that the Child arrived and left school each day. Mother testified that on one occasion, when the Children were in Father's care, one of the Children was injured and had sustained a hairline fracture. Father chose not to tell Mother about this injury because he did not thing the injury was "serious." When Father went to Egypt for three weeks to visit his dying father, he only gave Mother a few hours notice. During the trip, Mother did not have a cell phone, and Father had suspended the home telephone. Mother did not have access to a car, and she could not use the credit cards because Father had not paid the bills. Father had left Mother with some food and $100. Based on this

evidence, COA held that trial court did not abuse its discretion in limiting Father's possessory rights.

TFC 153.502 provides factors to consider in determining whether a child is at risk of international abduction by a parent. These factors include evidence that the parent has withheld a child, or threatened to withhold a child, in violation of another person's right of possession; has closed or liquidated bank accounts; or has strong ties to a country that is not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction. Here, Mother and Father signed a Rule 11 agreement that Father would take the Children for winter break and return them on December 28, 2009. Father did not return the children until January 3, 2010. Although the Rule 11 agreement was not filed until after January 3, it was still a valid Rule 11 agreement because it was filed before trial court rendered its judgment. Also, Father had liquidated his retirement account to pay his attorneys. Finally, Father had strong ties to Egypt, which is not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction. Father was born, raised, and educated in Egypt, and he worked at an Egyptian bank for about ten years. Father had a brother working in Egypt. There was sufficient evidence to support a finding that the Children were at risk of international abduction.

TFC 153.503 provides a list of actions available to the court if it determines that a child is at risk of international abduction. A court may appoint the other parent as the sole managing conservator and require the parent found to pose a risk to relinquish the child's passport. The court may enjoin the parent found to pose a risk from removing the child from school or from the United States and from applying for a new passport for the child. Because trial court found that the Children were at risk of international abduction, trial court was within its discretion in imposing these abduction prevention measures on Father.

In a SAPCR, a court may award attorney's fees. However, to support this award, there must be evidence supporting a finding that the fees were reasonable and necessary. Here, Mother did not present any evidence as to the hours spent on the case, the attorney's hourly rate, or the reasonableness or necessity of the fees. Without evidence on the record, trial court abused its discretion in awarding Mother attorney's fees.

SAPCR
MODIFICATION

EVIDENCE OF A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES SHOULD HAVE BEEN ESTABLISHED BY A COMPARISON WITH CIRCUMSTANCES AT TIME LAST CHILD SUPPORT ORDER WAS SIGNED, NOT WITH CIRCUMSTANCES AT TIME LAST MOTION TO MODIFY WAS DECLINED

¶11-6-14. ***In re J.D.D.,*** No. 05-10-01488-CV, 2011 WL 5386370 (Tex. App.—Dallas 2011, no pet. h.) (mem. op.) (11/09/11).

Facts: In 2002, Father was ordered to pay child support. This order was modified in 2004. Father was denied a modification of the order in 2008. In 2009, Father filed a motion to modify, arguing the circumstances of the children and the Joint Managing Conservators have materially and substantially changed since the rendition of the 2004 order. OAG and Mother contended that Father's current circumstances should have been compared to those in 2008 because trial court had denied an earlier motion by Father to modify in 2008. In trial court's findings of facts and conclusions of law, trial court found that there had been no material and substantial change since 2008. Father appealed, arguing that he should have been able to show a material and substantial change since 2004.

Holding: Reversed and Remanded

Opinion: A court may modify a previous child support order only if the circumstances of the child, or another party affected by the order, has materially and substantially changed since the date the original order was

signed. The court must compare the current circumstances with the circumstances at the time of the original order. If a party petitions the court to modify a child support order and the court denies the motion, the denial does not change the relevant date for comparing circumstances in future motions for modification. Here, the last time Father's child support obligations were modified was in 2004. Father filed a subsequent motion to modify his obligations, which was denied in 2008. Trial court should have compared Father's current circumstances with his circumstances in 2004, not those in 2008. COA noted that trial court's focus should be on whether the circumstances had changed, not on whether the original amount of child support was correctly calculated.

Editor's Comment: *A good reminder that, even if it seems obvious to everyone in the courtroom, you MUST put on specific and clear evidence of the circumstances at the time the last order was signed, as compared to the current circumstances. Anything less is going to get booted back down on appeal every time. R.T.*

SAPCR
PROTECTIVE ORDER

EVIDENCE THAT FATHER BLOCKED MOTHER'S CAR WITH HIS BODY AND JUMPED ON THE HOOD OF HER CAR, COMBINED WITH EVIDENCE THAT HE SENT TEXT MESSAGES UNDER A FAKE NAME TO LEAD MOTHER TO BELIEVE HE HAD COMMITTED SUICIDE, WAS SUFFICIENT TO SUPPORT TRIAL COURT'S AWARD OF A PROTECTIVE ORDER

¶11-6-15. ***Boyd v. Palmore,*** -- S.W.3d --, 2011 WL 4500825 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (09/29/11).

