SECTION REPORT
FAMILY LAW

http://www.sbotfam.org Volume 2018-2 (Spring)

IN THIS MONTH'S REPORT

NEWSLETTER EDITOR
Georganna L. Simpson
Georganna L. Simpson, P.C.
1349 Empire Central Drive, Ste. 600
Dallas, Texas 75247
214.905.3739 • 214.905.3799 (fax)
georganna@glsimpsonpc.com

COUNCIL ADMINISTRATIVE ASSISTANT
Christi A. Lankford. christil@idworld.net
Section Wear and Publications

MESSAGE FROM THE CHAIR

My tenure as Chair of this Section will be coming to a close soon. It has been a privilege to serve you, and I hope the Family Law Section provided you with valuable information and insight. As always, we are here to serve you so please do not hesitate to reach out to me with any questions or concerns.

Membership

- As you already know, membership in the Family Law Section is a great value! For only $40 per year, you receive:
- The Family Lawyer's Essential Tool Kit;
- The Family Law Section Report every quarter with articles, case digests, an annual bibliography of recent CLE articles, and a legislative update; and,
- Discounts on State Bar family law seminars such as the Advanced Family Law Course, Marriage Dissolution, New Frontiers in Marital Property Law, and Innovations—Breaking Boundaries in Child Custody Litigation.

If you are already a member, thank you. If you know attorneys who are not members, we would love for you to spread the word of our benefits.

Innovations—Breaking Boundaries in Child Custody Litigation

Thank you to Angela Pence England and Charlotte Rainwater for organizing a spectacular course in New Orleans in January. The speakers and topics were both entertaining and educational…the perfect combination! Thanks for making this program a success.

Publications

The Client Notebook is a flash drive that enables attorneys to print information that is helpful to your client. You can print the applicable portions of the Notebook, place it in a binder, and give to your clients. Family Law At Your Fingertips, the Predicates Manual, and the Fast Guide to Family Law—Checklists for Everyday Practice are must-haves for your practice. The DVDs are a great source of information for clients regarding depositions, trials, mediation and social media presence. If you are interested in purchasing a publication, please visit the Section's website at www.sbotfam.org.

Website

We are currently in the process of re-vamping our website. Make sure to check in often to see the new and improved version!

Upcoming CLE

Collaborative Law Course
March 22, 2018 (ATT Conference Center, Austin, TX)

Marriage Dissolution
April 12-13, 2018 (Westin Galleria Hotel, Dallas, TX)
Course Director: Chris Wramplemeier
101 Course Director: Jacqueline Smith

Advanced Family Law
August 13-16, 2018 (Marriott Rivercenter, San Antonio, TX)
Course Directors: Anna McKim and Rick Robertson
101 Course Director: Lisa Hoppes

GO TO TABLE OF CONTENTS

I am proud to call myself a family law attorney. I am proud to be a member of the Family Law Section. The collegiality and mentorship amongst members of this Section renew my faith in this profession. I want to thank Georganna Simpson for her dedication to this Section. She compiles this Section Report, the Bibliography, and the legislative update timely, efficiently, and without much recognition. The next time you see her, please give her a word of thanks.

It has been an honor and privilege to serve as Chair, and I welcome Stephen Naylor as Chair next year. Although I will be stepping down as Chair, I look forward to volunteering my time in the future to this Section and to the family law attorneys of the State of Texas in whatever way I can. Thank you for my chance to do so.

Cindy Tisdale
Chair, Family Law Section

2018 Recommended Nominations Slate
State Bar of Texas Family Law Section

Pursuant to Article VI, Section 1 of the Bylaws of the State Bar of Texas, Family Law Section, the Nominating Committee of the Section hereby forwards the following names for the following positions on the Family Law Council:

Officers		**Nominations to the Class 2023**
Chair:	**Stephen Naylor**	**Roxie W. Cluck (Canton)**
Chair-Elect:	**Chris Nickelson**	**Karl E. Hays (Austin)(silver bullet)**
Vice-Chair:	**Kristal Thomson**	**Sarah Keathley (Corsicana)**
Treasurer:	**Jonathan Bates**	**Chad Petross (Weatherford)**
Secretary:	**Joseph Indelicato, Jr**	**Dean Rucker (Midland)**
Immediate Past Chair:	**Cindy Tisdale**	

The election will take place on **April 12, 2018,** at the section meeting during Marriage Dissolution.

GO TO TABLE OF CONTENTS

OFFICE OF ATTORNEY GENERAL
2018 REVISED TAX CHARTS

Effective February 2, 2018

Pursuant to § 154.061(b) of the Texas Family Code, the Office of the Attorney General of Texas, as the Title IV-D agency, has promulgated the following tax charts to assist courts in establishing the amount of a child support order. These tax charts are applicable to employed and self-employed persons in computing net monthly income.

INSTRUCTIONS FOR USE

To use these tables, first compute the obligor's annual gross income. Then recompute to determine the obligor's average monthly gross income. These tables provide a method for calculating "monthly net income" for child support purposes, subtracting from monthly gross income the social security taxes and the federal income tax withholding for a single person claiming one personal exemption and the standard deduction.

Thereafter, in many cases the guidelines call for a number of additional steps to complete the necessary calculations. For example, §§ 154.061 - 154.070 provide for appropriate additions to "income" as that term is defined for federal income tax purposes, and for certain subtractions from monthly net income, in order to arrive at the net resources of the obligor available for child support purposes. If necessary, one may compute an obligee's net resources using similar steps.

LIMITATIONS ON USE

These charts are intended to assist courts in common situations, and do not account for all deductions and adjustments allowable under the Internal Revenue Code. For instance, these charts do not take into account the qualified business income deduction which might be taken by some owners of sole proprietorships, S corporations, partnerships, or stand-alone rental properties (pass-thru entities). In some situations, section 199A of the Internal Revenue Code allows owners of pass-thru entities to take a deduction against their income resulting in a reduction of the effective tax rate. These charts should not be used to estimate the net income of owners of pass-thru entities. The computation of net income for parties with complex tax situations may require consultation with an income tax professional.

REASONS FOR REVISION

2018 Tax Charts published in the Texas Register on December 29, 2017 were prepared and submitted for publication before enactment of recent amendments to the Internal Revenue Code. *An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.).* The 2018 Revised Tax Charts consider temporary changes to the Internal Revenue Code for tax years 2018 through 2025, including new income tax brackets and rates, reduction of the personal exemption to zero, and an increased standard deduction. Column headings were revised for greater accuracy, alternating row shading was added to enhance readability, and new income levels were selected for the left hand column (removal of some rows for very low income, increase in the number of rows that display in $100 increments, removal of rows for income that exceed the point where net resources reach $8550 [more fully explained in the footnotes]).

GO TO TABLE OF CONTENTS

EMPLOYED PERSONS 2018 REVISED TAX CHART				
	Federal Insurance Contributions Act Taxes			
Monthly Gross Wages	Old-Age, Survivors and Disability Insurance Program (Social Security) Tax (6.2%)*	Medicare's Hospital Insurance Program (Medicare) Tax (1.45%)*	Federal Income Tax***	Net Monthly Income
$500.00	$31.00	$7.25	$0.00	$461.75
$750.00	$46.50	$10.88	$0.00	$692.62
$1,000.00	$62.00	$14.50	$0.00	$923.50
$1,100.00	$68.20	$15.95	$10.00	$1,005.85
$1,200.00	$74.40	$17.40	$20.00	$1,088.20
$1,256.67****	$77.91	$18.22	$25.67	$1,134.87
$1,300.00	$80.60	$18.85	$30.00	$1,170.55
$1,400.00	$86.80	$20.30	$40.00	$1,252.90
$1,500.00	$93.00	$21.75	$50.00	$1,335.25
$1,600.00	$99.20	$23.20	$60.00	$1,417.60
$1,700.00	$105.40	$24.65	$70.00	$1,499.95
$1,800.00	$111.60	$26.10	$80.12	$1,582.18
$1,900.00	$117.80	$27.55	$92.12	$1,662.53
$2,000.00	$124.00	$29.00	$104.12	$1,742.88
$2,100.00	$130.20	$30.45	$116.12	$1,823.23
$2,200.00	$136.40	$31.90	$128.12	$1,903.58
$2,300.00	$142.60	$33.35	$140.12	$1,983.93
$2,400.00	$148.80	$34.80	$152.12	$2,064.28
$2,500.00	$155.00	$36.25	$164.12	$2,144.63
$2,600.00	$161.20	$37.70	$176.12	$2,224.98
$2,700.00	$167.40	$39.15	$188.12	$2,305.33
$2,800.00	$173.60	$40.60	$200.12	$2,385.68
$2,900.00	$179.80	$42.05	$212.12	$2,466.03
$3,000.00	$186.00	$43.50	$224.12	$2,546.38
$3,100.00	$192.20	$44.95	$236.12	$2,626.73
$3,200.00	$198.40	$46.40	$248.12	$2,707.08
$3,300.00	$204.60	$47.85	$260.12	$2,787.43
$3,400.00	$210.80	$49.30	$272.12	$2,867.78
$3,500.00	$217.00	$50.75	$284.12	$2,948.13
$3,600.00	$223.20	$52.20	$296.12	$3,028.48
$3,700.00	$229.40	$53.65	$308.12	$3,108.83
$3,800.00	$235.60	$55.10	$320.12	$3,189.18
$3,900.00	$241.80	$56.55	$332.12	$3,269.53
$4,000.00	$248.00	$58.00	$344.12	$3,349.88
$4,100.00	$254.20	$59.45	$356.12	$3,430.23
$4,200.00	$260.40	$60.90	$368.12	$3,510.58
$4,300.00	$266.60	$62.35	$387.62	$3,583.43
$4,400.00	$272.80	$63.80	$409.62	$3,653.78
$4,500.00	$279.00	$65.25	$431.62	$3,724.13
$4,600.00	$285.20	$66.70	$453.62	$3,794.48
$4,700.00	$291.40	$68.15	$475.62	$3,864.83
$4,800.00	$297.60	$69.60	$497.62	$3,935.18
$4,900.00	$303.80	$71.05	$519.62	$4,005.53
$5,000.00	$310.00	$72.50	$541.62	$4,075.88
$5,100.00	$316.20	$73.95	$563.62	$4,146.23
$5,200.00	$322.40	$75.40	$585.62	$4,216.58
$5,300.00	$328.60	$76.85	$607.62	$4,286.93
$5,400.00	$334.80	$78.30	$629.62	$4,357.28
$5,500.00	$341.00	$79.75	$651.62	$4,427.63
$5,600.00	$347.20	$81.20	$673.62	$4,497.98
$5,700.00	$353.40	$82.65	$695.62	$4,568.33
$5,800.00	$359.60	$84.10	$717.62	$4,638.68
$5,900.00	$365.80	$85.55	$739.62	$4,709.03
$6,000.00	$372.00	$87.00	$761.62	$4,779.38
$6,250.00	$387.50	$90.63	$816.62	$4,955.25
$6,500.00	$403.00	$94.25	$871.62	$5,131.13
$6,750.00	$418.50	$97.88	$926.62	$5,307.00
$7,000.00	$434.00	$101.50	$981.62	$5,482.88
$7,500.00	$465.00	$108.75	$1,091.62	$5,834.63
$8,000.00	$496.00	$116.00	$1,204.12	$6,183.88
$8,500.00	$527.00	$123.25	$1,324.12	$6,525.63
$9,000.00	$558.00	$130.50	$1,444.12	$6,867.38
$9,500.00	$589.00	$137.75	$1,564.12	$7,209.13
$10,000.00	$620.00	$145.00	$1,684.12	$7,550.88
$10,500.00	$651.00	$152.25	$1,804.12	$7,892.63
$11,000.00	$663.40**	$159.50	$1,924.12	$8,252.98
$11,398.43*****	$663.40	$165.28	$2,019.75	$8,550.00

GO TO TABLE OF CONTENTS

Footnotes to Employed Persons 2018 Revised Tax Chart:

References to "the Code" refer to the Internal Revenue Code of 1986, as amended (26 U.S.C.)

*An employed person not subject to the Social Security Tax and the Medicare Tax will be allowed the reductions reflected in these columns, unless it is shown that such person has no similar contributory plan such as teacher retirement, federal railroad retirement, federal civil service retirement, etc.

** This amount represents the maximum monthly average of the Social Security tax based on the maximum OASDI Contribution and Benefit Base amount of $128,400 for 2018. In 2018 the maximum level of Monthly Gross Wages for an employed person subject to the 6.2% Social Security tax is $128,400 per year.

Monthly Gross Wages	$128,400 for the year, or $10,700 monthly average
Social Security tax rate = 6.2%	$128,400 is equal to the 2018 OASDI contribution and benefit base, so $128,400 is taxed at this rate. $128,400 x .062 = $7,960.80 for the year, or $663.40 monthly average

*** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption (in the case of a taxable year beginning after December 31, 2017, and before January 1, 2026 the exemption amount is zero), and taking the standard deduction ($12,000).

Examples:

Monthly Gross Wages	$72,000 for the year, or $6,000 monthly average	$132,000 for the year, or $11,000 monthly average
Personal Exemption Section 151(d) of the Code	$0 for tax years 2018 through 2025	$0 for tax years 2018 through 2025
Standard Deduction Section 63(c) of the Code	$12,000	$12,000
Income amount to be used in the income tax computation	$72,000 - $0 - $12,000 = $60,000	$132,000 - $0 - $12,000 = $120,000
Income tax computation for 2018	*If taxable income is over $38,700 but not over $82,500, the tax is $4,453.50 plus 22% of the excess over $38,700 (Section 1(j) of the Code)* $4,453.50 + (($60,000 - $38,700) x .22) = $9,139.50 for the year, or $761.62 monthly average	*If taxable income is over $82,500 but not over $157,500, the tax is $14,089.50 plus 24% of the excess over $82,500 (Section 1(j) of the Code)* $14,089.50 + (($120,000 - $82,500) x .24 = $23,089.50 for the year, or $1,924.12 monthly average

**** This amount represents one-twelfth (1/12) of the gross income of an individual earning the federal minimum wage ($7.25 per hour) for a 40-hour week for a full year.

Federal Minimum Wage = $7.25 per hour	$7.25 x 40 hours per week x 52 weeks per year = $15.080 per year
Monthly average	$15,080 / 12 = $1.256.67 monthly average

***** This amount represents the point where the monthly gross wages of an employed individual would result in $8,550.00 of net resources. Texas Family Code section 154.125 provides "The guidelines for the support of a child in this section are specifically designed to apply to situations in which the obligor's monthly net resources are not greater than $7,500 or the adjusted amount determined under Subsection (a-1), whichever is greater." Effective September 1, 2013 the adjusted amount determined under Subsection (a-1) is $8,550.00. Texas Family Code section 154.126(a) provides, "If the obligor's net resources exceed the amount provided by Section 154.125(a), the court shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed that amount. Without further reference to the percentage recommendation by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child." The tax charts promulgated by the Office of the Attorney General include net monthly income amounts up to the amount specified in Texas Family Code section 154.125.

* *

GO TO TABLE OF CONTENTS

Citations Relating to Employed Persons 2018 Revised Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax
   (a) Contribution Base
      (1) Social Security Administration's notice appearing in 82 Fed. Reg. 59937 (December 15, 2017)
      (2) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))
      (3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

   (b) Tax Rate
      (1) Section 3101(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3101(a))

2. Hospital (Medicare) Insurance Tax
   (a) Contribution Base
      (1) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))
      (2) Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467-69 (1993)

   (b) Tax Rate
      (1) Section 3101(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3101(b))

3. Federal Income Tax
   (a) Tax Rate Schedule for 2018 for Single Taxpayers
      (1) An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.) amended the Internal Revenue Code of 1986 by adding Section 1(j) to include tax rates for the taxable years 2018 through 2025.
      (2) Section 1(j) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1(j))

   (b) Standard Deduction
      (1) An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.) amended the Internal Revenue Code of 1986 by amending subsection (c) of section 63 to increase the basic standard deduction to $12,000.00 for the taxable years 2018 through 2025 (and may be adjusted for inflation for tax years 2019 through 2025).

      (2) Section 63(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 63(c))

   (c) Personal Exemption
      (1) An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.) amended the Internal Revenue Code of 1986, by adding a new paragraph to Section 151(d), which dictates that the personal exemption amount is zero for the taxable years 2018 through 2025.
      (2) Section 151(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 151(d))

4. Adjusted amount determined under Subsection (a-1) of Texas Family Code section 154.125
   Office of the Attorney General "Announcement of Adjustment Required by Texas Family Code section 154.125" appearing in 38 TexReg 4647 (July 19, 2013)

GO TO TABLE OF CONTENTS

SELF-EMPLOYED PERSONS 2018 REVISED TAX CHART				
Monthly Self-Employment Income TFC 154.065*	Old-Age, Survivors and Disability Insurance Program (Social Security) Tax (12.4%)**	Medicare's Hospital Insurance Program (Medicare) Tax (2.9%)**	Federal Income Tax****	Net Monthly Income
$500.00	$57.26	$13.39	$0.00	$429.35
$750.00	$85.89	$20.09	$0.00	$644.02
$1,000.00	$114.51	$26.78	$0.00	$858.71
$1,100.00	$125.97	$29.46	$2.23	$942.34
$1,200.00	$137.42	$32.14	$11.52	$1,018.92
$1,300.00	$148.87	$34.82	$20.82	$1,095.49
$1,400.00	$160.32	$37.49	$30.11	$1,172.08
$1,500.00	$171.77	$40.17	$39.40	$1,248.66
$1,600.00	$183.22	$42.85	$48.70	$1,325.23
$1,700.00	$194.67	$45.53	$57.99	$1,401.81
$1,800.00	$206.13	$48.21	$67.28	$1,478.38
$1,900.00	$217.58	$50.88	$76.58	$1,554.96
$2,000.00	$229.03	$53.56	$87.17	$1,630.24
$2,100.00	$240.48	$56.24	$98.32	$1,704.96
$2,200.00	$251.93	$58.92	$109.47	$1,779.68
$2,300.00	$263.38	$61.60	$120.63	$1,854.39
$2,400.00	$274.83	$64.28	$131.78	$1,929.11
$2,500.00	$286.29	$66.95	$142.93	$2,003.83
$2,600.00	$297.74	$69.63	$154.08	$2,078.55
$2,700.00	$309.19	$72.31	$165.23	$2,153.27
$2,800.00	$320.64	$74.99	$176.39	$2,227.98
$2,900.00	$332.09	$77.67	$187.54	$2,302.70
$3,000.00	$343.54	$80.34	$198.69	$2,377.43
$3,100.00	$354.99	$83.02	$209.84	$2,452.15
$3,200.00	$366.44	$85.70	$221.00	$2,526.86
$3,300.00	$377.90	$88.38	$232.15	$2,601.57
$3,400.00	$389.35	$91.06	$243.30	$2,676.29
$3,500.00	$400.80	$93.74	$254.45	$2,751.01
$3,600.00	$412.25	$96.41	$265.61	$2,825.73
$3,700.00	$423.70	$99.09	$276.76	$2,900.45
$3,800.00	$435.15	$101.77	$287.91	$2,975.17
$3,900.00	$446.60	$104.45	$299.06	$3,049.89
$4,000.00	$458.06	$107.13	$310.21	$3,124.60
$4,100.00	$469.51	$109.80	$321.37	$3,199.32
$4,200.00	$480.96	$112.48	$332.52	$3,274.04
$4,300.00	$492.41	$115.16	$343.67	$3,348.76
$4,400.00	$503.86	$117.84	$354.82	$3,423.48
$4,500.00	$515.31	$120.52	$365.98	$3,498.19
$4,600.00	$526.76	$123.19	$382.13	$3,567.92
$4,700.00	$538.22	$125.87	$402.57	$3,633.34
$4,800.00	$549.67	$128.55	$423.02	$3,698.76
$4,900.00	$561.12	$131.23	$443.47	$3,764.18
$5,000.00	$572.57	$133.91	$463.91	$3,829.61
$5,100.00	$584.02	$136.59	$484.36	$3,895.03
$5,200.00	$595.47	$139.26	$504.80	$3,960.47
$5,300.00	$606.92	$141.94	$525.25	$4,025.89
$5,400.00	$618.38	$144.62	$545.69	$4,091.31
$5,500.00	$629.83	$147.30	$566.14	$4,156.73
$5,600.00	$641.28	$149.98	$586.59	$4,222.15
$5,700.00	$652.73	$152.65	$607.03	$4,287.59
$5,800.00	$664.18	$155.33	$627.48	$4,353.01
$5,900.00	$675.63	$158.01	$647.92	$4,418.44
$6,000.00	$687.08	$160.69	$668.37	$4,483.86
$6,250.00	$715.71	$167.38	$719.48	$4,647.43
$6,500.00	$744.34	$174.08	$770.60	$4,810.98
$6,750.00	$772.97	$180.78	$821.71	$4,974.54
$7,000.00	$801.60	$187.47	$872.83	$5,138.10
$7,500.00	$858.86	$200.86	$975.06	$5,465.22
$8,000.00	$916.11	$214.25	$1,077.29	$5,792.35
$8,500.00	$973.37	$227.64	$1,180.00	$6,118.99
$9,000.00	$1,030.63	$241.03	$1,291.53	$6,436.81
$9,500.00	$1,087.88	$254.42	$1,403.05	$6,754.65
$10,000.00	$1,145.14	$267.82	$1,514.57	$7,072.47
$10,500.00	$1,202.40	$281.21	$1,626.09	$7,390.30
$11,000.00	$1,259.65	$294.60	$1,737.61	$7,708.14
$11,500.00	$1,316.91	$307.99	$1,849.14	$8,025.96
$12,000.00	$1,326.80***	$321.38	$1,966.34	$8,385.48
$12,223.40*****	$1,326.80	$327.36	$2,019.24	$8,550.00

GO TO TABLE OF CONTENTS

Footnotes to Self-Employed Persons 2018 Revised Tax Chart:

References to "the Code" refer to the Internal Revenue Code of 1986, as amended (26 U.S.C.)

*Texas Family Code Section 154.065 defines what is included in, and what may be excluded from, self-employment income for Texas child support guideline computation purposes. The values displayed in the first column of this chart are the full amount of net earnings from self-employment income (determined before the deduction required by Section 1402(a)(12) of the Code explained in the next footnote, **).

** The tax rates for self-employment taxes are 12.4% for the Social Security tax and 2.9% for the Medicare tax, however, only a portion of the net earnings from self-employment are subject to these taxes. Section 1402(a)(12) of the Code permits a self-employed person a deduction in net earnings from self-employment (as defined in sections 1401 and 1402 of the Code) equal to one-half of the combined rates. The purpose is to adjust net income downward by the amount that would have been paid by an employer, had the individual been classified as an employee. The sum of these rates is 15.3% (12.4% + 2.9% = 15.3%). One-half (1/2) of the combined rate is 7.65% (15.3% x 1/2 = 7.65%). Self-employed taxpayers compute this deduction by multiplying net earnings from self-employment by .9235 (100% - 7.65% = 92.35%) to determine the portion of self-employment income subject to self-employment taxes.

Social Security tax is owed on the portion of self-employment income subject to self-employment taxes that do not exceed the maximum OASDI Contribution and Benefit Base amount of $128,400 (for tax year 2018). Medicare's Hospital Insurance Program (Medicare) tax is owed on the full amount of self-employment income subject to self-employment taxes. Section 1401 of the Code.

Examples:

Monthly Self-Employment Income, TFC 154.065	$72,000 for the year, or $6,000 monthly average	$144,000 for the year, or $12,000 monthly average
92.35% of self-employment income is subject to self-employment taxes	$72,000 x .9235 = $66,492 for the year	$144,000 x .9235 = $132,984 for the year
Social Security tax rate = 12.4%	$66,492 does not exceed the OASDI contribution and benefit base, so $66,492 is taxed at this rate. $66,492 x .124 = $8,245 for the year, or $687.08 monthly average	$132,984 exceeds the OASDI contribution and benefit base, so only the first $128,400 is taxed at this rate. $128,400 x .124 = $15,921.60 for the year, or $1,326.80 monthly average
Medicare tax rate = 2.9%	$66,492 x .029 = $1,928.27 for the year, or $160.69 monthly average	$132,984 x .029 = $3,856.54 for the year, or $321.38 monthly average

*** This amount represents the maximum monthly average of the Social Security tax based on the maximum OASDI Contribution and Benefit Base amount of $128,400 for 2018. In 2018 the maximum level of Monthly Self-Employment Income subject to the 12.4% Social Security tax is $139,036.27 per year (the amount before the deduction required by Section 1402(a)(12) of the Code).

Monthly Self-Employment Income, TFC 154.065	$139,036.27 for the year, or $11,586.36 monthly average
92.35% of self-employment income is subject to self-employment taxes	$139,036.27 x .9235 = $128,400 for the year
Social Security tax rate = 12.4%	$128,400 is equal to the 2018 OASDI contribution and benefit base, so $128,400 is taxed at this rate. $128,400 x .124 = $15,921.60 for the year, or $1,326.80 monthly average

**** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption (in the case of a taxable year beginning after December 31, 2017, and before January 1, 2026 the exemption amount is zero), and taking the standard deduction ($12,000).

The calculation of federal income taxes on self-employment income requires the determination of the total self-employment taxes imposed, as described above. The calculation of federal income taxes permits the taxpayer to reduce net income from self-employment by one half of the actual taxes imposed thereby approximating the employment taxes (Social Security and Medicare) that are paid by an employed person. Section 164(f) of the Code.

GO TO TABLE OF CONTENTS

Examples:

Monthly Self-Employment Income, TFC 154.065	$72,000 for the year, or $6,000 monthly average	$144,000 for the year, or $12,000 monthly average
Social security tax	$8,245 for the year, or $687.08 monthly average	$15,921.60 for the year, or $1,326.80 monthly average
Medicare tax	$1,928.27 for the year, or $160.69 monthly average	$3,856.54 for the year, or $321.38 monthly average
Total self-employment taxes imposed	$8,245 + $1,928.27 = $10,173.27 for the year	$15,921.60 + $3,856.54 = $19,778.18 for the year
Tax deductible portion of self-employment taxes. Section 164(f) of the Code	$10,173.27 x 1/2 = $5,086.64 for the year	$19,778.14 x 1/2 = $9,889.07 for the year
Personal Exemption Section 151(d) of the Code	$0 for tax years 2018 through 2025	$0 for tax years 2018 through 2025
Standard Deduction Section 63(c) of the Code	$12,000	$12,000
Income amount to be used in the income tax computation	$72,000 - $5,086.64 - $0 - $12,000 = $54,913.36	$144,000 - $9,889.07 - $0 - $12,000 = $122,110.93
Income tax computation for 2018	*If taxable income is over $38,700 but not over $82,500, the tax is $4,453.50 plus 22% of the excess over $38,700 (Section 1(j) of the Code)* $4,453.50 + (($54,913.36 - $38,700) x .22) = $8,020.44 for the year, or $668.37 monthly average	*If taxable income is over $82,500 but not over $157,500, the tax is $14,089.50 plus 24% of the excess over $82,500 (Section 1(j) of the Code)* $14,089.50 + (($122,110.93 - $82,500) x .24 = $23,596.12 for the year, or $1,966.34 monthly average

Note: For tax years 2018 through 2025, the personal exemption amount is zero. Section 63(c) of the Code. For 2018, the computations do not include the subtraction of any personal exemptions.

***** This amount represents the point where the monthly gross wages of an employed individual would result in $8,550.00 of net resources. Texas Family Code section 154.125 provides, "The guidelines for the support of a child in this section are specifically designed to apply to situations in which the obligor's monthly net resources are not greater than $7,500 or the adjusted amount determined under Subsection (a-1), whichever is greater." Effective September 1, 2013 the adjusted amount determined under Subsection (a-1) is $8,550.00. Texas Family Code section 154.126(a) provides, "If the obligor's net resources exceed the amount provided by Section 154.125(a), the court shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed that amount. Without further reference to the percentage recommendation by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child." The tax charts promulgated by the Office of the Attorney General include net monthly income amounts up to the amount specified in Texas Family Code section 154.125.

