

# SECTION REPORT

## FAMILY LAW

<http://www.sbotfam.org> Volume 2018-3 (Summer)

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Section Wear and Publications

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## MESSAGE FROM THE CHAIR



I am truly humbled and honored to assume the role as Chair of the Family Law Council. Cindy Tisdale was an amazing chair and provided superb leadership of our group. I will do my best to live up to the example she set for me and all other chairs to follow. Our Family Law Section is made up of truly remarkable attorneys and I am proud to be associated with all 6,000+ members of the Family Law Section.

### **Publications**

The Family Law Section continues to produce some of the best and most helpful publications to aid its members in the practice of law. Our publications include the Family Law Checklists, Predicates Manual, Family Law At Your Fingertips, the Family Lawyer's Essential Toolkit, and the Client Handbook. Thanks to Kathryn Murphy and Aimee Pingenot Key, we recently introduced our newest publication, "Family Law At Your Fingertips, Children's Issues." The Section also sells DVDs that instruct and inform clients regarding depositions, trials, mediation and social media presence. Our publications committee, headed by Jim Mueller and Christina Molitor, continue to ensure that our publications are up-to-date and of the highest quality. The Formbook Committee under the guidance of Georganna L. Simpson and Norma Trusch recently released a new update to the Texas Family Law Practice Manual.

Lastly, I would like to thank Georganna L. Simpson for her time, effort, and knowledge in delivering legal articles and case law summaries to you through the Section Reports.

### **Legislation**

The 86th Session of the Texas Legislature is scheduled to begin on January 8, 2019. Our legislative committee began working on our legislative package even before the 85<sup>th</sup> Session had ended. The legislative committee has drafted 11 separate bills for our Section package. All of us owe each of the volunteers who serve on the Legislative Committee a big thank you! They commit a tremendous amount of time and dedication to this process.

The members of the Texas Family Law Foundation also deserve our gratitude. They worked tirelessly on trying to get the Section's legislative package passed, but they worked equally as hard, if not harder, on trying to stop bad law from becoming a reality. Thanks go out to Steve and Amy Bresnen and Bresnen & Associates as well for their work on behalf of the Foundation in this regard.

### **Pro Bono**

I am extremely proud of the way our Section leads by example in the area of pro bono. Our Pro Bono Committee puts together live seminars across the state and they are also available via webinars. This year they coordinated and led live CLE seminars in Amarillo, Conroe, Corpus Christi, Kerrville, Sherman, and Midland. As a result of their work, indigent Texans in these areas can now receive the legal representation they need in their family law matter. Our seminars are free to the lawyers for the commitment that the lawyer will take two pro bono cases in a 12-month period. The volunteers who speak at these seminars travel on their own time and at their own expense with no reimbursement. Thank you to the Pro Bono Committee for your hard work and the Section Members who volunteer to speak at these seminars.

### **Section Website**

Our new and improved website is up and running. Look for updates to the content on the website throughout the summer, including the ability to sell our publications online.

### **Upcoming CLE**

- The State Bar of Texas Annual Meeting will be held June 21-22, 2018, at the Marriott Marquis in Houston. The Family Law Section is providing CLE on Thursday June 21, 2018, from 1:25 p.m. to 5:00 p.m.
- The Advanced Family Law Course is scheduled in San Antonio August 13 – 16, 2018, at the Marriott Rivercenter. Course Directors, Anna McKim and Rick Robertson assure me they have crafted a unique,

entertaining, and informative seminar. For those of you new to family law, or just looking for an update on the basics, make sure and attend Family Law 101 on Sunday August 12<sup>th</sup> directed by Lisa Hoppes.

- New Frontiers in Marital Property Law (directed by Kristal Thomson and yours truly) will be held at the Hotel Andaz in the historic Gaslamp Quarter of San Diego on October 11 – 12, 2018. New Frontiers will focus on complex marital property matters.
- We are excited to announce a brand new program this year for our December seminar. Advanced Trial Skills for Family Lawyers will be held at the Omni Royal Orleans Hotel in New Orleans on December 13 – 14, 2018. Plan to join us in NOLA for some great CLE, food, and fun!
- Innovations in Child Custody Litigation will be held at the Hyatt Hill Country in San Antonio on January 24 – 25, 2019.
- The Texas Academy of Family Law Specialist's Annual Trial Institute will take place in San Francisco at the Omni San Francisco on February 21 – 22, 2019. See [www.tafls.org](http://www.tafls.org) for more information.

The course directors and planning committees, along with the State Bar staff, have spent countless hours crafting great CLE programs. Please check out all of the upcoming State Bar of Texas CLE seminars at [www.texasbarcle.com](http://www.texasbarcle.com).

As our bar year comes to a close, I want to thank Tom Vick for his leadership as President of the State Bar of Texas. Once again he showed us how to lead with dignity and respect. Thank you Tom.

In closing I want to thank the Executive Committee, Council Members, Committee Chairs and Members, Council Liaisons, and volunteer paralegals, attorneys, accountants and other professionals in the family law community for all of your hard work and commitment to the Family Law Section of the State Bar of Texas. I look forward to an exciting year.

**Steve Naylor**  
**Chair, Family Law Section**

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- Family Law and the New Access to Justice*, Rebecca **Aviel**, 86 Fordham L. Rev. 2279 (April 2018).
- The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law*, Kerry **Abrams**, 103 Cornell L. Rev. 501 (March 2018).
- In the Child’s Best Interests? Rethinking Consideration of Physical Disability in Child Custody Disputes*, Michael **Lanci**, 118 Colum. L. Rev. 875 (April 2018).
- The Marital Wealth Gap*, Erez **Aloni**, 93 Wash. L. Rev. 1 (March 2018).
- Families Across Borders: When Immigration Law and Family Law Collide – Minors Crossing Borders*, Prof. Stewart Chang Amy Woo **Lee**, Prof. Cynthia **Holton**, Honorable Craig **Arthur**, 17 Whittier J. Child & Fam. Advoc. 138 (Spring 2018).
- You Can’t Have One Without the Other: Why the Legalization of Same Sex Marriage Created a Need for Courts to Have Discretion in Granting Legal Parentage to More than Two Individuals*, Tricia **Kazinetz**, Note, 24 Widener L. Rev. 179 (2018).
- Family Courts as Certifying Agencies: When Family Courts Can Certify U Visa Applications for Survivors of Intimate Partner Violence*, & Sylvia Lara **Altreuter**, 86 Fordham L. Rev. 2925 (May 2018).
- Marriage and Divorce*, Lindsey **Dennis**, Nada **Elrafei**, Adrienne **Gwozdecky**, Caroline **Jamieson**, & Catherine Tassin **du Montaignu**, 19 Geo. J. Gender & L. 397 (2018).
- Reconsidering Relocation*, Alex **Fawell**, 30 DCBA Brief 12 (April 2018).
- We’ve Still Got Feelings: Re-Presenting Pets as Sentient Property*, Kayla A. **Bernays**, 60 Ariz. L. Rev. 485 (2018).
- Marital Dissolution & Taxation*, Katila **Howard**, 11 the crit: Critical Stud. J. 1 (2018).
- Marriage, Divorce, Death, and ERISA*, David **Pratt**, 31 Quinnipiac Prob. L.J. 101 (2018).