Facts: Mother and Father had one Child before they separated. After separation, they entered an agreed order establishing visitation and possession of the Child. A few months later, Mother filed an application for a temporary ex parte protective order and a standard protective order. Trial court issued a temporary ex parte order and held a hearing on the motion. At the hearing, Mother testified that prior to the entry of the visitation and possession order, Father had followed her to her mother's office, got out of his car, blocked her car with his body, and jumped on the hood of her car. Mother stated that she feared for her life and called the police. Mother also testified that Father had hired a private investigator, who had been following her for months. Mother intercepted text messages that discussed vehicle tracking devices and videos of Mother taken in her parents' home. Father sent text messages from his work phone, pretending to be a female Mother did not know. These messages stated that Father had attempted suicide and blamed the attempt on Mother. Father testified that he used these tactics to get Mother to talk to him. Father also testified that he had checked himself into a medical hospital to receive treatment for depression. Father admitted to hiring a private investigator, but he claimed that the investigator was no longer authorized to follow Mother. Father's sister and one of his friends each testified that Father was non-violent. After the hearing, trial court granted Mother's motion for protective order. Father appealed, arguing that the evidence was legally and factually insufficient to support a finding that family violence had occurred or a finding that it was likely to occur in the future. Father argued that because the incident that involved him jumping on a car occurred more than 30 days before Mother filed her application and because she did not mention the incident in her application, the evidence relating to that incident was legally insufficient to support trial court's finding. Father also contended that the evidence was legally insufficient because it failed to show a pattern of threats or violent acts. Finally, Father contested the factual sufficiency of the evidence supporting trial court's finding that family violence was likely to occur in the future and pointed to several pieces of evidence tending to challenge that finding.

Holding: Affirmed

Majority Opinion: (C.J. Radack and J. Brown)

A trial court must enter a protective order if it finds that family violence has occurred and family violence is likely to occur in the future. Even though Father never physically harmed Mother, the evidence was legally sufficient to support a finding that family violence occurred because Father's actions constituted a threat that placed Mother in fear of imminent physical harm or bodily injury. Father blocked Mother's car with his body and jumped on the hood of her car. Mother testified that Father's actions made her call for the police because she was "scared for her life."

TFC 83.006(b)(2) requires a person seeking a temporary ex parte order excluding a party from a residence show that family violence occurred within 30 days of the request. However, there is no such time requirement for a standard protective order. Father only challenged trial court's finding of family violence to support the standard protective order and did not challenge trial court's grant of a temporary ex parte order. Thus, Father's argument was without merit.

An application for a standard protective order must contain (1) the name and county of the applicant, (2) the name and county of person who allegedly committed family violence, (3) the relationship between the applicant and that person, and (4) the request for a protective order. There is no requirement that the applicant provide details of any alleged family violence.

There is no statutory law requiring more than one act of family violence or a pattern of family violence. Because "[o]ftentimes, [the] past is a prologue," one act alone can be sufficient to support an award of a protective order. Here, Father jumping on Mother's car and his harassing text messages provided sufficient evidence to support trial court's award of the protective order. Although Father never physically harmed Mother, he did not dispute that he jumped on the hood of her car. Despite the fact that Mother worked out a visitation agreement with Father, she testified that, "[she] wouldn't say that [she] felt safe doing it." Further, the only proof that Father received psychological treatment was his sister's and his own testimony. Mother testified that she had no way of knowing whether Father had actually received treatment. The incident involving Father jumping on Mother's car occurred a substantial distance from Father's residence, which indicates that living several hours away would not prevent Father from harassing Mother. Finally, the fact that Father did not contact Mother for several weeks prior to trial could be explained by the effectiveness of the temporary protective order. Trial court's finding that family violence would likely occur in the future was not clearly wrong or manifestly unjust.

Dissenting Opinion: (J. Sharp)

TFC 71.004 defines family violence as "an act by a member of a family . . . against another member of the family . . .[that results in physical harm], or that is a threat that *reasonably* places the member in fear of imminent [harm]." (emphasis added). Here, the only "remotely physical" incident occurred when Father jumped on Mother's car. While "obviously misguided," this act could not reasonably be construed as a threat to place Mother in fear of imminent harm. Further, although Mother testified that she was "scared for her life," she offered no evidence of any threats or of verbal abuse. Even if Father's acts could be considered harassment, the harassment described in the record did not rise to the level of an active threat. Moreover, there was no evidence supporting a holding that family violence was likely to occur in the future.

Editor's Comment: *This case is particularly helpful if faced with making an argument for or against family violence, which is another exceedingly fact-specific determination. This opinion has the unenviable job of drawing a very fine line between harassment and family violence. R.T.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

PARENTS' PARENTAL RIGHTS TERMINATED BECAUSE FAMILY HOME WAS DEPLORABLE FIRE-HAZARD, THE CHILDREN WERE USED IN PANHANDLING, THE CHILDREN TESTED POSITIVE FOR COCAINE, AND THE NEEDS OF THE CHILDREN WERE BETTER SERVED BY FOSTER CARE

¶11-6-16. ***In re J.L.B.,*** -- S.W.3d --, 2011 WL 3862875 (Tex. App.—Texarkana 2011, no pet. h.) (09/02/11).