* *

Citations Relating to Self-Employed Persons 2018 Revised Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax
   (a) Contribution Base
      (1) Social Security Administration's notice appearing in 82 Fed. Reg. 59937 (December 15, 2017)
      (2) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))
      (3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

   (b) Tax Rate
      (1) Section 1401(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1401(a))

   (c) Deduction Under Section 1402(a)(12)
      (1) Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12))

2. Hospital (Medicare) Insurance Tax
   (a) Contribution Base
      (1) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))
      (2) Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467-69 (1993)

   (b) Tax Rate
      (1) Section 1401(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1401(b))

   (c) Deduction Under Section 1402(a)(12)
      (1) Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12))

GO TO TABLE OF CONTENTS

3. Federal Income Tax
   (a) Tax Rate Schedule for 2018 for Single Taxpayers
      (1) An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.) amended the Internal Revenue Code of 1986 by adding Section 1(j) to include tax rates for the taxable years 2018 through 2025.
      (2) Section 1(j), of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1(j))

   (b) Standard Deduction
      (1) An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.) amended the Internal Revenue Code of 1986 by amending subsection (c) of section 63 to increase the basic standard deduction to $12,000.00 for the taxable years 2018 through 2025 (and may be adjusted for inflation for tax years 2019 through 2025).
      (2) Section 63(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 63(c))

   (c) Personal Exemption
      (1) An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.) amended the Internal Revenue Code of 1986, by adding a new paragraph to Section 151(d), which dictates that the personal exemption amount is zero for the taxable years 2018 through 2025.
      (2) Section 151(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 151(d))

   (d) Deduction Under Section 164(f)
      (1) Section 164(f) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 164(f))

4. Adjusted amount determined under Subsection (a-1) of Texas Family Code section 154.125
   Office of the Attorney General "Announcement of Adjustment Required by Texas Family Code section 154.125" appearing in 38 TexReg 4647 (July 19, 2013)

TABLE OF CASES

GO TO TABLE OF CONTENTS

IN THE LAW REVIEWS AND LEGAL PUBLICATIONS

NON-TEXAS ARTICLES

GO TO TABLE OF CONTENTS

Corporate Family Law, Allison Anna **Tait**, 112 Nw. U. L. Rev. 1 (2017).
Overcoming Roadblocks to Reaching Settlement in Family Law Cases, John **Lande**, 40-WTR Fam. Advoc. 26 (Winter 2018).
Shifting Ethical and Social Conundrums and "Stunningly Anachronistic" Laws: What Lawyers in Adoption and Assisted Reproduction May Want to Consider, Dana E. **Prescott** & Gary A. **Debele**, 30 J. Am. Acad. Matrim. Law. 127 (2017).
Parents, Babies, and More Parents, June **Carbone** & Naomi **Cahn**, 92 Chi.-Kent L. Rev. 9 (2017).
Nurturing Parenthood Through the UPA (2017), Courtney G. **Joslin**, 127 Yale L.J. Forum 589 (January 7, 2018).
The Intersection of Sharia and Family Law: A Policy and Case Summary, Christine **Albano** & Laura W. **Morgan** 30 J. Am. Acad. Matrim. Law. 219 (2017).
Doing More for Children with Less: Multidisciplinary Representation of Poor Children in Family Court and Probate Court, Robert N. **Jacobs** & Christina **Riehl**, 50 Loy. L.A. L. Rev. 1 (2017).
The Evolutionary Interpretation of Treaties and the Right to Marry: Why Article 23(2) of the ICCPR Should Be Interpreted to Encompass Same-Sex Marriage, Oscar I. **Roos** & Anita **Mackay**, 49 Geo. Wash. Int'l L. Rev. 879 (2017).
Distributing Children as Property: The Best Interest of the Children or the Best Interest of the Parents?, Darya **Hakimpour**, 37 Child. Legal Rts. J. 128 (2017).
Stemming the Tide of Misinformation: International Consensus on Shared Parenting and Overnighting, Richard A. **Warshak, Ph.D.**, 30 J. Am. Acad. Matrim. Law. 177 (2017).
Cutting Off the Umbilical Cord – Reflections on the Possibility to Sever the Parental Bond, Tali **Marcus**, 25 J.L. & Pol'y 583 (2017).
Collaborative Divorce: What Louis Brandeis Might Say About the Promise and Problems?, Susan Saab **Fortney**, 33 Touro L. Rev. 371 (2017).
Roadblocks: The Court's Jurisdiction or Authority to Act, Kathleen A. **Hogan**, 40-WTR Fam. Advoc. 9 (Winter 2018).
Who is the Parent and Who is the Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: The U.S. Perspective, Mary Kay **Kisthardt** & Richard A. **Roane**, 30 J. Am. Acad. Matrim. Law. 55 (2017).
A Bone to Pick: Applying a "Best Interest of the Family" Standard in Pet Custody Disputes, L. Morgan **Eason**, 62 S.D. L. Rev. 79 (2017).
Religious Law Cannot Be Enforced by Any Civil Court in the United States, Gerald L. **Nissenbaum** & Wendy O. **Hickey**, 30 J. Am. Acad. Matrim. Law. 83 (2017).
Pro Se Roadblocks: How to Get Around Them, Amy Calvo **MacNamara**, 40-WTR Fam. Advoc. 12 (Winter 2018).
Habitual Residence: Perspective from the United Kingdom, Caroline **Holley**, 30 J. Am. Acad. Matrim. Law. 233 (2017).
Your Money or Your Life: Indian Parents and Child Support Modifications, Marcia **Zug**, 29 J. Am. Acad. Matrim. Law. 409 (2017).
Legal Issues Facing Transgender and Gender-Expansive Youth, Angie **Martell**, 96-DEC Mich. B.J. 30 (December 2017).
In the Shadow of a Myth: Bargaining for Same-Sex Divorce, Noa **Ben-Asher**, 78 Ohio St. L.J. 1345 (2017).
Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children, Timothy **Sandefur**, 37 Child. Legal Rts. J. 1 (2017).
Chickens and Eggs: Does Custody Move Support, or Vice-Versa, Margaret F. **Brinig**, 29 J. Am. Acad. Matrim. Law. 269 (2017).
Marriage, Divorce, Death, and ERISA, David **Pratt**, 31 Quinnipiac Prob. L.J. 101 (2018).
A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion over Religious Exemptions, and the Future of Free Exercise, James M. **Oleske, Jr.**, 20 Lewis & Clark L. Rev. 1317 (2017).
Increasing Legal Support for End-of-Life Planning in the United States: How Probate and Family Attorneys Can Contribute to a Culture of Dignified Dying, Sarah E. **Ryan**, 30 Quinnipiac Prob. L.J. 335 (2017).

GO TO TABLE OF CONTENTS

IN BRIEF

Family Law From Around the Nation
by
Jimmy L. Verner, Jr.

Abuse: The Iowa Supreme Court reversed a court of appeals, to rule that a father's history of domestic violence and his physical abuse against other family members supported an adjudication of a child in need of assistance without a showing of physical abuse against the child in question. *In re L.H.,* 904 N.W.2d 145 (Iowa Nov. 17, 2017). The Maryland Court of Appeals held that a 9-year-old's out-of-court statement of sexual abuse was admissible without a finding of competency because the child's statement met the "particularized guarantees of trustworthiness" required by statute. *In re J.J. & T.S.,* 174 A.3d 372 (Md. Nov. 28, 2017). The West Virginia Court of Appeals affirmed a finding that a father was an abusing and neglectful parent, but it remanded for reconsideration of the parenting plan in light of W.V. R.A.P. 11(j), which requires the parties to update the court of any changes of circumstances since their briefs within one week of oral argument. *In re J. P., E. P., & S. P.,* ___ S.E.2d ___, 2018 WL 944377 (W.V. Feb. 14, 2018).

Child support: The Mississippi Supreme Court held that an NFL player's signing bonus should be considered part of his gross income "when crafting a child-support award." *McKinney v. Hamp,* ___ So.3d ___, 2018 WL 793995 (Miss. Feb. 8, 2018). A Wyoming court did not abuse its discretion when it modified a child support award downward by relying on the matrix setting child support for two children because the respondent mother had one child and another woman another child by the obligor. *TSR v. State ex rel. Department of Family Services,* 406 P.3d 729 (Wyo. Dec. 7, 2017). The Maine Supreme Judicial Court vacated a child support arrearage award of $10,692.58 because there were no factual findings to support it, no calculations, no evidence of interim payments and payments were dated back to the "date of service," whatever that means. *Boyd v. Manter,* ___ A.3d ___2018 WL 829985 (Me. Feb. 13, 2018). The New Hampshire Supreme Court rejected a father's position that when one of the kids graduated from high school and thus became emancipated, child support for that child terminated "without further legal action" per statute, reasoning that the statute applied when the court has established child support for only one child. *In re White,* ___ A.3d ___, 2018 WL 792237 (N.H. Feb. 9, 2018).

Division: The Vermont Supreme Court affirmed a trial court's division of property, which included a $970,000 award to the wife composed of both property equalization and lump-sum alimony without allocating between the two, despite the wife's claim that the overall property division could not be reviewed without allocation. *MacKenzie v. MacKenzie,* ___ A.3d ___, 2018 WL 5951783 (Vt. Dec. 1, 2017). In Nebraska, premarital crops "should be treated similarly to a herd of cattle . . . for tracing purposes" because crops are an end product, unlike a herd of cattle, which is "self-sustaining and income producing." *Osantowski v. Osantowski,* 904 N.W.2d 251 (Neb. Dec. 8, 2017). The Nebraska Supreme Court modified a requirement in a divorce decree that an ex-husband refinance a house within 60 days, extending the time to six months, given the ex-husband's financial situation and the requirement that he pay spousal support to his ex-wife. *Onstot v. Onstot,* 906 N.W.2d 300 (Neb. Feb. 9, 2018). The Montana Supreme Court disallowed modification of spousal maintenance when the parties agreed that it could not be modified, reasoning that the maintenance was, in effect, a buy-out of the wife's interest in the husband's business at the time of divorce. *Orr v. Orr,* ___ P.3d ___, 389 Mont. 400, 2017 WL 5714014 (Nov. 28, 2017).

GO TO TABLE OF CONTENTS

Evidence: A Nebraska trial court erred when it took judicial notice of the facts underlying a plea admitting domestic violence rather than only the plea itself. *In re Lilly S.,* 903 N.W.2d 651 (Neb. Dec. 1, 2017). The Nevada Supreme Court held that surreptitious recordings of an ex-wife and the parties' child could be considered by an expert witness, despite the fact that making the recordings violated a criminal statute, because they were "of a type reasonably relied upon by experts in forming opinions or inferences upon the subject." *Abid v. Abid,* 406 P.3d 476 (Nev. Dec. 7, 2017). Drug test results in termination cases can be admitted in Maine provided that the parties waive hearsay objections, which can be done by agreeing that the results are "admissible." *In re Arturo G.,* 175 A.3d 91 (Me. Dec. 12, 2017).

Parentage: The Vermont Supreme Court reversed dismissal of a parentage suit when the plaintiff alleged that her domestic partner adopted the child, "that she and defendant mutually agreed to bring [the child] into their family and to raise her together as equal co-parents, and have in fact done so for many years." *Sinnott v. Peck,* ___ A.3d ___, 2017 WL 1846 (Vt. Dec. 1, 2017). After a mother, the child's biological father and the mother's now-former husband designated the three of them co-parents of the child and agreed that paternity was established in the biological father, but things later fell apart, the New Mexico Supreme Court held that the agreement to be co-parents did not confer any parental rights on the mother's former husband because he was not a parent of the child. *Tran v. Bennett,* ___ P.3d ___, 2018 WL 286309 (N.M. Jan. 4, 2018). A California appellate court held that "receiving" a child into the home, for purposes of establishing parentage, required "something more than a man's being the mother's casual friend or long-term boyfriend" holding that a man did not receive a child into his home merely by living under the same roof with the child. *W.S. v. S.T.,* ___ Cal. Rptr.3d ___, 2018 WL 654547 (Cal. App. Feb. 1, 2018).

Undefined words matter: Under Arkansas case law, there is "a presumption in favor of relocation for custodial parents with sole or primary custody." But when parents share joint custody of a child – meaning that the parents share equal time with the child – there is no such presumption. In *Cooper v. Kalkwarf,* 532 S.W.3d 58 (Ark. Nov. 30, 2017), the parents agreed to share joint legal custody but also agreed that the mother would have "primary physical custody" of the child. That phrase is undefined in Arkansas law. Noting that the mother had possession of the child for only one more day per week than the father, a divided Arkansas Supreme Court rejected the mother's claim that the relocation presumption applied and remanded the case for further proceedings. Query: Don't we often use phrases such as "primary possession?" Just sayin'.

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

Like you, when I was a kid, I didn't understand aging. When I saw an old person (like, the over-40-all-the-way-to-decompisition phase, which was one, big demographic category, kind of like "people who like Yanni"), it was literally impossible for me to conceive of that same person at a younger age. Obviously, the old person in front of me belonged to a different species, perhaps a different genus, than me, like the difference between a federal judge and a …judge.

But now that the demographic categories have changed, and I now find myself in the slot that is called "Junior Archeological," I finally have a handle

[1] Mr. Geilich is a writer, family lawyer, and full-time mediator in the DFW Metroplex. He's doing what he can with what he's got and can be reached at cngeilich@gmail.com. His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

GO TO TABLE OF CONTENTS

on this age thing, and I would like to share it with you so that you, too, may benefit from my hard-earned wisdom. It all comes down to this: I'm not aging!

It's true. My gray hair is a lifestyle choice, perhaps like your blond hair. While I don't recall making that choice, that's only a result of my decision to stop remembering every little detail. I've decided to let things go, stop trying to stay on top of so many trivialities, like where I parked my car, that person's name, what kind of car I actually own now, and why I walked into this room. Who needs that kind of detritus in one's life? Not me, my young friends. I'm on a different plane, now. Wiser, more confident. (Also, I once almost got on a "different plane" than the one headed to my intended destination, but that was because I was being spontaneous.)

Not for me are the problems of excessive youth like wondering, "Does this color look good on me?" Who cares? (It probably doesn't, by the way. I'm not a slave to 20/20 vision any more).

Young people worry about things like, "Am I eating right?" and "Am I exercising enough?," and that really misguided one, "Am I drinking too much?" No, no, and yes, but who's in charge here? I no longer listen to The Man trying to keep me in line because, in fact, I can't hear The Man, or The Woman, in a crowded room with a lot of conversation. Speak Up, The Man! Stop mumbling.

So, you see, aging, like wearing khaki and living In Oklahoma, is a matter of "framing." You take something negative and declare it positive. Do I listen to "Classic Rock?" No, sir, I listen to music from the Rock and Roll Canon. Eating dinner early isn't just for old people, it's a smart choice. It leaves more time later in the evening for things like, oh, I don't know, going to bed early.

Just remember, or at least write it down because you'll probably forget, that aging is a choice, and you have chosen wisely.

TIE MENTAL HEALTH EXPERTS TO THE REFFERAL QUESTIONS

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

Referral questions should anchor your critiques of mental health experts' evaluations and testimony. Tie an expert to the referral questions of the evaluation on which he bases his opinions, and you'll chart a path to test the relevance and reliability of his testimony. Evaluation referral questions serve three objectives: *to define the evaluation's focus and scope*; *to direct the expert's inquiry and methods*; *to organize the expert's testimony*. Use these objectives to chart your path. Although these referral question objectives apply for all forensic psychological evaluations, let's unwrap each objective in a family law context:

Defines the Evaluation's Focus and Scope

The primary legal purpose of a court-appointed psychological evaluation in family law cases is to provide the court with findings on which it may rely for its decisions. The court's specific referral questions (usually found in the evaluation's appointment orders) define the evaluation's focus and scope. Such questions may include: What parenting plan best meets the child's needs? Must the parent's contact with the child be supervised? What is the source of the child's resistance to spending time with a

---

[1]***John A. Zervopoulos, PhD, JD, ABPP*** *is a forensic psychologist and lawyer who directs* ***PsychologyLaw Partners****, an expert consulting service that assists lawyers with psychology-related issues, materials, and testimony. His most recent book, Confronting Mental Health Evidence: A Practical PLAN to Examine Reliability and Experts in Family Law—Second Edition, was published by the ABA in 2015. How to Examine Mental Health Experts: A Family Lawyer's Handbook of Issues and Strategies, also published by the ABA, was released in 2013. He is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

GO TO TABLE OF CONTENTS

parent? Evaluation inquiries or findings that stray from the court's specific referral questions raise both legal relevance concerns. Straying from the court's specific referral questions also raises professional concerns: American Psychological Assn. (APA) practice guidelines state, “Psychologists strive to establish the scope of the evaluation in a timely fashion, consistent with the nature of the referral question." *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 Am. Psychol. 863, 865 (2010).

In contrast to specific evaluation referral questions, overly general referral questions—e.g., merely asking evaluators to conduct an evaluation and submit a final report to the court—muddy the evaluation's focus and tempt the evaluator to extend his inquiries and opinions beyond the intended scope of the evaluation.

Directs the Expert's Inquiries and Methods

Different referral questions direct the expert to adopt different types of evaluation inquiries. For instance, inquiries that address questions about a parent's ability to structure a child's school week will differ from inquiries that explore a parent's alleged abusive behavior towards a child. Further, the evaluation's referral questions direct the expert's methods. For example, Who will be interviewed, and what interview questions will be asked? What testing will be administered? Which relevant records or documents will be reviewed? If the methods are not reliable enough to produce trustworthy data, the trial judge may exclude the expert testimony or, if the testimony is admitted, give little weight to that testimony.

Organizes the Expert's Testimony

Finally, specific referral questions organize the expert's testimony. Caselaw and the APA's *Ethics Code* stress that testifying experts must show their "homework"—how they addressed the evaluation's purposes and supported their findings. The testimony and its supporting "homework" will reflect whether the expert stayed within the scope of the court's referral questions and used reliable methods to address those questions.

Use these three objectives of an evaluation's referral questions to test the quality of an expert's testimony. You'll be richly rewarded.

ROLE OF THE FINANCIAL PLANNER IN THE PRE-DIVORCE PROCESS

By Christy Adamcik Gammill, CDFA[1]

Although most financial planners have the relevant tax and financial knowledge to act as traditional “outside experts,” their best contributions come from a more intimate involvement in the divorce process. The broad educational background of the financial planner is ideally suited to this type of work. Because planners have traditionally helped individuals achieve long-term financial goals, e.g., saving for college or retirement, they have specialized training and skills that enable them to analyze financial issues in their long-term economic contexts. During the divorce process, this often sets a more positive and productive tone for discussion, provides reality checks, empowers individuals to make wise and workable decisions and hard, but often necessary, lifestyle adjustments. It also

[1] AXA Advisors and its affiliates and associates do not provide legal accounting or tax advice and this articles is not intended as legal or tax advice. Accordingly, any tax information provided in this article is not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer. The tax information was written to support the promotion or the marketing of the transaction(s) or matter(s) addressed and you should seek advice based on your particular circumstances from an independent tax advisor.

This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC, member FINRA, SIPC. 12377 Merit Drive, Suite 1500, Dallas, TX 75251, offers investment advisory products and services through AXA Advisors, LLC, an investment advisor registered with the SEC and offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC. CBG Wealth Management is not a registered investment advisor and is not owned or operated by AXA Advisors or AXA Network. Contact information: 972-455-9021 or Christy@CBGWealth.com.

GO TO TABLE OF CONTENTS

enables them to address insecurities about financial consequences, power imbalances and emotional agendas that often impede the decision-making process. The parties frequently feel more comfortable and secure with the choices they are considering, find workable solutions more quickly (often at less cost) and become more aware of post-divorce changes in standard of living, ultimately making them less likely to need to revisit support issues in the future.

Top Five Reasons for Using
A Certified Divorce Financial Analyst During the Divorce Process

1) Financial analysis conducted early in the divorce process can save time. The average length of the U.S. divorce process is one year. In the beginning stages of the process, both parties spend a great deal of time trying to get a clear understanding of the financial aspects and terminology of the separation. A Certified Divorce Financial Analyst (CDFA) can explain all financial aspects of the pending legal documents and help to empower their client to make educated decisions throughout the proceedings.

2) A CDFA can help their client save money during the divorce process. By using a CDFA, you can have a clearer view of your financial future. Only then can you approach a legal settlement that fully addresses your financial needs and capabilities. A legal settlement that floats back and forth between attorneys, without the client having a clear understanding of all financial ramifications, can be detrimental and time consuming. CDFAs can educate their clients by providing a thorough knowledge and understanding of the often-complicated financial proceedings.

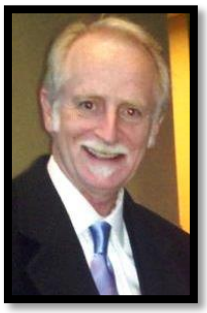
3) A CDFA can help their clients to avoid long-term financial pitfalls related to divorce agreements. Working with a client and their attorney, a CDFA can forecast the long-term effects of the divorce settlement. This includes detail of all tax liabilities and benefits. Developing a long-term forecast for their financial situation is far better than a short-term snapshot. Financial decisions must be made that not only take care of immediate family needs, but retirement needs as well.

4) CDFAs can assist their clients with developing detailed household budgets to help avoid post-divorce financial struggles. A CDFA can help clients think through what the divorce will really cost in the long run and develop a realistic monthly budget during the financial analysis process. Expenses such as life insurance, health insurance and cost of living increases must be taken into consideration when agreeing on a final financial settlement.

5) Using a CDFA can reduce the amount of apprehension and misunderstanding about the divorce process. Misinformation and misconceptions about the divorce process can be detrimental. Many have false expectations that they will be able to secure a divorce settlement allowing them to continue with their accustomed style of living. Financial divorce analysis helps to ensure a good, stable economic future and prevent long-term regret with financial decisions made during the divorce process.

GO TO TABLE OF CONTENTS

HOME FINANCING FOR DIVORCING HOME OWNERS
By Noel Cookman[1]



To properly assist divorcing home owners, you need to learn and understand the following:

A Rudimentary Understanding of the Owelty Lien AND HOW IT WORKS

- Owelty liens are liens (security) against the marital residence (homestead) payable to the "departing" spouse.
- There is practically no downside to a properly established Owelty lien.
- They are *authorized* in a divorce decree but *perfected* (on title) with the *Owelty Deed of Trust* and *Special Warranty Deed with Encumbrance for Owelty of Partition*.
- They can be agreed to after the fact but probably not after the spouse's interest has been conveyed (although there are exceptions).
- They are designed to be financed–but do not design them yourself, let the financier do that. When memorializing a buyout (for example in mediation), do not fix the Owelty amount. Call it "net buyout to spouse [final Owelty to be determined by lender.]"
- Owelties can be financed as "purchase money" transactions–NOT equity liens/loans. They are not "cash outs." (Purchase money liens are the purest and best lien types in home financing). The homeowner is not "cashing out." They are paying an ex-spouse for their interest in the property.

Credit and Mortgage Qualifying in Divorce

- Child support and any kind of spousal support is viewed pretty much the same in terms of "qualifying" income. A pay history is required (current guidelines require 6 months) before closing the loan–so get started early; that is, documentation more so than orders is necessary. Just make it work. Continuance of 3 or more years is required; so, watch the emancipation dates and termination of spousal support.
- Debt ratios are "make or break." The surest way to keep them in check is for a specialist to pre-underwrite a loan for each party (whether they are refinancing or purchasing). Sometimes, a re-structuring of the same numbers can manipulate debt ratios to the advantage of all parties.
- Ratios–including LTV (Loan To Value) ratios–are critical; hence,

Appraisals: Value and Equity in Properties

- An appraisal is someone's "opinion of value." The folks with the money to lend are the ones who determine which opinion is operative. No court can establish (or even determine) value let alone equity.
- When financing is required, it is a mistake to rely on an appraisal ordered by a court, attorneys or parties. In fact, it's a total waste of money.
- Only the appraisal ordered and obtained by the lender can be considered in underwriting. No other appraisal can even be viewed.
- Equity is roughly value minus encumbrances minus transactional costs. *Accessible* equity is 1) the difference between encumbrances/costs and the maximum LTV (Loan To Value) loan amount allowed by law and/or industry standard; and, 2) whatever "equity" can be included in the maximum loan amount for which the borrower qualifies. There is sometimes a significant difference between Equity and Accessible Equity.
- Parties can agree on any dollar amount as an "equitable" buyout. There is no legal or industry-required formula for establishing equity or a buyout. Financing that buyout is another matter.

---

[1] Mr. Cookman is a licensed residential loan originator and mortgage banker. You can reach him and sign up for his newsletter at noel@themortgageinstitute.com. For more information on these topics and other related topics can be found on his searchable blog—www.TheMortgageInstitute.com/blog.

GO TO TABLE OF CONTENTS

ARTICLES

New Partnership Tax Audit and Collection Rules Impact Divorce Property Settlements

BY
Charles D. Pulman, J.D., LL.M., CPA[1]
Matthew L. Roberts, J.D., LL.M.

Introduction. Family lawyers deal with property settlements often involving interests in partnerships or limited liability companies ("**LLC**"). Sometimes all of the partnership/LLC interest is awarded to one spouse; sometimes the partnership/LLC interest is awarded in some portion to each spouse. Up until this year (2018), the tax consequences of the division of the partnership/LLC interest were pretty much straight forward: tax liabilities arising out of the partnership/LLC for post-divorce years were the responsibility of the spouse owning the partnership/LLC interest; tax liabilities arising out of the partnership/LLC for pre-divorce years were the responsibility of whichever spouse the property settlement agreement stated was liable. Beginning for tax year 2018 and forward, those straight forward rules just got discarded as applied to IRS tax audits of a partnership or LLC.

Since family lawyers tend to shy away from anything having to do with taxes, the purpose of this article is to present a comprehensible overview of the very complex and developing new Internal Revenue Service ("**IRS**") rules relating to tax liabilities arising out of an IRS audit of a partnership or LLC for tax years beginning in 2018 and thereafter. For purposes of this article, references to "partnership" means a partnership, a LLC, or any arrangement taxed as a partnership for federal income tax purposes. An example of how these new tax audit rules might affect property settlements is set out toward the end of this article.

Prior Tax Audit Rules. For decades, partnerships have not been subject to federal income tax. Rather, the income, gains, losses, deductions and credits ("**Tax Items**") have been allocated to the partners in accordance with their respective percentage interests, and the partners have paid federal income tax based on their share of the partnership's Tax Items. If the IRS audited the partnership and determined that there was an income tax deficiency allocable to the partnership, the income tax deficiency was taken into account by the persons who were partners of the partnership in the year audited, who paid the tax based on their share of the tax deficiency. In 1982, Congress adopted what is known as TEFRA, which allowed the IRS to conduct the audit at the partnership level and impose the tax resulting from the audit at the partner level on those persons who were partners during the year audited by the IRS.

New Tax Audit Rules. In 2015, Congress adopted Section 1101 of the Bipartisan Budget Act of 2015 ("**BBA**") that adopted a new centralized partnership audit regime ("**Audit Regime**") that generally assesses and collects tax at the partnership level, not the partner level, resulting from an audit of the partnership. This new Audit Regime, set out in Sections 6221 to 6241 of the Internal Revenue Code, commences with partnership tax years beginning in 2018. Partnership tax years prior to 2018 are governed by the old audit rules. Partnership tax years beginning in 2018 are governed by the new audit rules. The new Audit Regime applies to any entity taxed as a partnership for federal income tax purposes. Thus, entities formed and taxed as partnerships are subject to the Audit Regime, as well as joint ventures and limited liability companies taxed as partnerships. In addition, arrangements that were not

[1] Charles D. Pulman and Matthew L. Roberts are tax attorneys with Meadows, Collier, Reed, Cousins, Crouch & Ungerman, LLP, in Dallas, Texas. They can be reached at cpulman@meadowscollier.com and mroberts@meadowscollier.com.

GO TO TABLE OF CONTENTS

intended by the owners to be partnerships for federal income tax purposes will be subject to the new Audit Regime if the IRS decides the arrangement is a partnership for federal income tax purposes. However, entities formed under state law as a partnership or limited liability company but that are disregarded for federal income tax purposes will not be subject to the new Audit Regime since the disregarded entity does not file a partnership tax return. As of the date of this article, the IRS has issued Proposed Regulations on June 14, 2017, November 30, 2017, and December 19, 2017, and final Regulations on January 2, 2018, dealing with the "opt-out" election discussed below.

The Audit Regime imposes, with certain exceptions discussed below, on the partnership the resulting tax from an IRS audit of the partnership and it is the partnership, and not the partners, that is required to pay the tax (including interest and penalties). Generally, the partnership pays the tax in the year in which the IRS adjustments are finally determined by the IRS or through judicial proceedings (the "**Adjustment Year**"). Thus, the persons that were partners during the prior year that is the subject of the IRS audit (the "**Reviewed Year**") do not bear, directly or indirectly, the resulting tax. Rather, the persons who are partners in the later Adjustment Year bear the economic consequences of the tax paid by the partnership even though the tax relates to an adjustment of Tax Items for a prior tax year.

Two Elections.

Opt-Out Election.

The Audit Regime contains two (2) elections that can be made by the partnership to alter the general rules of this new Audit Regime. The first election is an "opt-out" election that allows the partnership, under certain limited conditions, to elect out of the new Audit Regime. If the partnership elects out of this new Audit Regime, then any audit of the partnership is conducted at the partner level and any resulting adjustment of Tax Items and tax is assessed against the persons who were the partners during the year that was audited (ie, the Reviewed Year). While this opt-out election seemingly is a convenient way to put the economic consequences of an audit back on the persons who were the partners during the year audited, the conditions under which a partnership can make the opt-out election are severely limited and may not apply in reality to many partnerships.

- First, the opt-out election has to be made by the partnership on a timely filed partnership federal return for the year in which an election is to be made.
- Second, the partnership can have no more than one hundred (100) partners, which is measured by the number of Schedule K-1 forms issued by the partnership for the year in which the opt-out election is to be made. However, if one (1) of the partners is an S corporation, the number of Schedule K-1 forms issued by the S corporation to its shareholders is included for purposes of determining the one hundred (100) partner rule.
- Third, a partnership can opt-out of the new Audit Regime only if its partners during the year for which the election is to be made consisted solely of the following: individuals, C corporations, S corporations, foreign entities that would be treated as domestic corporations for federal income tax purposes and estates of deceased individuals. Thus, partnerships that have at any time during a taxable year for which the election is to be made a partner who is not one of the permitted partners cannot make the opt-out election. Ineligible partners include a partnership, a trust, a disregarded entity, the estate of an individual other than a deceased individual or any person that holds an interest in a partnership on behalf of another person.

Push-Out Election.

The second election that a partnership can make to alter the general rules of the Audit Regime is to "push-out" IRS audit adjustments of a Reviewed Year to the persons who were the partners during the Reviewed Year. If this election is timely made, the economic burden of the IRS audit of the Reviewed Year is borne directly by the persons who were the partners during the Reviewed Year and the partnership is not liable for the tax due under the audit. While there is no restriction on the identity or number of partners, the partnership must make this election within forty five (45) days after the IRS sends the partnership what is called the Notice of Final Partnership Adjustment ("**FPA**"). While the tax burden is shifted back to the persons who were partners during the Reviewed Year, those same persons did not have, and do not have, the right to participate in the IRS audit and have no voice with the IRS in that

process. Thus, all decisions made by the partnership relating to the audit are binding on all the partners, including the Reviewed Year partners. In addition, the additional tax owed by the Reviewed Year Partners is computed by taking the IRS audit adjustments into account for the Reviewed Year but is reported by the Reviewed Year Partners on their tax returns for the year the push-out election is made and is paid with the tax return for such year (which is a year after the Reviewed Year).

Modification. The Audit Regime also contains a provision allowing a partnership to reduce all or a portion of the partnership's liability for the tax resulting from the audit through a procedure referred to as the Modification Procedure. Under this Procedure elected by a partnership, the Reviewed Year partner files an amended return with the IRS that takes into account that partner's respective share of the IRS proposed tax adjustments and that partner pays the resulting tax, thus reducing the tax liability of the partnership. Unlike the push-out election, this Modification Procedure is voluntary and the Reviewed Year partners are not required to file an amended return under the statute, but the partnership agreement could require the Reviewed Year partners to do so. In addition, if this Modification Procedure is utilized and the Reviewed Year partner files an amended return, that partner must make any corresponding adjustments in years subsequent to the Reviewed Year taking into account the effects of the adjustments in a subsequent year arising out of the IRS audit of the partnership for the Reviewed Year.