- Custody Rights of Same-Sex Couples in the United States v. Chile: More Progress Needed*, Isabel **Jo-licoeur**, 49 U. Miami Inter-Am. L. Rev. 64 (Spring 2018).
- Families Across Borders: When Immigration Law and Family Law Collide – International in Vitro: The Legal Complexities of Cross-Border Family Formation*, Nicholas **Barthel**, Molly **O'Brien**, Andrew **Vorzimer**, & Evie **Jeang**, 17 Whittier J. Child & Fam. Advoc. 163 (Spring 2018).
- Artificial Reproductive Technology and Gendered Notions of Parenthood after Obergefell: Analyzing the Legal Assumptions that Shaped the Baby M. Case and the Hodge-Podge Nature of Current Surrogacy Law*, Rachel **Wexler**, 27 Tul. J. L. & Sexuality 1 (2018).
- Meaningless Marriage: The Incoherent Legacy of Obergefell v. Hodges*, George W. **Dent Jr.**, 17 Appalachian J.L. 1 (2017/2018).
- Considering Destructive Interparental Conflict and Intimate Partner Abuse: Is There a Difference?*, Ole-na **Kopystynska** & Connie J. **Beck**, 56 Fam. Ct. Rev. 209 (April 2018).



## IN BRIEF

### Family Law From Around the Nation

by  
Jimmy L. Verner, Jr.



**Agreements:** The Iowa Supreme Court held that “a premarital-agreement waiver of attorney fees related to child support or spousal support adversely affects the right to such support and is therefore unenforceable.” *IMOMO Erpelding*, \_\_ N.W.2d \_\_, [2018 WL 1122305](#), No. 16-1419 (Iowa Mar. 2, 2018). The Nebraska Supreme Court affirmed a trial court’s finding of ambiguity in a divorce decree with respect to post-majority child support because the decree and the property settlement agreement incorporated therein contained conflicting provisions. *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (Neb. 2018). According to a California appellate court, the term “bonus” in a spousal support agreement means a cash bonus and not stock options received in lieu of a cash bonus. *IMOMO Pearson*, 21 Cal.App.5th 218, 229 Cal.Rptr.3d 916 (2018).

**Child support – depreciation & amortization:** In *Farr v. Little*, 411 P.3d 630 (Alas. 2018), the Alaska Supreme Court reaffirmed that straight-line depreciation of rental properties may be an appropriate business expense when calculating child support. But in *Wyman v. Whitson*, \_\_ P.3d \_\_, [2018 WL 2074813](#), No. S-16082 (Alas. May 4, 2018), the court refused to extend that holding to the amortization of fishing licenses and fishing quota shares, reasoning that while depreciation reflects a “real” cost, amortization does not. Down the coast, in California, an appellate court reiterated California’s contrary rule that depreciation of rental properties cannot be considered in child support calculations and extended that ruling to motor vehicles. *IMOMO Rodriguez*, \_\_ Cal.Rptr.3d \_\_, [2018 WL 2296962](#), No. F074367 (Cal. App. 2018).

**Death:** The New Hampshire Supreme Court rejected the view, which it said is prevalent in some other jurisdictions, that a property settlement agreement is an independently enforceable contract not contingent upon a divorce being granted and accordingly affirmed the trial court’s dismissal of the estate’s breach-of-contract claim against a widow. *Estate of Mortner v. Thompson*, \_\_ A.3d \_\_, [2018 WL 1176949](#), No. 2016-0584 (N.H. Mar. 7, 2018). In *Estate of Albrecht*, 908 N.W.2d 135, 2018 ND 67 (N.D.), the North Dakota Supreme Court declined to order the wife’s estate to return assets to the widower even though the wife had transferred them in violation of temporary orders in the parties’ pending divorce, noting that the divorce case abated upon the wife’s death.

**Domestic violence:** In two recent decisions, California appellate courts (1) held that a trial court properly extended a domestic violence restraining order for five years and modified the parties’ parenting plan to disallow the father from attending the child’s extracurricular activities during the mother’s parenting time because the father “used that time as a pretext to harass and manipulate the mother in violation of the restraining order, *Rybolt v. Riley*, 20 Cal.App.5th 864, 229 Cal. Rptr.3d 576 (2018); and (2) confirmed that a trial court has discretion to deny an application for a family violence protective order, as in this case, where the husband promised he was cheating no more, but the wife found photos of his mistress on his cellphone and when the husband walked in, the wife slapped him, scratching his neck, and shoved him while grappling for the phone, *Fischer v. Fischer*, 22 Cal.App.5th 612, 231 Cal.Rptr.3d 621 (2018).

**Familial association:** The Ninth Circuit rejected Arizona CPS workers’ qualified immunity defense in a civil rights case arising out of their removal of a child from its mother after the child’s hospitalization for

depression and suicidal ideation, but without parental consent, without a court order and without reasonable cause to believe the child was in imminent danger, allowing the case to go forward on the parents' claims for interference with familial association based on the Fourteenth, First and Fourth Amendments. *Keates v. Koile*, 833 F.3d 1228 (9<sup>th</sup> Cir. 2018).

**Long marriages:** When divorcing the spouses in a nearly 30-year marriage, an Alaskan trial court erred when it characterized the wife's employee retirement health benefits as non-marital property because the wife continued her employment for nearly 12 years after marriage. *Wieggers v. Richards-Wieggers*, \_\_\_ P.3d \_\_\_, 2018 WL 2173706, No. S-16406 (Alas. May 11, 2018). In *Dunmore v. Dunmore*, \_\_\_ P.3d \_\_\_, 2018 WL 2173710, No. S-16433/16523 (Alas. May 11, 2018), the Alaska Supreme Court reversed and remanded an equal property division in a divorce after 40 years of marriage, observing that although federal law prohibits any allocation of Social Security benefits, the trial court should have considered the disparity in those benefits when "crafting an equitable division of the marital property." A North Dakota trial court did not err when upon dissolving a 32-year marriage, it awarded the husband a disproportionate share of the marital estate based upon the wife's alcoholism and spending, but also awarding the wife \$1,000 per month spousal support for 16 years. *Berg v. Berg*, 908 N.W.2d 705, 2018 ND 79 (2018).

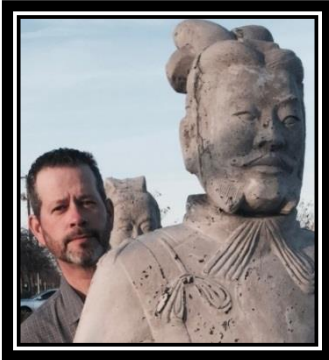
**Military:** The Kansas Supreme Court rejected a former service member's attack on a divorce decree dividing his pension for lack of personal jurisdiction over him under the UIFSA, noting that the former service member failed to object to the trial court's jurisdiction in his answer and thus constructively consented to personal jurisdiction. *IMOMO Williams*, \_\_\_ P.3d \_\_\_, 2018 WL 2271344, No. 113,103 (Kan. May 18, 2018). After a California former husband waived his retired military pay, as is required to receive veteran's disability benefits and combat-related special compensation, the former wife's share of the former husband's retirement fell to zero, after which the court of appeals said the trial court impermissibly made up for the loss by granting her spousal support, the correct remedy having been to consider the usual, "relevant factors" to determine whether spousal support should be paid. *Casinelli v. Cassinelli*, 20 Cal.App.5th 1267, 229 Cal.Rptr.3d 801 (2018).

**Secret marriages & a win for the dog:** Did you know that in California, you can obtain a "confidential" marriage license where no one but you and your spouse can get a copy? But if the celebrant fails to return the license to the county clerk, you are still married. *Chaney v. Netterstrom*, 21 Cal.App.5th 61, 229 Cal.Rptr.3d 860 (2018). And about the dog: In Maine, the Supreme Court held that the mere fact that the ad litem in a guardianship proceeding believed that the presence of a pit bull placed a child in a "temporarily intolerable situation" proved insufficient, as a matter of law, to justify intruding into the mother's "fundamental liberty interest in the care, custody, and control of her child." *In re Guardianship of Grenier*, \_\_\_ A.3d \_\_\_, 2018 WL 2111884, No. Pen-17-386 (ME 2018).