Facts: CPS was called to investigate Parents and Children after a police officer stopped a friend of the Parents' in a traffic stop and found the Children in the backseat of the friend's car. The three-year-old Child was naked, wrapped in a blanket. The five-year-old Child was wearing a "filthy" jumpsuit. Both Children smelled as if they had not been bathed in days. After further investigation, it was discovered that the friend had just taken the Children panhandling. The friend had also gone to a drug house and left the Children outside with a woman he did not know while he purchased crack cocaine. The Children's Parents had permitted the friend to take the Children after they had already used the Children to panhandle. The Parents had purchased drugs with the money they acquired and had gotten high at home. The Parents reported the Children as kidnapped more than a day after the Children had been gone.

During trial, testimony described the family home as having a "foul odor" with food and dirty pots on the table and floors. There was trash under the refrigerator and stove. One of the burners on the stove was lit and burning to keep the house warm. The Children were allowed to climb on broken chairs to play on the cabinets. A CPS worker had seen the Children playing with electrical outlets. Space heaters were placed dangerously close to piles of dirty clothes. A city code enforcement officer testified that he had issued thirteen or fourteen citations since 2005 for hazardous conditions.

A special education teacher testified that the Children suffered from significant speech difficulties. Both Children were developmentally delayed in their intellectual progress. The foster mother with whom the Children had been placed testified the boys were not familiar with bathing or brushing their teeth and that neither had been potty trained. Additionally, the children appeared to be undernourished, and they had both tested positive for cocaine.

The Parents had been abused when they were children, and they were in the "borderline range of intelligence." Mother suffered from attachment disorder, and Father showed signs of low-level depression and schizoaffective symptoms. A psychologist suggested that the parents would need five to eight years of weekly counseling to be able to care for the Children. Both Parents actively used cocaine.

Trial court terminated the parental rights of both Parents. Parents appealed, arguing the evidence was legally and factually insufficient to support trial court's findings.

Holding: Affirmed

Opinion: A court may terminate a parent's parental rights if the court finds the parent committed one of the enumerated acts in TFC 161.001(1) and termination is in the best interests of the child. TFC 161.001(1)(D) allows termination if the parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." TFC 161.001(1)(E) permits termination if the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." Here, there was sufficient evi-

dence to support trial courts finding of 161.001(D) and (E). A psychologist testified that neither Parent was capable of caring for the Children. The home was unsanitary and unsafe. The Parents used illegal drugs, and the Children tested positive for cocaine. The Children were neglected and lacked personal hygiene. The Parents took the Children with them to panhandle, and they allowed another man to take the children on panhandling trips. While there was evidence that Mother had curtailed her drug use, some repairs had been made to the family home, and the Parents had completed some service plans and parenting classes, trial court was justified in giving this evidence as much or as little weight as it deemed appropriate.

There was also sufficient evidence to support a finding that termination was in the bests interests of the Children. The Children's emotional and physical needs were better served by the foster mother than by the Parents. Both Children were behind in their intellectual, social, and emotional development. The Parents allowed the Children to be used in panhandling, and the family home was found in a "deplorable condition." Finally, the Children had responded well to foster care.

INCOMPETENT FATHER'S MOTION FOR CONTINUENCE IN TERMINATION PROCEEDINGS DENIED BECAUSE THE PROCEDURES IN TFC MEET THE MINIMUM DUE PROCESS REQUIREMENTS OF THE CONSTITUTION AND BECAUSE FATHER PRESENTED NO EVIDENCE INDICATING HE WOULD REGAIN COMPETENCY BEFORE THE "DROP DEAD DATE"

¶11-6-17. ***In R.M.T.,*** -- S.W.3d --, 2011 WL 4578328 (Tex. App.—Texarkana 2011, no pet. h.) (10/05/11).

Facts: Mother and Father's parental rights were terminated. Sometime before the termination proceedings, Father was charged with assault family violence (enhanced). After a competency evaluation, Father was found to be incompetent to stand trial in that case. He was still incompetent at the termination proceedings. Father filed a motion for continuance, and trial court denied the motion. Trial court found that the procedures set forth in TFC meet the minimum due process requirements of the constitution and that no binding legal authority requires trial court to halt or delay the proceeding based on Father's incompetence. Father appealed arguing that trial court erred in denying his motion, in continuing his trial despite his incompetence, and in allowing him to testify over his attorney's Rule 601 objection.

Holding: Affirmed

Majority Opinion: (J. Moseley, C.J. Morriss, J. Carter)

The involuntary termination of parental rights implicates fundamental constitutional rights, and the parent must be afforded procedural due process. However, there is no precedent permitting a trial court to halt termination proceedings due to the incompetency of the parent. TFC has no competency standard that a parent must meet before participating in a hearing or trial. Further, despite the fundamental significance of the parent-child relationship, the emotional and physical interests of the child must also be considered. The State and the Child each had an interest in reaching a final decision. Father presented no evidence indicating that he would regain his competency before the "drop dead date." When the interests of the child are in direct conflict with the interests of the parent, "the interest of the child is the trump card." There was no indication that trial court's decision to deny Father's motion for a continuance was an abuse of its discretion.

Tex. R. Evid. 601 states that a person who is insane is incompetent to testify. Here, evidence was submitted indicating Father could not rationally or factually discuss his case or otherwise communicate with his attorney and that Father suffered from schizoaffective disorder, polysubstance dependence, cognitive disorder, and personality disorder with paranoid and antisocial traits. Father's attorney ad litem and guardian ad litem both stated that Father lacked the capacity to understand the nature of the proceedings. Moreover, trial judge stated that Father likely did not comprehend the implications of the oath. Trial court erred in allowing Father

to testify. However, Father's testimony likely did not damage his case. Father's testimony did not touch on the grounds for termination presented by the State.