Ceased to Exist. The new Audit Regime also has a unique provision that applies if the partnership "ceased to exist," which is defined as including not only dissolution but also the inability of the partnership to pay (as determined by the IRS) the tax liability arising from the tax audit. In this case, the Audit Regime allows the IRS to assess and collect the tax from the persons who were partners in the Adjustment Year or during the last year the partnership filed a tax return. This provision, which can be applied through tiered partnerships, is an example of the new powers of the IRS to collect the tax resulting from an audit from partners despite the dissolution of the partnership or an insolvent partnership.

Amended Partnership Return. The new Audit Regime also has unique rules for the voluntary filing of an amended partnership return, which is referred to as an Administrative Adjustment Request ("**AAR**"). Under these rules, a partnership may file an AAR for one or more Tax Items applicable to a prior year, i.e., the Reviewed Year. However, the new Audit Regime requires the partnership to take into account the tax adjustment in the later taxable year in which the AAR is filed, which for this purpose is referred to as the Adjustment Year. If the tax adjustments results in less tax owed (i.e., refund of tax), the partners during the prior year to which the AAR relates, i.e., the Reviewed Year, are required to take into account the tax adjustments in the Reviewed Year. Conversely, if the tax adjustments results in additional tax due, the Adjustment Year partners are required to take into account the tax adjustments in the Adjustment Year unless the partnership elects to "push out" the tax adjustments to the partners of the prior Reviewed Year.

Partnership Representative. Under the new Audit Regime, the partnership must designate one (1) person, who is referred to as the Partnership Representative, to deal with the IRS in the audit. The partnership makes this designation on the partnership return and the designation must be made for each tax year. After an IRS audit begins, the Partnership Representative has the sole and exclusive authority to deal with the IRS. Thus, the Partnership Representative makes all decisions and takes all actions and makes all elections arising out of and related to the audit of the partnership and any resulting judicial proceedings available under the new Audit Regime. Unlike the TEFRA rules, the new Audit Regime rules do not provide or even require that the Partnership Representative give notice of the audit to any person who was or is a partner of the partnership being audited.

Analysis of Partnership Agreements. As a result of the new Audit Regime, partnership agreements will need to be analyzed to determine how these new rules are addressed in the partnership agreement and how that agreement sets out the duties, obligations and liabilities of the persons who are partners during the Reviewed Year and the Adjustment Year. In many partnerships, the identity of the persons in the Reviewed Year and the Adjustment Year will change. Moreover, because persons who were part-

ners during the earlier Reviewed Year may not be partners in the later Adjustment Year, or may own a different percentage interest in the partnership during those periods, the economic consequences of the IRS audit and resulting tax are shifted and are not borne in the same proportion as the partnership interest percentage in the Reviewed Year. For this reason, partnership agreements will need to be reviewed to determine how the economic consequences of the partnership audit and resulting tax will be borne by the persons who were partners during each period of time, whether one group of partners will be required to indemnify another group of partners or the partnership, whether the partnership can require partners during the Reviewed Year to file amended returns and whether partners will be required to contribute to the partnership additional funds to cover any additional tax, penalty, and interest required to be paid by the partnership resulting from the audit.

Partnership agreements also will need to be reviewed to determine the authority of the Partnership Representative and whether the Partnership Representative has to receive the approval of partners (and then which set of partners – Reviewed Year or Adjustment Year or both) for any action or election that the Partnership Representative intends to take, including any obligation of the Partnership Representative to notify the partners of the commencement of an audit and to keep the partners informed of the status of the audit and any judicial action.

Divorce Instruments. The new Audit Regime rules will require careful drafting and scrutiny of property settlement agreements and divorce decrees ("**Divorce Instruments**"). Generally, Divorce Instruments contain provisions that make one or both spouses responsible for federal income tax liabilities incurred prior to the divorce. Moreover, Divorce Instruments typically contain indemnity provisions in which one spouse is required to indemnify the other spouse for the payment of tax liabilities that are the agreed responsibility of the indemnifying spouse. Because the new Audit Regime rules can be manipulated to impose the tax or economic consequences of the tax on the partners during either the pre-divorce Reviewed Year or the post-divorce Adjustment Year, the intent of the parties must be clear as to which party bears the consequences of an IRS audit of the partnership and the Divorce Instruments must clearly set out the obligations and indemnities of the parties resulting from an IRS tax audit of a partnership in which an interest is owned on the date of divorce. If the tax liability is "pushed out" by the partnership to the partners in the Reviewed Year, one or both spouses may be liable for the resulting tax under the terms of the Divorce Instruments. However, if the tax liability is to be paid by the partnership in the Adjustment Year, neither spouse is personally liable for, or required to pay, the tax but the spouse holding the partnership interest in the Adjustment Year will bear the economic consequence of the partnership paying the tax and may even have to contribute cash to the partnership to pay the tax. In addition, the Divorce Instruments may need to include terms addressing the provisions of the partnership agreement dealing with the new Audit Regime rules, including how an IRS audit of the partnership is to be handled by the partnership and the Partnership Representative. The Divorce Instruments should also address whether the spouse awarded the partnership interest can consent to actions affecting the other spouse without the other spouse's consent.

Texas Family Law Practice Manual. The Texas Family Law Practice Manual has suggested provisions for addressing taxes in both the form "Final Decree of Divorce" and the form "Agreement Incident to Divorce." One provision dealing with pre-divorce years provides that either one or both of the parties will be solely or equally "responsible for all federal income tax liabilities of the parties from the date of marriage through December 31, ____," with obligations to pay and to indemnify.

Example.

It is not clear how the above Practice Manual provision would apply under the new Audit Regime. For example, assume SF and SM are divorced in the year 2021 after 20 years of marriage and one of the assets is a 40% community property interest in P partnership, which was owned in the name of SF since 2016. The Divorce Instruments award all of the 40% interest to SF but states that SM is responsible for all federal income tax liabilities of the parties from the date of marriage through December 31, 2020. In the year 2022, the IRS commences and concludes a tax audit of the partnership for the year

2019 and proposes Tax Item adjustments resulting in a tax deficiency of $200,000, of which SF's share is 40% or $80,000.

Suppose the partnership elects in the year 2023 to "push out" the tax liability of $200,000 to the persons who were partners during the tax audit year 2019 and the portion of the tax liability allocable to SF is $80,000. Here, it would seem that the $80,000 is a "tax liability of the parties" for which SM is required to pay and indemnify SF since the tax is computed by reference to the tax return of the parties for the pre-divorce year 2019. However, because the additional tax of $80,000 is reported on the 2023 tax return and paid in 2024, it is not clear if the additional tax is to be reported by SF only since the interest in P was in the name of SF or one-half by each of SF and SM since the interest in P was community property in 2019. Thus, since the additional tax is reported on the 2023 tax return of either SF (or possibly one-half by each of SF and SM), further uncertainty arises as to whether SF or SM, or both, are liable for this additional tax and whether this additional tax is subject to the indemnification under the Divorce Instruments.

If, however, under the above example the partnership did not "push out" the tax liability to the persons who were partners during 2019 but instead the partnership remained liable for the tax, it seems clear that the tax language of the Practice Manual would not cover this situation since the tax liability is the obligation of the partnership and not the partners. However, if the partnership is liable for the tax but insolvent, the "ceased to exist" provision could be used by the IRS to collect the tax from SF in 2022, in which event it is not clear if the tax provision in the Practice Manual would apply since the tax liability asserted against SF in 2022 may not be a "tax liability of the parties" during a year prior to the year of divorce in 2021. Likewise, if the partnership makes a capital call on the partners in 2022 to pay the tax required to be paid by the partnership, the tax language of the Practice Manual would not apply. In either event, SF would bear the economic consequences, which may not be consistent with the intent of the parties.

Suppose further under this example the partnership elects the Modification Procedure, which requires SF to file an amended return for the Reviewed Year reporting that partner's share of the adjustment and paying the resulting share of the tax. The complication in this scenario is the amended return for the Reviewed Year must be signed by the parties who signed the original tax return for the Reviewed Year. If a joint tax return was filed for the Reviewed Year and SM refuses to sign the amended return, the Modification Procedure cannot be utilized by SF. Furthermore, if the partnership agreement obligates SF to file an amended return, SF would be in breach of the partnership agreement. The resulting issue then is who among SF and SM is liable for the damages arising out of the breach of the partnership agreement.

Conclusion. The new Audit Regime significantly changes the obligations and liabilities of the parties to the Divorce Instruments with respect to the partnership interest and the economic consequences of an IRS audit of a partnership with the result that what should have been a pre-divorce year tax liability of the parties turns out to be a post-divorce year tax liability of the partnership arising out of an IRS audit of a pre-divorce year of the partnership. If the parties want the economic consequences of the audit and the related obligations and liabilities to be what they would have been before the application of the new Audit Regime, the tax section of Divorce Instruments will need to be drafted carefully to achieve that result as the tax language in the present Family Law Practice Manual does not address fully these issues. If the parties are willing to "let the chips fall as they may," the present tax language in the Practice Manual can remain. In either event, the divorcing parties need to be made aware of this potential shifting of the property division economics and of the tax liabilities arising out of an interest in a partnership/LLC that is audited by the IRS.

The Evolution of Common Law Marriage in the U.S.: A Case for Why Texas Should Retain Its Informal Marriage Statute

By Zachary Wilson[1]

I. Introduction

"No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were."[2] The U.S. Supreme Court has long emphasized the importance and pervasiveness of family and more specifically, marriage.[3] The history of common law marriage, or marriage achieved by the intent and conduct of the parties without the ceremonial formalities, dates back to the formation of this country, as it is a part of English common law. At one time in our history, about half of the states recognized common law marriages as legally equivalent to a marriage performed with the proper formalities.[4] However, although the number of states that still recognize common law marriage has been on a steady decline for some time, there are several reasons why states should continue to recognize common law marriage.

In order to evaluate arguments both for and against keeping common law marriage, it is important to understand its history and development. Much is made about abolishing common law marriage because, it is argued, the primary reason for its creation is no longer relevant, i.e., people no longer live in such rural areas that access to the courthouse is a real issue. But does the evaporation of one of its purposes mean that states are better off eliminating their common law marriage statutes? If it ain't broke, fix it anyway? Or, if the existence of these statutes is not causing any substantial problems, should they not be kept?

Ultimately, the benefits of common law marriage outweigh any of its reported drawbacks, especially now in the wake of *Obergefell*, and Texas should retain its common law marriage statute. This article begins with a brief look into the creation and early history of common law marriage in the United States. Next, it discusses the evolution of common law marriage as the nation expanded from its first thirteen colonies into more modern times. This portion will examine the prevailing trend of states abandoning their common law marriage statutes. Specifically, then, the article will consider the history and development of common law marriage in Texas—or as it's referred to only in Texas, informal marriage. Because there has been some discussion of repealing Texas's informal marriage statute, it will evaluate arguments on both sides of the issue. A careful consideration of the arguments for abolishing common law marriage will reveal that, even when taken all together, the reasons behind many states' abandonment of the doctrine are not very compelling. Instead, the reasons and arguments in favor of keeping common law marriage on the books build a compelling case for it. Because keeping its common law marriage statute would retain more benefits and repealing is would cause more harm, Texas should keep its informal marriage statute intact.

II. The Creation and Early History of Common Law Marriage

During the first decade of the nineteenth century, New York was the first state in the U.S. to validate a marriage between two individuals who had not wed through traditional, legal means.[5] Even though the parties in this case did not "actually marry," the court declared that a marriage could be "proved … from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred."[6] Setting an example for other states in the U.S., this court held that a marriage *per verba de praesenti*, or by the words of present intent, is just

---

[1] Mr. Willson graduated from SMU Deadman School on Law in May 2017. He is currently working for Holmes, Diggs & Sadler in Houston, TX, and may be reached at zwilson@holmesdiggs.com.
[2] Obergefell v. Hodges, 576 U.S. __, 135 S.Ct. 2584, 2608 (2015).
[3] *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Lawrence v. Texas, 539 U.S. 558 (2003).
[4] *See infra*, note 18.
[5] Fenton v. Reed, 4 Johns. 52 (N.Y. Sup. Ct. 1809) (per curiam).
[6] *Id.* at 54.

as valid as a formal marriage.[7] In its reasoning, the court argued that a jury probably would have been able to infer an actual marriage from the circumstances, and the court would not block it from doing so.[8]

Just over thirty years after the *Fenton* case in New York, the United States Supreme Court took up the opportunity to examine the legality of common law marriage.[9] However, at the time the case was decided only eight Justices were sitting, and the Court was divided on the issue of whether marriage *per verba de praesenti* was valid and binding.[10] It was not until 1877 that the U.S. Supreme Court formally endorsed common law marriage and, in doing so, it validated a growing number of state statutes prescribing the requirements of common law marriages.[11] As it upheld a Michigan statute allowing common law marriage, the Court noted that a valid wedding can occur even without a ceremony so long as "the parties agreed presently to take each other for husband and wife, and from that time live together professedly in that relation."[12] Additionally, the Court declared that everywhere marriage is regarded as a civil contract and formal marriage requirements may be properly viewed as "merely directory."[13] The Court's reasoning and policy-based considerations will be discussed further in detail when examining the arguments both for and against common law marriage.

The history of common law marriage, though, is not all in favor of its existence. Only one year after the first supporting opinion was issued in *Fenton*, the Supreme Judicial Court of Massachusetts delivered an opinion to the contrary and refused to recognize common law marriage.[14] While there were numerous other considerations made by this court that will also be discussed further in Section VII, Chief Justice Parsons primarily focused on the statutory language and its absence of language specifically allowing common law marriage.[15] Essentially, the Court argued that because the state has statutes in place that require the certificate of a justice of the peace or of a minister to validate a marriage, the people of the state have both an interest in, and a duty to, enforce those regulations.[16] Ultimately it held that "a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage."[17] And so began the legal debate about allowing and enforcing valid, legal marriages based solely on an agreement between a man and a woman.

As the nation grew beyond the original thirteen colonies, new states were presented with the opportunity to accept or reject common law marriage. Perhaps the most popular stated reason for allowing common law marriages to be valid was that many individuals lived outside of major cities and resided in distant rural areas, making access to the courthouse and city civilization very burdensome—especially before the advent of automobiles. In 1934, the Court of Appeals in Fort Worth, Texas, summed up the prevailing notion when it cited "sparse settlements, the long distance to places of records, bad roads, [and] difficulties of travel" as one the reasons for validating common law marriage within the state.[18] The first half of the nineteenth century saw plenty of states refusing to recognize common law marriage, but the majority of states in the union favored it, and the result was random common law marriage acceptance on a state-by-state basis.[19]

III. The Development of Common Law Marriage and its Recent History

Although common law marriage was a doctrine that each state had to decide whether to accept, the United States Supreme Court did identify some features that are essential to forming a common law marriage.[20] First, as is true with a ceremonial marriage and any other contract, both individuals are re-

---

[7] *Id.*
[8] *Id.*
[9] Jewell's Lessee v. Jewell, 42 U.S. 219, 11 L. Ed. 108 (1843).
[10] *Id.* at 224.
[11] Meister v. Moore, 96 U.S. 76 (1877).
[12] *Id.* at 82.
[13] *Id.* at 81.
[14] Inhabitants of Town of Milford v. Inhabitants of Town of Worcester, 7 Mass. 48 (1810).
[15] *Id.* at 55.
[16] *Id.* at 55-56.
[17] *Id.* at 57.
[18] McChesney v. Johnson, 79 S.W.2d 658, 659 (Tex. Civ. App.—Fort Worth 1934).
[19] Cynthia G. Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 731 (1996).
[20] Travers v. Reinhardt, 205 U.S. 423, 438-42 (1907).

quired to have capacity to enter the marriage.[21] So, too, there must be consent—common law marriage is an agreement by presently stated words, or *per verba de praesenti*; thus, it seems obvious that both individuals must be consenting adults.[22] The Court also discussed in detail that cohabitation by the man and woman is a necessary element of common law marriage, and it is also compelling evidence for the tribunal that the two intended to be married.[23] Justice Harlan explained, "It is a holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit that the man and the woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife."[24] Further, cohabitation lets family, friends, neighbors, and acquaintances all know that the parties living together as man and wife.[25]

A. The Movement Away from Common Law Marriage

In the late nineteenth and early twentieth centuries, a movement to abolish common law marriage took hold, and a handful of states that had previously recognized common law marriage seemingly changed their minds and took action to abandon it.[26] As the effects of the Industrial Revolution became more prevalent and transportation became easier, North Dakota,[27] California,[28] Illinois,[29] Arizona,[30] and Alaska[31] all found reason to abolish the previously accepted common law marriage within their jurisdictions. Fast-forward several decades, and the trend to abolish common law marriage where it previously existed continued. States like Indiana,[32] Florida,[33] Ohio,[34] Georgia,[35] and Pennsylvania[36] each enacted statutes that effectively voided common law marriages entered into after a certain date. At this time, certainly the "covered wagon days [were] over," as one court remarked as it distanced itself from common law marriage,[37] but increased access to the judiciary is not the only reason this shift away from common law marriage occurred.

Concerns about fraud, protecting of the institutions of marriage and family, and rightful distribution of government benefits also fueled the shift away from common law marriage.[38] For example, the Supreme Court of Florida warned about the dangers of fraud in common law marriage scenarios when it ruled an intestate decedent's sister be awarded with the property of her brother, rather than the woman claiming to be his common law wife.[39] The Court anticipated that, after a man dies, a woman could come before the judiciary claiming that she had entered into a private agreement with the man and, without any substantiation, validate a marriage contract between the two.[40] Worried about this possible occurrence, the court opined, "It is difficult to imagine a readier vehicle of fraud."[41] It is interesting to note that the court here was very concerned about fraud and falsehoods, particularly by younger "gold-

---

[21] *Id.* at 438.
[22] *See id.*
[23] *Id.* at 441-42.
[24] *Id.* at 442.
[25] *Id.*
[26] *Id.* at 731-32.
[27] *See* Schumacher v. Great Northern Ry. Co., 136 N.W. 85, 86 (1912).
[28] *See* Norman v. Norman, 54 P. 143 (1898).
[29] 750 Ill. Comp. Stat. Ann. 5/214 (West 1977).
[30] See Levy v. Blakely, 18 P.2d 263, 265 (1933).
[31] See Edwards v. Franke, 364 P.2d 60, 63 (1961) (quoting legislation from 1917 declaring no marriage is valid without a license issued by a qualified individual).
[32] Ind. Code § 31-11-8-5 (West 2016) (voiding common law marriages entered into after January 1, 1958).
[33] Fla. Stat. Ann. § 741.211 (West 2017) (invalidating common law marriages entered into after January 1, 1968).
[34] Ohio Rev. Code Ann. § 3105.12 (West 2016) (prohibiting common law marriages entered on or after October 10, 1991).
[35] Ga. Code Ann. § 19-3-1.1 (West 2017) (prohibiting common law marriages entered on or after January 1, 1997).
[36] 23 Pa. Cons. Stat. Ann. § 1103 (West 2016) (invalidating common law marriages contracted after January 1, 2005).
[37] *In re* Soeder's Estate, 220 N.E.2d 547, 562 (Ohio Ct. App. 1966).
[38] Bowman, *supra* note 18, at 740-48.
[39] *See* McClish v. Rankin, 14 So.2d 714 (Fla. 1943).
[40] *Id.* at 718.
[41] *Id.*

digging" women,[42] yet the court rather easily identified and thwarted the potential fraud here, as did the lower courts.

Another popular purported reason to rid states of common law marriage statutes was to protect the institutions of marriage and family.[43] In the early stages of the twentieth century, the Supreme Court of Arkansas, while still acknowledging Chancellor Kent's opinion and reasoning in *Fenton v. Reed*, refused to accept common law marriage in its state.[44] The court recognized that the doctrine existed in other states, and it also confirmed that the concept of common law marriage originated in English common law and was adopted in some of the original U.S. colonies; but, it provided its own reasons for rejecting the doctrine.[45] After careful review of arguments both for and against common law marriage, the court decided to reject it in order to "best foster and protect the home, and promote the sacredness of the marriage relation, which is the foundation of the family and the origin of all forms of government."[46]

As the country moved from the early 1900's into the 1960's and 1970's, this protecting-the-family theme continued to show its face in court decisions rejecting common law marriage principles.[47] A 1966 case decided by the Court of Appeals of Ohio rejected common law marriage because it felt that public policy alone should not allow it—it would shock people's morality and decency.[48] It went even further and reiterated that the allowance of common law marriage would offend the sanctity of marriage, obscure rights of proper inheritance, "and would place honest, God-ordained matrimony and mere meretricious cohabitations too nearly on a level with each other."[49]

The trend has continued into the present day. Just last year, in 2016, the Alabama legislature decided to repeal its existing common law marriage statute.[50] As of January 1, 2017, no person can enter into a common law marriage in the state of Alabama, but the state will continue to recognize common law marriages that were entered into before 2017.[51] Almost two decades before the legislature decided to do away with common law marriage, a sitting judge in the state, the Honorable John B. Crawley, penned a law review article arguing for the retention of common law marriage in the event that the state considered abolishing it.[52] After his review of the benefits and pitfalls of common law marriages, he urged that the legislature keep the doctrine for public policy reasons, along with the ease of its application, its predictability and long-standing history, and the uncertainty of what could replace it.[53] However, a new wrinkle has been added to the equation with the Supreme Court's recognition of marriage equality in *Obergefell v. Hodges*.[54] The allowance of same-sex marriages produces new complications in the common law marriage context, and these will be discussed in further detail in Section V below.

---

[42] The woman in this case was twenty years younger than the man she claimed to have entered a private marriage contract with, who was a doctor with a considerable amount of property in multiple states. The woman did not assert their marital relationship until after the man's death, and the extent of their relationship beforehand involved some "illicit cohabitation," as the man was formally married to another woman at one time.
[43] Bowman, *supra* note 18, at 736.
[44] *See* Furth v. Furth, 133 S.W. 1037 (Ark. 1911).
[45] *Id.*
[46] *Id.* at 1039.
[47] Bowman, *supra* note 18, at 743-44.
[48] *Soeder*, 220 N.E.2d at 562.
[49] *Id.* (quoting *Duncan v. Duncan*, 10 Ohio St. 181, 188 (1859)).
[50] *Alabama Abolishes Common-Law Marriage*, Wash. Times (Jan. 1, 2017), http://www.washingtontimes.com/news/2017/jan/1/alabama-abolishes-common-law-marriage/
[51] Ala. Code § 30-1-20 (2016).
[52] Hon. John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 Cumb. L. Rev. 399 (199).
[53] *Id.* at 424-25.
[54] *See* Obergefell v. Hodges, 576 U.S. __ (2015) (holding that depriving same-sex couples of the right to marry is a violation of the U.S. Constitution).

B. The Retention of Common Law Marriage

Today, only ten jurisdictions within the United States allow for a common law marriage to originate within their borders: Colorado,[55] Iowa,[56] Kansas,[57] Montana,[58] Oklahoma,[59] Rhode Island,[60] South Carolina,[61] Texas,[62] Utah,[63] and the District of Columbia.[64] Certainly, this is significantly less than the almost half of states that recognized common law marriage in the early 1900's.[65] The number is in danger, too, of dropping even lower, as Kansas currently has a proposed bill sitting in its House that would ban common law marriages if the bill succeeds.[66] A proponent of the bill is quoted, saying that ministers used to be scarce and it used to be socially unacceptable for an unmarried couple to reside together, but now "times have changed."[67] On the other hand, a local family law attorney and opponent of the bill is quoted, saying "we want to encourage marriage, not discourage marriage."[68] And while the debate on the benefits and drawbacks of common law marriage still continues, the trend to abolish it also continues; but a handful of states have still chosen to retain common law marriage within their jurisdictions.

In one such state, for example, the Supreme Court of Rhode Island was given the opportunity to effectively eliminate common law marriage where statutory law was silent on the matter.[69] The facts of the case involved a woman and her incarcerated husband who entered into a marriage contract (during the incarceration) and held out to be husband and wife, and when the Division of Vital Statistics in the Department of Health refused to recognize the marriage contract, the woman brought suit.[70] The defendant asserted that common law marriage was no longer recognized in Rhode Island, and the trial court agreed, holding that the plaintiffs' supposed common law marriage was invalid.[71] The plaintiffs appealed and petitioned for a writ of mandamus.[72] As it reversed the trial court's decision and upheld the validity of common law marriage, the Supreme Court of Rhode Island emphasized the long history that the doctrine has enjoyed in the state.[73] The court also considered that the legislature has enacted statutes prescribing rules regarding the solemnization and licensing or marriages, but it stressed that these statutes do not prescribe the *only* ways to accomplish a valid marriage.[74] Because the statutes "contain no language indicating that common-law marriages are now prohibited," the court decided to preserve the doctrine.[75]

Another state that chose to continue recognizing common law marriage during the mid-twentieth century, when the trend to get rid of it was popular, is Iowa. In a decision from the Supreme Court of Iowa, Justice Peterson acknowledged the trend to abolish common law marriage in the U.S.[76] He noted that the doctrine had been recognized in Iowa for over one hundred years and it received "periodical decisions of approval."[77] The case before the court involved an alleged common law marriage where one of the individuals was deceased, and Justice Peterson pointed out that a case with strikingly similar

---

[55] Colo. Rev. Stat. Ann. § 14-2-109.5 (West 2006).
[56] State v. Lawson, 165 N.W.2d 838, 839 (Iowa 1969).
[57] Kan. Stat. Ann. § 23-2502 (West 2011).
[58] Mont. Code Ann. § 40-1-403 (West 1975).
[59] *In re* Sanders' Estate, 168 P. 197, 199 (Okla. 1917).
[60] Souza v. O'Hara, 395 A.2d 1060, 1061-62 (R.I. 1978).
[61] Callen v. Callen, 620 S.E.2d 59, 62-63 (S.C. 2005).
[62] Tex. Fam. Code Ann. § 2.401 (West 2005).
[63] Utah Code Ann. § 30-1-4.5 (West 2011).
[64] Johnson v. Young, 372 A.2d 992, 994 (D.C. 1977).
[65] *See supra* note 25.
[66] Daniel Salazar, *Common-Law Marriage? Not in Kansas if Bill Succeeds*, The Wichita Eagle (Feb. 8, 2017), http://www.kansas.com/news/politics-government/article131568029.html.
[67] *See id.*
[68] *See id.*
[69] *Souza*, 395 A2.d at 1061-62.
[70] *Id. at 1061.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 1061-62.
[75] *Id.* at 1062.
[76] *In re* Long's Estate, 102 N.W.2d 76, 78 (Iowa 1960).
[77] *Id.*

facts was recently decided in Mississippi, where common law marriage was still recognized at the time.[78] Ultimately, he held that the burden in this case was not met so no valid marriage was formed, but the decision itself reiterated Iowa's continued recognition of common law marriages.[79]

Iowa has several safeguards in relation to asserting a common law marriage that help protect against any fraud or abuse, and perhaps these protections are a factor in the decision to retain the doctrine.[80] For instance, along with the elements of an agreement, cohabitation, and holding out, the burden of proof is always on the person asserting the marriage, and "a claim of common-law marriage is regarded with suspicion and will be closely scrutinized."[81] Additionally, when one party to the alleged marriage is deceased, all elements "must be shown by clear, consistent, and convincing evidence"[82] In another interesting measure that Iowa has taken in an effort to protect against abuse and fraud in this area, there is a fee imposed of fifty dollars on the parties to a common law marriage, as well as any persons aiding or abetting them, if they fail to follow the statutory requirements.[83]

So, despite many states' adherence to the prevailing trend of nixing common law marriage, nine states—and Washington D.C.—have retained it. Like the Rhode Island court mentioned in the *Souza* case, courts can choose to continue recognition of common law marriage even where state legislatures prescribe rules for entering marriages, so long as those rules are silent on or in support of common law marriages.[84] Additional safeguards, like the ones described to exist in Iowa, also help courts recognize the continued validity of common law marriages by eliminating, or minimizing, worries about potential abuse and fraud. Like Iowa, Texas has also continued to recognize common law marriages originating within its borders.[85] And, as will be discussed in detail in Section VII, additional protections in the statutory scheme help provide sound reasons for keeping the doctrine.

IV. Common Law Marriage in Texas

Unique in many special ways, Texas does not even refer to common law marriage as common law marriage; rather, Texans call it informal marriage, and there are two ways of creating it.[86] First, the couple can sign and file a signed declaration of informal marriage with the county clerk.[87] The form essentially states that the couple swears that they made the requisite agreement to be married and fulfilled the other elements required to form an informal marriage in Texas.[88] The second way to create an informal marriage is to meet three elements: (1) the man and the woman agree to be married, (2) and after the agreement the couple lives together in Texas as husband and wife, and (3) the couple represents to others in Texas that they are married.[89] Additionally, the statute requires that both parties be at least eighteen years of age at the time of the agreement to be married.[90]

A. Creation and History

Texas first recognized the ability to form a legal marriage without the traditional formalities in a Supreme Court decision rendered less than two years after the state was annexed to the U.S.[91] Mr. Chief Justice Hemphill declared that marriage can be shown "by evidence of cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which an inference

---

[78] *Id.*
[79] *Id.* at 78-82.
[80] *Id.* at 78-79.
[81] *Id.*at 79.
[82] *Id.*
[83] Iowa Code Ann. § 595.11 (West 1983).
[84] *See supra*, note 73.
[85] Tex. Fam. Code § 2.401.
[86] *See* Tex. Fam. Code § 2.401.
[87] *Id.* at § 2.402.
[88] *See id.*
[89] *Id.* at § 2.401.
[90] *Id.*
[91] Tarpley v. Poage's Adm'r, 2 Tex. 139, 149 (1847).

of marriage could be drawn."[92] Although the opinion did not cite to the first-decided common law marriage case in the U.S., Texas followed New York's example in *Fenton v. Reed*.[93]

There was, however, some confusion among Texas courts early in the state's history on whether the adoption of the common law of England required that Texas recognize common law marriages.[94] Texas joined the United States at the end of 1845, and in an act of the Congress of the Republic of Texas five years prior, the state expressly adopted the common law of England.[95] Later, when the state legislature prescribed rules for formally entering marriage, courts considered whether this act was intended to be the only method for entering a legal and valid marriage.[96] Eventually, the Court of Civil Appeals addressed this issue and clearly provided that the statutes prescribing regulations for marriage formalities do not void marriages that are formed without attention to these formalities.[97] The court reasoned, "the statutes are held merely directory, because marriage is a thing of common right" and therefore the state should encourage and allow for it.[98] The court also mentioned that some of the most prominent judges and policy writers have clearly encouraged the doctrine in other states, and Texas should maintain a broad and liberal construction of the statutes so as to allow for informal marriages where the facts point to such.[99]

Similar to its spread throughout other states in the U.S., common law marriage in Texas "took root there when the conditions … justified it."[100] Texas cites difficulty of travel, access to the officers of the court, unfamiliarity with the law, and the right to contract, *inter alia*, as compelling reasons to adopt and give legal recognition to the doctrine.[101] Even as early as 1934, though, this particular court recognized the reasons for the doctrine's creation are not as relevant as they once were.[102] However, the court said that does not mean all the reasons for upholding common law marriage have vanished, and because it is important public policy to promote something with the importance and uniqueness of marriage, courts should continue to rely on the well-established law by recognizing common law marriages.[103]

B. It's Different in Texas

Texas requires that all three elements—an agreement, cohabitation, and holding out—be shown before an informal marriage will be recognized by the state.[104] This three-step proof affords greater protection against the fraud and abuse that those opposed to common law marriage warn about. Some other states required less than these three elements to prove a common law marriage, and perhaps that insufficiency contributed to the abolition of the doctrine in those jurisdictions. Take Georgia, for example, which only required that there be an agreement to be married and subsequent cohabitation—there was no holding out requirement.[105] Now, Georgia does not allow for common law marriage.[106] Or take a look at Florida, which only required the capacity to marry and an agreement to be married.[107] Now, too, Florida no longer allows for common law marriage.[108] Because Texas requires the showing of all three elements before an informal marriage is declared valid, there is less opportunity for Texans to abuse the doctrine. The discussion below will shed light on what is required to prove each element, and it will demonstrate that courts do leave some wiggle room so as to minimize negative or damaging results.