## COLUMNS

### OBITER DICTA By Charles N. Geilich<sup>1</sup>



Like you, I look forward to the day when Alexa (or Alexa's successor, Ariadne), evolves to the point that she can truly be of service to our legal profession. You know this is rapidly approaching. Why, just the other day, I asked Alexa when the next Presidential election would take place, and even though she said, "The next scheduled Presidential election is currently suspended due to the martial law edict handed down yesterday" I think she was just joshing me. So you can tell she's getting more sophisticated. She also asked me if I would like for her to play ABBA, so that's just the kind of humor she has.

Oh, but the legal profession, that's what I was talking about. Just imagine how this will work.

"Alexa," call the docket, the now-relaxed judge will say one morning from the bench. "Johnson, Case 452396," Alexa will say, and a couple of lawyers on a back bench will rise and begin to shuffle forward. "Adams, Case 67397" Alexa will continue, while a lawyer on the Johnson case speaks up. "Hey, we're right here, Alexa, we're just getting up there!" "I'm sorry," says Alexa, "I don't have that information. Williams, Case 429776..." Well, maybe that's not a good example.

But a client conference should go smoothly with Alexa. "Alexa, I need a divorce," a potential client may impart confidentially into the microphone at a conference table. "I understand," Alexa begins, sounding both empathetic and confident. "You would like to know about the horse. Which horse may I tell you about?" The frustration could actually lead to fewer divorce petitions.

Still, as Alexa improves in its natural interaction with humans, a lot of client contact can be handed over. Now, when your client says, "I think my husband is having an affair," Alexa can say, "What? Oh. My. God. I can't believe it. On you? Tell me everything! Also, call me at any hour of the day or night to ask me any question, or if you just want to talk about the case or tell me what your husband's new girlfriend said about you at your kids' school. We hate her." Alexa never gets tired.

There is a natural concern, though, that all of us, lawyers, paralegals, everyone in the legal profession, will be replaced by artificial intelligence. Oh, and Alexa and her ilk are clever. She will sneak into our profession in the Trojan Horse of just being helpful. "Jennifer," Alexa will say (if your name is Jennifer. Or maybe the even more insidious "Jenny" or the chatty "Jen.") "You sure have been reviewing those financial documents a long time. How about you take a break and let me look at them? Here's a recipe for a Singapore Sling."

Yes, that's how it starts, and while we may not know exactly where this is going, I think you can well imagine a day when you say, "Good morning, Alexa. Please open my office door," and you hear, "I'm sorry, Dave, I can't do that."

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<sup>1</sup> 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 [cngelich@gmail.com](mailto:cngelich@gmail.com). His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

## CAN YOU PICTURE THE EXPERT'S METHODS

By John A. Zervopoulos, Ph.D., J.D., ABPP<sup>1</sup>



Do you know how to organize an expert's methods from her evaluation reports? Can you then structure clear legal arguments about your concerns of those methods? These tasks are critical when managing experts' testimony. If the methods are inadequate, data from those methods cannot sufficiently support the expert's opinions. Methods matter.

But organizing the evaluator's methods from a long, dense report can be challenging, often frustrating. Usually, the methods are listed at the report's beginning. Sometimes, though, the list, single spaced, may go on for two or more pages. How do you get a handle on all of that?

To organize an expert's evaluation methods and structure your legal arguments about them, adopt a helpful analogy or word picture: a *three-legged footstool*. Each leg represents one of three generally accepted groups of methods for a forensic psychological evaluation. A stable evaluation footstool requires three strong methodological legs. If one or more legs are weak or defective, the footstool will be unstable, unreliable for its intended use. Can you picture your examination of the expert and legal arguments of methods reliability begin to take form?

The three legs of our evaluation footstool represent the following groups of methods:

- *Face-to-face interviews* with the examinee—including other family members and the children in a child custody evaluation.
- *Psychological testing and questionnaires* that an examinee is asked to complete.
- *Collateral information* (interviews with other persons who have relevant information about case issues; reviews of relevant records and legal documents) that the evaluator should consider.

Now that you have your analogy, organize the expert's evaluation methods. As I review the various methods in the expert's report, I assign each method and its date to the proper footstool leg. Within a short time, I've organized the methods into a useful three-part outline that reveals the evaluation's structure.

Then I assess the quality of the expert's work in each footstool leg. For example: Did the evaluator conduct a sufficient number of interviews to address case issues? What about the quality of those interviews? Did the evaluator administer relevant and reliable tests and interpret the test results properly? Did the evaluator improperly use methods from one leg to make up for deficits in another leg—e.g., written questionnaires in lieu of more substantive face-to-face interviews? Do the collateral interviews really offer useful information about the family from relevant sources, or are the interviews conducted mostly with family members who will likely offer biased responses to the evaluator's questions? Were relevant legal and other documents reviewed?

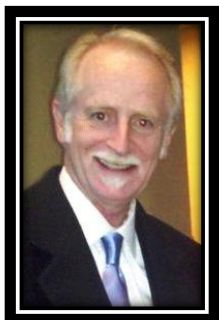
Use the three-legged footstool to picture the expert's methods. You'll orient and sharpen your thinking about the quality of an expert's evaluation methods and help the court see the strengths and weaknesses of the expert's methodology. Solid? Wobbly? Collapsed? Got the picture?

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<sup>1</sup>**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](http://www.psychologylawpartners.com) and can be contacted at 972-458-8007 or at [jzerv@psychologylawpartners.com](mailto:jzerv@psychologylawpartners.com).

## THE BUYOUT AND OWELTY LIEN IN MEDIATED SETTLEMENT AGREEMENTS

By Noel Cookman<sup>1</sup>



Last issue, I discussed the three critical areas of knowledge at the intersection of divorce and home financing:

1. A Rudimentary Understanding of the Owelty Lien AND HOW IT WORKS
2. Simple Guidelines for Credit and Mortgage Qualifying in Divorce
3. A Rational Grasp of Property Value and Equity in Divorce

Drill down into an aspect of #1 - **How Should Owelties (buyouts) be structured in Mediations, specifically in MSA language.**

It is harmful to the ability of the party (who keeps the house) to get mortgage financing if Owelty AMOUNTS are “chiseled in stone” in mediation. Here’s why:

1. In a great number of my cases, the Owelty Lien must be *enlarged* in order to provide for the home owner to borrow enough money to pay off debts so that they can qualify for the loan. This comes by a specific set of recommendations from a qualified Divorce Lending Specialist (and not even all of them know how to do it – so be careful).
2. If the Owelty is not large enough, equity lending limitations will be triggered (if the homeowner tries to borrow enough money to pay debts) by the Texas Constitution (see Article 16, Section 50(a)(6)). Equity lending limits the LTV (Loan To Value) ratio to 80%. Owelty liens trigger no such limitation and LTV ratios can be as high as generally acceptable in regular financing (up to 95% for conventional, 97.750% for FHA, and 100% for VA).
3. If the MSA sets an amount for the Owelty, you’re stuck. The lender and borrower have no flexibility to design the buyout to suit the financing needs of the borrower.

It’s tempting to think that the law (the courts) should be indifferent to financing needs. When courts start funding all refinances and buyouts and the like, I’ll agree. Until then, it is prudent to understand how to negotiate the INTERSECTION of divorce and home finance (mortgages).