Concurring Opinion: (J. Carter)

The majority opinion was a proper interpretation of the law. However, the result was unfair to the parent and may have led to a premature termination. The current law forces the court to decide between a dismissal or termination rather than focusing on the best interests of the child. Legislature should amend the statute to give more discretion to trial court judges.

MOTHER REMAINED A PARTY IN TERMINATION SUIT AFTER SIGNING AN AFFIDAVIT VOLUNARILY RELINQUISHING HER RIGHTS; THERE WAS NO NEED TO INCLUDE WIFE ON NON-PARTY WITNESS LIST

¶11-6-18. ***In re J.L.J.,*** -- S.W.3d --, 2011 WL 4827652 (Tex. App.—El Paso 2011, no pet. h.) (10/07/11).

Facts: TDFPS filed a termination suit to terminate Mother's and Father's parental rights to the Child. Mother signed an affidavit voluntarily relinquishing her rights. Later, at the final hearing Father objected to Mother being permitted to testify because he claimed she was no longer a party to the suit, and she was not listed as a non-party witness in TDFPS's discovery. Trial court overruled the objection and permitted Mother to testify. Trial court entered a judgment terminating both parents' parental rights. Father filed a notice of appeal arguing that there was legally and factually insufficient evidence to support the judgment. Additionally, Father argued that trial court abused its discretion in allowing Mother to testify.

Holding: Affirmed

Opinion: TFC 263.405(b) states that when appealing an order terminating the parent-child relationship, the appellant must file a statements of points for appeal. The purpose of the statement of points is to provide a trial court with a chance to correct erroneous findings or procedural errors before an appeal. Upon filing, trial court must determine whether the appeal is frivolous. Here, Father included his statement of points in his notice of appeal rather than in a separate document or a motion for new trial. Because this did not frustrate the purpose of the requirement, Father's statement of points satisfied the statutory requirement.

Father did not specify any reason why the evidence was legally or factually insufficient to support the judgment, so he did not preserve that issue for appellate review.

No legal authority supports the contention that when a party relinquishes her parental rights, she is no longer a party to the case. Moreover, only a court has the authority to terminate a parent's parental rights, so signing an affidavit voluntarily relinquishing parental rights has no immediate effect. Because there was not yet a final judgment terminating Mother's rights, she was still a party to the suit and could testify without the need for notice and due process.

EVEN THOUGH FATHER DID NOT LIVE WITH THE CHILDREN, FATHER'S PARENTAL RIGHTS WERE TERMINATED BECAUSE HE KNEW THAT THE CHILDREN WERE IN AN ENVIRONMENT THAT ENDANGERED THEIR PHYSICAL AND EMOTIONAL WELL-BEING, AND FATHER DID NOTHING TO REMOVE THE CHILDREN FROM THE ENVIRONMENT

¶11-6-19. ***In re M.C.,*** -- S.W.3d --, 2011 WL 4908747 (Tex. App.—Dallas 2011, no pet. h.) (10/17/11).

Facts: TDFPS sought conservatorship and termination of Mother and Father's parental rights to three Children. Mother voluntarily relinquished her rights to the younger two Children. After a bench trial, trial court

found that Father had committed acts described in TFC 161.001(1)(D) and (E) and that termination of Father's parental rights to the younger two Children was in their best interests. Father appealed, arguing that the evidence was factually insufficient to support trial court's finding.

Holding: Affirmed

Opinion: In a termination proceeding, the petitioner must establish one ground listed in TFC 161.001(1) and that termination is in the best interests of the child. In establishing 161.001(D), it must be shown that the parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child." The question is whether the environment endangers the child's physical or emotional well-being, not whether the parent's conduct does so. Here, although Father was not living with the Children, he knew that Mother was dealing drugs, was very violent, was using drugs, and was in jail for the manufacture and delivery of a controlled substance. Further, Father knew that the Children had "serious behavior problems." Father knew that ten-year-old Daughter was acting out sexually; that twelve-year-old Son was defiant, resistant, and hostile; and that both Children had been restrained a number of times at school. Father was not permitted to be around the Children, and he did not have a job or reliable transportation. However, it was not Father, but CPS, who removed the Children from Mother's care. Father knowingly allowed the Children to remain in conditions and surroundings that endangered their physical and social well-being.

MOTHER'S RESTICTED APPEAL WAS BARRED BY THE PLAIN LANGUAGE OF TFC 161.211(a) BECAUSE HER NOTICE OF APPEAL WAS FILED MORE THAN SIX MONTHS AFTER THE TRIAL COURT'S FINAL ORDER WAS SIGNED

¶11-6-20. ***L.J. v. DFPS,*** -- S.W.3d --, 2011 WL 5617756 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (11/17/11).