---

[92] *Id.*
[93] *See supra* note 1.
[94] Annotation, *Validity of Common-Law Marriage in American Jurisdictions*, 39 A.L.R. 538 (1925).
[95] *Id.*
[96] *Id.*
[97] Ingersol v. McWillie, 30 S.W. 56, 60-61 (Tex.Civ.App. 1895, writ ref'd).
[98] *Id.*
[99] *Id.* at 61.
[100] *McChesney*, 79 S.W.2d at 659.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 659-60.
[104] Humphreys v. Humphreys, 364 S.W.2d 177, 178 (Tex. 1963).
[105] See *In re* Madia's Estate, 215 N.E. 72 (Ohio 1966).
[106] Ga. Code Ann. § 19-3-1.1 (West 2017)
[107] *See In re* Alcala's Estate, 188 So.2d 903, 905 (Fla. Dist. Ct. App. 1966).
[108] Fla. Stat. Ann. § 741.211 (West 2017)

The first of Texas's three required elements, the agreement, may be difficult to expressly prove, especially if the case is brought after the death of one of the individuals purported to be in the marital relationship. So, while all the elements of informal marriage must be shown, Texas courts have allowed the fact finder to infer an agreement to be married based on the facts and circumstances of the case.[109] "It is not essential that an express agreement be shown by direct evidence."[110] Evidence proving cohabitation and holding out will also tend to show that there was an agreement to do so in the first place, and therefore the courts will allow this inference to be made.[111] In earlier cases, courts were more cautious to allow this inference to be made, but because a finding of no marriage could often times be detrimental, courts began to favor a more liberal use of the inference.[112] This liberal interpretation in the *Kelly* case was endorsed by the Texas Supreme Court in the *Humphreys* case.[113]

The second of Texas's three required elements, cohabitation, is arguably the most important and probably the easiest to show. Unlike the holding out requirement, which is a couple's representation to others that they are married, the cohabitation requirement strikes a more personal and private chord. One can represent to others anything he wants and it might even be true, but the act of cohabitation focuses more on actual behavior of the couple as opposed to public perceptions of the couple. The Supreme Court of Texas commented extensively on the importance of cohabitation in the context of an informal marriage.[114] In *Grigsby v. Reib*, the court emphasizes that, when a man and a woman cohabit, the couple has chosen to live together not only for the benefit of their lives, but also for the benefit of society overall.[115] The court goes even further to say that the commitment to live together is one of the most important that a human can make, and "it is regarded by all Christian nations as the basis of civilized society, of sound morals, and of the domestic affections; and the relations, duties, obligations, and consequences flowing from the contract are so important to the peace and welfare of society."[116] It is evident from this discussion that the cohabitation requirement is certainly important, and it is rather easy to show. Cohabitation is simply living together "as man and wife," meaning simply that the two individuals claiming to be married must share a common residence or room in the state of Texas.[117]

The third and final requirement to prove informal marriage in Texas, holding out, concerns the couple's representations to others that they are married. A careful reading of the statute reveals that the couple must represent to others *in Texas* that they are married.[118] Secrecy and common law marriage principles are completely inconsistent, and the Supreme Court of Texas has held further that simply telling two close friends about the apparent marriage does not suffice, especially when other friends or acquaintances give conflicting information.[119] The conduct of the parties must illustrate to others that the two have entered into an honorable agreement to be man and wife, and while cohabitation is also required for a valid informal marriage, holding out is, as one court called it, the acid test.[120] Evidence that would tend to show that the parties are holding out as a married could includes the wife's using the husband's last name,[121] testimony from third parties regarding the couple's reputation in the community as being married,[122] the filing of joint taxes,[123] as well as evidence of the couple's cohabitation as husband and wife.[124] Of course, there is a litany of other pieces of evidence that would tend to show that a couple has properly met the holding out requirement, but the Texas Supreme Court summed up the

---

[109] *Humphreys*, 364 S.W.2d at 178.
[110] *Id.*
[111] *Id.*
[112] *See* Consolidated Underwriters v. Kelly, 15 S.W.2d 229, 230 (Tex. Comm'n App. 1929); *see also,* Clarice M. David, *Common-Law Marriage in Texas*, 21 Sw. L.J. 647, 649-52 (1967).
[113] *Humphreys*, 364 S.W.2d at 178.
[114] *See* Grigsby v. Reib, 153 S.W. 1124 (Tex. 1913).
[115] *Id.* at 1126.
[116] *Id.*
[117] *Ex parte* Threet, 333 S.W.361, 364 (Tex. 1960).
[118] Tex. Fam. Code § 2.401(a)(2).
[119] *Threet*, 333 S.W.2d at 364-65.
[120] *McChesney*, 79 S.W.2d 659.
[121] *Kelly*, 15 S.W.2d at 230.
[122] Danna v. Danna, No. 05-05-00472-CV, 2006 WL 785621, at *1 (Tex.App.—Dallas Mar. 29, 2006, no pet.) (mem. op.).
[123] Small v. McMaster, 352 S.W.3d 280, 286 (Tex.App.—Houston [14th Dist.] 2011).
[124] Shelton v. Belknap, 282 S.W.2d 682, 687 (Tex. 1955).

standard nicely in the *Grigsby* case: the husband and wife's conduct towards each other must be so public so that others would know that they are husband and wife.[125]

Another aspect of Texas's common law marriage statute that sets it apart from other states, in addition to the proof of all three elements just discussed, is that fact that the statute effectively has a built-in hint at common law divorce.[126] The language in the statute reads that if a court proceeding to argue the existence of an informal marriage is not commenced before the second anniversary on the date in which the couple separated and stopped living together, "it is rebuttably presumed that the parties did not enter into an agreement to be married."[127] Now, because the statute only creates a rebuttable presumption, it is too far a stretch to say that the statute reaches the level of a common law divorce; but, it does shift the burden of proof and potentially acts as a divorce replacement.[128] To be clear, there is not such thing as common law divorce in Texas, nor is there anywhere else in the U.S., but the two-year time limit to commence a case without facing a presumption is unique to Texas.[129] Once an informal marriage is established in Texas, it is recognized as a true marriage as if it were a ceremonial marriage, and the only way to terminate the marriage is by death, divorce, or annulment.[130] The Texas legislature surely included this rebuttable presumption of no marriage agreement after a two-year separation as an additional safeguard against fraud and abuse, which bolsters the argument for retaining Texas's informal marriage statute. More on that to come, but first a discussion on how the Supreme Court of the United States landmark ruling in *Obergefell v. Hodges* changed the landscape for common law marriage.

V. Marriage Equality and Its Implications on Common Law Marriage

In a 2015 opinion written by Justice Kennedy, the highest Court in the land declared that limitation of marriage to opposite sex couples only deprives same sex couples of their fundamental right to marry,[131] and the landscape of family law in the entire country instantly changed. Whereas a statute prescribes a rule that comes into existence at a certain place in time, when the Supreme Court recognizes a fundamental right in the Constitution, it is essentially that the right has always been in existence since ratification—but is just now being recognized.[132] Same sex couples have the fundamental right to get married in all states, and no state can refuse to recognize a lawful marriage simply because the two parties are of the same sex.[133] The issue with regard to common law marriage, then, is whether *Obergefell* requires that same sex couples, who have more or less met the requirements for common law marriage in the states that still recognize the doctrine, can have a valid marriage that originated decades before the *Obergefell* decision was announced.

A. The retroactivity of *Obergefell*

In a 1991 Supreme Court decision, Justice Souter provided a thorough explanation of how courts should deal with the retroactivity of a new rule in civil cases.[134] He pointed out that when the Court decides to adopt a new rule, there are three ways in which it may move forward with applying that new law, and it need not explicitly state which method it intends.[135] First, the decision can be "fully retroactive," meaning that the newly adopted rule applies to the parties before the court in the current case (for this discussion, the parties in *Obergefell*) and to all other parties.[136] Justice Souter declared that this

---

[125] *Grigsby*, 153 S.W. at 1130.
[126] *See* Tex. Fam. Code § 2.401(b).
[127] *Id.*
[128] Joanna L. Grossman & Lawrence M. Friedman, Inside the Castle: Law and the Family in 20th Century America 79 n.3 (2011).
[129] *See id.*
[130] Claveria's Estate v. Claveria, 615 S.W.2d 164, 167 (Tex. 1981).
[131] *Obergefell*, 576 U.S. at __, 135 S.Ct. at 2600-02.
[132] *See id.* at __, 135 S.Ct. at 2608.
[133] *Id.*
[134] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-39 (1991).
[135] *Id.* at 535.
[136] *Id.*

fully retroactive application of new rules is "overwhelmingly the norm," and it follows the declaratory theory of the law, under which the court's purpose is to find the law, not to make it.[137]

Second, using a method called "purely prospective," the new rule may not even be applied to the parties in the case before the court nor to any parties retroactively; instead, the decision is used as a tool to announce the new rule moving forward.[138] If a new rule were to be found under this method, then the rule would apply only to conduct after the date of the decision but not to any conduct before the decision.[139] Justice Souter noted that the Supreme Court has only infrequently used this purely prospective method, and he warned that doing so weakens precedent and "allows the courts to act with a freedom comparable to that of legislatures."[140]

Third, using a method called "modified, or selective, prospectivity," the new rule may be applied to the current case in which it is declared as well as any cases that follow, but circumstances occurring before the decision will still be decided on the old rule.[141] This selective prospectivity applies usually in the criminal context so that, in the event of a newly created rule, countless criminal defendants are not overwhelming the court system with retrials and being released from their sentences that were based on "trustworthy evidence in conformity with previously announced constitutional standards."[142] Justice Souter pointed out that selective prospectivity had never been applied in a civil case, and the Court was presented with the opportunity to use this method in a civil context for the first time, but it declined to do so based on reasons of consistency, *stare decisis*, and rule of law.[143] Ultimately, the Supreme Court is the highest Court of the land, and its treatment of the retroactivity issue with respect to the parties in the case it declares a new rule "requires every court to give retroactive effect to that decision."[144]

The text of the *Obergefell* decision does not explicitly address the retroactivity of same-sex marriage, but its application to the parties before the Court sheds light on how the majority thinks that its new rule should be treated.[145] As is "overwhelmingly the norm," the Court took its new rule allowing same-sex marriages in all states and applied to each of the plaintiffs in *Obergefell*—consistent with the fully retroactive treatment discussed above.[146] Additionally, Justice Kennedy made clear that the Constitution granted the right to marry to same-sex couples, and the Court found—not created—that right.[147] This assertion is consistent with the notion that same-sex marriages can be found to have been created before the pronouncement of the Supreme Court's decision. Federal courts across the United States have since held that the rule in *Obergefell* shall be applied retroactively, and valid same-sex marriages have been recognized to exist long before the Court's decision in 2015.[148]

B. Same Sex Informal Marriage in Texas

Recall the informal marriage statute in the Texas Family Code prescribes the rules for how to prove "the marriage of a man and woman," and it states the "man and woman agree to be married" and they live together "as husband and wife."[149] Not only does the informal marriage section of the Texas Family Code only indicate rules for a man and a woman to be married, other sections relevant to marriage with formalities only provide rules for a man and a woman to marry as husband and wife.[150] In fact, the Code

---

[137] *Id.* at 535-36.
[138] *Id.* at 536.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 537.
[142] *Id.*
[143] *Id.* at 537-45.
[144] Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 89 (1993).
[145] *See generally*, *Obergefell*, 576 U.S. at __.
[146] *See supra*, note 106; *see also id.*
[147] *Obergefell*, 675 U.S. at __, 135 S.Ct. at 2606.
[148] *See e.g.,* De Leon v. Perry, 975 F.Supp.2d 632, 639-40 (W.D. Tex. 2014), *aff'd*, 791 F.3d 619 (5th Cir. 2015) (holding that the State of Texas is enjoined from enforcing its ban on same-sex marriage); *see also* Hard v. Attorney Gen., Fed.Appx. 853, 853-56 (11th Cir. 2016) (holding that the surviving spouse in a same sex relationship was entitled to death benefits even though the decedent died before the decision in *Obergefell* was announced); Schuett v. FedEx Corp., 119 F.Supp.3d 1155, 1165 (N.D. Cal. 2016) (holding that a woman and her same-sex partner were legally married at the time of the partner's death despite the death occurring before same sex marriage was made legal in California).
[149] Tex. Fam. Code § 2.401.
[150] *See e.g.*, Tex. Fam. Code Ann. § 2.001 (West 2015).

explicitly states that a marriage license "may not be issued for the marriage of persons of the same sex."[151] However, the holding in *Obergefell* renders these restrictions on same sex couples unconstitutional.[152]

The Federal Court in the Eastern District of Texas found, in applying Texas state law in an asserted same sex informal marriage situation, that *Obergefell* applies retroactively.[153] Evaluating specific occurrences in the State of Texas itself, the court recounted an instance where, after the ruling in *Obergefell*, a same sex couple went into the County Clerk's office in Tarrant County to file the "Declaration of Informal Marriage" form in compliance with the Texas Family Code sec. 2.401.[154] When filling out the form, the couple indicated that they had been married for twenty-three years, decades before *Obergefell* required marriage equality.[155] The clerk refused to register the couple's declaration with the marriage start date they provided.[156] Later, Tarrant County Clerk Mary Louise Garcia released a statement that the office would properly accept executed declarations of informal marriage with a marriage date predating June 26, 2015, the day of the decision in *Obergefell*.[157] The official statement said that "applicants, regardless of gender, may apply for an informal marriage license *using any date applicable to their relationship*."[158] The retroactivity of *Obergefell* in the common law marriage context was taking hold.

In another Texas case out of Travis County, one gutsy attorney really pushed the boundaries, as he was able to successfully achieve a marriage for his two female clients in the matter of a few hours, months before the decision in *Obergefell* was released.[159] First, the lawyer filed a lawsuit challenging the validity and constitutionality of the portions in the Texas Constitution and the Texas Family Code that restricted marriage to opposite sex couples.[160] Next, under that lawsuit and without notice to the Attorney General, he obtained a temporary restraining order from a district judge who primarily hears criminal matters, allowing his clients to obtain a marriage license from the clerk there.[161] Then, he managed to have waived the 72-hour waiting period required between the license and the ceremony and his clients Sarah Goodfriend and Suzanne Bryant were married on the courthouse steps in Travis County.[162] Finally, in an effort to avoid intervention by the Attorney General and/or appellate review, the attorney filed a nonsuit in the case less than three hours after he started this experiment.[163] Still, on the following day, the Attorney General filed a petition for writ of mandamus to challenge the trial court's temporary restraining order.[164]

By the time the Supreme Court of Texas delivered its opinion on the petition for writ of mandamus, it had been almost one year since *Obergefell* was decided, and therefore the Court dismissed the petition as moot.[165] Justice Willett's opinion and Justice Brown's concurring opinion both used harsh words to address the conduct of both the lawyer involved and the district court judge, and opined "the lawyer … intentionally and illegitimately gamed the system—and the trial court helped him do it."[166] More importantly, the decision held that *Obergefell* is the law of the land, and because of the holding in that case, the marriage of the two women on the courthouse steps could not be disturbed, even though it was performed before the *Obergefell* decision was made.[167] So, the Texas Supreme Court effectively

---

[151] *Id.*
[152] *Obergefell*, 576 U.S. at __, 135 S.Ct. at 2608.
[153] Ranolls v. Dewling, No. 1:15-CV-111, 2016 WL 7726597, at *7 (E.D. Tex. Sept. 22, 2016).
[154] *Ranolis*, 2016 WL 7726597, at *7.
[155] *Id.*
[156] *Id.*
[157] Tammye Nash, *Update: Tarrant County Clerk Says Her Office Will Accept Common-Law Marriage Affidavit*, Dallas Voice (Sept. 25, 2015), http://www.dallasvoice.com/update-tarrant-county-clerk-office-accept-common-law-marriage-affidavit-10205158.html.
[158] *Id.* (emphasis added).
[159] *See In re* State, 489 S.W.3d 454, 457 (Tex. 2016) (Brown, J., concurring).
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 454-58.
[167] *Id.* at 456-57.

applied the holding in *Obergefell* retroactively, and even if this case involved a ceremonial marriage, it is safe say that *Obergefell* can be retroactively applied to informal marriage cases, thereby allowing same-sex marriages to technically begin long before June 2015.[168]

VI. Arguments in Favor of Abolishing Common Law Marriage and Why They Are Not Compelling

As previously noted, the prevailing trend has been for states to repeal their common law marriage statutes or otherwise declare that the state will no longer recognize common law marriages as valid. The states that previously had common law marriage statutes, but now no longer allow for common law marriage are: Alabama,[169] Alaska,[170] Arizona,[171] California,[172] Florida,[173] Georgia,[174] Hawaii,[175] Idaho,[176] Illinois,[177] Indiana,[178] Kentucky,[179] Maine,[180] Michigan,[181] Minnesota,[182] Mississippi,[183] Missouri,[184] Nebraska,[185] Nevada,[186] New Jersey,[187] New Mexico,[188] New York,[189] North Dakota,[190] Ohio,[191] Pennsylvania,[192] South Dakota,[193] and Wisconsin.[194] This section will discuss and evaluate some of the most prominent reasons states have provided for why they did away with their common law marriage statutes. Furthermore, this section will refute or minimize the importance of the arguments set forth by some courts in favor of abandoning common law marriage.

A. Common Law Marriage Is No Longer Necessary

One factor that contributed to numerous courts expressing their disapproval of common law marriage in the early twentieth century is what one scholar has referred to as "the closing of the frontier."[195] As mentioned above in Section III, Part A., the turn of the century saw the expansion of developing cities and a boom in the availability of transportation. Some courts directly addressed this shift and questioned whether common law marriage was still necessary.[196] Common law marriage is said to have been born out of necessity, and one of the primary reasons for its creation was limited access to the courthouse for individuals living in rural areas.[197] The fading of this necessity led to the argument that common law marriage should no longer be used because its use was no longer tied to the reason for its

---

[168] *See id.*
[169] Ala. Code § 30-1-20 (2016).
[170] *See* Edwards v. Franke, 364 P.2d 60, 63 (Alaska 1961) (quoting legislation from 1917 declaring no marriage is valid without a liences issued by a qualified individual.).
[171] *See* Levy v. Blakely, 18 P.2d 263, 265 (Ariz. 1933).
[172] *See* Norman v. Norman, 54 P. 143 (Cal. 1898).
[173] Fla. Stat. Ann. § 741.211 (West 2017).
[174] Ga. Code Ann. § 19-3-1.1 (West 2017).
[175] Haw. Rev. Stat. § 572-1 (West 2013).
[176] Idaho Code Ann. § 32-201 (West 1995).
[177] 750 Ill. Comp. Stat. Ann. 5/214 (West 1977).
[178] Ind. Code § 31-11-8-5 (West 2016).
[179] Ky. Rev. Stat. Ann. § 402.020(1)(c) (West 1998).
[180] *See* Pierce v. Secretary of U.S. Dept. of Health, Ed. and Welfare, 254 A.2d 46 (Me. 1969).
[181] Mich. Comp. Laws Ann. § 551.2 (West 1996).
[182] Minn. Stat. Ann. § 517.01 (West 2013).
[183] Miss. Code Ann. § 93-1-15 (West 1956).
[184] Mo. Ann. Stat. 451.040(5) (West 2014).
[185] Neb. Rev. Stat. Ann. § 42-104 (West 2008).
[186] Nev. Rev. Stat. Ann. § 122.010 (West 1943).
[187] N.J. Stat. Ann. § 37:1-10 (West 1939).
[188] *See In re* Lamb's Estate, 655 P.2d 1001 (N.M. 1982).
[189] N.Y. Dom. Rel. Law § 11 (McKinney 2015).
[190] *See* Schumacher v. Great Northern Ry. Co., 136 N.W. 85, 86-87 (N.D. 1912).
[191] Ohio Rev. Code Ann. 3105.12 (West 2016).
[192] 23 Pa. Cons. Stat. Ann. § 1103 (West 2005).
[193] S.D. Codified Laws §25-1-29 (1959).
[194] *In re* Van Schaick's Estate, 40 N.W.2d 588, 589 (Wis. 1949) ("Common law marriages were abolished in Wisconsin in 1917 and, therefore, petitioner can claim no common-law marriage in Wisconsin.).
[195] Bowman, *supra* note 18, 732-736.
[196] *See e.g.*, *Norman*, 54. P. at 145.
[197] Bowman, *supra* note 15, 722-24.

creation.[198] In other words, because the necessity for non-ceremonial marriages was disappearing, courts should require that couples intending to marry do so in accordance with a legal, ceremonial process. One court put forth, "In this county no person lives, who cannot in some manner easily reach the county courthouse and partake of the beneficence of those who are by law endowed with the privilege authorizing and conducting the marriage ceremony."[199]

This argument does not carry much weight, as the disappearance of the original reason for a certain doctrine does not usually call for a review and abandonment of such doctrine. The argument is akin to asserting that the end result may be warranted and desirable, but because the reason for doing so does not match the reason the government originally intended, the end result should no longer be recognized. For example, imagine an elderly couple that has lived together as husband and wife for over fifty years. Say that they have three adult children and handful of grandchildren now. As a traditional couple, the husband worked to provide for the family his whole life, and the wife mostly stayed home to maintain the household and raise their children. The couple has lived together since they graduated high school, but since they never had the funds to have a big wedding, and since they did not think it was important to file any paperwork at the courthouse, the simply decided together that they were husband and wife.

When hypothetical husband died and his estate was administered, weeping wife was barred from receiving her share of his property once it was discovered that the two had not officially and ceremoniously been married. Granted, this example is a bit basic and shamelessly calls for sympathy, but it serves to prove the point. Husband and wife could have easily gone to the courthouse to solemnize and record their marriage, but did not do so. Yet, they lived their entire lives as a husband and wife would, and they had the expectation that they would be able to enjoy the benefits of a legal marriage. Doing away with common law marriage because access to the courthouse is much easier in today's world will harm more individuals than its absence will help. Just because the purpose for which the doctrine arose is less relevant today does not mean that the state should take action to abolish it.

B. Abolishing Common Law Marriage Protects the Institution of Marriage

Another popular, and seemingly counterintuitive, theme that emanated from some courts' movement away from common law marriage was the protection of the family and the institution of marriage.[200] This particular argument was presented quite early on, when states were first deciding whether to recognize common law marriage.[201] For example, one court proclaimed that allowing common law marriages so out of the norm that it would "shock [people's] sense of propriety and decency … [and] would tend to weaken the public estimate of the sanctity of marriage … [and] would be opening a door to false pretenses of marriage."[202] The court further declared that allowing common law marriages "would place honest, God-ordained matrimony and mere meretricious cohabitation too nearly on a level with each other."[203]

While this notion started early, it subsisted while the trend away from common law marriage continued, and the exact quote above was advanced in a 1966 opinion rendered by an Ohio court of appeals.[204] Another state, in its rejection of common law marriage, argued that disallowing it "will best foster and protect the home, and promote the sacredness of the marriage relation."[205] Apparently, the specific worry here is that the existence of common law marriages, or the option to marry purely by contract, somehow detracts from the sanctity of ceremonial marriages. Perhaps allowing—or worse, endorsing—a couples' cohabitation and sexual relationship, without the blessing of a court, minister, priest, or some other "qualified" individual, is seen as an indirect attack on ceremonial marriages. Common law marriage is the stepsister of ceremonial, "true" marriage, and participating in one is seen as an insult to the purity of the institution of marriage itself.

---

[198] *Soeder*, 220 N.E.2d at 561-62.
[199] *Id.* at 562.
[200] Bowman, *supra* note 18, at 743-44.
[201] See, e.g., Duncan v. Duncan, 10 Ohio St. 181, 188 (1859).
[202] *Id.*
[203] *Id.*
[204] *Soeder*, 220 N.E.2d at 292.
[205] *Furth*, 133 S.W. at 1039.

On the contrary, allowing common law marriages actually bolsters the institution of marriage. As the debate is still ongoing today, proponents of the doctrine continue to assert that common law marriage encourages marriage, while abolishing it discourages marriages.[206] At the most basic level, allowing common law marriages would allow for more individuals to marry. By requiring ceremonial marriages, the state is protecting and promoting that specific method of marriage; but allowing another method for individuals to marry promotes the overall institution of marriage itself. With regard to the importance of family, allowing common law marriages could result in fewer situations involving unwed fathers or illegitimate children.

Additionally, recognizing common law marriages as valid can help purify the institution of marriage by cleaning up taboo relationships. Although less relevant in today's society, state governments used to be much more concerned with regulating immoral behavior like cohabitation and fornication.[207] By taking one of these so-called meretricious relationships and affixing the label of "valid marriage" on them, the state can effectively clean up this undesired behavior by its citizens. This sanitization by labeling helps promote the institution of marriage.

C. Concerns About Fraud and Abuse

Perhaps the most legitimate concern with common law marriages is the availability of fraud and abuse in that context. After consideration, though, the concerns that exist do not actualize in any prevalent nor significant problems that would lead to the conclusion of necessary abandonment of common law marriage. Recall the dramatic claim in one Florida Supreme Court decision that "it is difficult to imagine a readier vehicle of fraud" than common law marriage.[208] One of the situations that causes the most concern, like the one being referenced in this quote, involves the death of an individual and a person claiming to be the common law spouse and seeking the entirety of the decedent's estate.[209] The decedent in this situation obviously would not be able to testify about the alleged agreement, so courts worry that uncontradicted testimony could result in a ruling of a valid marriage where one truly did not exist.

Safeguards exist in state statutes and the legal system itself that minimize and eliminate the ability for fraud and abuse. Recall the statutory scheme in Iowa that requires the elements of common law marriage to be shown by "clear, consistent, and convincing evidence" when one of the parties to the claimed marriage is deceased.[210] Additionally, statutes require that the party asserting a common law marriage exists have the burden of proof.[211] Whether it is the jury or a judge, the fact finder is tasked with weighing the evidence presented and assessing the integrity of the testimony given at trial. These safeguards inherent in the legal system, along with the built-in safeguards in different states' statutes help protect against fraud and abuse.

By the same token, the holding out requirement of common law marriage requires that the couple represent themselves to others as a married couple. Because this required element involves public perception, it is necessary for courts to examine evidence of the couple's relationship—whether in the form of testimony or evidence. Presumably, if the validation of a marriage that really was not one would cause harm to an individual (an heir, say), then that person would have the opportunity to present evidence to refute the holding out element. Otherwise, the person or persons claiming a common law marriage can have members of the community testify regarding the couple's relationship. Nowadays, with the prevalence of social media and increased interconnectedness of society, evidence about relationships should be easier to come across. All in all, the safeguards within the statutory schemes and the legal process itself provide enough protection against abuse and fraud that abolishing common law marriage is certainly not necessary.

---

[206] Daniel Salazar, *Common-Law Marriage? Not in Kansas if Bill Succeeds*, The Wichita Eagle (Feb. 8, 2017), http://www.kansas.com/news/politics-government/article131568029.html.
[207] Grossman & Friedman, *supra* note 127, 78-79.
[208] *McClish*, 14 So.2d at 718.
[209] *See id.*
[210] *Long's Estate*, 102 N.W.2d at 79.
[211] *Id.*

VII. Arguments in Favor of Retaining Informal Marriage in Texas and Why They Win

A. Safeguards in Texas's Statute Prevent Abuse and Fraud

Texas also has several safeguards built into its statute that protect against potential fraud and abuse as described above. For example, the statute requires that the couple live *in Texas* and represent to others *in Texas* that they are married.[212] By requiring that the cohabitation and the holding out occur within the state, Texas courts do not have to address situations where the couple entered an agreement in one state and subsequently moved around to other states while claiming to be husband and wife—everything must take place in Texas. This also means that any testimony about the couple's relationship and alleged marriage must come from individuals and instances within the state. Narrowing the scope in this manner not only helps with administrative ease, but it also helps deter fraudulent claims by having additional requirements.

Additionally, there is a statutory presumption that, if a court proceeding is not started before the second anniversary on which the couple separated and stopped living together, there is a rebuttable presumption that the parties did not enter an agreement to be married.[213] This presumption can help weed out potential abuse or fraud in situations where an individual comes forward after at least a two-year period and asserts that a marriage existed in order to obtain some marital benefit. While limited in its application, this extra requirement bolsters the overall strength of the statutory scheme.

The last component of Texas's statute that works to combat fraud or abuse is the provision that allows a couple to file a declaration of their marriage.[214] The form that is to be filed with the county clerk basically states that the couple declares under oath that they fulfilled all the requirements of a common law marriage: an agreement to be married, subsequent cohabitation in Texas, and holding out in Texas.[215] A couple that swears to the facts and signs this declaration is unlikely to be attempting to commit any kind of fraud against the government. As previously noted, courts were most concerned about an individual claiming common law marriage when the other spouse is dead and unable to testify. This provision allows a couple to declare their marriage, albeit an informal one, to the state at any time. Rather than waiting for litigation arising from some controversy to try to prove the existence of a marriage, this enables a couple to declare their marriage before a problem arises. If couples choose to take this step, then the number of suits seeking to have informal marriages declared following the death of an individual would potentially decrease, thereby reducing the opportunity for fraud and abuse.