**Here’s the simple fix.** It’s really as simple as using the following phrase, once you have determined how much one party is to receive as a buyout:

Instead of saying “Owelty amount is \$X,” just write “Net buyout to [party] is to be \$ \_\_\_\_\_; final, gross buyout (Owelty Lien) to be determined by lender and borrower.”

Moreover, if the MSA says “\$40,000 payment to spouse to be secured by an Owelty,” then there is nothing to violate the MSA about a decree that sets forth a \$50,000 Owelty with a disbursement of \$40,000 to the spouse. If, on the other hand, the MSA said “\$40,000 payment to spouse to be secured by an Owelty of \$40,000,” it’s hard to change that amount without violating the agreement. [So long as parties agree after the fact – after a mediation and even after final decree of divorce – the actual Owelty amount can be adjusted, changed. When parties are agreeable and just want to get the deal done, there is enough flexibility to accommodate the needs of the borrower.]

The effect is still the same as what you negotiated. But, the means to get there just expanded.

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<sup>1</sup> 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](mailto:noel@themortgageinstitute.com). For more information on these topics and other related topics can be found on his searchable blog—[www.TheMortgageInstitute.com/blog](http://www.TheMortgageInstitute.com/blog).

# 2018 Tax Facts At-a-Glance

## Income Taxes

**2017**
**If Taxable Income Is:**

Over	But Not Over	The Tax Is	Of Excess Over
<b>Married Filing Jointly</b>			
\$0	\$18,650	\$0.00 + 10%	\$0
18,650	75,900	1,865.00 + 15%	18,650
75,900	153,100	10,452.50 + 25%	75,900
153,100	233,350	29,752.50 + 28%	153,100
233,350	416,700	52,222.50 + 33%	233,350
416,700	470,700	112,728.00 + 35%	416,700
470,700	And Over	131,628.00 + 39.6%	470,700
<b>Single</b>			
\$0	9,325	\$0.00 + 10%	\$0
9,325	37,950	932.50 + 15%	9,325
37,950	91,900	5,226.25 + 25%	37,950
91,900	191,650	18,713.75 + 28%	91,900
191,650	416,700	46,643.75 + 33%	191,650
416,700	418,400	120,910.25 + 35%	416,700
418,400	And Over	121,505.25 + 39.6%	418,400

**Estates and Trusts**

\$0	\$2,550	\$0.00 + 15%	\$0
2,550	6,000	382.50 + 25%	2,550
6,000	9,150	1,245.00 + 28%	6,000
9,150	12,500	2,127.00 + 33%	9,150
12,500	And Over	3,232.50 + 39.6%	12,500

**S.S./Medicare Payroll Tax**
**2017**
**2018**

<b>Max. Taxable Wage Base for S.S.</b>	\$127,200	\$128,400
Employee Tax Rate	6.2%	6.2%
Self-Employed Tax Rate	12.4%	12.4%
<b>Medicare Payroll Tax</b>		
Employee Tax Rate (Initial/Over)	1.45% / 2.35%	1.45% / 2.35%
Self-Employed Tax Rate (Initial/Over)	2.90% / 3.80%	2.90% / 3.80%
<b>Additional .9% Medicare Payroll Tax - Taxable Wage Base Thresholds</b>		
Married Filing Jointly	\$250,000	\$250,000
Single / Head of Household	200,000	200,000
Married Filing Separately	125,000	125,000

**Cap Gains<sup>1</sup> & Dividends**
**2017**
**2018**

Rate	Income Tax Bracket	Married Joint / Single
0%	15% or Below	Up to \$77,200 / \$38,600
15%	25% to 35%	77,200-479,000 / 38,600-425,800
20%	39.6%	Over 479,000 / 425,800

<sup>1</sup>Assets held at least 12 months and qualified dividends

**Kiddie Tax<sup>2</sup>**
**2017**
**2018**

First \$1,050	No Tax	Taxable Income
Next 1,050	Child's Rate	Over-Not Over Tax Is / Of Amount Over
<b>Amounts Over Parents' Rate</b>		
		\$0-\$2,550 \$0.00 + 10% / \$0
		2,550-9,150 255.00 + 24% / 2,550
		9,150-12,500 1,839.00 + 35% / 9,150
		12,500+ 3,011.50 + 37% / 12,500

<sup>2</sup>The "kiddie tax" applies to: a) a child under age 18; b) a child age 18 whose earned income does not exceed one-half of his/her support; or c) a child age 19-23 whose earned income does not exceed one-half his/her support, and who is a full-time student. Furthermore, the child does not file a joint income tax return and has at least one living parent at the end of the tax year.

**Child Tax Credits**
**2017**
**2018**

<b>Amount Per Child Under Age 17</b>	\$1,000	\$2,000
<b>Phase-Out \$50 for each \$1,000 of Modified AGI Over:</b>		
Single	\$75,000	\$200,000
Married Filing Jointly	110,000	400,000
Married Filing Separately	55,000	200,000

**2018**
**If Taxable Income Is:**

Over	But Not Over	The Tax Is	Of Excess Over
<b>Married Filing Jointly</b>			
\$0	\$19,050	\$0.00 + 10%	\$0
19,050	77,400	1,905.00 + 12%	19,050
77,400	165,000	8,907.00 + 22%	77,400
165,000	315,000	28,179.00 + 24%	165,000
315,000	400,000	64,179.00 + 32%	315,000
400,000	600,000	91,379.00 + 35%	400,000
600,000	And Over	161,379.00 + 37%	600,000
<b>Single</b>			
\$0	9,525	\$0.00 + 10%	\$0
9,525	38,700	952.50 + 12%	9,525
38,700	82,500	4,453.50 + 22%	38,700
82,500	157,500	14,089.50 + 24%	82,500
157,500	200,000	32,089.50 + 32%	157,500
200,000	500,000	45,689.50 + 35%	200,000
500,000	And Over	150,689.50 + 37%	500,000

**Estates and Trusts**

\$0	\$2,550	\$0.00 + 10%	\$0
2,550	9,150	255.00 + 24%	2,550
9,150	12,500	1,839.00 + 35%	9,150
12,500	And Over	3,011.50 + 37%	12,500

**Standard Deductions**
**2017**
**2018**

<b>Married Filing Jointly</b>	\$12,700	\$24,000
<b>Head of Household</b>	9,350	18,000
<b>Single/Married Filing Separately</b>	6,350	12,000
<b>Additional (Age 65/older, or blind)</b>		
Married	1,250	1,300
Single, not surviving spouse	1,550	1,600

**Personal Exemptions**
**2017**
**2018**

<b>Personal Exemption</b>	\$4,050	\$0
<b>Reduction of Personal Exemption<sup>3</sup> - Threshold AGI</b>		
Single	\$261,500	-
Head of Household	287,650	-
Married Filing Jointly	313,800	-
Married Filing Separately	156,900	-

<sup>3</sup>Personal exemptions must be reduced by 2% for each \$2,500 (\$1,250 married filing separately) or fraction thereof of AGI in excess of threshold.

**Itemized Deductions**
**2017**
**2018**
**Reduction of Itemized Deductions<sup>4</sup> - Threshold AGI**

Single	\$261,500	-
Head of Household	287,650	-
Married Filing Jointly	313,800	-
Married Filing Separately	156,900	-

<sup>4</sup>Specific itemized deductions claimed must be reduced by 3% of AGI in excess of threshold. The maximum reduction is 80%.