Facts: Mother's parental rights to the Child were terminated. Mother filed a notice of appeal approximately six months and thirteen days later. Mother claimed that she did not receive notice of the final proceedings and that she was not appointed counsel. COA held that Mother's appeal was untimely, but it remanded the case and ordered trial court to appoint counsel to Mother. COA ordered trial court to make a finding of whether Mother's appeal was frivolous and to make findings of fact and conclusions of law regarding any issues that Mother intended to raise in support of a restricted appeal. Trial court found Mother's appeal would be frivolous. COA issued an Order of Reinstatement and Notice of Dismissal. Mother responded asking COA not to dismiss her restricted appeal because her notice of appeal was filed within six months and fifteen days.

Holding: Dismissed

Opinion: A restricted appeal is available if the appellant filed a notice of appeal within six months of a trial court's final order, was a party in the original suit but did not participate, and can show error apparent on the face of the record. Some courts have held that parents may be entitled to a fifteen-day extension in filing their notice of appeal. However, TFC 161.211(a) states that "a person who has been personally served . . . is not subject to collateral or direct attack after the sixth month after the date the order was signed." Here, Mother was personally served, and she filed her notice of appeal approximately six months and thirteen days after the order was signed. Her attempt to bring a restricted appeal was barred by the plain language of 161.211(a).

MOTHER'S PARENTAL RIGHTS WERE TERMINATED BECAUSE SHE VOLUNTARILY SURRENDERED HER CHILD TO CPS, AND HER MENTAL RETARDATION MADE IT IMPOSSIBLE FOR HER TO PROVIDE ADEQUATE CARE FOR THE CHILD

¶11-6-21. ***In re D.W.,*** -- S.W.3d --, 2011 WL 5600538 (Tex. App.—Texarkana 2011, no pet. h.) (11/18/11).

Facts: Mother had a child, but Mother could not remember Father's last name. Mother had been diagnosed with "mild" mental retardation. Mother's boyfriend told her that the Child had sickle cell anemia and that Mother would be unable to care for the Child. Although the Child did not have sickle cell anemia, Mother voluntarily surrendered her Child to CPS. CPS tried to offer assistance to Mother to allow her to keep the Child, but Mother declined the help. CPS offered transportation to allow Mother to visit the Child, but after a few months, she stopped visiting. More than a year after Mother surrendered the Child, trial court terminated her parental rights. Mother appealed, arguing that trial court abused its discretion in denying her motion for new trial and her motion for a continuance. Mother also contended that trial court erred in severing her parental rights case from the termination case against the biological Father. Finally, Mother argued that the evidence was legally and factually insufficient to support the termination.

Holding: Affirmed

Opinion: Once a party has made an appearance, the party must provide the court and counsel with a current address where the party can receive notice. Here, Mother moved and did not provide her final address to either the court or her counsel. Additionally, because the court cannot communicate directly with a party who is represented by counsel, the notice requirement was satisfied by serving Mother's attorney of record. Mother's attorney attempted to reach Mother by writing and by phone, but the attempts were unsuccessful. Moreover, the "drop dead" date required the court to choose to either try the case or dismiss it. Trial court did not abuse its discretion in denying the motion for new trial.

Although a termination hearing involves "a fundamental liberty interest," it was still necessary for Mother to take action to exercise those rights. Because the drop dead date was only about a month away, and because Mother failed to maintain communication with her attorney, trial court did not abuse its discretion in denying her motion for continuance.

A severance of claims is within the discretion of a trial court. Here, Father's identity was unverified, and the drop dead date was approaching. CPS was concerned with clearing the Child for adoption, but this was not an improper factor in considering whether to sever the case. A jury might have been inclined to terminate Mother's rights with the expectation that Father's rights would soon be before the court. However, it is also possible that a jury could have been disinclined to terminate Mother's rights if Father's rights might remain intact. Trial court could reasonably find that proceeding separately with Mother's portion served the state's and the Child's best interests.

In order to terminate a parent's parental rights, it must be shown that termination is in the best interests of the child and that the parent has committed one of the enumerated acts in TFC 161.001(1). TFC 161.001(1)(N) permits termination if the parent has constructively abandoned the child for at least six months, CPS has made reasonable efforts to return the child, the parent has not regularly visited the child, and the parent has demonstrated an inability to provide a safe environment for the child. Here, Mother voluntarily relinquished her Child to CPS. At the time of trial, the Child had been in state custody for over a year. CPS offered services and assistance to Mother, but she chose not to use them. Mother initially visited the Child regularly, but after a few months, she stopped visiting entirely. Mother was diagnosed with "mild" mental retardation, and an expert witness testified that she, by herself, would be unable to provide competent care for the child. There was sufficient evidence to support trial court's finding that Mother had committed the act described in 161.001(1)(N).

When determining whether termination is in a child's best interests, trial court will consider the *Holley* factors. These non-exhaustive factors include the present and future emotional and physical needs of the child, the parental abilities of the person seeking custody, and the acts or omissions of the parent. The expert witness testified that Mother was incapable of effectively meeting the emotional and physical needs of the Child. Further, it appeared that it was relatively easy for Mother to move on with her life once she relinquished her Child. There was sufficient evidence to support a finding that termination was in the Child's best interests.

MISCELLANEOUS

LIMITATIONS PERIOD BARRED THE CHILD'S CLAIM THAT PARENTS WERE COMMON-LAW SPOUSES BECAUSE PARENTS' RELATIONSHIP ENDED IN 1961 AND PROCEEDINGS DID NOT COMMENCE PRIOR TO SEPTEMBER 1, 1989.