B. Continued Recognition of Informal Marriage Benefits Same-Sex Couples Without Harming Other Individuals

Since it has been established that *Obergefell* can be applied retroactively to same-sex couples in Texas, retaining the informal marriage statute offers great benefits to same-sex couples.[216] Because same-sex marriage was not allowed in Texas before *Obergefell*, up until that date no valid same-sex marriages were solemnized in the state.[217] The informal marriage statute coupled with the retroactivity of *Obergefell* allow for same-sex marriages to have a starting date long before the summer of 2015. This benefits same-sex couples by allowing for a much larger community estate to have developed, assuming that the couple can prove the elements of informal marriage.

In the event of a divorce between a long-term same-sex couple, a larger community estate means that while the two were acting as a married couple, their property and debts during the marriage would be characterized as community rather than separate property. If there were a relatively high earner in the relationship, the characterization of the income during the marriage as community property would benefit the low earner upon divorce. Similarly, in the event of a death of one of the individuals involved in a long-term same-sex relationship, the date of the origin of the marriage becomes very important. With the benefit of Texas's informal marriage statute, so long as the surviving spouse can establish the existence of all three elements, a much larger portion of the decedent's estate would be classified as

---

[212] Tex. Fam. Code § 2.401(a)(2).
[213] *Id.* § 2.401(b).
[214] *Id.* at § 2.401(a)(1).
[215] *Id.* at § 2.402.
[216] *In re* State, 115 S.W.3d at 456-67; *Ranolis*, 2016 WL 7726597, at *8.
[217] Except for the unique case of Sarah Goodfriend and Suzanne Bryant, discussed on pp. 22-23.

community property, depending on the duration of the marriage. This benefits same-sex couples by providing much greater protection for marital assets in the case of divorce or death—the longer the duration of the marriage, presumably, the larger the community estate. Repealing the statute would only cause more harm than provide any benefit in this instance.

VIII. Conclusion

As it has been shown, common law marriage has experienced an up and down history in the United States. At the birth of our nation, the doctrine took hold in some states and was rejected in others. Then, as the country progressed from its early history to the nineteenth and twentieth centuries, about half of the states recognized common law marriages as legal, valid unions. The trend to get rid of common law marriage took a strong hold, and the number of states allowing it sharply declined. Now, less than twenty percent of this Nation's states recognize common law marriages as valid. Reasons for the decline include greater access to the legal system, the purported protection of the institution of marriage, and the fear of fraud and abuse. None of these reasons alone provide enough weight to compel a state to abandon the doctrine. And, even when taken together, they are not compelling, as common law marriage still provides benefits to couples, it benefits the institution of marriage, and states like Texas have enough safeguards in their statutes and legal systems to protect against fraud and abuse. Informal marriage in Texas is not causing any legitimate problems, and retaining the statute will benefit the people of Texas, especially same-sex couples. Therefore, if the Texas legislature considers repealing the informal marriage statute, it should not.

GO TO TABLE OF CONTENTS

Guest Editors this month includes: Jimmy Verner (*J.V.)*, Michelle May O'Neil (*M.M.O.*), Rebecca Tillery Rowan (*R.T.R.*), and Jessica H. Janicek (*J.H.J.*)

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

MSA AGREEING TO CONVEY RESIDENCE TO WIFE INSUFFICIENT TO ESTABLISH—IN SUMMARY JUDGMENT PROCEEDING—HUSBAND'S PRESENT INTENT TO FORSAKE THE RESIDENCE AS HIS HOMESTEAD.

¶18-2-01. ***Drake Interiors, Inc. v. Thomas*, ___ S.W.3d ___, No. 14-17-00374-CV, 2018 WL 3927521** (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (02-13-18).

Facts: Before marriage, Husband acquired debt from Creditor but, subsequently, only made one payment towards repaying the loan. During the marriage, Husband and Wife purchased a home they claimed as their homestead. Subsequently, Wife purchased another property that was her sole management community property. When the couple separated, Husband moved out of the marital residence and lived with a friend. Wife and the couple's children moved to Wife's other home.

Creditor sued Husband and obtained a judgment for the unpaid debt. After abstracting the judgment, Creditor sought to attach the judgment to what it asserted was an abandoned homestead.

During the couple's divorce proceeding, they signed an MSA that awarded both pieces of real property to Wife and included an agreement that Husband would make some payments on Wife's other home. When the divorce was final, Wife moved back into the marital residence. Wife and Creditor filed cross-motions for summary judgment in Creditor's suit to execute its judgment against the marital residence. The trial court granted Wife's motion and denied Creditor's. Creditor appealed.

Holding: Reversed and Remanded

Opinion: The question in this case is whether a husband and wife abandoned their homestead before they divorced. If the answer is no, then the wife, who was awarded the home in the divorce, took the home free and clear of a judgment lien arising out of the husband's premarital debt. On the other hand, if the answer is yes, then the lien attached during the marriage, and the judgment creditor may now be able to execute against the home.

Because the evidence conclusively established that Husband and Wife did not live in the home at the time of divorce, the only question was whether they intended to forsake the property as their homestead. To defeat Wife's motion, Creditor simply needed to establish some question of fact regarding abandonment; however, to prevail in its own motion, Creditor needed to conclusively establish that both Husband and Wife intended to forsake the property.

Wife was not entitled to summary judgment because Husband signed an MSA agreeing to give Wife the property, and Wife claimed a new home as her homestead on her taxes one year during the divorce proceeding. Thus, a reasonable person could find that both parties intended to forsake the property.

However, the MSA was an agreement to give Wife the property at the time of divorce, not immediately. Further, the parties could have at any time reconciled and non-suited the divorce. Thus, the execution of the MSA did not necessarily manifest a present intent to forsake the residence, and if the presumptive homestead continued on the day of divorce, the decree would have conveyed to Wife the property free and clear of any judgement lien. Accordingly, the Creditor was also not entitled to summary judgment.

GO TO TABLE OF CONTENTS

Editor's comment: *The court correctly points out that a family can have only one homestead. Thus, even if wife intended to abandon the homestead, husband must have intended to abandon it, too. Here, husband moved out, then signed an MSA that would grant the former marital residence to wife upon divorce, yet this was held inconclusive evidence that husband intended to abandon the homestead. The slim reed on which this holding rests is that the spouses might have reconciled and torn up the MSA. But how would that change the prior intent of either? J.V.*

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

WIFE OVERCAME PRESUMPTION AGAINST SPOUSAL MAINTENANCE BECAUSE SHE ATTEMPTED TO FOCUS ON HER EDUCATION, BUT FATHER AND CPS IMPEDED HER EFFORTS.

¶18-2-02. *Arellano v. Arellano*, No. 01-16-00854-CV, 2018 WL 284333 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (01-04-18).

Facts: Husband and Wife began living together as a couple since she was 16 years old. Over the next 16 years, Wife tended to the house, prepared meals, and cared for the couple's two Children, plus Husband's son from a previous relationship. Wife had only a high-school education and attempted to bolster her education during the marriage, but Husband caused her to miss classes. After separation, Wife worked low paying jobs because she lacked the educational background to find better employment. She testified that educational programs were available that would enable her to earn a higher income and would take five years to complete. However, because of CPS's involvement in the case, she could not work fewer hours to focus on education.

The trial court granted a divorce, divided the marital estate, and ordered Husband to pay spousal maintenance for five years. Husband appealed the spousal maintenance award, arguing in part that Wife failed to rebut the presumption against spousal maintenance.

Holding: Affirmed

Opinion: Wife exercised diligence in earning sufficient income, but her efforts were hindered by her lack of education and by CPS's requirement that she maintain full-time employment. The evidence supported the trial court's finding that Wife overcame the presumption against spousal maintenance.

Editor's comment: *We frequently have cases involving factors that may be against our client's control, or that make it difficult for our client's to obtain employment to meet their minimum reasonable needs. If you have a client that has diligently been attempting to gain employment, don't forget to put on that evidence. It could mean cover letters, resumes, job interviews, recruiters, and anything else that your client has to show his or her diligence in obtaining sufficient income. J.H.J.*

Editor's comment: *CPS required wife to work full time at her job with Babies R Us. That requirement kept wife from "retraining" or looking for another job. If wife had quit, or cut her hours, she would have been in violation of CPS' service plan. A true Catch-22. J.V.*

DIVORCE
INFORMAL MARRIAGE

HUSBAND COULD NOT RELY ON QUASI-ESTOPPEL IN DEFENSE OF WIFE'S COMMON LAW MARRIAGE CLAIM BECAUSE IRS WAS A "STRANGER" TO MARRIAGE.

¶18-2-03. *Leyendecker v. Uribe*, No. 04-17-00163-CV, 2018 WL 442724 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (01-17-18).

Facts: Wife filed for divorce, alleging an informal marriage. Husband denied the existence of a marriage. Husband filed no-evidence and traditional motions for summary judgment. Husband argued that because the parties ceased living together more than two years before Wife filed her petition, there was a rebuttable presumption the parties never agreed to be married, and that Wife failed to rebut that presumption. Additionally, Husband argued that because Wife filed her taxes some years as "single," that she was precluded by the quasi-estoppel doctrine from alleging that the parties were married. The trial court granted Husband a summary judgment, and Wife appealed.

Holding: Reversed and Remanded

Opinion: Wife raised no more than a scintilla of evidence that she was still living in the house after 2011. Thus, Wife had to overcome the rebuttable presumption that the parties never agreed to be married. Nevertheless, Wife's presented sufficient evidence to raise a question of fact as to whether the parties agreed to be married.

Quasi-estoppel is an equitable doctrine that prevents a party from maintaining a position inconsistent with one to which he acquiesced or from which he accepted a benefit. The doctrine cannot be asserted by or against a "stranger" to the transaction that gave rise to the estoppel. Thus, Husband could not rely on Wife's representations to the IRS on a few tax returns that she was single for support of a quasi-estoppel claim because the IRS was a stranger to the transaction of a possible common-law marriage between Husband and Wife.

Editor's comment: *This case is interesting to me, because it appears it was overturned on appeal due to the fact that it was an MSJ, and not all elements of quasi estoppel (an affirmative defense) could be met. However, whether someone files their taxes as married or single, when claiming a common law marriage, is a major piece of evidence we use in these cases. While this evidence may not have supported quasi estoppel, it will certainly be useful in the trial to rebut the presumption of common law marriage. J.H.J.*

DIVORCE
PROPERTY DIVISION

TRIAL COURT AUTHORIZED TO ORDER, CONCURRENTLY WITH DIVORCE PROCEEDING, A PARTITION OF THE JOINTLY-OWNED RESIDENCE BY SALE THROUGH A RECEIVER.

¶18-2-04. *Allen v. Allen*, No. 02-17-00031-CV, 2018 WL 547586 (Tex. App.—Fort Worth 2018, no pet. h.) (mem. op.) (01-25-18).

Facts: On April 3, 2009, Wife purchased a residence located in Bedford, Texas. Shortly after, on May 16, 2009, she married Husband. On January 18, 2012, Wife executed a general warranty deed in which she conveyed to Husband an undivided one-half interest in the residence. The deed recites that the consideration for that conveyance was "[l]ove of, and affection for, [Husband]." A few years later, Wife filed a petition for divorce, which the trial court granted. Husband claimed an undivided one-half separate property interest in the residence and sought partition and appointment of a receiver to sell the residcence. In its decree, the trial court confirmed that Wife and Husband each owned, as their separate property, an undivided one-half interest in the residence, and it appointed a receiver to sell the residence and distribute the net proceeds as provided in the decree.

Holding: Affirmed.

Opinion: Trial court had authority, under the general laws pertaining to partition suits between cotenants, to order, concurrently with the divorce proceeding, that the residence be partitioned by sale. The trial court's appointment of a receiver to sell the residence arose from Husband's request to partition the residence by sale. Here, applying the laws of a partition action, the trial court implicitly found that the residence was incapable of partition in kind and that equity required a partition by sale. And having the authority to order a partition by sale, the trial court was also authorized both by statute and the rules of civil procedure to appoint a receiver to accomplish the sale.

Editor's comment: *See Jodi Bender's article in the 2017 Fall Section Report entitled, "Yours, Mine, or Ours? Dealing With a Jointly-Owned Separate Property House during Divorce for a further discussion of how to handle the above situation. G.L.S.*

Editor's comment: *This is an important point to remember—bring a civil partition action as part of the divorce when the parties jointly own property purchased before marriage. Remind the divorce court that the rules and procedure are very different and precise as to how it should proceed. M.M.O.*

TRIAL COURT COULD NOT DIVIDE A MARTIAL ESTATE WHILE A BANKRUPTCY STAY WAS IN PLACE.

¶18-2-05. ***Adeleye v. Driscal*, ___ S.W.3d ___, No. 14-14-00822-CV, 2018 WL 1057482 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.)** (02-27-18).

Facts: Wife testified that she and Husband married in a traditional Nigerian ceremony, even though neither party was present at the ceremony. During the marriage, they had three children. A few years after they married, Husband arranged for Wife to marry Husband's co-worker so that she could get a green card and then later help Husband do the same. That marriage was never consummated, and the co-worker died before Wife obtained a green card.

During the divorce proceedings, Husband argued that he married another woman before marrying Wife, making that marriage an impediment to his marriage to Wife. However, Husband's brother testified that he had never heard of the other wife. Husband also alleged that he could not be married to Wife under Nigerian wife because he had never agreed to marry her.

The trial court held that a valid marriage existed between Husband and Wife and divided the community estate. Subsequently, among many other issues, Husband challenged the factually sufficiency of the trial court's finding that a valid marriage existed between the parties.

After the appellate court affirmed Husband and Wife's final decree of divorce, Husband filed a motion for rehearing alleging that he filed for Chapter 13 bankruptcy before the divorce was filed and that the bankruptcy was not discharged until after the divorce decree was signed. Thus, Husband argued that due to the automatic stay, the trial court lacked jurisdiction to divide the marital estate. The appellate court then remanded the case to the trial court. In its opinion, the trial court set forth law governing automatic stays, including that stays apply automatically, do not require notice, do apply to divorce proceedings, void any actions taken against the debtor or his property, and can be raised at any time, even sua sponte on appeal.

On remand, the trial court found that no notice had been received of the stay and that because of the lack of notice, the stay was lifted after 30 days.

Holding: Affirmed in Part; Reversed and Remanded in Part; Petition for Writ of Mandamus denied as moot.

Majority Opinion: Any action taken in violation of an automatic bankruptcy stay is void, not merely voidable. While a bankruptcy stay may be limited to 30 days in certain circumstances, there was no indication or finding that such circumstances existed in this case. The trial court had no authority to divide the marital estate until the stay was lifted by the bankruptcy court. However, the trial court did have the authority to determine whether a valid marriage existed and grant the dissolution of the marriage.

Husband asserted that the evidence only showed that he and Wife had entered an "engagement" and not a marriage. However, Wife, Husband's brother, and an attorney licensed in Nigeria and New York testified that a wedding in Nigeria is often referred to as an "engagement." There was evidence that the wedding took place, even if the parties did not attend the ceremony. Additionally, the attorney—who testified as an expert on Nigerian weddings—confirmed that "customary law by proxy" marriages occur when the parties are not physically present for the wedding ceremony. Rather, the families of the couple meet and agree on a "bride price," and then family members or personal representatives of both sides must meet along with two witnesses for the marriage to take place. The attorney further testified that such marriages are recognized as valid pursuant to the United States Citizenship and Immigration Service Policy Manual. Wife presented a letter from Husband's brother to her father approving the marriage and letter from friends congratulating her on the "engagement." The couple lived together, moved together, had three children together, and held themselves out as being married. There was no evidence that the marriage had been dissolved.

The divorce decree produced by Husband showing his dissolution of marriage from the other woman included a date of divorce after he and Wife married, but it did not include a date of the other marriage. Thus, the divorce decree alone was insufficient to overcome the presumption that his current marriage to Wife was valid.

Further, Wife testified that her alleged marriage to another man—while she was married to Husband—was a sham marriage to obtain a green card. She met the man once, the marriage was never consummated, and the man died before the current divorce proceeding.

Editor's comment: *This is terrifying. It's a gentle reminder that if there is a bankruptcy in place, the SAFEST thing to do is to notify the court and halt all operations. If you just can't do that, get a lift of the stay. Even then, some family courts still won't touch a case until the bankruptcy is completed. Remember, it is a violation of the stay to take ANY action whatsoever on a case when a bankruptcy stay is in place. J.H.J.*

GO TO TABLE OF CONTENTS

Editor's comment: *Are we sure this case isn't a law school exam? What a mess—bankruptcy preemption, foreign marriage law, interpretation of foreign versus US terms, marriage by proxy, informal marriage, putative marriage, children. What else? I don't agree with the COA opinion that the validity of the marriage and dissolution could be addressed without a lift of the bankruptcy stay. Certainly, dissolution would affect the parties' property rights. Safest thing to do is get a lift stay to proceed with any part of the proceeding. Even if the dissolution went forward, it would be interlocutory until the property division is addressed. M.M.O.*

SAPCR
PROCEDURE AND JURISDICTION

TO HAVE THE RIGHT TO INTERVENE, INTERVENORS MUST SHOW THAT THEY "HAD SUBSTANTIAL PAST CONTACT" WITH THE CHILDREN.

¶18-2-06. *In re Tinker.* ___ S.W.3d ___, No. 10-17-00194-CV, 2017 WL 6374803 (Tex. App.—Waco 2017, orig. proceeding) (12-13-17).

Facts: The children were placed with the Tinkers, the maternal great-aunt and uncle of the children, by DFPS and the Tinkers were named the sole managing conservators of the children in a final order entered in 2010. That order named the children's parents, Mary and Mario, as possessory conservators. In 2014, the Tinkers filed a petition to terminate the parent-child relationship between the children and their parents.

Subsequently, Julia and Roberto filed a petition in intervention seeking possession and access to the children and also filed a motion to transfer venue from Burleson County to Brazos County with an affidavit signed by Julia alleging that the children were residing in Brazos County. Julia and Roberto served the Tinkers through their attorney. However, an affidavit contesting the motion to transfer was untimely pursuant to the Family Code. The trial court in Burleson County entered an order transferring the proceedings to Brazos County.

The Tinkers first filed a plea to the jurisdiction in Burleson County, and later filed a motion to strike the intervention in Brazos County. The trial court in Brazos County conducted a temporary hearing which included the hearing on the motion to strike the intervention. The trial court denied the motion and determined that Julia and Roberto had standing to intervene as grandparents of the children. The Tinkers sought mandamus relief asking the Court to order the trial court withdraw its order finding that Julia and Roberto had standing to intervene. The Tinkers further seek an order requiring that the proceeding be transferred back to Burleson County because the transfer of venue was improperly ordered due to the lack of standing.

Holding: Mandamus conditionally granted.

Opinion: In order for Julia and Roberto to have the right to intervene in this proceeding, one requirement pursuant to Section 102.004(b) was to show that they "had substantial past contact" with the children. The affidavit filed in support of the petition in intervention mentions one time when Julia saw one of the children briefly in September of 2013 when she was a substitute teacher at the child's school, which was more than one year prior to the filing of the petition in intervention. As to Roberto, there is no mention of any contact having ever taken place between him and the children in the affidavit.

The evidence presented by Julia at the temporary hearing relating to past contact with the children was that neither she nor Roberto had visited with the children since the entry of the order in 2010. In a 3-week period beginning in August of 2014, Julia sent 3 letters asking for a visit to Mr. Tinker through the Parks and Recreation Department at the City of College Station where Julia believed Mr. Tinker was employed, which were signed for by a third party. There was no response to the letters. The only

other contact between Julia and the Tinkers and the boys had taken place "a few years" before the temporary hearing at a Walmart where Julia saw the boys but did not have contact with them due to an altercation between her and Mrs. Tinker where the police were called. There was no other evidence of attempts by Julia or Roberto to contact the children between 2010 and the letters sent in 2014.

Even accepting Julia and Roberto's testimony regarding contact with the children as true, the evidence does not raise a fact issue on substantial past contact. Therefore, Roberto and Julia lacked standing to intervene in the proceeding that was pending in Burleson County that was transferred to Brazos County.

Even though controverting affidavit filed untimely, because Julia and Roberto did not have standing to intervene in the first place, the parties should be returned to the position they were in prior to the filing of the petition in intervention. In order to accomplish this, the proceeding should be transferred back to Burleson County.

MOTHER REQUIRED TO RETURN CHILD TO MEXICO BECAUSE NO CLEAR AND CONVINCING EVIDENCE OF GRAVE RISK TO CHILD IN MEXICO.

¶18-2-07. ***Soto v. Contreras*****,** ___ F.3d ___, No. 16-11541, 2018 WL 507802 (5th Cir.) (01-23-18).

Facts: Mother and Father, citizens and residents of Mexico, married in Mexico and had three children. Mother fled Mexico with two of the Children to escape alleged abuse by Father. Father sought relief in a Texas court, asking the court to order Mother to return the child to Mexico. (One of the two children was over the age of 16, so the Hague Convention did not apply to her.) At a hearing, the parents presented conflicting evidence about whether Father was abusive to Mother and the children. At the hearing's conclusion, the trial court found Mother failed to establish that the children were at a grave risk in Mexico and that there was no justification for the abduction. Accordingly, the court ordered Mother to return the child to Mexico. Mother appealed.

Holding: Affirmed

Opinion: The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. Those who abduct a child may assert several narrow affirmative defenses, include the "grave-risk defense," which provides that the abductor is not required to return the child if she establishes by clear and convincing evidence that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Here, the parents presented conflicting testimony, and the trial court had the discretion to determine which evidence it found to be more credible. Additionally, contrary to Mother's assertion, while spousal abuse can support a finding of a grave risk to a child, spousal abuse does not mandate a grave-risk finding.

Editor's comment: *The Fifth Circuit agreed with the district court's ruling if not its analysis. The district court stated that because neither party provided "objective evidence" of grave risk, mother's allegations of abuse failed "to rise to the level of clear and convincing evidence of a grave risk of harm." The Hague Convention does not require "objective evidence" or include that term. However, the district court was entitled to believe or disbelieve the parties' testimony, so the Fifth Circuit affirmed. J.V.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WIFE'S CONTINUANCE BECAUSE WIFE FAILED TO SHOW THAT HER ATTORNEY'S WITHDRAWAL WAS NOT CAUSED BY WIFE. ALSO, BY FAILING TO TIMELY APPEAR FOR TRIAL, WIFE WAIVED HER RIGHT TO A JURY TRIAL.

¶18-2-08. ***Harrison v. Harrison*, ___ S.W.3d ___, No. 14-15-00430-CV, 2018 WL 894442 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.)** (02-15-18).

Facts: In a previous appeal of the divorce on the merits, the court affirmed the divorce decree insofar as to the divorce, but reversed the remainder of the decree and remanded for a new trial. In the first trial, Wife, who is an attorney, represented herself after her attorney withdrew and the trial court refused to grant her a continuance. Since the remand in April 2012, this case has been preferentially set for trial a number of times, and Wife has alternated between periods of self-representation and representation by numerous attorneys, all of whom have withdrawn.

In January 2014, after participating in court-ordered mediation, the parties signed a mediated settlement agreement (the "MSA"). Wife moved to set aside the MSA the following March, asserting that she had been a victim of family violence, which impaired her ability to make decisions, and the MSA was not in the best interest of the Children. The trial court disagreed and, based on a motion by the children's amicus attorney, signed an interim order on parent-child issues incorporating the terms of the MSA on April 10 (the "Interim Order"). Wife failed to fully comply with the trial court's Interim Order, as well as other orders. Thereafter, Husband filed a motion to set aside the MSA or to modify the Interim Order. Subsequently, Wife's attorney was allowed, over Wife's objection, to withdraw after a three-day hearing.

The trial court instructed all parties to appear at 8:30 a.m. on January 20, 2015 to resolve any outstanding pre-trial matters then begin trial. Wife was not represented by counsel and she failed to appear at 8:30 a.m. Husband, his counsel, and the amicus attorney appeared timely. At approximately 9:30 a.m., Husband, the only party who filed a jury demand and paid a jury fee, waived his right to jury trial and requested a bench trial. Wife still was not present. Testimony commenced to the bench. Wife did not arrive in the courtroom until about 10:15 a.m. At that time, Husband was testifying. Wife notified the trial court that she had filed a motion to recuse the trial judge. The trial court denied the motion to recuse, but recessed proceedings until the administrative judge could rule on the motion. After the administrative judge denied the motion to recuse, proceedings recommenced around 1:30 p.m. At that time, Wife objected to proceeding with trial without a jury. The trial court overruled her objection and proceeded with the bench trial.

During trial, the trial court afforded Husband and Wife equal, but reasonably limited, time to present their evidence and cross-examine witnesses. During the trial, the trial court repeatedly reminded Wife how much time she had used and how much time remained. Despite the trial court's reminders, when Wife's allotted time expired, Wife argued she lacked sufficient time to present all her desired evidence. The court granted Wife an additional hour to present further evidence. At the conclusion of trial, the court appointed Husband sole managing conservator of the Children, limited Wife to supervised possession, and awarded Husband the former marital home. Wife appealed complaining, among other things, that the trial court abused its discretion by permitting her trial counsel to withdraw, over her objection, approximately four weeks before trial and without granting a trial continuance and by denying her the right to a jury trial.

Holding: Affirmed.

Opinion: Wife's attorney explained that her continued representation of Wife would have caused the attorney to violate the disciplinary rules by compromising her fiduciary duties to Wife. Under such circumstances, the attorney was required to withdraw as Wife's counsel. Although it would have been preferable to have obtained a more detailed explanation through an in camera conference or other means that would have preserved attorney-client privilege, Wife's attorney's explanation was sufficient to support good cause to withdraw.

GO TO TABLE OF CONTENTS

In exercising its discretion over whether to grant or deny a continuance due to the withdrawal of counsel, a trial court may consider the entire procedural history of a case. Here, the trial court possessed abundant knowledge of this matter's prolonged history bearing upon whether Wife was entitled to a continuance in December 2014. The record reflects that Wife retained upwards of a dozen different attorneys over the course of this case, hiring at least half of them following our remand. Many of these attorneys withdrew—often with Wife's blessing—before trial settings, resulting in a pattern of trial postponements. Wife consented to the withdrawal of her previous counsel in September 2014, when Wife was aware of the January 2015 trial setting. Wife did not retain her last attorney until early December 2014—a little over a month before trial. Less than two weeks into that attorney's representation of Wife, that attorney moved to withdraw based on Wife's actions. On this record, Wife's serial employment of attorneys, continuing unabated following remand, reasonably could be viewed as undertaken for dilatory purposes, which the court could balance against her requested continuance.

Wife also complained that she was denied her right to a jury trial. A right to jury trial may be waived by a party's untimely appearance. Here, Wife repeatedly proved herself unable or unwilling to manage her schedule or affairs in such a way as to ensure compliance with the court's orders, including orders to appear timely in court. The court was entitled to take Wife's dilatory history into account in exercising its discretion whether—and if so, for how long—to wait for Wife to appear for trial. The trial court has authority to impose consequences for a party's failure to appear timely for trial. The judge, not the litigant, controls the trial court docket. In light of the surrounding circumstances, we cannot say that the trial court abused its discretion by proceeding with a bench trial.

Editor's comment: *This opinion is voluminous and very fact-specific but it does include an interesting analysis of how, in this case's particular procedural history, the COA blessed the trial court's "sidestepping" In re Lee to basically avoid an MSA. R.T.R.*

Editor's comment: *My comment on this case has to do with the withdrawal. So many times, we represent clients who have done or said things that cause us to question whether it is even ethical to continue representation. This case has explanation and commentary with regards to what you need to do to in this situation if you are teetering on the basis of violating the attorney client privilege, by telling the judge your basis for withdrawal. I have to question though, is an in camera conference really a way to get around the attorney client privilege? It seems as if the court orders such, you would still have the fiduciary duty to assert the privilege on behalf of your client. Deep thoughts. J.H.J.*

SAPCR
TEMPORARY ORDERS

TRIAL COURT MAY NOT CHANGE THE CONSERVATOR WITH THE RIGHT TO DETERMINE THE CHILD'S PRIMARY RESIDENCE IN A TEMPORARY ORDER UNLESS IT IS SHOWN THAT THAT THE CHILD'S PRESENT CIRCUMSTANCES WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

¶18-2-09. *In re Charles*, No. 03-17-00731-CV, 2017 WL 5985524 (Tex. App.—Austin 2017, orig. proceeding) (mem. op.)(12-01-17).

Facts: In January 2014, the trial court signed an order giving Mother the right to determine the child's primary residence. In January 2016, the trial court signed an order, which stated that the Child's primary residence would be kept "in Bell or any contiguous county." In August 2017, Father filed a petition to modify, seeking the right to designate the Child's primary residence. Father's motion and affidavit did not refer to the requirements of section 156.006, make any allegations that the present circumstances would significantly impair the child's well-being, or provide any factual basis for inferring such a fact.

GO TO TABLE OF CONTENTS

The trial court held a hearing in September 2017. At the hearing, Father testified that Mother had moved to Arlington, violating the limitation that she stay in Bell County or a contiguous county, that Mother had hidden the child from Father, and that Mother would not tell Father where the child was or let him speak to her. Father also testified that the child was "not being well taken care of" by Mother.

Mother gave some controverting testimony.

At the conclusion of the hearing, the trial court stated that it was making "temporary orders pending further hearing and further orders" and that under those temporary orders, Father would have the right to designate the child's primary residence. The court stated that because Mother had "chosen to leave the area," she would have to pick up and drop off the child for her visitations. The trial court did not state any findings of fact or refer to the standards set out in section 156.006. Mother sought mandamus relief from this order.

Holding: Mandamus conditionally granted

Opinion: The trial court abused its discretion in holding a hearing based on Father's motion to modify and accompanying affidavit. Section 156.006 provides that a trial court must deny relief and refuse to schedule a hearing on a motion to modify if the party seeking the change does not provide an affidavit setting out "facts that support the allegation that the child's present circumstances would significantly impair the child's physical health or emotional development." Although holding a hearing on an insufficient affidavit may be harmless error if the evidence provided at the hearing supports an allegation of significant impairment, based on the evidence produced in this hearing, the court abused its discretion in issuing the temporary order taking from Mother the right to designate the child's primary residence. "Texas courts have recognized that the 'significant impairment' standard in section 156.006(b)(1) is a high one," and that standard requires "evidence of bad acts that are more grave than violation of a divorce decree or alienation of a child from a parent."