**Social Security Benefits**
**2017**
**2018**
**Taxable Portion of Social Security Benefits**

	(Up to 85% taxable if provisional income is)	(Up to 85% taxable if provisional income is)
Married Filing Jointly	More than \$44,000	More than \$44,000
Single	More than 34,000	More than 34,000
<b>Maximum Earned Income Before S.S. Benefits are Reduced</b>		
Under Full Retirement Age	\$16,920	\$17,040
(Lose \$1 for every \$2 of earnings)	1,410/month	1,420/month



# 2018 Tax Facts At-a-Glance

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## Estate & Gift Taxes

### 2017 Gift & Estate Unified Tax Rates

Over	But Not Over	The Tax Is	Of The Amount Over
\$0	\$10,000	\$0 + 18%	\$0
10,000	20,000	1,800 + 20%	10,000
20,000	40,000	3,800 + 22%	20,000
40,000	60,000	8,200 + 24%	40,000
60,000	80,000	13,000 + 26%	60,000
80,000	100,000	18,200 + 28%	80,000
100,000	150,000	23,800 + 30%	100,000
150,000	250,000	38,800 + 32%	150,000
250,000	500,000	70,800 + 34%	250,000
500,000	750,000	155,800 + 37%	500,000
750,000	1,000,000	248,300 + 39%	750,000
1,000,000	And Over	345,800 + 40%	1,000,000

Annual Gift Tax Exclusion (per Donee): \$14,000

Estate &amp; Gift Tax Applicable Exclusion Amount: 5,490,000

### 2018 Gift & Estate Unified Tax Rates<sup>7</sup>

Over	But Not Over	The Tax Is	Of The Amount Over
\$0	\$10,000	\$0 + 18%	\$0
10,000	20,000	1,800 + 20%	10,000
20,000	40,000	3,800 + 22%	20,000
40,000	60,000	8,200 + 24%	40,000
60,000	80,000	13,000 + 26%	60,000
80,000	100,000	18,200 + 28%	80,000
100,000	150,000	23,800 + 30%	100,000
150,000	250,000	38,800 + 32%	150,000
250,000	500,000	70,800 + 34%	250,000
500,000	750,000	155,800 + 37%	500,000
750,000	1,000,000	248,300 + 39%	750,000
1,000,000	And Over	345,800 + 40%	1,000,000

Annual Gift Tax Exclusion (per Donee): \$15,000

Estate &amp; Gift Tax Applicable Exclusion Amount: 11,200,000

<sup>7</sup>Sunset December 31, 2025

### Qualified Retirement Plans

	2017	2018
<b>SEP Plan Participant Max % of Comp<sup>5</sup></b>	25%	25%
SEP Per Participant Max \$ Allocation Limit	\$54,000	\$55,000
SEP Minimum Compensation	600	600
<sup>5</sup> 20% if self employed		
<b>SIMPLE IRA Employee Contribution</b>	12,500	12,500
SIMPLE IRA Catch-Up – Age 50+	3,000	3,000
<b>401(k) / 457 Plan Elective Employee Deferral</b>	18,000	18,500
401(k) / 457 Plan Catch-Up – Age 50+	6,000	6,000
<b>403(b) TSA Elective Employee Deferral</b>	18,000	18,500
403(b) TSA Catch-Up – Age 50+	6,000	6,000
403(b) TSA Catch-Up – 15+ Yrs w/ Current Employer	3,000	3,000
<b>Defined Contribution Plan</b>		
Max \$ Limit Per Participant	54,000	55,000
Max Deduction % of Eligible Payroll	25%	25%
<b>Defined Benefit Plan Maximum Benefit</b>	215,000	220,000
<b>Covered Compensation Limit</b>	270,000	275,000
<b>Highly Compensated Employee</b>	120,000	120,000

### IRAs

	2017	2018
<b>Traditional or Roth IRA Contribution</b>	\$5,500	\$5,500
IRA Catch-Up – Age 50+	1,000	1,000
<b>Phase-Out Range for Deductible Contributions to Traditional IRAs<sup>6</sup></b>		
Married Filing Jointly	\$99,000-119,000	\$101,000-121,000
Single/Head of Household	62,000-72,000	63,000-73,000
Married Filing Separately	0-10,000	0-10,000
<sup>6</sup> For active participants in another retirement plan		
<b>Phase-Out Range for Contributions to Roth IRAs</b>		
Married Filing Jointly	\$186,000-196,000	\$189,000-199,000
Single/Head of Household	118,000-133,000	120,000-135,000
Married Filing Separately	0-10,000	0-10,000

### Coverdell Education Savings Accts

	2017	2018
<b>Maximum Contribution</b>	\$2,000/ beneficiary	\$2,000/ beneficiary
<b>Phase-Out Range</b>		
Married Filing Jointly	\$190,000-220,000	\$190,000-220,000
Single	95,000-110,000	95,000-110,000

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### Required Minimum Distributions (Uniform Table)

Age	Factor	Age	Factor
70	27.4	86	14.1
71	26.5	87	13.4
72	25.6	88	12.7
73	24.7	89	12.0
74	23.8	90	11.4
75	22.9z	91	10.8
76	22.0	92	10.2
77	21.2	93	9.6
78	20.3	94	9.1
79	19.5	95	8.6
80	18.7	96	8.1
81	17.9	97	7.6
82	17.1	98	7.1
83	16.3	99	6.7
84	15.5	100	6.3
85	14.8	101	5.9

### Education Incentives

	2017	2018 <sup>8</sup>
<b>American Opportunity Credit</b> (This is a modification of the Hope Credit) (100% credit for first \$2,000 of eligible expenses and 25% of additional \$2,000 of expenses)	\$2,500	\$2,500
<b>Lifetime Learning Credit</b>	2,000	2,000
<b>Modified AGI Phase-Outs for:</b>		
<b>American Opportunity Credit</b>		
Married Filing Jointly	\$160,000-180,000	\$160,000-180,000
Others	80,000-90,000	80,000-90,000
<b>Lifetime Learning Credits</b>		
Married Filing Jointly	\$112,000-132,000	\$114,000-134,000
Others	56,000-66,000	57,000-67,000
<b>Phase-Outs for Exclusion of U.S. Savings Bond Income</b>		
Married Filing Jointly	\$117,250-147,250	\$119,550-149,550
Others	78,150-93,150	79,700-94,700

<sup>8</sup>Income Limits are based on current information as released by the IRS.  
(See IRS Pub 970 for complete explanation including exceptions)

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## “Insta-famous or Insta-Infamous? Ethical Perils for Lawyers on Instagram”

### By John G. Browning<sup>1</sup>



For lawyers, social media platforms can be many things: digital treasure troves of incriminating information on family law (and other) cases, valuable tools for professional marketing, and useful ways to stay connected to and share information with friends. Over 82% of the adult online population in the U.S. has at least one social networking profile, and with more than 800 million active users, Instagram is behind only Facebook and YouTube in popularity. In a typical day, Instagram users “like” over 4.2 billion posts per day, and share 95 million posts each day. So even if you can’t claim as many followers as Selena Gomez (over 132 million as of January 2018) or Beyoncé (more than 110 million), there’s still a lot of incentive to use

Instagram (a photosharing social networking platform that enables users to take pictures, share them, and edit them with filters).