¶11-6-22. ***Humphries v. Humphries*****,** -- S.W.3d --, 2011 WL 3837973 (Tex. App.—Tyler 2011, no pet. h.) (08/31/11).

Facts: Father had been married twice before he began living with Mother. He had one son with each of the three women. At some point, Mother and Father began representing to others that they were married, but they were never officially wed. Father died intestate in 1961, and Mother served as executrix of his estate. She classified land acquired by Father as community property, and she claimed a one-half interest in the land as her property. When she died, Mother left her entire estate to her Child. The Half-Brothers sued, seeking damages and partition of the land. The Child countersued, requesting a declaratory judgment that he owned two-thirds of the land. The Half-Brothers amended their petition, requesting a declaratory judgment that the property was Father's separate property and that the Child could not raise a claim of common-law marriage because the applicable statute of limitations had expired. Trial court granted a motion for summary judgment finding any claim of a common-law marriage was barred by limitations. The Child appealed, arguing the statute of limitations defense was waived because it was not pleaded as an affirmative defense, the statute of limitations did not apply to the Parents' marriage, the Half-Brothers' judicially admitted to the common-law marriage, and the inventories from the estates served as evidence of the common-law marriage.

Holding: Affirmed

Opinion: Because the Half-Brothers were not Mother's biological children, and because Father's death preceded Mother's death, the distribution of the property depended on whether Mother and Father were common-law married. If they were married, then the property would be classified as community property. If they were not married, the property was Father's separate property. If the property had been community property, then the Half-Brothers would each receive one-sixth of the estate and the Child would receive two-thirds of the estate. Contrarily, if the property was Father's separate property, each of the three Children would receive one-third of the estate.

The purpose of pleadings is to give notice to the opposing party of claims, defenses, and relief sought. In his counterclaim, the Child did not allege that his Parents were common-law spouses. Thus, there was no allegation against which the Half-Brothers needed to assert an affirmative defense. Moreover, despite the lack of any common-law marriage claim by the Child, the Half-Brothers requested in their amended petition that any common-law marriage be declared unenforceable because the applicable statute of limitations had expired. This request in the amended petition satisfied the pleading requirement and gave the Child sufficient notice of the Half-Brother's claim that the Parent's common-law marriage was barred by limitations.

In 1989, legislature amended TFC 1.91 to make proving a common-law marriage more difficult. This section stated that a proceeding to prove the existence of a common-law marriage had to be commenced within one year of the end of the relationship or Sept. 1, 1989, whichever was later. The section was amended again in 1995 to say that if the proceeding was not commenced within two years of the end of the relationship, there would be a rebuttable presumption against the existence of a marriage. With this change, the legislature also clarified that any proceeding which would have been barred before Sept. 1, 1995 would also not be permitted under the new TFC 1.91. Here, because the Parents relationship ended in 1961, the plain language of the statutes did not permit a proceeding to prove the existence of a common-law marriage to commence after Sept. 1, 1989.

A judicial admission must be clear, deliberate, and unequivocal. In one sentence of their original petition, the Half-Brothers referred to Mother as the common-law wife of Father. However, the Half-Brothers amended their petition, so the original petition was not their live pleading at the time trial court considered their motion for summary judgment. Additionally, the statement was not clear and unequivocal because in their next sentence, the Half-Brothers claimed the property was Father's separate property. This separate property claim was inconsistent with a position that the Parents were common-law spouses. The statement could be considered as an evidentiary admission, but that would not relieve the Child from his burden to prove a common-law marriage existed. Further, since any claim of a common-law marriage was barred by limitations, only a judicial admission could support a finding of the existence of a common law marriage. Thus, any other evidence tending to prove the existence of a common law marriage, including the inventories from the estates, was irrelevant.

Editor's Comment: *Another reason why everyone should have a will. J.V.*

TEX. R. APP. P. 20.1 GAVE TRIAL COURT JURISDICTION TO CONDUCT HEARING ON CONTEST OF APPELLANT'S AFFIDAVIT OF INDIGENCE EVEN THOUGH TRIAL COURT'S PLENARY POWER OVER THE ORIGINAL MATTER HAD EXPIRED

¶11-6-23. ***In re A.L.V.Z.,*** -- S.W.3d --, 2011 WL 4953444 (Tex. App.—Dallas 2011, no pet. h.) (10/19/11).

Facts: Trial court issued a final judgment. Appellant appealed the judgment and attached an affidavit of indigence to her notice of appeal. Ten days later, trial court conducted a hearing and found Appellant was not indigent. Appellant argued that trial court did not have jurisdiction to conduct that hearing because it was more than 90 days after its final judgment. Additionally, Appellant argued that trial court erred because she was certified by Legal Aid as indigent.

Holding: Affirmed

Opinion: Tex. R. App. P. 20.1 states that if a contest to an affidavit of indigence is filed, the trial court must conduct a hearing within 20 days. Appellant timely filed her notice of appeal with her affidavit of indigence attached. The contest to her affidavit was filed, and trial court conducted a hearing 10 days later. Thus trial court had jurisdiction to rule on the contest.