Editor's comment: *I understand that the standard of proof is high if you are trying to flip primary on a temporary basis, but here, the child is routinely showing up dirty, soiled, with ill-fitting holey shoes and clothes, and possibly with a case of SCABIES and that is STILL not "significant impairment"?? Yikes. R.T.R.*

Editor's comment: *It seems this case turned on the facts in the affidavit itself. However, I noticed the court commented that neither the motion nor the affidavit met the requirements of 156.006. Under the statute itself, a hearing itself cannot even be set without the proper allegations. The safest thing to do is specifically plead the statute and language of 156.006, and to make sure the affidavit tracks the same language. J.H.J.*

Editor's comment: *This case interprets the requirement and standards for a temporary hearing in a modification. There must be an affidavit that meets the "significant impairment" standard, which has been found to be a very high burden, more than just a violation of a decree. Without such an allegation in the affidavit, the court properly refuses to set a temporary hearing. M.M.O.*

TRIAL COURT COULD NOT ENTER TEMPORARY ORDERS IMPOSING GEOGRAPHICAL RESTRICTION ON MOTHER'S RIGHT TO DESIGNATE CHILDREN'S PRIMARY RESIDENCE WITHOUT EVIDENCE OF SIGNIFICANT IMPAIRMENT.

¶18-2-10. *In re Coker*, No. 03-17-00862-CV, 2018 WL 6763227 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (01-23-18).

Facts: In their divorce proceedings, the parties signed an MSA giving each parent the exclusive right to designate the primary residence of three of their six minor Children without geographical restrictions. At the time the MSA was signed, Mother lived more than 100 miles away from Father, but the possession

schedule in the decree tracked the Family Code's language for conservators living within 100 miles of each other. Before the decree was signed Mother voluntarily moved closer to Father. However, shortly after the decree was signed, Mother moved further away again because her new husband found a better job. Father filed a petition seeking to prevent Mother's move, but she was not served with the petition until after she had moved and signed a lease on a new home.

At a temporary orders hearing, Father asserted that his agreement not to impose a geographical restriction was an "emotional mistake," the move could increase the health care costs for the Children, the Children were not excited about the move, and the siblings remaining with Father had a strong relationship with the ones living with Mother. In an affidavit filed after the hearing, Father averred that Mother intended to move to disrupt the Children's relationship with Father, they were not being consistently home schooled, their sleep schedules were inconsistent, and Mother had sent Father mean text messages.

The trial court signed an order restricting Mother to the county in which Father lived and contiguous counties. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Because the trial court's temporary order imposed a geographical restriction on Mother's right where previously there had been none, the order had the effect of changing the person who had the exclusive right to designate the Children's primary residence. Here, even if the evidence presented in Father's affidavit and at the hearing was taken as true, it was insufficient to meet the high burden of establishing that the Children's present circumstances would significantly impair their physical health or emotional development.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

THE MERE POSSIBILITY OF TERMINATION AT THE TIME AN MSA IS ENTERED DOES NOT SUFFICE TO MAKE SECTION 153.0071 INAPPLICABLE.

¶18-2-11. ***In re G.V.,*** ___ **S.W.3d** ___, No. 02-17-00220-CV, 2017 WL 6422132 (Tex. App.—Fort Worth 2017, no pet. h.) (12-18-17).

Facts: DFPS filed its "Original Petition for Protection of a Child, For Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship" against Father and Mother in regards to 3-month-old Betty, who had several fractures, and two-year-old Andrew, who had no injuries. The petition sought termination under Chapter 161 and also encompassed conservatorship and child-support issues under Chapter 153. After an evidentiary hearing, the Department was appointed as the children's temporary conservator.

The children were placed with the Jones, Mr. Jones being Father's paternal great uncle. Subsequently, Jane Doe, a person who had had regular contact with the children in the past, filed an intervention seeking appointment as the children's possessory conservator alleged that appointment of Mother and Father as conservators would significantly impair the children's physical health or emotional development.

Subsequently, the Department, the Joneses, Father, Mother, and Jane Doe filed a "Binding [Mediated] Settlement Agreement" pursuant to Family Code Section 153.0071. After which, the Department filed a "Motion to Modify Managing Conservatorship in a Suit Affecting the Parent-Child Relationship." The Department sought to have itself removed as managing con-

servator and to have the Joneses appointed as managing conservators. The Department additionally sought to have Father, Mother, and Jane Doe appointed as possessory conservators.

Afterwards, Father and Mother replaced their original attorney and filed a joint objection to the MSA but not on any of the grounds set forth in Section 153.0071. On June 1, 2017, relying specifically on section 153.0071(e), the Department filed a motion to enter judgment. At the hearing, the Department put on no evidence. That same day, the trial court signed its "Final Order in Suit Affecting the Parent-Child Relationship" and appointed the Joneses as the children's permanent managing conservators and Father, Mother, and Jane Doe were appointed possessory conservators. Mother and Father appealed.

Holding: Affirmed, Motion for Rehearing En Banc Denied.

Majority Opinion (Kerr): Father and Mother asserted that section 153.0071(e) does not apply to suits to terminate the parent–child relationship brought under family code Chapter 161. They contend that because termination under Chapter 161 was foundational to this suit, the trial court erred by granting the motion to enter judgment on the MSA based on section 153.0071. Although the Department's suit did not result in a Chapter 161 termination, Father and Mother argue that because termination was still a possibility at the time they negotiated and agreed to the MSA, section 153.0071 does not apply.

The mere possibility of termination at the time an MSA is entered does not suffice to make section 153.0071 inapplicable—that is, the parents do not have the ability to revoke an otherwise-binding MSA that modified managing conservatorship simply because the Department initially and conditionally pleaded for termination.

Dissenting Opinion (Walker): The State's contractual rights to enforce a mediated settlement agreement (MSA) in a parental-rights-termination suit does not trump the rights—inherent, constitutional, and statutory—that Texas parents possess concerning their children.

Editor's comment: *So if the Department seeks only termination, section 153.0071 does not apply. But if the Department alternatively seeks relief under chapter 153, and the case is resolved under that chapter, section 153.0071 does apply. J.V.*

SIMPLY CONTENDING THAT CIRCUMSTANCES HAVE ARISEN RENDERING THE MSA CONTRARY TO THE CHILDREN'S BEST INTERESTS IS NOT ENOUGH TO RENDER THE MSA UNENFORCEABLE.

¶18-2-12. *In re Marriage of Flores*, No. 07-17-00283-CV, 2018 WL 895032 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (02-14-18).

Facts: Husband and Wife entered into an MSA, which was signed by the parties, their attorneys, and the mediator. The MSA dealt with the division of property, debt, conservatorship of their children, access to the children, and child support. Within two months of its execution, Husband moved the trial court to rescind or modify the document. The motion was denied, and the MSA was incorporated into the final divorce decree. Husband appealed asserting that the trial court erred because the MSA was unenforceable because Wife (1) was the subject of newly discovered 2003 outstanding deportation order, (2) purportedly drove without a license contrary to court order, (3) purportedly had a history of driving while intoxicated, and (4) otherwise endangered the children.

Holding: Affirmed

Opinion: The trial court may "decline to enter a judgment on" an MSA when (1) a party to the agreement was a victim of family violence which impaired the person's ability to make decisions; (2) the agreement permits someone subject to registration under Chapter 62 of the Texas Code of Criminal Procedure or has a history or pattern of engaging in physical or sexual abuse to reside with or have unsupervised access to the child, ***and*** (3) the agreement is not in the child's best interests. That is, before an MSA may be disregarded, the trial court must find not only that either the family violence or Chapter 62/abuse prong exists but also that the best interests of the child warrant rejection of the mediated accord. It lacks authority to reject the contract simply because it concludes that the agreement is not in the child's best interests.

None of the circumstances cited by Husband come within the statutory exceptions to enforcing the MSA. Instead, he repeatedly couched the foregoing circumstances within the framework of best interests. That is, he argued at the hearing held on his motion to rescind or modify the MSA, at the final divorce hearing, and at the hearing on his motion for new trial that those circumstances illustrated the MSA was not in the best interests of the children. Yet, as said by the Supreme Court in *In re Lee*, "it absolutely clear that the Legislature limited the consideration of best interest in the context of entry of judgment on an MSA to cases" falling within the scope of § 153.0071(e-1). *In re Lee*, 411 S.W.3d 445, 453 (Tex. 2013). Simply contending that circumstances have arisen rendering the MSA contrary to the children's best interests is not enough.

Editor's comment: *Trial courts have very, very, very little discretion to involuntarily set aside an MSA, even on kid issues. The Amarillo court says that a trial court must find all three factors in 153.0071(e-1) to disregard the parties' agreement. This raises the burden super high. Make sure you really mean it before you sign an MSA. M.M.O.*

UNLESS ONE OF THE TEXAS FAMILY CODE § 153,0071(e-1) EXCEPTION APPLIES, PARTIES CANNOT AGREE TO SET ASIDE AN MSA.

¶18-2-13. ***In re Minix*****, ___ S.W.3d ___, No. 14-17-00417-CV, 2018 WL 1069558 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding)** (02-27-18).

Facts: Mother and Father signed an MSA that addressed the issues between them regarding their child. Neither party asked the trial court to enter judgment on the MSA. Subsequently, Father filed a motion to enforce the MSA asserting Mother had failed to comply with it. Mother sought a restraining order against Father.

Father later filed a petition to set aside the MSA. Subsequently, the parties appeared in court before the district judge and advised the court that they had agreed to set aside the MSA. Mother later testified that she did not recall being present at that hearing. No record was made, the docket did not reflect that the MSA had been set aside, and no order was entered setting aside the MSA. However, the following day at a hearing before the AJ, the parties informed the AJ that the MSA had been orally set aside pursuant to the parties' stipulation. Thus, the AJ entered temporary orders that were inconsistent with the MSA. Later, the district judge signed an agreed order for psychological evaluations of the parties. Another temporary order was signed that was very similar to the MSA except that Father's child support obligation was higher.

After retaining new counsel, more than nine months after the MSA had purportedly been set aside pursuant to the parties' stipulation, Mother filed a motion for judgment on the MSA and requested that all subsequent orders and Rule 11 agreements be vacated. The trial court denied Mother's motion, and she sought mandamus relief.

Holding: Writ of Mandamus Conditionally Granted

Majority Opinion: (J. Jamison, J. Busby)

The MSA complied with the Tex. Fam. Code, and the parties were entitled to a judgment consistent with the MSA. Nothing in the Tex. Fam. Code explicitly permits the parties to agree to set aside a statutorily compliant MSA.

The invited-error doctrine did not apply because Mother appealed the denial of her motion for entry, not the setting aside of the MSA or the granting of TROs.

Concurring Opinion: (J. Busby)

The dissent's reliance on equity ignores the mandatory nature of the statute at issue. The dissent's suggestion is "a recipe for anarchy." An undocumented oral argument is not enforceable. An agreement in open court is only enforceable after the parties receive a judgment describing the agreement. Here, there was no ruling setting aside the MSA.

Further, a modification based on a material and substantial change is not necessarily inconsistent with a prior MSA. A trial court does not run afoul of Tex. Fam. Code § 153.0071 if it alters the terms of an order incorporating an MSA based on subsequent events that meet the statutory requirements for modification. The court should hesitate to discourage a parent from acting to protect the safety and welfare of a child by forcing that parent to make an all-or-nothing choice between seeking modification and preserving the bargain struck in an MSA.

Dissenting Opinion: (C.J. Frost)

The court of appeals should not have reached the merits of Wife's petition because she was not entitled to relief pursuant to the doctrines of quasi-estoppel and invited error. Equity steps in to bar relief that mandamus might otherwise afford.

Mother—through her attorney—agreed on the record to set aside the MSA. Mother's attorney later asserted to another judge that the parties had stipulated to setting aside the MSA. Subsequently, the parties and the trial court then acted as though the MSA were set aside. Mother benefitted from the subsequent temporary orders, and Father was disadvantaged by the increased costs of litigation that would not have been incurred if the MSA had not been set aside.

The majority too narrowly framed the invited-error doctrine to exclude Mother's actions. If the majority's interpretation were accepted, a party could dodge the consequences of inviting error simply by asking the trial court to rule on an issue, obtaining the requested ruling, filing a motion to reconsider, and then appealing the denial of the motion to reconsider. Mother engaged in gamesmanship, and her petition should not have been heard by the appellate court.

Editor's comment: *Although I understand where the majority is coming from and have certainly made the same argument in other situations, I agree with the dissent as to the doctrines of acceptance of benefits and quasi-estoppel under the facts of this case. Additionally, since the trial court cannot do a best interest analysis of the parties' MSA in a SAPCR, it would seem that, if the parties jointly agree that the MSA is no longer in the children's best interest, they should be able to jointly repudiate the agreement, without the necessity of expending more time and money to enter a final order and then file a modification. Also, under the very strict interpretation approach set forth in the majority opinion, what happens if the parties made a mutual mistake, which is not also addressed in the statute? Of course, no indication here that the parties jointly agreed that agreement was not in the children's best interest or that they both agreed that they had made a mutual mistake—but, it could be implied by the later actions of the parties. Once again, even when we all believe that everything regarding MSAs has been resolved, yet another twist arrives.*

Editor's comment: *So if BOTH parties jointly seek to repudiate their own agreement, they can't do it if it complies with all requirements of an MSA? That does not seem to make sense. If everyone agrees, it seems like an awful waste of time and money for both parties to fight against the court with regards to their own agreement. J.H.J.*

GO TO TABLE OF CONTENTS

Editor's comment: *The lesson to me from this case is that if you are going to agree to set aside an MSA, do it in writing not orally. I do not agree with the majority that an MSA is always irrevocable just because the statute says so. M.M.O.*

SAPCR
CONSERVATORSHIP

ABSENT EVIDENCE SHOWING THAT IT HAS HAD A MATERIAL, ADVERSE EFFECT ON THE ABILITY TO PARENT, IMMIGRATION STATUS SHOULD NOT BE USED AS A BASIS TO DENY JOINT MANAGING CONSERVATORSHIP.

¶18-2-14. Turrubiartes *v. Olvera*, ___ S.W.3d ___, No. 01-16-00322-CV, 2018 WL 708547 (Tex. App.—Houston [1st Dist.] no. pet. h.) (mem. op.) (02-06-17).

Facts: Mother and Father have 3 children, who were born before their marriage. The couple married in February 2013 and separated in October or November 2014, after Mother and a neighbor had an altercation. The altercation arose when Father told the neighbor that the neighbor's husband and Mother were having an extramarital affair. After the altercation with her neighbor, Mother left with the children.

The trial court heard mostly conflicting testimony from Mother and Father as to conservatorship. No other witnesses testified and the parties introduced little documentary evidence. The trial court heard non-conflicting testimony from both Mother and Father about her immigration status. While Father is a United States citizen, Mother is an undocumented immigrant. Mother drives without a driver's license, which she cannot obtain as an undocumented immigrant. She testified that she intends to apply for legal status in the country. But Mother conceded that she had not yet applied for that status.

The trial court divided the property as requested by Father, and appointed him as sole managing conservator and Mother as possessory conservator. The trial court also ordered Mother to have a licensed driver pick up and return the children during the periods when they were to be in her custody.

Mother filed a motion for new trial contending that the trial court refused to appoint her as a joint managing conservator based on her national origin and immigration status. The trial court denied her motion. The trial court made two dozen fact findings; nine refer to Mother's immigration status. Among other things, the court concluded that Mother lacked stability "due to her immigration status." It also noted that Father, by contrast, is a United States citizen.

Holding: Reversed and Remanded

Opinion: Immigration status, standing alone, is not probative of Mother's fitness to be a parent to her children so as to deny her joint managing conservatorship. The trial court heard no evidence in this case regarding any detention or immigration-related charge, any pending removal proceeding, or that Mother was a subject of any criminal prosecution. The trial court expressly found that there was no evidence that Mother "has been detained by immigration authorities since coming to this country in 2006, or that she is the subject of any removal proceedings against her." The trial court's orders otherwise protected the children by requiring that they travel with a licensed driver and by designating Father as the parent to determine the children's residence and school.

Given that the court granted primary possession of the children to Father and ordered Mother to have a licensed driver pick up and return the children in connection with her periods of possession, her immigration status was collateral to the children's best interest. Absent evidence showing that it has had a material, adverse effect on the ability to parent, immigration status should not be used as a basis to deny joint managing conservatorship.

GO TO TABLE OF CONTENTS

Editor's comment: *This case is interesting, as I do not recall another family law opinion that so specifically makes holdings about whether a parent's immigrations status should affect conservatorship decisions. Certainly the non-citizen mother in this case made some questionable parenting moves that might support naming the father the primary conservator on remand, but it seems like the trial court went one step too far in naming the citizen father the SMC. R.T.R.*

SAPCR
POSSESSION

UNDER LIMITED CIRCUMSTANCES, A COURT MAY DELEGATE SOME AUTHORITY TO A NEUTRAL THIRD PARTY IN ORDER TO BOTH PROTECT THE BEST INTEREST OF A CHILD AND TO MINIMIZE, WHEN POSSIBLE, THE RESTRICTIONS PLACED ON A PARENT'S RIGHT TO POSSESSION OF AND ACCESS TO HIS CHILD. HOWEVER, THE ORDER DOING SO MUST BE SUFFICIENTLY SPECIFIC SO AS TO BE ENFORCEABLE BY CONTEMPT.

¶18-2-15. *Waters v. Waters*, No. 04-16-00690-CV, 2017 WL 6345223 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.)(12-13-17).

Facts: Beth filed a petition for divorce on June 6, 2016, and the trial court called the case for trial on September 26, 2016. At that time, Father was serving a fifteen year prison sentence for aggravated assault with a deadly weapon and was awaiting trial on other charges. Father represented himself at trial pro se.

Based on the testimony presented, the trial court signed a final decree of divorce appointing Beth as sole managing conservator and Father as possessory conservator.[2] The decree ordered the children to continue counseling and ordered both Beth and Father to comply with the counselor's requests. The decree ordered that any possession and access between Father and the children would be determined by the children's counselor. Among other issues, Father challenged the trial court's order giving the children's counselor the authority to determine Father's possession time with the children.

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

Opinion: Generally, trial courts must exercise their judicial power to decide disputed issues and not delegate the decision of questions within their jurisdiction. However, limited circumstances may require the delegation of some authority to a neutral third party in order to both protect the best interest of a child and to minimize, when possible, the restrictions placed on a parent's right to possession of and access to his child. However, we also noted the trial court's ability to obtain assistance from a third party is not limitless. The trial court must maintain the power to enforce its judgment. Specifically, the trial court's order appointing a third party to assist in deciding issues related to possession and access must be sufficiently specific so as to be enforceable by contempt.

Here, the record supports the trial court's conclusion that restricting Father's possession and access is in the children's best interest. The record also supports the trial court's decision to appoint the children's therapist to assist the court in deciding issues related to Father's possession and access. The **trial** court's order, however, fails to provide any guidelines or specific terms under which Father would be permitted to exercise his right of possession and access.

Editor's comment: *This is no different than the order stating "Mother shall agree to Father's access." It's simply not enforceable. With that said, we agree to orders all the time where the parties are to follow a counselor or amicus or parent facilitator with regards to an access schedule. While not enforceable, it works very well for cases in which both parties are participating with the assigned third party. This is especially true in reunification cases. It seems the issue here is when one party doesn't participate with*

the third party or agrees to the recommendations, or the court makes the order absent party agreement. As long as the clients understand that and the risks, it seems like this is something people will continue to agree to do in difficult cases. J.H.J.

Editor's comment: *On the one hand, I like that the San Antonio court is reaffirming the requirement of the trial court to enter an enforceable possession order. I see so many possession orders that violate this premise. But, I don't like the idea of giving trial courts the discretion to put a third party in charge of a parent's possession and thereby abdicate the judicial function. This is a very slippery slope, folks, and is ripe for overabuse. M.M.O.*

Editor's comment: *The trial court ordered the children's counselor—"or another licensed professional coounselor, therapist, or psychologist selected by [wife]"—to determine father's possession and acccess to the children. Although not an issue in this case, the court's order would not prevent a parent from counselor-shopping which could result in possession or access at that parent's standardless discretion. J.V.*

SAPCR
CHILD SUPPORT

ONCE AN OBLIGOR OFFERS PROOF OF HER CURRENT WAGES, THE OBLIGEE MUST DEMONSTRATE THE OBLIGOR IS INTENTIONALLY UNEMPLOYED OR UNDEREMPLOYED IN ORDER TO RECEIVE CHILD SUPPORT COMPUTED ON EARNING POTENTIAL.

¶18-2-16. *In re J.D.A.*, No. 05-17-00053-CV, 2017 WL 6503094 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.)(12-19-17).

Facts: Mother and Father, parents of child, divorced in August 2011. Following trial, the trial court signed a divorce decree appointing Mother and Father as joint managing conservators, giving Mother the exclusive right to designate the primary residence, and ordering Father to pay monthly for child support.

In November 2015, the parties entered into an MSA and an Agreed Order was entered, which kept in place prior orders but included a geographical restriction to the child's elementary school in Coppell until Father moved within that area, and at that time would have increased access. Three months after Father moved into the area, Mother advised that she was moving to Arlington. Father then filed a motion to modify seeking primary conservatorship of the child and child support from Mother and supervised possession for Maternal Grandfather.

At trial, Mother testified that she moved for financial reasons, that she was a self-employed CPA, that she made $15,000/year, and that she couldn't work more because of her MS, which caused fatigue and limited the hours that she could work. Mother testified as to her monthly expenses. Father acknowledged that Mother suffered from fatigue and questioned her ability to raise the child and told the court that he believed Mother made more than she testified to. The trial court asked Mother why she was underemployed; Mother responded that it was due to her health and the ongoing litigation. The trial court then stated on the record, "I'll look up what a public accountant makes, and I'll determine what your child support is on that amount." The trial court issued a ruling that day naming father as primary JMC and ordered Mother to pay $652/month in child support based on the trial court's findings that Mother was intentionally underemployed and the median salary for a CPA in Tarrant County was $50,000. The ruling also included a permanent injunction precluding Maternal Grandfather from unsupervised access to J.D.A. The trial court subsequently entered a Final Order. Although timely requested, the trial court never filed FOF and COL. Mother appealed.

Holding: Modified in part, reversed in part, and remanded.

Opinion: Once an obligor offers proof of her current wages, the obligee must demonstrate the obligor is intentionally unemployed or underemployed in order to receive child support computed on earning potential. At the close of evidence, the trial court entered findings into the record, including that Mother is a CPA, Mother is intentionally underemployed, and the median annual salary for a CPA in Tarrant Count is $50,000. The Final Order incorporated those findings and assessed monthly child support of $652, which the trial court derived by applying the statutory percentage guideline to a monthly net resource amount based on an annual income of $50,000.

The evidence of Mother's current wages was $1000 per month. Although Father had the burden to show intentional underemployment, he neither alleged in his petition to modify that Mother was intentionally underemployed nor produced any evidence on the issue beyond his wholly speculative testimony that he believed she was making more and was "either lying to the court or underemploying herself." Father produced no evidence to show what Mother previously earned. Without some evidence of Mother's past income, the trial court had no basis for finding that she was intentionally making "significantly less."

Further, the record is devoid of any evidence of Mother's earning potential. Although the trial court planned to "look up what a public accountant makes" and subsequently entered a finding that the median salary of a CPA in Tarrant County was $50,000, there was no evidence admitted in the record at trial to support that finding or any finding that Mother actually had the capacity to earn $50,000 annually or any level of annual earning other than $12,000 to $15,000.

Because there was no evidence of a "substantive and probative character" to support the trial court's finding that Mother is either intentionally underemployed or has an earning potential of $50,000 per year, the trial court abused its discretion by ordering Mother to pay $652 in monthly child support.

Editor's comment: *A good refresher case to read if you are requesting or defending a claim of underemployment. But here, since the obligor didn't make such a claim of underemployment, nor offer evidence in support thereof, the trial court exceeded its bounds in deciding (almost sua sponte) that the obligee was intentionally underemployed. R.T.R.*

Editor's comment: *This case reminds us of two important points. First, pleadings matter. Put your request for relief in your pleadings. Second, many issues in family law require a comparison of evidence. Here the COA says that to prove underemployment there must be a comparison of previous level of earnings compared to current earnings in order to show that the current level is significantly less than before. M.M.O.*

Editor's comment: *This case illustrates some of the dangers of applying general statistics to individual situations. The median salary means that half of Tarrant County CPAs made more than $50,000 in 2016 when the case was tried, while the other half made less. But a cursory Google search reveals that accountant pay varies widely, just as it does for lawyers. The obligor here would earn on the lower end, as a self-employed solo, and her earnings would be even lower because of the MS that the obligee admitted caused the obligor fatigue and therefore limited her ability to work. Accountants who work in firms specializing in taxation and audit earn far more than solos. Further, data sources matter. The median and range of accountant earnings depend on whether one views a government website, a commercial site, or a site that encourages people to become accountants. J.V.*

GO TO TABLE OF CONTENTS

★★★TEXAS SUPREME COURT ★★★

MOTHER HAD STANDING TO SEEK ADULT DISABLED CHILD SUPPORT FROM FATHER EVEN THOUGH MOTHER DID NOT LIVE WITH THE CHILD.

¶18-2-17. ***In re C.J.N.-S.***, ___ S.W.3d ___, No. 16-0909, 2018 WL 1022598 (Tex. 2018) (02-23-18).

Facts: Before turning 18, the Child had a disability that interfered with her ability to work. After turning 18, the Child began living alone, but because the Child's condition worsened, Mother paid the Child's living and medical expenses and visited the Child regularly to help with chores. Mother sought from Father adult disabled child support. The trial court granted Mother's petition, and Father appealed. The Court of Appeals agreed with Father that Mother lacked standing to file her petition. The relevant Family Code Section stated who had standing to bring suit but included no punctuation:

Father's interpretation:
> (a parent of the child or another person) (having physical custody or guardianship of the child under a court order)

Mother's interpretation:
> (a parent of the child) or (another person having physical custody or guardianship of the child under a court order)

Holding: Reversed and Remanded to the Court of Appeals

Opinion: To interpret the statute as suggested by Father rendered meaningless the clause "a parent of the child" because it required both parents and other persons to have physical custody or guardianship of the child, without regard to parentage. The Texas Supreme Court remanded the case to the appellate court to consider Father's challenges to the sufficiency of the evidence.

SAPCR
MODIFICATION

TRIAL COURT HAD AUTHORITY TO CONSIDER MODIFICATION SUIT DESPITE PENDING APPEAL OF PRIOR CHILD-CUSTODY ORDER.

¶18-2-18. *In re G.E.D.*, No. 05-17-00160-CV, 2018 WL 507673 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (01-02-18).

Facts: The trial court signed an order giving Mother the exclusive right to designate the Child's primary residence with a geographical restriction. Mother appealed that order. While the appeal was pending, Mother lived outside the geographically restricted area. Father filed a motion to enforce the order. At the courthouse before a hearing, the parties reached an agreement that Father would be granted the exclusive right to designate the Child's primary residence because the Mother would not move to live within the geographically restricted area. The trial court signed and entered the parties' agreement that day. Subsequently, Father filed a petition to modify the parent-child relationship. Mother challenged the entry of a final order on Father's petition, alleging the agreement was unclear and ambiguous and that she had revoked her consent. The trial court signed a final order incorporating the parties' agreement. Mother appealed, arguing in part that the trial court lacked authority to consider a new modification petition while the appeal of the prior order was still pending.

Holding: Affirmed

GO TO TABLE OF CONTENTS

Opinion: Acknowledging a split of authority on the issue, the Dallas Court of Appeals, affirmed its earlier holding in *Hudson v. Markham*, holding that a court with continuing exclusive jurisdiction has jurisdiction over a new proceeding to modify the parent-child relationship even if an appeal is pending from a previous order regarding that relationship.

Because the parties signed a written agreement to modify the child-custody order, Father was not required to show a material and substantial change since the prior order's rendition.

Editor's comment: *Dallas COA thinks you can modify an order while it is on appeal. Some COAs disagree. M.M.O.*

AN ANTICIPATED CIRCUMSTANCE CANNOT BE EVIDENCE OF A MATERIAL OR SUBSTANTIAL CHANGE OF CIRCUMSTANCES.

¶18-2-19. ***Smith v. Karanja*****,** ___ S.W.3d ___, No. 01-16-01004-CV, 2018 WL 761905 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (02-08-18).

Facts: Mother sought to modify the decree to allow for an international travel provision so that she could travel abroad with the Child to the Child's birthplace, Kenya, Africa, to attend a memorial service for the Child's grandfather. Father wanted the court to deny all international travel until the Child turned 16 because Kenya is not a signatory to the Hague Convention on the Civil Aspects of Child Abduction. Father asserted in his response that Mother "remained in the US as an illegal resident for 7 years. And now, 16 years later, she is petitioning ... to secure [the Child]'s passport with the intent to permanently resettle to her homeland."

After a hearing, the trial court signed the Order Modifying the Divorce Decree in which the court found that "the material allegations in [Mother]'s Motion to Modify are true and the modifications made by this order are in the best interest of [the Child]," and ordered as follows: (1) either parent may apply for a passport for the Child, but must notify the other parent within 5 days; (2) Mother has the right to maintain possession of the passport; (3) either parent must deliver the passport to the requesting parent within 10 days of notice of intent to have the Child travel abroad; (4) either parent must provide written notice to the other parent of plans to travel internationally within 21 days of the date of departure, and of certain information describing the travel (such as date, time, location, means of transportation) and (5) either parent must properly execute a written consent form to travel abroad and any other required form. The trial court further found that "credible evidence has been presented to the court indicating a potential risk of the international abduction of a child by a parent of the child," and so ordered that Mother take certain protective measures, including posting a $75,000 bond and following detailed procedures for notification to the U.S. Department of State's Office of Children's Issues and to the relevant foreign consulate or embassy, before traveling abroad with the Child. Father appealed and, without providing a reporter's record, challenged the trial court's modification without the imposition of adequate international abduction prevention measures.