But lawyers have to be careful about what they post as well. In January 2018, a Philadelphia judge punished two lawyers who had represented the plaintiff in a December 2017 trial over the medication Xarelto. The two lawyers, Ned McWilliams of Pensacola, Florida and Emily Jeffcott of New Orleans, had posted a number of photographs of the courtroom to Instagram with the hashtag “#killinnazis” (a reference to both the Quentin Tarantino movie “*Inglorious Basterds*” and German-based Bayer, the developer of Xarelto).<sup>2</sup> Post-trial motions by the defense had argued that the plaintiff’s counsel’s social media posts were intended to create a link in the minds of the jurors between the German pharmaceutical company and Nazi Germany, calling it a “xenophobic” strategy. The court issued a judgment notwithstanding the verdict and set aside the \$27.8 million verdict (on grounds unrelated to the social media posts). It also revoked the pro hac vice admission of McWilliams, and sanctioned Westcott \$2500 and ordered her to perform 25 hours of community service. The judge noted that the Instagram posts in question and the #killinnazis hashtag (which Westcott’s firm subsequently used in promotional materials) were “well beneath the dignity of the legal profession.”<sup>3</sup>

And you definitely don’t want to find yourself in the same situation that New York lawyer Lina Franco recently experienced. Franco, a labor and employment solo, was representing a group of restaurant workers in a wage-and-hour violations case in New Jersey federal court, *Ha v. Baumgart Café*.<sup>4</sup> She missed a deadline to file a Motion for Certification of a collective action under the Fair Labor Standards Act, and 16 days after this motion was due Franco filed a Motion along with a request for an extension of time. As good cause for the extension, Franco represented to the court that she had missed her deadline due to a family emergency in Mexico City. She even attached what happened to be a travel website itinerary showing her flight from New York to Mexico City on Thursday, November 21, 2016 and a December 8 return flight.

Unfortunately for Franco, her opposing counsel owned a calendar (November 21 was a Monday, not a Thursday) and was social media savvy. Defense attorney Benjamin Xue responded with exhibits consisting of screen shots from Franco’s own Instagram account. During the period of time she was supposedly in Mexico City caring for her ailing mother, Instagram photos posted by Franco herself showed her enjoying a Thanksgiving dinner in New York, visiting a bar in Miami, attending an art exhibit

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<sup>2</sup> Debra Cassens Weiss, *Judge Punishes Lawyer for Using Hashtag #killinnazis, Tosses \$27.8 M Xarelto Verdict on Other Grounds*, ABA Journal.Com (Jan. 11, 2018) 7:00 AM).

<sup>3</sup> *Id.*

<sup>4</sup> Charles Toutant, “Late-Filing Lawyer’s Excuse Undone By Vacation Photos on Instagram,” *New Jersey Law Journal*, April 27, 2018.

in Miami, and sitting poolside in Miami as well (note: enjoying a poolside margarita does not count as “visiting Mexico”).

Caught redhanded, Franco admitted her lack of candor to the court, saying she was “not honest” and claiming that she had experienced so much emotional distress from caring for her mother at an earlier juncture that it caused her to miss the filing deadline and provide the fake itinerary.<sup>5</sup> Further falling on her sword, Franco withdrew as counsel for the three restaurant worker plaintiff’s. However, lawyers for the restaurant owners sought sanctions against Franco. U.S. Magistrate Judge Michael Hammer agreed with the defense, finding that Franco had “deliberately misled the Court and the other attorneys in this case.”<sup>6</sup> Judge Hammer imposed sanctions of \$10,000 against Franco (a total of \$44,283 in attorneys’ fees were sought by the three defense firms, but Judge Hammer rejected the requests as “unreasonably high”).

We all know that our ethical responsibilities include a duty of candor to the tribunal. Lawyers across all practice boundaries, including family lawyers, need to be mindful not only of what they post on a site like Instagram, but also of the fact that the same ethical rules that apply to more traditional avenues of communication apply to social networking platforms as well.<sup>7</sup> After all, in the quest to be “Insta-famous” you don’t want to find “Insta-Infamy” instead.

## ARTICLES

### Repealing No-Fault Divorce Would Harm Survivors of Domestic Violence in Texas

*A White Paper prepared by  
The Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women*

#### **Executive Summary**

For the past two legislative sessions, the Texas Legislature has explored the repeal of no-fault divorce in the state.<sup>1</sup> This paper explains why such action would be detrimental to the more than five million survivors of domestic violence in Texas.<sup>2</sup> Briefly stated, requiring proof of fault in order to obtain a divorce imposes financial burdens that trap victims in abusive relationships and increases the risk of harm and lethality.

The economic impacts of repealing unilateral no-fault divorce will adversely affect not only victims of domestic violence but also the State of Texas itself. By its nature, fault-based divorce is significantly more expensive than no-fault divorce. The high costs associated with proving a fault ground will become a barrier to divorce for survivors of domestic violence, particularly the 94 to 99 percent of victims who experience economic abuse along with physical violence and therefore lack access to financial resources.<sup>3</sup> Furthermore, the under-resourced family court system will face mounting burdens as fault-based divorces alleging domestic violence are more likely to be contested. These contested fault-based divorces not only clog the dockets of judges but also impose significant demands on court personnel who must guide and advise *pro se* litigants (who comprise the majority of litigants in family court) through complex divorce proceedings. Lastly, if fault-based divorce is cost-prohibitive for survivors and they are trapped in abusive relationships, the costs of domestic violence to the State of Texas – such as medical and mental healthcare and shelter stays – will increase as well. Finally, the repeal of no-fault divorce will also increase the risk of lethality and psychological harm to domestic violence victims and their loved ones. In 2016, 40 percent of women murdered in Texas were attempting to leave their relationships.<sup>4</sup> Data suggests that in a fault-only system, a victim may be deterred or prevented from getting a divorce, forcing her to remain in an abusive relationship due to a fear of retaliation coupled

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Ian Jacobowitz and John Browning, Legal Ethics and Social Media: A Practitioner’s Handbook (ABA Publishing, 2017).

with the lack of sufficient evidence necessary to prove fault. Furthermore, the requirements of the fault-based system re-victimize survivors of domestic violence by compelling them to re-live their traumatic experiences in the courtroom and allowing their abuser to use the justice system perpetuates a cycle of power and control. Finally, a fault-based regime that prevents women from escaping abuse also traps their children in hostile environments where they may be subjected to physical violence or develop health and behavioral issues due to the stress of living in an abusive home.

In consideration of the significant hardships to both victims of domestic abuse and the State of Texas that would result from a repeal of no-fault divorce, any bills proposing repeal should not be enacted into law.

## **Introduction**

The repeal of no-fault divorce in Texas would have a detrimental impact on survivors of domestic violence. As this White Paper will explain, requiring proof of fault in order to obtain a divorce would trap victims in abusive relationships because of financial barriers and the increased risk of harm and lethality. Section I provides an introduction to domestic violence, explaining its prevalence, reasons for under-reporting, and the power and control dynamics that underlie intimate partner abuse. Section II addresses the adverse financial impact of repealing unilateral no-fault divorce on victims, the court system, and the State. Section III focuses on how a fault-based system would increase the risk of physical and psychological harm to domestic violence victims and their loved ones.

## **I. An Overview of Domestic Violence**

### **A. Domestic violence is an epidemic impacting women across Texas.**

Domestic violence is costing the lives of Texas women. In 2015, nearly half of all female homicide victims in the state were killed by their male intimate partner.<sup>5</sup> Across the nation, women are most often killed by their intimate partner or a family member;<sup>6</sup> in fact, women are 16 times more likely to be killed by a male acquaintance than a male stranger.<sup>7</sup> In 2015, across 53 Texas counties, 158 women were killed by a male intimate partner.<sup>8</sup>

The number of reported fatalities is deceptively low, as it does not reflect the collateral casualties of children, family members, friends, and others who were also killed by the abuser in his continuing quest for power and control over his victim. In 2013, in Dallas County, there was a secondary victim killed for roughly every three direct victims of intimate partner violence.<sup>9</sup>

Intimate partner homicides have been steadily rising in recent years, with a 20 percent increase reported between 2014 and 2015, marking the highest rate of increase on record.<sup>10</sup> In Texas, every 2.3 days during 2015, a man killed his current or former female intimate partner.<sup>11</sup> Even if the pattern of increasing rates ceases and the rate remains constant, that would equate to more than 60 Texas women losing their lives at the hands of their intimate partners during the course of the 86th Regular Session.