If a party's affidavit of indigence is accompanied by a certificate that the party is entitled to receive free services from a program funded by Interest on Lawyer's Trust Accounts or the Texas Access to Justice Foundation, that affidavit may not be contested. Here, Appellant introduced a letter from Legal Aid. However, the letter did not state that Appellant qualified for aid; it merely stated that Legal Aid did not have resources to help her. Moreover, Appellant was granted permission by trial court to borrow the letter to make a copy, but she did not return the original to the court. Thus, the letter was not part of the appellate record and could not be considered by COA.

In Appellant's affidavit, she stated that her expenses exceeded her income and that her liabilities exceeded her assets. However, Appellant took out a loan to purchase a house after becoming disabled, and although she mowed her own lawn, she paid for landscaping. Additionally, she paid for cable television and internet access. Further, she owned a motorcycle that she made no effort to sell. Finally, contrary to her statement in her affidavit, Appellant testified that she had not asked her family for help or tried to take out a loan to cover the costs of the appeal. Trial court did not abuse its discretion in finding Appellant was not indigent.

ALTHOUGH BOTH PARTIES AGREED THAT WIFE DID NOT RECEIVE ADEQUATE NOTICE OF A HEARING, AND BOTH PARTIES ASKED COA TO REVERSE TRIAL COURT'S JUDGMENT, THERE WAS NO ERROR TO REVERSE AND COA WAS PROHIBITED FROM REVERSING THE JUDGMENT

¶11-6-24. ***Culver v. Culver*****,** -- S.W.3d --, 2011 WL 5042070 (Tex. App.—Texarkana 2011, no pet. h.) (10/21/11).

Facts: While their divorce was pending, Husband sought a protective order against Wife. Wife received notice of the application and initially represented herself. Wife filed a general denial, a motion for discovery, and a motion for a continuance. The application was prosecuted by the DA on Husband's behalf. Wife made a motion for the trial judge to recuse himself. Trial judge referred the request to an administrative judge who found the request was untimely and factually insufficient. At trial, Husband presented evidence that Wife had committed family violence in the past and was likely to do so in the future. Trial judge granted a standard protective order. Wife filed a motion for new trial, a second request for recusal, and a motion for continuance. Soon after, Wife filed a notice of appeal. Subsequently, trial court held a hearing, of which the DA acknowledged Wife had no notice. COA held that the later judgments corrected judicial mistakes and were made while trial court had plenary power over the case. Wife complained that trial court erred in failing to refer her second motion to recuse to an administrative judge. Finally, Wife argued that the modified judgment was void because she received inadequate notice.

Holding: Affirmed

Opinion: Tex. R. Civ. P. 18a states that a motion requesting recusal must be filed ten days before trial and must be verified. Here, Wife's second motion to recuse was filed about three weeks after the hearing, so trial judge was not obligated to refer the motion to an administrative judge. Further, Wife's motion was not verified.

Husband agreed that Wife received inadequate notice of the hearing where trial court corrected the judgment and asked COA to reverse trial court's judgment. However, at the time the judgment was signed, the matter was still within the plenary power of trial court. The judgment did not include new substantive changes. It was a modification of the protective order based on the original evidence and hearing. Because trial court still had plenary jurisdiction over the case, it was not required to hold an additional hearing. Thus, Wife's due process rights were not violated by the lack of notice. While a party is generally not entitled to relief that has not been requested, "[a] reviewing court can reverse only when there is error in the judgment of the court below." So, even though Husband agreed with Wife on this issue, COA could not reverse because there was no error.

OWNERS WERE ENTITLED TO SEEK DAMAGES FOR THE SENTIMENTAL OR INTRINSIC VALUE OF THEIR DOG, WHICH WAS NEGLIGENTLY EUTHANIZED BY ANIMAL CONTROL EMPLOYEE

¶11-6-25. ***Medlen v. Strickland,*** -- S.W.3d --, 2011 WL 5247375 (Tex. App.—Fort Worth 2011, no pet. h.) (11/03/11).

Facts: Plaintiff-Owners' dog escaped from their yard and was picked up by animal control. Owner went to reclaim his dog, but he did not have enough money with him to pay the fees. Animal control told him that the dog would be tagged "hold for owner" and would not be euthanized. However, Defendant-Employee put the dog on the euthanize list despite the "hold for owner" tag. The dog was euthanized before Owner had an opportunity to reclaim his pet. Owners sued Employee for her negligence and sought to recover the dog's "sentimental or intrinsic" value. Trial court dismissed the lawsuit because Owners failed to state a claim for damages recognized at law. Owners appealed.

Holding: Reversed and Remanded

Opinion: In 1891, Tex. Sup. Court held that dogs were treated differently than personal property. At the time that case was decided, Texas law did not allow recovery for the sentimental value of any personal property. At that time, one could only recover actual damages for personal property, "not any fanciful price that [the plaintiff] might, for special reasons, place upon them." However, since that time, Tex. Sup. Court has held that if personal property has little or no market value, a plaintiff may recover damages based on the property's intrinsic or sentimental value. COA held that because of the special position pets hold in the family, there was no reason not to allow recovery for a lost pet at least to the same extent as any other personal property. Even the 1891 case noted that dogs "were of a special value to the owner." Trial court erred in dismissing Owners' action against Employee.