Holding: Reversed and rendered, modification order vacated.

Opinion: If a circumstance was sufficiently contemplated at the time of an original agreement, its eventuality is not a changed circumstance, but instead an anticipated circumstance that cannot be evidence of a material or substantial change of circumstances.

Here, Mother's desire for the Child to be able to visit family abroad as she had done in the past cannot be considered a change from the state of affairs 3 months earlier when the parties' divorce decree was entered. As Mother stated in her petition, the Child "has traveled to Kenya on several occasions before with no issues"; thus, travel to visit family in Kenya was an eventuality which was anticipated before the parties' divorce. Critically, while the divorce was pending—and a year before Mother filed her motion to modify—Father filed a motion addressing the need to determine whether Mother

should be permitted to travel abroad with the Child and requesting that the Child's passport "be placed in [t]rust with the Court pending the outcome of the divorce proceedings." These facts show that the Child's international travel issue was not a changed circumstance, but rather an issue of some contention between the parties which they neglected to address in their divorce decree. This paired with the trial court's express finding in the modification order that Mother is a flight risk renders the trial court's modification order arbitrary and capricious and an abuse of discretion.

The trial court's modification order did not limit Mother's use of the Child's passport to allow travel to attend the memorial service; it granted Mother possession of the Child's passport and the unrestricted ability to travel internationally with the Child, assuming compliance with the protective measures outlined in the order. Such carte blanche permission to Mother to control the Child's international travel is contrary to the statutory requirement that a modification order be based upon a material and substantial change in circumstances. The changed circumstances here were the death of the Child's grandfather; that change does not open the door to other international travel that could have been anticipated at the time of the divorce. In other words, the relief the trial court may grant must be somehow connected to the changed circumstance. For example, a remarriage may require some changes but does not mean that the trial court may now modify other provisions in the original divorce decree unrelated to the remarriage.

Editor's comment: *I have to say that I whole-heartedly agree with this case. It is so frustrating for people to make agreements, knowing certain circumstances will exist in the future, then using those as a reason to modify in the future. I think if you have a similar situation, absolutely bring this case up as a reason that those "changed" circumstances do not arise to a material and substantial change. J.H.J.*

Editor's comment: *This is an important case, folks! Read it! I have argued for years that the "changed circumstances" standard on modification was too broad and needed narrower interpretation. Many trial courts have believed that any old change will do to open up the whole order. Finally, someone agrees with me! The Houston 1st COA has now interpreted the modification standard to require that the change in circumstance must be connected to the relief sought/granted. Secondly, they say that if a possible situation is contemplated in the order, then the situation occurring cannot be the grounds for a modification. Cheers, Houston 1st COA! Here, the mother sought and received a complete lifting of the international travel restrictions where the changed circumstances was the death of a family member requiring a one-time trip to the foreign country. The trial court's relief should have been much, much narrower. M.M.O.*

FATHER FAILED TO PRESENT SUFFICIENT EVIDENCE THAT CIRCUMSTANCES HAD CHANGED BETWEEN THE DATE THE PRIOR ORDER WAS SIGNED AND HIS NEW PETITION TO MODIFY.

¶18-2-20. *In re K.M.*, No. 12-18-00012-CV, 2018 WL 991570 (Tex. App.—Tyler 2018, orig. proceeding) (mem. op.) (02-21-18).

Facts: Father filed an original SAPCR and, in a supporting affidavit, asserted that Mother was addicted to prescription drugs. The parties attended mediation and signed an MSA that appointed the parents joint managing conservators and gave Father the exclusive right to designate the Child's primary residence.

About a week after a final order was signed, Father initiated another SAPCR seeking to modify the existing order. Father asserted that circumstances had materially and substantially changed because the Child had tested positive for marijuana. Mother filed a counter-petition, to which she attached an affidavit averring that Father liked to have sex with little girls, that he probably drugged the Child to help his case, and that he fed drugs to the Child because of his "sick sexual fetish." The trial court, noting that Mother did not raise such accusations in the prior proceeding, advised Mother that she reconsider her affidavit or have "really, really good proof" that her accusations were true. The trial court signed a

temporary order giving Mother supervised access to the Child in a therapeutic setting. Mother filed a petition for writ of mandamus asserting that Father offered no evidence to change custody on a temporary basis and that Father's assertions were based on conduct that predated the settlement agreement.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The drug test reflected a six-month period before the test. Given the length of time covered by the test, the trial court could not have pin pointed when the exposure occurred or identified the source of the exposure. Thus, the trial court had insufficient information on which to determine whether circumstances had materially and substantially changed in the nine-day period between the signing of the prior order and Father's filing of his new petition. Further, Father submitted the Child's hair for drug testing before he signed the MSA. Thus, he at least contemplated the possibility that the Child may have been exposed to some medication or other substance at the time the MSA was signed.

SAPCR
CHILD SUPPORT ENFORCEMENT

THE TEXAS FAMILY CODE PROHIBITS A TRIAL COURT FROM HOLDING A PARTY IN CONTEMPT BY DEFAULT.

¶18-2-21. *In re Daniels*, No. 05-17-01260-CV, 2017 WL 6503107 (Tex. App.—Dallas 2017, orig. proceeding) (mem. op.)(12-19-17).

Facts: On April 17, 2017, Father filed a motion to enforce the trial court's November 7, 2016 child support order. In the motion, he argued that Mother was in contempt of court for failure to pay child support and requested, among other relief, that Father be incarcerated for up to 180 days and fined up to $500 for each violation of the order. By order dated April 24, 2017, the trial court ordered Mother to appear and respond to the motion at a hearing scheduled for June 16, 2017. Mother filed a vacation letter on May 4, 2017 setting out dates that she was unavailable due to vacation or work-related travel. In the letter, Mother asked the trial court not to set trial, hearings, or any matters on the dates listed. One of the travel dates listed was June 16, 2017, the date set for the hearing on Father's motion for enforcement. Mother filed a formal answer denying the allegations in the motion for enforcement on May 25, 2017.

The trial court held the hearing as scheduled on June 16, 2017 and entered a default judgment holding Mother in contempt for failure to pay child support. The contempt order states that Mother was present for trial on the motion for enforcement, but that is incorrect. Mother did not appear at the hearing. The trial court found Mother in contempt for failing to make 5 child support payments, found an arrearage, awarded Father attorney's fees, assessed an $100 fine against Mothers, and ordered Mother committed to the county jail for 15 days. The trial court suspended commitment and, as a condition of the suspension, ordered Mother to pay $252.00 per month beginning July 1, 2017 until she has paid the full child support arrearage and accrued interest.

Thereafter, Mother filed a motion to set aside default judgment and motion for new trial. In an affidavit in support of those motions, Mother stated that she did not intentionally fail to appear at the hearing. She averred that she did not see the notice of hearing when she received the motion for enforcement because it was attached to the back of the motion, and she trusted that the court would not set a hearing on any of the dates listed in her vacation letter. Mother sought mandamus relief.

Holding: Mandamus conditionally granted.

Opinion: The Texas Family Code prohibits a trial court from holding a party in contempt by default. Tex. Fam. Code §§ 157.066, 157.115(b). If a respondent fails to appear, the trial court may order a capias be issued but may not hold the party in contempt. *Id.* Violating sections 157.066 and 157.115 renders the contempt order void. In addition, the contempt and commitment orders are void because the trial court failed to admonish Mother of her right to counsel in accordance with section 157.163 of the family code.

BEFORE FATHER CAN BE HELD IN CONTEMPT, HE IS ENTITLED TO 10-DAYS NOTICE OF CONTEMPT HEARING AND AN ADMONISHMENT AS TO HIS RIGHT TO COUNSEL.

¶18-2-22. *In re Chambers*, No. 05-18-00031-CV, 2018 WL 833392 (Tex. App.—Dallas 2018, orig. proceeding) (02-12-18).

Facts: In a March 17, 2017 Agreed Order in Suit to Modify Parent-Child Relationship, Father was required to pay child support arrearages and unpaid medical expenses through monthly payments of $1,200.00. On November 13, 2017, Mother filed a motion for enforcement of the modification order. She alleged that Father had failed to pay the required amounts from April 1, 2017 to September 1, 2017. She requested criminal and civil contempt against relator. Father was served with notice on December 28, 2017 of a January 2, 2018 hearing on the motion for enforcement and contempt. Father appeared pro se at the January 2 hearing. Following the hearing, the trial court signed its "Order Holding Respondent in Contempt for Failure to Pay Child Support and Arrearages, Granting Judgment, and for Commitment to County Jail" and held relator in criminal and civil contempt. The criminal contempt order requires Father to pay a $500 fine and be confined in the county jail for a period of 180 days for each violation, with the confinement to be served concurrently. The civil contempt order required Father to be confined in the county for either a period not to exceed 18 months, including time served for criminal contempt, or until relator pays $37,518.60 in arrearages and $1,835.23 in fees, whichever occurs first. Father was taken into custody on January 2, 2018. Father sought a petition for writ of habeas corpus.

Holding: Writ granted, January 2, 2018 Order vacated.

Opinion: Order void because Father (1) did not receive the statutorily-required 10-days' notice of the hearing, and (2) was not admonished of his right to counsel and did not waive his right to counsel.

SAPCR
Removal of Child and
Termination of Parental Rights

UNDER ICWA, AN INDIAN TRIBE MAY INTERVENE AT ANY TIME INCLUDING AT THE FINAL TERMINATION HEARING AND A WRITTEN PLEADING DOING SO IS NOT REQUIRED.

¶18-2-23. ***In re J.J.T.***, ___ S.W.3d ___, No. 08-17-00162-CV, 2017 WL 6506405 (Tex. App.—El Paso 2017, no pet. h.) (12-20-17).

Facts: After it determined that the Child, who is a member of the Navajo Indian Nation, had suffered non-accidental trauma, the hospital notified DFPS, who sought termination of Mother's and Father's parental rights. The Child was placed with a non-Indian foster family, and by all accounts, he is thriving, his medical, physical, and emotional needs are being met, and he is closely bonded with the family.

The Department gave notice to the Nation of the pending suit involving the Child. The Nation did not formally intervene in the case. On the day of trial, both parents voluntarily relinquished their parental rights. The Nation did not object to the temporary placement of the child because all family members in Texas were ruled out and it had been difficult to find an ICWA-compliant home for the child. Regarding The Child's future placement, the Nation had located a Navajo home. The adoptive mother is Navajo and her husband is Hispanic. The home study process and background checks had been completed, and the couple was ready to receive The Child. The Nations representative at trial agreed that there would need to be a plan to transition The Child to this home in order to minimize emotional trauma because he was bonded to his foster family.

During trial one of the attorneys stated that the Nation had not intervened, and The Nation's representative stated, "I think we are intervening at this moment." When the trial court asked The Nation's representative to explain how she thought she was intervening, The Nation's representative explained: "In other ICWA cases, the Navajo Nation is considered a party, we're not considered a witness and so in other states the ICWA worker has attended the entire court hearing and so based upon the testimonies that are given, we take that into consideration based on the information that's being provided to us." The Nation's representative expressly relied on ICWA Section 1911(c) in support of the Nation's request to intervene. The trial court concluded that the Nation had not filed a written intervention and the request to intervene made on the day of trial was too late. Consequently, The Nation's representative was excluded from hearing any of the testimony and the Nation was not allowed to participate in the final hearing. The trial court terminated the parental rights of both parents, and it appointed the Department as the Permanent Managing Conservator of The Child. The court ordered that The Child remain in his current foster home. The Nation formally intervened after the trial and it filed a motion requesting a placement hearing. The Nation filed notice of appeal, but neither parent has appealed the termination of their parental rights.

Holding: Reversed and remanded for a new trial.

Opinion: Under ICWA Section 1911(c), "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." Giving effect to the plain language of the statute, a request to intervene is not untimely even if it is made at the final hearing. Additionally, the statute does not require that the intervention be in writing. In this instance, Federal law preempts state law. Federal law preempts state law when: (1) Congress has expressly preempted state law, (2) Congress has installed a comprehensive regulatory scheme in the area, removing the entire field from the state realm, or (3) state law directly conflicts with the force or purpose of federal law. Here, the state's requirement of a written pleading stands as an obstacle to the accomplishment of congressional objectives.

FATHER FAILED TO CHALLENGE ALL INDEPENDENT BASES OR GOUNDS THAT FULLY SUPPORT A JUDGMENT OR APPEALABLE ORDER.

¶18-2-24. ***In re M.J.M.G.***, ___ S.W.3d ___, No. 04-17-00349-CV, 2017 WL 6502440 (Tex. App.—San Antonio 2017, no pet. h.) (12-20-17).

Facts: At birth, the Child and Mother tested positive for amphetamines and the Child had to be placed in neonatal ICU. Ten days later, DFPS filed a petition for protection and termination. At trial, V.M. appeared and testified that he was M.J.M.G.'s father. In addition, V.M.'s trial counsel maintained that V.M. was M.J.M.G.'s father and advocated against termination of V.M.'s parental rights. After trial, V.M.'s rights were terminated on the following grounds: 1) After being served with citation, V.M. failed to file an admission of paternity or counterclaim for paternity under Chapter 160 of the Texas Family Code; and 2) V.M. constructively abandoned M.J.M.G. and used controlled substances supporting termination un-

der Texas Family Code Sections 161.001(b)(1) (N), and (P) and termination of V.M.'s parental rights was in M.J.M.G.'s best interest. V.M. appealed.

Holding: Affirmed.

Opinion: The trial court's judgment sets forth the basis for termination. In addition to the statutory findings pursuant to Texas Family Code section 161.001(b)(1)(N) (constructive abandonment) and (P) (use of a controlled substance), and the trial court's finding that termination of V.M.'s parental rights was in M.J.M.G's best interest, the trial court also found, by clear and convincing evidence, that V.M. failed to timely file an admission of paternity or counterclaim for paternity under Chapter 160 of the Texas Family Code. On appeal, V.M. only challenges the trial court's best interest findings; V.M. does not challenge the trial court's finding that V.M. failed to file an admission of paternity.

An appellant must challenge all independent bases or grounds that fully support a judgment or appealable order. By failing to challenge the trial court's finding that V.M. failed to file an admission of paternity, V.M. did not challenge all of the independent grounds listed in the termination order. Accordingly, this court must accept this unchallenged finding as true.

★★★TEXAS SUPREME COURT ★★★

PRECLUDING PARENTS FROM CHALLENGING, ON APPEAL, FACTUAL AND LEGAL SUFFICIENCY OF TRIAL COURT'S BEST INTEREST DETERMINATION, ON BASIS THAT PARENTS HAD EXECUTED AFFIDAVITS OF VOLUNTARY RELINQUISHMENT, DOES NOT VIOLATE DUE PROCESS.

¶18-2-25. ***In re K.S.L.***, ___ S.W.3d ___ (Tex. 2017) (12-22-17).

Facts: The DFPS removed the children from Mother and Father. After reunification of the family failed, DFPS sought termination of Mother's and Father's parental rights. Initially, both parents demanded a jury trial, but later both parents signed voluntary affidavits of relinquishment of parental rights. Among other provisions, the affidavits recited that the parents had been informed of and understood their parental rights and duties, and that "termination of the parent-child relationship is in the best interest of the child(ren)." As to the effect of signing the affidavits, they state: "I understand that by naming the Texas Department of Family and Protective Services as Managing Conservator in this Affidavit of Relinquishment, I give up all my parental rights and grant them to the Department and/or to the adoptive parents with whom my child(ren) may be placed." As to the voluntary nature of the relinquishments, the affidavits state: "I freely, voluntarily, and permanently give and relinquish to the Department all my parental rights and duties. I consent to the placement of the child(ren) for adoption or in substitute care by the Department or by a licensed child-placing agency." Throughout the proceeding in the trial court and on appeal, the parents have been represented by counsel.

At a brief trial, the trial court reviewed the affidavits and heard evidence from the case worker that termination was in the children's best interest. The court signed an order of termination that day, terminating the parent-child relationship of both parents. The order recited that the court had examined the record and heard the evidence and argument of counsel presented at trial. The order found by clear and convincing evidence that (1) the parents had signed irrevocable affidavits of relinquishment, and (2) the terminations were in K.S.L.'s best interest.

A few days later, without any explanation, both parents appealed the termination of their parental rights on the sole ground that the evidence was legally and factually insufficient to support the trial court's best-interest finding. A divided court of appeals reversed the trial-court judgment terminating parental rights, holding, "the Department did not meet its burden to establish by clear and convincing evidence that termination of Mother's and Father's parental rights to K.S.L. is in the child's best interest."

Holding: Affirmed in part and reversed in part.

Opinion: Even under a clear-and-convincing standard, in the ordinary case a sworn, voluntary, and knowing relinquishment of parental rights, where the parent expressly attests that termination is in the child's best interest, satisfies a requirement that the trial court's best-interest finding be supported under this higher standard of proof. Under the Family Code, "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." A parent's willingness to voluntarily give up her child, and to swear affirmatively that this is in her child's best interest, is sufficient, absent unusual or extenuating circumstances, to produce a firm belief or conviction that the child's best interest is served by termination.

In deciding whether a parent has received due process, a court must balance three elements: the private interests at stake, the government's interest supporting the challenged procedure, and the risk that the procedure will lead to erroneous decisions. The private interest of the parents in termination cases is indisputably "a commanding one." The State's interest in the welfare of the child means that its interest in a just decision is largely coextensive with the parents' interests. The Texas Supreme Court has repeatedly emphasized that the State, as parens patriae for the child, has an interest in seeing these cases decided not only fairly but also expeditiously. "Parents and children [ ] have an interest in resolving termination proceedings as expeditiously as reasonably possible." The child's best interest is inherently threatened by undue uncertainty and delay in finally determining where the child will live and who will raise her. This concern is also reflected in legislative mandates that trial-court proceedings and appeals in parental-termination cases are subject to expedited procedures, and the statutory mandate that in deciding the child's best interest, "the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest."

IN A TERMINATION SUIT, AMICUS ATTORNEY'S FEES CAN BE AWARDED AS NECESSARIES BUT NOT AS ADDITIONAL CHILD SUPPORT.

¶18-2-26. ***In re R.H.W.***, ___ S.W.3d ___, No. 14-17-00217-CV, 2018 WL 344082 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (01-09-18).

Facts: After all four children made outcries to Mother that they had been sexually abused by Father. Mother filed for divorce. Father, then a doctor pursuing a medical residency, was arrested on four felony sexual-abuse charges. Contemporaneously, the criminal district court in which the cases were pending issued a "no contact" order prohibiting Father from any contact with the children. Father's medical license was suspended, as was his residency. At the trial conclusion, Father's parental rights to the four children were terminated. and he was ordered to pay the amicus attorney's fees as additional child support. Father appealed, arguing in part that the trial court erred in ordering him to pay the amicus attorney's fees as additional child support and entering a wage withholding order.

Holding: Affirmed as modified.

Opinion: A court's authority to assess attorney's fees as additional support or as necessaries cannot be inferred, but must be specifically authorized by statute. The Family Code authorizes a trial court to make a discretionary appointment of an amicus attorney in a private suit affecting the parent-child relationship when the best interest of the children is an issue. Texas Family Code § 107.023 authorizes awards of reasonable fees and expenses to appointed amicus attorneys, "[t]he court may determine that fees awarded under this subchapter to an amicus attorney ... are necessaries for the benefit of the child." Therefore, the trial court did not abuse its discretion in awarding the fees as necessaries. However, the trial court also characterized the fees as "additional child support," which is not expressly authorized by the statute. Attorney's fees may be awarded as child support solely under Family Code section 157.067, which is limited to child support enforcement proceedings. Additionally, a wage withhold-

ing order to satisfy an award of attorney's fees and costs in a suit affecting the parent-child relationship is an exercise of the court's contempt power derived from Chapter 157 and is authorized only in child support enforcement actions. Absent an express provision authorizing an award of amicus attorney's fees to be characterized and enforced as additional child support, the trial court erred by awarding the amicus attorney's fees in this case as additional child support and providing for enforcement of its order by a wage withholding order. To conform the trial court's judgment to the governing statute, the court of appeals modified the decree to delete the language indicating the amicus attorney's fees awarded to the amicus attorney are awarded "as additional child support" and the provisions authorizing [amicus attorney] to enforce the wage withholding order against Father if the amicus attorney's fees are not timely paid.

FATHER DID NOT VOLUNTARILY LEAVE CHILD IN POSSESSION OF DEPARTMENT FOR AT LEAST SIX MONTHS AS REQUIRED TO SUPPORT TERMINATION ON BASIS OF ABANDONMENT.

¶18-2-27. ***In re F.E.N.***, ___ S.W.3d ___, No. 14-17-00598-CV, 2018 WL 723787 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (02-06-18) (on rehearing).

Facts: Father was a "shrimper" who was gone for 5 or 6 weeks at a time for 5-10 times a year. The Department received a referral for Mother's neglectful supervision of his 11-month child. Father was not contacted at the time. After a trial, Father's parental rights were terminated and the Department was left as the Child's sole managing conservator. Father appealed.

Holding: Affirmed in part, reversed and rendered in part, reversed and remanded in part.

Majority Opinion (J. Jamison): (1) Father did not voluntarily leave child in Department's possession for at least six months, required to support termination order; (2) Father's actions in leaving child with Mother who used drugs did not amount to endangerment, as required to support termination order; (3) Father did not fail to support child, as required to support termination order; (4) Department did not make reasonable efforts to return child to father, as required to support termination order; and (50) appointment of Father as child's sole managing conservator would not have significantly impaired child's physical health or emotional development, and thus Department did not rebut presumption that appointment of father was in child's best interest.

Dissenting Opinion (J. Boyce): Termination of parental rights and the appointment of a non-parent as sole managing conservator are two distinct issues, with different elements, different standards of proof, and different standards of review. Trial court did not abuse its discretion in leaving the Department as the Child's sole managing conservator.

THE MERE INTRODUCTION OF PAROLE-RELATED EVIDENCE DOES NOT PREVENT A FACT-FINDER FROM FORMING A FIRM CONVICTION OR BELIEF THAT THE PARENT WILL REMAIN INCARCERATED FOR AT LEAST TWO YEARS, WHICH MEETS TEXAS FAMILY CODE §161.001(B)(1)(Q)'S TWO-YEAR IMPRISONMENT REQUIREMENT TO PROVE ABANDONMENT.

¶18-2-28. ***In re H.O,*** ___ S.W.3d ___, No. 01-17-00633-CV, 2018 WL 708542 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (02-06-18).

Facts: DFPS sought termination of both parental rights. Father repeatedly requested to take a drug test, when he eventually did, he tested positive for several drugs. Father admitted to her that he had a criminal history, including a burglary conviction in Illinois, but he denied using illegal drugs. More than a year after the initial referral of H.O., DFPS amended its petition to allege an additional predicate act

supporting the termination of Father's parental rights. Specifically, DFPS alleged that Father had knowingly engaged in criminal conduct resulting in his conviction for an offense and confinement and an inability to care for H.O. for not less than two years from the date of the filing of the petition, pursuant to section 161.001(b)(1)(Q).

Father appeared at trial and testified that he was arrested for possession of methamphetamine three days after Child first came into DFPS's custody. Father pleaded guilty to that offense, and the criminal court signed a judgment of conviction and assessed his punishment at four years' confinement. Father testified that he was "under the impression that non-aggravated cases only do 25 percent [of the assessed sentence] and [that he is] eligible for parole immediately once [he] enter[s] TDC." Father acknowledged, however, that his parole eligibility was not guaranteed and that, hypothetically, he could serve the entire four-year sentence. The trial court entered his judgment of conviction into evidence, and this judgment reflected that Father had credit for time served, approximately nine and a half months' worth of time credited against his sentence.

At the conclusion of trial, Father's parental rights were terminated. Father appealed arguing in part that

Holding: Affirmed.

Opinion: Family Code § 161.001(b)(1)(Q) allows termination of the parent-child relationship if the trial court finds, by clear and convincing evidence, that the parent knowingly engaged in criminal conduct that resulted in the parent's (1) conviction of an offense and (2) "confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition." Subsection (Q) applies prospectively and allows the State to act in anticipation of a parent's abandonment of the child and not just in response to it.

However, a two-year sentence does not automatically meet subsection Q's two-year imprisonment requirement because in some cases, neither the length of the sentence nor the projected release date is dispositive of when the parent will in fact be released from prison. Courts may consider the availability of parole as evidence relevant to determining whether the parent will be released within two years, but because parole decisions are inherently speculative and rest entirely within the parole board's discretion, the mere introduction of parole-related evidence does not prevent a factfinder from forming a firm conviction or belief that the parent will remain incarcerated for at least two years.

EVIDENCE SUFFICIENT TO SUPPORT TERMINATION OF FATHER'S PARENTAL RIGHTS AND THAT TERMINATION IN CHILD'S BEST INTEREST.

¶18-2-29. ***In re B.D.A.***, ___. S.W.3d ___,No. 01-17-00065-CV, 2018 WL 761313 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (02-08-18).

Facts: The DFPS sought termination of incarcerated Father's parental rights to three children. At the time of trial, Father was incarcerated and would be so until approximately July 2019. The children were removed from Mother's care in June 2015 following a referral for neglectful supervision of the middle child, who was hearing impaired and autistic, resulting in his hospitalization for a head scalp injury from a dog bite. Mother appeared intoxicated when she arrived at hospital. The Department learned from Mother that Father was incarcerated. The Department sought termination on many grounds. The family service plan outlined the Department's initial concerns regarding the children, including that the mother suffered from anxiety, depression, and insomnia but had no medication; she tested positive for cocaine and marijuana; she was leaving the children with inappropriate caregivers; she had been involved in four previous CPS referrals and had a history of fleeing from the Department; and she was not associating with her family and had limited outside support. The children were placed in different homes. After a trial, Father's parental rights were terminated. Father appealed.

Holding: Affirmed.

Majority opinion (Keyes): The Court found that: (1) sufficient evidence supported termination under statute governing a parent's criminal conduct that resulted in a conviction and imprisonment; (2) sufficient evidence supported termination under statute governing child endangerment; (3) sufficient evidence supported termination under statute governing constructive child abandonment; and (4) termination was in children's best interests. Termination of father's parental rights to his three biological children was in best interests of children, who were aged seven, five, and four at the time of trial; father committed a violent felony and would be imprisoned for the majority of the children's childhoods, although trial court made multiple orders to effectuate the ability of the Department to locate father, establish his paternity through genetic testing, and otherwise provide him with notice of the Department's case, father never contacted children's caseworker to obtain information regarding the children or to communicate his plans or desires for the children, and father did not have any willingness or ability to provide children with a safe environment and instead left them exclusively in the care of their mother, who endangered their wellbeing and ultimately relinquished her parental rights to them.

Dissenting Opinion (Massengale): Rather than supporting a firm belief or conviction that termination would be in the children's best interest, the record before the court raises more questions than it answers. Did the Department make reasonable efforts to provide appropriate services to facilitate the children building or maintaining a healthy relationship with their incarcerated father, who could be released from prison as soon as July 2019? Were all the children's eligible relatives considered as possible kinship placements? And what is the plan for the children to achieve permanency, particularly in light of the separation of three siblings into separate placements, with no evidence of their placement history in foster care or of prospective adoptive placements?

INSUFFICIENT EVIDENCE TO SUPPORT ABANDONMENT OF CHILD BY FATHER.

¶18-2-30. ***In re R.I.D.***, ___ S.W.3d ___, No. 14-17-00793-CV, 2018 WL 830671 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (02-13-18).

Facts: After the death of the Child's younger brother, the Department became involved. At caseworker's encouragement, Father saw Child one time, he encouraged the Department to place Child with Mother, Father's mother not a good fit because off immigration status, Father did not submit to a drug test, and Father had 3 other children who did not live with him none of whom live with him, and Father convicted of misdemeanor possession of marijuana. After trial, the trial court found Father had abandoned the Child and Father's parental rights were terminated. Father appealed.

Holding: Affirmed in Part, Reversed and Rendered in Part.

Opinion: To terminate Father's rights on the ground of abandonment, the Department had to prove that termination in child's best interest and that the parent has constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the [Department] for not less than six months, and: (i) the [Department] has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment. Although there was evidence to support (i) and (ii), there was no evidence to support (iii). There was no evidence of Father's living condition or about Father's conduct in his home.

EVIDENCE SUFFICIENT TO SUPPORT TERMINATION OF FATHER'S PARENTAL RIGHTS BASED UPON ABANDONMENT.

¶18-2-31. ***In re J.G.S.***, ___ S.W.3d ___, No. 08-17-00192-CV, 2018 WL 851257 (Tex. App.—El Paso 2018, no pet. h.) (02-14-18).

Facts: Father was never part of Child's life and he was been incarcerated in Arkansas during most of the case as the result of a sexual assault conviction. The Department sought termination of Father's parental rights based upon his conviction and constructive abandonment. After a trial, Father's parental rights were terminated. Father appealed.

Holding: Affirmed.

Opinion: To establish constructive abandonment under section 161.001(b)(1)(N), the Department was required to prove by clear and convincing evidence that: (1) Father had constructively abandoned Child who had been in the Department's permanent or temporary managing conservatorship for not less than six months; (2) the Department made reasonable efforts to return Child to Father; (3) Father had not regularly visited or maintained significant contact with Child; and (4) Father had demonstrated an inability to provide Child with a safe environment. Father restricted his appeal only to element (2). This element applies even if Father is incarcerated.

The case law does not hold, however, that such evidence is absolutely required to prove constructive abandonment under Section 161.001(b)(1)(N). The Department's efforts to place the child with relatives may constitute legally and factually sufficient evidence to support the trial court's finding that the Department made reasonable efforts.

SAPCR
ADOPTION

BIOLOGICAL FATHER NOT ENTITLED TO NOTICE OF TERMINATION PROCEEDING BECAUSE HE FAILED TO REGISTER IN THE PATERNITY REGISTRY; TRIAL COURT ABUSED DISCRETION IN GRANTING BIOLOGICAL FATHER BILL OF REVIEW SETTING ASIDE TERMINATION AND ADOPTION WHEN FATHER PRESENTED NO EVIDENCE OF MERITORIOUS DEFENSE AND FAILED TO SERVE ALL NECESSARY PARTIES.

¶18-2-32. *In re T.D.B.*, No. 05-17-01137-CV, 2018 WL 947905 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (02-20-18).