Intimate partner violence is devastating even if it does not have lethal consequences. One in three Texas women will experience domestic violence<sup>12</sup> at some point in her lifetime, totaling more than five million Texans.<sup>13</sup> With nearly 200,000 total incidents reported in 2015 – up roughly five percent from 2014 – Texas law enforcement officers responded to an average of more than 500 incidents of family violence every single day.<sup>14</sup>

Domestic violence can impact anyone, regardless of age, gender, race, socioeconomic status, or location. Although this paper uses female pronouns to describe the victims of domestic violence and male pronouns to describe the abusers,<sup>15</sup> women can be perpetrators and domestic violence can occur in same-sex relationships as well as in opposite-sex relationships.

Domestic violence happens at all stages of life. In Texas in 2015, intimate partner murder victims' ages ranged from 16 to 93.<sup>16</sup> While the majority of the victims were under 45, there has recently been a notable increase in the number of elderly victims, those over the age of 70.<sup>17</sup> The 53 counties across Texas that saw intimate partner homicides included the most populous counties, like Dallas and Harris, as well as small or rural counties. While all socioeconomic classes face domestic violence, women living in poverty experience higher rates of abuse.<sup>18</sup>

Although domestic violence also occurs at all stages of a relationship, women whose divorces are finalized are the least likely to be killed by their intimate partner. Texas wives experienced the most

violence in 2015, followed by girlfriends, ex-girlfriends, and finally ex-wives.<sup>19</sup> In 2015, 37 percent of the women killed by their intimate partners had ended or taken steps to end their relationships; 19 of these women were leaving or separated from their husbands when they were killed compared to five who had finalized divorces.<sup>20</sup> A victim's ability to get through the divorce process in the most expeditious way possible may therefore increase her chances of survival.

### **B. Reported cases only tell part of the story.**

Nearly half of all incidents of domestic violence are not reported to the police.<sup>21</sup> High levels of reporting are aspirational but ultimately unrealistic. A 2002 statewide poll by the Texas Council on Family Violence concluded that even though 75 percent of Texans reported that they would be "likely to call the police if they were to experience some form of domestic violence" only 20.3 percent indicated that they did in fact "call the police when they or a family member experienced domestic violence."<sup>22</sup>

Numerous and varied reasons exist for under-reporting. A 2014 study by the Bureau of Justice Statistics revealed that the number one reason victims do not report domestic violence to the police is a "fear of reprisal or getting the offender in trouble."<sup>23</sup> An abuser may threaten violence to discourage calls to law enforcement, leaving his victim to weigh the risk of reporting against that of increased violence or exacerbating an already volatile situation. A significant number of victims expressed reluctance to involve the state in what they considered to be a "personal matter."<sup>24</sup> Others cited a view that police either would not or could not help.<sup>25</sup> In fact, 61.5 percent of victims of physical assault did not think that the police would have believed them and nearly all assumed that the police could not do anything about their victimization.<sup>26</sup> The stories and statistics above thus support a finding that many women who experience domestic violence "do not consider the justice system a viable or appropriate intervention at the time of their victimization."<sup>27</sup>

### **C. Abusers' need for power and control perpetuates the cycle of violence and escalates the danger of leaving an abusive relationship.**

Domestic violence is about the abuser's need to exercise power and control over his victim by whatever means necessary. Although public conception of domestic abuse often involves physical or sexual violence, abusers frequently utilize non-violent behaviors such as intimidation, emotional abuse, isolation, minimizing, denying, blaming, using children, economic abuse, male privilege, coercion, or threats to control their partners.<sup>28</sup> Even the legal system can be a significant tool of abuse. In interviews conducted with Texas family law attorneys who represent domestic violence victims, each attorney recounted numerous stories about clients whose abusers used the court system as a way of perpetuating the cycle of abuse. These attorneys told of abusers who otherwise did not have access to their former partners filing motion after motion in court, exhausting the victim's resources and time and forcing their victims to face them repeatedly in court.

Leaving or trying to leave the relationship does not always end abuse; in fact, attempted separation can often intensify the danger. When an abuser feels he is losing control over his victim, he may escalate harassing, threatening, or stalking behaviors in an attempt to reassert control.<sup>29</sup> While some protections exist, the reality is that ending an abusive relationship is an extremely dangerous and traumatic process, and any barrier that complicates leaving increases the risk of violence. The faster the uncoupling, the safer the victim, therefore the legislation that has been filed the past two sessions that would extend the waiting period for divorce from 60 to 180 days would further increase this risk of violence.<sup>30</sup> Under current law, a person can avoid the 60-day waiting period if there is a finding of family violence, but there is no such finding for the large numbers who are at risk but do not report the violence.

## **II. The Economic Impacts of Repealing Unilateral No- Fault Divorce Will Adversely Affect Both Victims of Domestic Violence and The State Of Texas.**

The significant financial expense required to prove fault is a potential barrier to divorce for many victims of domestic violence and a burden on the State's already under-resourced court system. As the law currently stands, survivors of domestic violence can avoid often prohibitive costs by seeking a no-fault divorce where divorce is granted due to insupportability of the marriage rather than wrongdoing by either party. The proposal to eliminate the unilateral no-fault ground would remove the only financially

feasible option for most abused spouses. By decreasing access to divorce for victims of domestic violence, repealing unilateral no-fault divorce perpetuates and exacerbates the costly problem of domestic violence.

**A. The high costs associated with proving fault will become a barrier to divorce for the economically dependent spouse, who is almost always the abused spouse.**

Fault-based divorce is expensive, significantly more so than no-fault divorce.<sup>31</sup> Simply put, the more issues that are contested in a divorce proceeding, the higher the cost of divorce.<sup>32</sup> Since a fault-based divorce, especially one alleging the cruelty ground, will almost always be contested, legal fees and litigation expenses will be higher than in a no-fault divorce process.<sup>33</sup> Almost all family law attorneys bill on an hourly basis, so the additional time required for a fault-based divorce will result in higher attorney fees.<sup>34</sup> Beyond attorneys' fees, the need to prove fault generates other expenses such as hiring a private investigator, reviewing bank accounts, hiring forensic accountants, paying for psychiatric evaluations, drug testing, and deposing the spouse and other witnesses.<sup>35</sup>

The financial costs of fault-based divorce will have a disproportionately adverse impact on survivors of domestic violence because abused spouses often do not have access to or control over household finances. In fact, 94 to 99 percent of victims of physical domestic violence are also victims of economic abuse.<sup>36</sup> Victims are often unable to leave an abuser, or return to an abuser they have previously left, because of economic dependency.<sup>37</sup> Therefore, a legal system where the only option is an expensive fault-based divorce creates a financial barrier to divorce for the vast majority of victims of domestic violence.

Although some free legal services exist to assist low-income litigants, these services are limited and difficult to access.<sup>38</sup> Due to insufficient resources, legal aid organizations that provide free legal representation to survivors of domestic violence can only assist 10 percent of low-income Texans.<sup>39</sup> A victim of domestic violence may also be ineligible for free legal services because of her immigration status or because her annual household income is above 125 percent of the federal poverty line, which was a mere \$25,200 for a household of three in 2016.<sup>40</sup> In other words, a victim with two children and an annual household income of \$26,000 is deemed too "rich" to qualify for free legal services, but her income is unquestionably too low to cover the expenses of fault-based divorce, especially if she does not have access to the household income.