TRIAL JUDGE ABUSED HER DISCRETION IN ORDERING WIFE TO PREPAY $95,000 TO COVER ATTORNEY'S FEES ON APPEAL

¶11-6-26. ***Halleman v. Halleman,*** No. 02-11-00238-CV, 2011 WL 5247882 (Tex. App.—Fort Worth 2011, orig. proceeding) (mem. op.) (11/03/11).

Facts: Husband and Wife divorced. Trial court ordered Wife to pay $50,000 for Husband's attorney's fees, as well as attorney's fees on appeal. Husband's attorney testified as to the reasonableness and necessity of his fees. Husband's attorney also testified that he was unemployed and had not received any fees from Wife. Wife testified as to her income and expenses and stated that she did not have the ability to pay the $50,000 judgment. Wife had sold her car and lived in a house paid for by her mother. Wife's mother had paid her appellate attorney's retainer, but her mother expected to be paid back for the loan. Trial court ordered Wife to pay $95,000 into the court's registry to cover appeals to COA and Tex. Sup. Court. The order conditionally granted funds to be returned to Wife or paid to the attorney, depending on whether the attorney filed briefs and whether the courts affirmed attorney's motions. Wife filed a motion to suspend the temporary orders pending an appeal. Trial court denied the motion. Wife filed a petition for writ of mandamus, arguing that trial court abused its discretion in order the $95,000 pre-payment.

Holding: Petition for Mandamus Conditionally Granted

Opinion: TFC 6.709 permits a trial court to "require the payment of reasonable attorney's fees and expenses" if it is "necessary for the preservation of the property and for the protection of the parties during the appeal." This type of temporary order is not subject to interlocutory appeal. The evidence clearly showed that Wife would be unable to prepay the amount set in trial court's order. By requiring the prepayment of funds that were unavailable to Wife, trial court's order effectively precluded her right to appeal. Thus, Wife did not have

an adequate remedy by appeal. Furthermore, "[a]n unconditional award of appellant's appellate attorney's fees is improper." Trial court abused its discretion by requiring Wife to prepay counsel's attorney's fees. COA ordered trial court to substitute conditional language that was provided in COA's opinion.

Editor's Comment: *Although it is true that an unconditional award of appellate attorney's fees is improper, the order in this case expressly conditioned that the funds would be returned to wife if she won on appeal. Thus, the order WAS conditional. And although there was testimony that wife's financial situation was tight, she had managed to pay her appellate attorney's fees retainer without problem and certainly there was similar testimony about husband's dire financial straits. Lastly, husband had very legitimate concerns about wife's payment of any appellate attorney's fees after the fact because she had already failed to pay the $50,000 judgment for TRIAL attorney's fees that had previously been awarded. This opinions appears to conflict with In re Garza, 153 S.W.3d 97, 101 (Tex. App.—San Antonio 2004, no pet.), both of which hold that similar orders are permitted. R.T.*

TRIAL COURT ORDERED TO RULE ON APPELLANT'S MOTIONS THAT HAD BEEN PENDING FOR OVER A YEAR

¶11-6-27. ***In re Armstrong,*** No. 06-11-00100-CV, 2011 WL 5561705 (Tex. App.—Texarkana 2011, no orig. proceeding) (mem. op.) (11/16/11).

Facts: Appellant filed several motions with the trial court. After over a year without a ruling, Appellant filed a petition for writ of mandamus, asking COA to order trial court to rule on his motions.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: A petition for writ of mandamus may be granted when there is no adequate remedy at law and the act to be compelled is purely ministerial. Ruling on a motion is a ministerial act. A mandamus can be issued if a trial court refuses to rule on a pending motion within a reasonable amount of time. What is reasonable depends on the facts of each case. Here, the motions were pending for over a year. Appellant was entitled to have a ruling.

Editor's Comment: *I wonder how the trial court ruled? C.N.*

FATHER WAS NOT ENTITLED TO A RESTRICTED APPEAL BECAUSE HE DID NOT SATISFY THE JURISDICTIONAL REQUIREMENTS; FATHER WAS NOT A PARTY TO THE ORIGINAL TERMINATION PROCEEDINGS

¶11-6-28. ***In re Baby Girl S.,*** -- S.W.3d --, 2011 WL 5975155 (Tex. App.—Dallas 2011, no pet. h.) (11/30/11).

Facts: Mother relinquished her parental rights to the Child a few days after the Child was born. At that time, there was no presumed father, and Father had not filed a notice of intent to claim paternity. An adoption agency filed a petition to terminate both Parents' parental rights. Trial court found no man had timely registered with the Texas Paternity Registry and that it was in the Child's best interests to terminate both Parents' parental rights. Six months later Father filed a notice of restricted appeal, a petition in intervention, and a motion for new trial. Trial court denied Father's petition and motion. Father argued that trial court's judgment terminating his parental rights was void because trial court violated his due process rights by failing to provide adequate notice.

Holding: Dismissed for want of jurisdiction

Opinion: "To prevail on a restricted appeal, [the person seeking it] must establish: (1) he filed notice of the restricted appeal within six months after the judgment was signed; (2) he was a party to the underlying suit, (3) he 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, Father was not a party to the underlying suit, and his first appearance was six months after the judgment. Because Father failed to meet the jurisdictional requirements of a restricted appeal, COA dismissed the appeal.