Facts: After Mother gave birth to the Child, she relinquished her parental rights to an adoption agency. The adoption agency conducted a diligent search of the paternity registry and found no notice of intent to claim paternity of the Child. The Child's Adoptive Parents filed a petition to adopt the Child. The trial court signed a decree terminating the parental rights of Mother and of "any unknown, unnamed, and/or unidentified biological father." Before the adoption was finalized, Biological Father notified the adoption agency that he was the Child's father, but Biological Father did not file anything in the paternity registry. Six months after the termination order, and two weeks after the adoption was finalized, Biological Father filed a petition for a bill of review. Only one of the two Adoptive Parents was served with Biological Father's petition. The adoption agency, the served Adoptive Parent, and Biological Father appeared at was supposed to be a pretrial status conference. After hearing argument of counsel, the trial court granted Biological Father's bill of review and set aside the termination and adoption orders. All three parties expressed surprise at the trial court's ruling. The Adoptive Parents, who had expected an oppor-

tunity to file a motion for summary judgment before the trial court ruled on the merits, filed a petition for writ of mandamus.

Subsequently, the trial court appointed Biological Father a temporary managing conservator and removed the Child from the adoptive parents' home. Nine days later, Biological Father tested positive for cocaine, codeine, oxycodone, hydrocodone, and marijuana. The trial court then placed the Child with his paternal grandmother and gave the Adoptive Parents limited weekend visits.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Biological Father did not register with the paternity registry, there was no evidence that a father-child relationship had been legally established, and Biological Father did not commence a proceeding to adjudicate his paternity before the trial court terminated his parental rights. Thus, Biological Father was not entitled to notice of the termination proceeding and was required to prove all elements for his petition for bill of review. Because Biological Father presented no evidence of a meritorious defense, the trial court abused its discretion in granting the bill of review. Additionally, the trial court abused its discretion in granting the bill of review without notice to all necessary parties.

Editor's comment: *The paternity registry statute means what it says. If you don't register, you don't get to know that your rights are being terminated. Period. Here's my issue—If you aren't entitled to notice of the underlying proceeding, then how are you a proper party to a BOR proceeding over the underlying termination? And, how in the world would any dude ever be able to show a meritorious defense? I mean, they shouldn't even have standing to sue for BOR because they weren't a party to and weren't entitled to be a party to or receive notice of the termination. M.M.O.*

MISCELLANOUS

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM ONLY AVAILABLE IF ANOTHER THEORY OF RECOVERY WOULD NOT SUFFICE.

¶18-2-33. *Finley v. May*, No. 07-17-00233-CV, 2017 WL 5763076 (Tex. App.—Amarillo 2017, no pet. h.) (mem. op.) (11-28-17).

Facts: Father sued Mother for intentional infliction of emotional distress claiming that she caused him such distress by her efforts to alienate their 2 children from him. Her efforts were purportedly manifested through her interference with his possessory rights regarding the children and her utterance of false accusations about him. The trial court denied Ex-Husband's claim.

The trial court disallowed any recovery any acts that occurred prior to the children's 18th birthday; however, it allowed him to prosecute his suit to the extent he sought redress for misconduct occurring thereafter. Father apparently construed the decision to mean that his suit for IIED was untimely or barred by the statute of limitations in part. In addition to finding that Father's suit was limited to misconduct occurring after the children turned 18, the trial court found that IIED is a 'gap-filler' cause of action available only when no other alternative cause of action is available to plaintiff."

Holding: Affirmed

Opinion: The Texas Supreme Court observed that "intentional infliction of emotional distress is a 'gap-filler' tort that should not be extended to circumvent the limitations placed on the recovery of mental anguish damages under more established tort doctrines." Its "purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct 'that its more established neighbors in tort doctrine would technically fence out.' "

GO TO TABLE OF CONTENTS

The appellate court further held that Father had other remedies pursuant to Chapter 42 of the Family Code, which provides that a "person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person." Furthermore, the legislature defined "possessory right" to mean "a court-ordered right of possession of or access to a child, including conservatorship, custody, and visitation." The damages recoverable included, among other things, those attributable to "mental suffering and anguish incurred by the plaintiff because of a violation of the order."

The appellate court further noted that Father's decision to wait until the children turned 18 did nothing to prevent Mother's alleged bad behavior, whereas a suit prior to that time would have served a more remedial purpose. The mere possibility that IIED might result in a higher damage recovery, does not justify ignoring the Supreme Court's mandate that IIED claims are only available when recovery under another theory would not suffice.

TO PRESERVE ERROR, THE COMPLAINING PARTY MUST MAKE A TIMELY OBJECTION WITH SUFFICIENT SPECIFICITY TO MAKE THE TRIAL COURT AWARE OF THE COMPLAINT.

¶18-2-34. ***In re M.M.W.***, ___ S.W.3d ___, No. 06-17-00067-CV, 2017 WL 5907851 (Tex. App.—Texarkana 2017, no pet. h.) (12-01-17).

Facts: DFPS sought termination of Mother's parental rights to her two children on various grounds. After a trial, Mother's parental rights were terminated. Mother appealed. In her sole issue, Mother argued that the trial court should have excluded testimony from both the Department's caseworker and the Court Appointed Special Advocate that termination of Mother's parental rights was in the best interests of the children. Specifically, Mother points out that the Department failed to qualify the witnesses as expert witnesses. Accordingly, she argues that the trial court should have excluded the lay witness testimony because it was opinion testimony that was not helpful to the jury in determining a fact in issue.

Holding: Affirmed

Opinion: Mother failed to preserve error pursuant to Texas Rule of Appellate Procedure 33.1. In order to preserve error on this point, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:
    (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context.

Here, when the Department asked each witness whether they believed that Mother's parental rights should be terminated, Mother objected on the ground that the question "[c]all[ed] for a conclusion." No further explanation was provided. After this objection was overruled, both witnesses answered in the affirmative. This objection was no specific enough to preserve Mother's complaint.

Editor's comment: *Just a reminder here that when you object, simply objecting is not enough for the record. The record alone MUST support the reasoning for the objection, especially if the objection is overruled. It is always good practice to explain to the court an objection, especially if you are preserving the record for appeal. I have had judges get frustrated before with this, and I simply explain I have to do it for clarity of the record. Most Judges are going to understand, and if they don't, it's still better to preserve your record! J.H.J.*

THE COURT OF CONTINUING JURISDICTION MAY ASSIGN, BUT NOT TRANSFER, A CASE TO ANOTHER COURT WITH CONCURRENT JURISDICTION WITHIN THE SAME COUNTY WITHOUT THE FILING OF A MOTION BY A PARTY.

¶18-2-35. *Ward v. Ward*, No. 09-17-00024-CV, 2017 WL 6062133 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.)(12-07-17).

Facts: Husband filed for divorce in the 253rd District Court in Liberty County. After Wife filed her answer, the case was transferred to the 75th District Court. Subsequently, the Judge of the 75th District Court signed a final decree of divorce. Several months later, Wife filed a motion to clarify several aspects of the property division. Several months after that, Husband filed a petition to modify his child support. Subsequently, the parties each filed motions for enforcement. The Judge of the 75th District Court signed an "Order Assigning Case[,]" in which it stated that the cause "is hereby assigned to the County Court at Law of Liberty County, Texas. The County Court at Law will have jurisdiction over this cause for all purposes."

Several months later, the County Court at Law conducted a hearing on all of the party's various motions. The trial court signed the order on February 11, 2016, and wrote underneath the date that the order is "effective 12–21–15[.]" The order denied Wife's motions and granted Husband's.

On June 21, 2016, Wife filed an expedited motion to set aside the trial court's order due to the County Court at Law's alleged lack of jurisdiction. In that pleading, Wife alleged that her attorney did not receive notice of the February 11 hearing for entry of the court's judgment of December 21, 2015, nor did her attorney receive notice that the trial court had signed a final, appealable order. According to Wife, the "transfer" of the petition to modify to the County Court at Law was issued *sua sponte*, and the County Court at law therefore lacked jurisdiction to enter any orders. As support for her jurisdictional argument, Lisa cited sections 155.001, 155.002, and 155.202(b) of the Texas Family Code. Wife argued that a transfer from a court with continuing, exclusive jurisdiction to another court requires a written motion, hearing, and order, and that since none existed, the County Court at Law lacked jurisdiction. Wife's motion was denied. Wife appealed.

Holding: Affirmed

Opinion: Under Government section 74.093, "the only limitation on local rules governing transfer of cases within a county is that the case must be transferred to a court that has jurisdiction over the case." The Government Code specifically provides that "a county court at law in Liberty County has concurrent jurisdiction with the district court in family law cases and proceedings." When the two courts at issue have concurrent jurisdiction, the jurisdictional limitation on transfers contained in section 74.093 is not implicated.

Given that the judge of the 75th District Court entitled his order "Order Assigning Case[,]" stated in the order that the case "[i]s hereby assigned to the County Court at Law of Liberty County, Texas[,]" and noted in the order that the County Court at Law "will have jurisdiction over this cause for all purposes[,]"the order was an *assignment* of the case to a court that had concurrent jurisdiction, not a *transfer* of the case to the County Court at Law by the court of continuing, exclusive jurisdiction as contemplated by the Family Code. *See* Tex. Fam. Code Ann. §§ 155.001(a), (c), 155.002; Tex. R. Jud. Admin. 9.

ABATING CASE FOR APPROXIMATELY FIVE YEARS FOR A RULING BY IRS EFFECTIVELY VITIATES DEFENDANT'S ABILITY TO PRESENT A CLAIM OR DEFENSE.

¶18-2-36. *In re Shulman,* ___ S.W.3d ___, No. 14-17-00508-CV, 2017 WL 6331176 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (12-12-17).

Facts: Wife engaged attorney Shulman to provide tax planning advice regarding certain property transfers benefitting Wife as a result of a divorce settlement with Husband. Wife later sued Shulman alleging negligence, breach of fiduciary duty, and other claims. Wife claims principally that Shulman's alleged wrongful conduct exposed her to approximately $1.6 million in potential federal tax liability. After Shulman moved for summary judgment, Wife filed a motion to abate all of her claims until potentially August 2021, when she contends the limitations period for the IRS to assess taxes will expire. The trial court abated the case "until August 15, 2021 or until the IRS assesses the tax liability at issue in the lawsuit, whichever is sooner." Before abating the case, the trial court signed a separate order compelling Shulman to produce documents Shulman contends are subject to the attorney-client privilege. Shulman requests mandamus relief as to both orders.

Holding: Mandamus conditionally granted in part and denied in part.

Opinion: Under the present circumstances, abating the case for the time period at issue is an abuse of discretion and effectively vitiates Shulman's ability to present a claim or defense so mandamus granted as to that order. However, as to the order to produce documents because the trial court has not finally refused Shulman's motion to reconsider and request to review the documents *in camera* so mandamus is denied as to that order.

THE PARTY WHO IS SUBJECT TO BEING SANCTIONED MUST BE GIVEN NOTICE REASONABLY CALCULATED, UNDER THE CIRCUMSTANCES, TO APPRISE THE PARTY OF THE PENDENCY OF THE ACTION AND AFFORD HIM THE OPPORTUNITY TO PRESENT HIS OBJECTIONS.

¶18-2-37. *Bellow v. McQuade*, No. 09-16-00165-CV, 2017 WL 6559053 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.)(12-21-17).

Facts: On January 26, 2016, Father, acting pro se, filed a verified petition for an ex parte emergency temporary restraining order and temporary injunction seeking to enjoin the Child's dentist from performing a non-emergency, invasive dental procedure that required intravenous sedation by an anesthesiologist on his three year old son. The trial court signed an Ex Parte Temporary Restraining Order on that same day.

The following day, Mother sought to intervene in the lawsuit and filed her Motion to Vacate Ex Parte Temporary Restraining Order, Motion to Dismiss for Lack of Jurisdiction and Motion for Sanctions, as well as a Motion to Show Cause. The trial court signed an Order to Appear and Show Cause ordering Father to appear before the court on the following day, January 28, 2016, at 2:30 p.m.

On January 28, 2016, prior to the show cause hearing, Father filed his Motion to Withdraw Petition for Temporary Injunction, Motion to Strike Hearing, and Motion to Rescind Emergency Temporary Restraining Order. Additionally, Father simultaneously filed pleadings, among other things, objecting to the lack of notice for the show cause hearing and request for sanctions.

On February 5, 2016, the trial court dismissing the ex parte temporary restraining order and sanctioning Father $3000. Father appealed alleging that he had not received sufficient notice as to the sanctions.

Holding: Affirmed in part and reversed and remanded in part.

Opinion: Mother's motion did not expressly state the legal basis on which she was seeking sanctions. However, from the transcript of the hearing and the wording of the trial court's order, it is clear that the trial court sanctioned Bellow for his "actions and dishonesty with the Court, both verbally and in his Verified Pleadings[,]" relying, at least in part, upon the inherent power of the court to impose sanctions.

The due process clause of the United States Constitution and of the Texas Constitution limits a court's power to impose sanctions. Accordingly, imposing sanctions requires the party who is subject to being sanctioned to be given "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections."

Here, It is undisputed that Father received less than 24 hours' notice of the show cause hearing. Because the Motion for Sanctions failed to provide Father adequate notice of his allegedly sanctionable conduct, and because Father had no notice that the trial court intended to sanction him based on its inherent authority, the trial court abused its discretion by imposing sanctions at the show cause hearing that occurred on January 28, 2016.

AN APPELLEE MAY NOT RECOVER ATTORNEY'S FEES FOR WORK PERFORMED ON ANY ISSUE OF THE APPEAL WHERE THE APPELLANT WAS SUCCESSFUL, SO APPELLATE FEES IN THAT INSTANCE MUST BE SEGREGATED.

¶18-2-38. *Robertson v. Robertson*, No. 13-16-00309-CV, 2017 WL 6546005 (Tex. App.—Corpus Christi-Edinburg 2017, no pet. h.) (mem. op.) (12-21-17).

Facts: This is the second appeal from the underlying divorce proceeding between Husband and Wife. The divorce involved a marital property agreement, which the appellate court found to be valid and enforceable and that, contrary to the trial court's ruling, husband's proceeds from two lawsuits were his separate property, and remanded the case back to the trial court for further proceedings. The appellate court also found that Husband had waived his complaint about the award of attorney's fees to Wife.

On remand, Wife presented an amended decree that moved the lawsuit proceeds to Husband's separate property and included a $15,000 appellate attorney's fee judgment in her favor against Husband. In response, Husband filed a counter-petition asserting that other property awarded to Wife was either of mixed character or Husband's separate property. After a hearing, the trial court agreed with Wife and signed her proposed Amended Decree. Husband appealed. He first asserted that the trial court erred in signing an amended divorce decree after *Robertson I* without hearing evidence and characterizing the property in dispute. He also complained about the $15,000 in appellate attorney's fees awarded to Wfie.

Holding: Affirmed in Part, Reversed in Part, and remanded for further proceedings.

Opinion: The scope of the remand is determined by looking to both the mandate and the opinion. Here, there is no language in *Robertson I*'s opinion or mandate providing special instructions or indicating that the appellate court limited the scope of remand to any particular issue. Instead, the Court affirmed in part and reversed in part and remanded "for further proceedings consistent with [our] opinion." Therefore, the case was reopened in its entirety on all issues of fact that were not disposed of in the portion of the original final decree which we affirmed. That included the characterization of the income listed in Schedule C's allocation of income and the proceeds from Husband's two lawsuits. Here, the law-of-case doctrine bars Husband from challenging the character of the property he seeks to dispute in this second appeal. Under this doctrine, the decisions made on questions of law on appeal govern the case throughout its subsequent stages.

Husband also challenged the trial court's award of appellate attorney's fees of $15,000. An award of appellate attorney's fees must be contingent upon the appellant's unsuccessful appeal. Thus, an appellee may not recover attorney's fees for work performed on any issue of the appeal where the appellant was successful. However, an appellee may still recover attorney's fees for work performed on any issue of the appeal where the appellant was unsuccessful. If a party is entitled to attorney's fees from

the adverse party on one claim but not another, the party claiming attorney fees must segregate the recoverable fees from the unrecoverable fees. The attorney's fees for time spent on addressing the issues on which Husband prevailed should have been segregated from the recoverable fees on the issues on which Wife prevailed, but they were not. Therefore, the issue of attorney's fees is remanded to the trial court for a determination of the reasonable amount of appellate attorney's fees to be awarded to Wife in view of the fact that Husband was partially successful in the first appeal. On remand, Wife must segregate the recoverable fees from the unrecoverable fees.

Editor's comment: *I may be misreading this opinion, but this case seems to conflict with other opinions on appellate attorney fees. Additionally, how are you supposed to segregate fees on one issue vs another in an appeal? When you have no clue which is going to be successful? It seems like in the billing, it may be necessary to identify specifically what issue you are working on so if the appeal is reversed in part, you can identify which parts of the bill pertain to the unsuccessful appeal. J.H.J.*

Editor's comment: *When you are awarded appellate fees conditioned upon success of the appeal, you can recover based on a partial win, but only if you provide evidence of segregation of the fees per issue. Reminder to you trial lawyers out there—please ask for appellate attorney's fees if you think a case is going up after a contested trial. M.M.O.*

PARTIES ENTITLED TO 45 DAYS' NOTICE OF TRIAL DATE.

¶18-2-39. *Guevara v. Guevara*, No. 13-17-00410-CV, 2017 WL 6545998 (Tex. App.—Corpus Christi-Edinburgh 2017, no pet. h.) (mem. op.)(12-21-17).

Facts: Father filed for divorce from Mother. Father requested the trial court appoint him as the sole managing conservator of their children and to order Mother to pay child support. Mother filed her original answer in response to the petition for divorce in the form of a general denial and requested attorney's fees from Father. Mother also filed a counter-petition for divorce, requesting that the trial court appoint Mother the sole managing conservator of the children and order Father to pay child support. Mother also requested the trial court deny Father access to the children due to a history of family violence in the two-year period prior to the filing of the lawsuit.

On November 2, 2016, the trial court entered a written order that set the parties' petitions for divorce for final hearing on December 14, 2016, 42 days from the date of the order. On December 2, 2016, Mother's attorney filed a motion to withdraw, stating that Mother failed to comply with their agreement and had not made any payments toward her legal fees. On December 14, 2016, Mother's attorney stated to the trial court that she e-mailed Mother the motion to withdraw, to which Mother responded, but there had been no further communication between them. The trial court granted the motion to withdraw prior to the final hearing. Mother did not appear at the final orders hearing.

After hearing minimal testimony from Father, the trial court appointed Father the sole managing conservator of the children. The trial court also ordered visitation by Mother as would be agreed to by the parties. Mother was ordered to pay child support. Mother filed this restricted appeal challenging the trial court's final decree of divorce.

Holding: Reversed and remanded.

Opinion: To prevail on a restricted appeal, the appellant must establish that: (1) it filed its notice of restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it 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.

Mother argues that error is apparent on the face of the record and that the trial court's judgment must be set aside because the trial court did not comply with the requirements of Rule 245 of the Texas

Rules of Civil Procedure, causing Mother to receive less than 45 days' notice of the final hearing. Although due process can be waived by the appellant appearing, Mother did not appear at the final hearing in this case. Mother's attorney testified that Mother was aware of the hearing date based on e-mail correspondence when she moved to withdraw from the case, but no documents were offered before the trial court or this Court to show that Mother had received proper notice of this hearing date. The clerk's record in this Court also includes an entry on the docket sheet showing that there appeared to have been a prior hearing or setting where the trial court set the December 14 date. The entry does not detail who was present at this prior court setting. However, even if the entry did show Mother was present, "docket sheets are not evidence and, therefore, cannot demonstrate that proper notice was given."

Additionally, even if Mother had notice of the final hearing, the trial court still scheduled and held the hearing with less than 45 days' notice to the parties. Mother was required to have "not less than forty-five" days' notice, and the trial court violated her due process rights by holding a hearing before that.

HUSBAND'S MOTION TO CLARIFY OF DECREE TO ADD IN ENDING DATE FOR SPOUSAL MAINTENANCE FOUR YEARS LATER WAS A COLLATERAL ATTACK ON THE DECREE BARRED BY RES JUDICATA.

¶18-2-40. *Lowery v. Lowery*, No. 01-16-00147-CV, 2017 WL 6520428 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (mem. op.) (12-21-17).

Facts: In 2009, Husband and Wife entered into an agreed decree based upon an MSA. The decree provided for Husband to pay spousal maintenance pursuant to Texas Family Code Chapter 8 to Wife until the first occurrence of either Wife's death, Father's death, Wife's remarriage, or further order of the court affecting the spousal maintenance obligation, including a finding of cohabitation by Wife with another person in a permanent place of abode on a continuing conjugal basis. Neither party appealed the decree.

Over 4 years later, on October 29, 2014, Husband filed an original petition to modify his spousal maintenance obligation on the ground that the obligation did not terminate in accordance with Chapter 8. When Husband quit paying the maintenance, Wife filed a motion to enforce by contempt or in the alternative clarify. Husband also filed a motion to clarify.

Ultimately the trial court found that "the language in the 'Post–Divorce Maintenance' section ... of the Final Decree of Divorce is contrary to the applicable statute at the time of the commencement of the proceedings, specifically section 8.054 of the Texas Family Code." The trial court further found that the language in the 'Post–Divorce Maintenance' section of the Final Decree of Divorce is not enforceable by contempt and may be enforceable as a contract. The trial court concluded that the maintenance obligation terminated by operation of law after thirty-six months on March 12, 2012. Wife appeals the trial court's order.

Holding: Reversed.

Majority Opinion: The record does not indicate that either party appealed the 2009 divorce decree. Thus, the 2009 divorce decree, which appears valid on its face and not appealed, is not subject to collateral attack. In his brief, Husband asserts multiple times that the trial court erred in 2009. Specifically, he states, "Ultimately, the Trial Court erred in 2009 having been given no evidence of [Wife's] ability to be unable to support herself because of a physical or mental disability to determine that the decree of divorce in this case ordering spousal maintenance past a three year period until the death of a party, the party receiving maintenance marries or further order of the Court." He also states, "In reality the Court did not terminate spousal maintenance pursuant to a Motion to Clarify, but found by becoming familiar with this divorce case that the Court in 2009 erred in judgment by not requesting evidence to support using language referring to section 8.54(b) in the Divorce Decree."

Both of Husband's statements demonstrate that his motion for clarification served to collaterally attack the 2009 unappealed divorce decree. Likewise, the trial court's January 15, 2016 order granting

the motion for clarification and terminating agreed spousal maintenance had the effect of a collateral attack on the unappealed divorce decree. To the extent that the trial court, in 2009, erred in failing to provide a three-year termination date pursuant to Chapter 8 of the Family Code, such error should have been raised by direct appeal. As such, Husband's motion to clarify a provision of an unappealed divorce decree constitutes a collateral attack that is barred by res judicata.

If an appeal is not timely perfected from the divorce decree, res judicata bars a subsequent collateral attack. Even if a final judgment is erroneous or voidable, it is not void and subject to collateral attack if a trial court had jurisdiction over the parties and subject matter.

Dissenting Opinion: There was no collateral attack on the divorce decree in this case. Instead, the trial court clarified an ambiguity in the decree, as it was empowered to do. To the extent the decree was insufficiently definite to justify a contempt finding, Wife requested, in the alternative, that the trial court clarify the decree to support a future contempt finding in the event of Husband's continued nonpayment of maintenance. The Family Code expressly contemplates and authorizes the clarification of a divorce decree in this context, providing: "On the request of a party or on the court's own motion, the court may render a clarifying order before a motion for contempt is made or heard, in conjunction with a motion for contempt or on denial of a motion for contempt."

THE DEPARTMENT MAY NOT CONSENT TO IMMUNIZATION OF A CHILD WHEN IT IS AWARE THAT BOTH PARENTS HAVE EXPRESSLY REFUSED TO GIVE CONSENT TO THE IMMUNIZATION.

¶18-2-41. *In re Womack*, ___ S.W.3d ___, No. 10-17-00336-CV, 2017 WL 6614650 (Tex. App.—Waco 2017, orig. proceeding) (12-27-17).

Facts: Shortly after Child's birth, the DFPS removed him from Father's and Mother's care and filed a petition for protection of a child, for conservatorship, and for termination. The trial court then conducted an adversary hearing and signed a temporary order on June 14, 2017, appointing the Department as temporary managing conservator of the Child and appointing Father and Mother as temporary possessory conservators of the Child. The Court gave the Department the rights and duties set forth in Family Code Section 153.371 and authorized the Department to consent to medical care for the Child pursuant to Family Code Section 266.004.

At a subsequent hearing, the Department expressed a concern that the Child had not been vaccinated. The Department explained that the Child is living in a foster home where he is exposed to social environments like daycare and church, that the Department would therefore like the Child to receive immunizations. Father and Mother were both opposed to the Child being vaccinated at this time.

At a later hearing, the trial court then held an evidentiary hearing about whether immunizations should be administered to the Child. The Child's pediatrician, first testified that she believes that the benefits of receiving immunizations outweigh the potential side effects and that it is therefore in the Child's best interest to be given vaccinations. Mother then testified that, based predominantly on the prevalence of autism in her family, she is opposed to the Child receiving vaccinations until he is "past the age of autism," which she thinks is about 5 years old. Father then similarly testified that it is still his desire that the Child not yet be immunized. Father stated that he has filled out and had notarized an affidavit so that the Child would be exempt from the immunization requirements of section 161.004 of the Health and Safety Code.

The trial court subsequently signed an Order that authorized the Department to consent to medical care for the Child finding that it is in the Child's best interest to have the normal childhood immunizations. Mother and Father sought mandamus relief.

Holding: Mandamus conditionally granted.

Opinion: Subsection 32.101(c) of the Family Code provides in relevant part:

> A person otherwise authorized to consent under Subsection (a) may not consent for the child if the person has actual knowledge that a parent, managing conservator, guardian of the child, or other person who under the law of another state or a court order may consent for the child:
> (1) has expressly refused to give consent to the immunization;

Even though the Department was authorized to consent to immunizations for the Child, because Mother and Father are parents as contemplated by the statute and both parents expressly refused to give consent to immunization, the trial court abused its discretion in entering an order giving the Department the right to consent to immunizations over the parents objections.

FATHER NOT INDIGENT; HE FAILED TO SHOW HE COULD NOT PAY COURT COST OF REPORTER'S RECORD IF HE REALLY WANTED TO DO SO.

¶18-2-42. *In re J.P.N.*, No. 04-17-00633-CV, 2018 WL 626526 (Tex. App.—San Antonio 2018, orig. proceeding) (mem. op.) (01-31-18).

Facts: After the parties divorced, they continued to be involved in ongoing litigation regarding custody provisions in their divorce decree. Father filed a petition for writ of mandamus challenging certain temporary orders. Father then filed an affidavit of indigence, which the court reporter contested.

At the hearing on Father's ability to pay, he testified he had significant debt, limited property, and that his monthly income was less than his monthly expenses. However, evidence showed that Father had a law degree, a bachelor's degree in biochemistry, an associate's degree in cardiopulmonary technology, and a Master's Level Certification in Education. Father had passed the bar exam and had earned income as an attorney. He was recently employed as a teacher but claimed he could not continue functioning "in this case" and teach. He said his employer fired him because "there were so many trials." Father's mother had loaned him significant sums of money to cover legal expenses, and although she stated that she intended for Father to repay her, she also stated that she would not impose legal collection practices to recoup any of the money. The trial court signed an order stating that Father had the ability to pay costs. Father appealed.

Holding: Affirmed

Opinion: A litigant who voluntarily remains unemployed and lives by the generosity of relatives is not entitled to require the officers of the court to render services free while other citizens are required to pay for similar services. Here, Father failed to make a good-faith effort to obtain funds to pay for the fee for the court reporter's record.

BECAUSE MOTHER AND FATHER OFFERED CONTRADICTORY TESTIMONY, TRIAL COURT DID NOT ABUSE DISCRETION IN BELIEVING FATHER'S TESTIMONY THAT CHANGING THE CHILD'S NAME WAS IN THE CHILD'S BEST INTEREST.

¶18-2-43. ***Werthwein v. Workman*, ___ S.W.3d ___**, No. 01-16-00889-CV, 2018 WL 910934 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (02-15-18).

Facts: Mother and Father were married when Mother became pregnant. At some point during the pregnancy, Father denied his paternity of the Child and left. Mother filed for divorce. Father was not present at the Child's birth. Mother listed Father as the Child's father but gave the Child her last name, which she had used throughout the marriage both socially and professionally. A paternity test confirmed the Child was Father's, but he did not amend his divorce counter-petition to request the Child's name be changed. The Child was nine months old when the divorce decree was signed. More than a year later, Father filed a SAPCR, and in an amended petition, he asked the trial court to change the Child's

name to Father's. After hearing testimony from the parties, the trial court granted Father's requested name change. Mother appealed.

Holding: Affirmed

Majority Opinion: (J. Brown, J. Bland)

The factfinder is the sole judge of a witness's credibility and the weight to be given each witness's testimony.

Mother testified that Father showed little interest in developing a relationship with the Child until six months before the hearing. Father testified that Mother had refused him access to the Child. Mother testified that they had been trying to get pregnant and were happy about the pregnancy, when Father suddenly denied he was the father and left. Father testified that Mother announced to him that the Child was not his and would be a different race from him.

Because both parents testified as to the relevant factors relating to the name change, the trial court did not abuse its discretion in resolving inconsistencies in Father's favor. Further, contrary to Mother's contentions:

- there was no evidence that the trial court placed a heightened burden on Mother;
- there was no evidence that the trial court's decision was based on tradition; and
- Father was not required to establish that the Child's current name would be detrimental to the Child.

Dissenting Opinion: (J. Jennings)

An opinion is conclusory if no basis for the opinion is offered, or the basis offered provides no support for the opinion. Opinion testimony that amounts to mere conjecture, guess, or speculation is not sufficient. A witness must explain the basis of his statements to link his conclusions to the facts.

Father offered no real evidence that changing the Child's name would help the Child better bond with Father. Just because a name change would not necessarily disrupt the Child's life does not mean it is in the Child's best interest to rename him. Father's assertion that changing the Child's last name would facilitate a father-son bond constituted nothing more than speculative opinion unsupported by a specific factual basis. Father's assertion that changing the Child's name would benefit the development of a relationship between the Child and his paternal family ignored the converse that it could impede the Child's development of a relationship with his maternal family. Father's conclusory and speculative opinion testimony did not tend to make the existence of a material fact more or less probable and was neither relevant nor competent evidence.