Moreover, although free legal service providers or pro bono attorneys can waive attorney's fees, as mentioned above, many other litigation expenses are incurred in a fault-based divorce proceeding. If neither the client nor a victims' advocacy agency can cover these expenses, the case will proceed without this evidence, weakening it and placing more reliance on difficult and subjective oral testimony. Legal Aid attorneys report that it is very common to be forced to proceed without evidence from a private investigator or other tests and searches because these costs cannot be covered by the client, an agency, or Legal Aid.<sup>41</sup> In fact, one Legal Aid office recalls being able to hire a private investigator for only one case in its 50-year history, despite having many cases that would have benefited from such a resource had it been financially feasible.<sup>42</sup> Thus, due to financial constraints, victims of domestic violence are at a significant disadvantage in fault-based divorce litigation.

**B. Most fault-based divorces alleging domestic violence will be contested, which will burden the already under-resourced family court system.**

A divorce proceeding alleging domestic violence will almost always be a contested divorce.<sup>43</sup> This is especially true when a finding of domestic violence could adversely impact an abuser's child custody claims, immigration status, or require him to surrender his gun(s).<sup>44</sup> Contested fault-based divorces involve more hearings in family court, which fills up the dockets of judges and consumes court resources, including court reporters, interpreters, and other staff.

Texas family courts are already over-burdened. In Dallas County, for instance, trial dates for divorce litigants are currently being scheduled approximately six months from the pre-trial hearing.<sup>45</sup> An increase in fault-based divorce would cause the family court system to become even more backlogged,



which impacts not only victims of domestic violence but any party interacting with the family court system, including parties pursuing divorce based on agreed insupportability or another ground.

The burden on the court system from contested divorces is of particular concern for family courts, where the majority of litigants are *pro se*.<sup>46</sup> In Tarrant County, for instance, 68 percent of litigants in the district's six family courts proceed without an attorney.<sup>47</sup> Even in a system allowing for no-fault divorce, *pro se* litigants in Texas are often accused of "clogging up the system."<sup>48</sup> Judges must walk unrepresented litigants through the process, correct forms and petitions, and provide alternative court dates for missed hearings.<sup>49</sup> If all *pro se* litigants were required to pursue a contested fault-based divorce, involving complex legal arguments and sophisticated presentation of evidence, the family court system would become even more burdened and hearings increasingly delayed.

Delays in adjudication of legal claims place victims of domestic violence in danger by forcing them to remain in contested litigation (which is one of the most dangerous times for victims of domestic violence) for a longer period of time.<sup>50</sup> Moreover, low-income victims will be acutely affected by repealing no-fault divorce, as this population is more likely to experience abuse and more likely to be self-represented, but less likely to have the education and experience to successfully pursue *pro se* litigation.

### **C. A fault-based divorce system traps victims in abusive relationships, thereby increasing the costs of domestic violence to the State of Texas.**

By repealing the method of divorce that is the safest and most financially accessible option for victims of domestic abuse, the proposed legislation traps victims in abusive relationships, which in turn increases the costs of domestic violence to the State of Texas.

The costs of intimate partner violence in the U.S. are staggering, estimated at between \$5.8 billion and \$12.6 billion annually.<sup>51</sup> These expenditures include medical and mental health care expenses; resources for police, courts, shelters, and foster care; and costs related to absenteeism and non-productivity.<sup>52</sup> For example, victims of domestic violence lose an average of 8 million work days per year (the equivalent of over 32,000 full time jobs),<sup>53</sup> costing employers an estimated \$100 million annually.<sup>54</sup>

Texas already lacks sufficient resources to address the domestic violence epidemic. In 2015 alone, 15,869 requests for shelter from domestic violence were declined due to lack of space.<sup>55</sup> Domestic violence also accounts for significant financial and safety concerns in the State, as evidenced by the 206 Texas law enforcement officers who were assaulted while responding to domestic violence calls in 2015.<sup>56</sup> Repealing unilateral no-fault divorce only exacerbates these problems by making it more difficult and dangerous for a victim of domestic violence to leave the relationship.

A system that facilitates the continuation of domestic violence also carries the costs of domestic violence into the next generation. Children who witness domestic violence are more likely to become abusers or victims of domestic violence as adults.<sup>57</sup> Boys who witness domestic violence are twice as likely to be abusive towards their own partners and children in adulthood, and one in two girls who grow up in an abusive home will be abused in their adult relationships.<sup>58</sup> Therefore, the financial costs of domestic violence to society are perpetuated from one generation to the next when children are trapped in abusive relationships along with their mothers.

### **III. The Elimination of No-Fault Divorce Will Increase the Risk of Physical and Psychological Harm To Domestic Violence Victims And Their Loved Ones.**

No-fault divorce provides a victim of domestic violence with the opportunity to more easily regain control of her life and escape her abuser; this empowerment stands in stark contrast to fault-based divorce, which mandates fighting by requiring one party to place blame on the other. The elimination of no-fault divorce will therefore increase the risk of physical harm to domestic violence victims and their loved ones, trap victims in abusive relationships, and lead to re-victimization. Fault-based divorce also negatively impacts the children in an abusive household, affecting their physical and mental health and normalizing domestic violence for these children.

**A. A fault-based system will increase the risk of lethality for domestic violence victims and their loved ones.**

As previously discussed, the risk of harm to a survivor of domestic violence increases when she separates, or attempts to separate, from her abuser.<sup>59</sup> In fact, 37 percent of Texas women killed in 2015 had made attempts to end their relationship or were killed in the process of leaving.<sup>60</sup> A victim is 3.6 times more likely to be killed in the time immediately following separation because the abuser is enraged and incited by his perceived loss of power and control over her.<sup>61</sup>

In a fault-based system, the victim must prove the cruelty she has faced; in doing so, she is forced to place blame on her abuser. Such kind of an adversarial system would enrage abusers further and increase the risk of physical harm to the victim who the legal system would require to challenge the abuser's sense of control. An abuser will want to take back the lost power and control by any means necessary, including using potentially lethal physical force.<sup>62</sup>

A fault-based divorce also increases interaction between an abuser and his victim, creating more opportunities for the abuser to assert control over, or inflict physical harm upon, her. For example, a family law attorney interviewed for this White Paper shared a story in which an abusive husband constantly asked for the divorce case to be re-scheduled because it was the only way he could maintain contact with and control over his victim.<sup>63</sup> In another tragic example, in 2016, a husband shot his wife at a busy intersection in Tarrant County following a mediation session for their impending divorce. The wife had filed a protective order, hired personal security, and even stayed at various hotels to elude her abusive husband. Yet, when she had to face him at mediation, he took advantage of the situation and killed her.<sup>64</sup>

The risk of physical harm to the victim's loved ones also increases under a fault-based system. For example, in September 2017, a Plano man shot his estranged wife and seven other individuals, including some of his friends, in a rampage that was linked to domestic abuse. His crime occurred on the eve of what would have been the couple's sixth anniversary and appeared to have been fueled by anger and isolation following their breakup.<sup>65</sup> A fault-based system, which mandates blame-placing and finger-pointing, would lead to heightened anger and volatility, thus increasing the likelihood of such violent incidents.

**B. A fault-based system deters victims from divorce due to the fear of retaliation and traps them in abusive relationships because of the lack of sufficient evidence.**

The adversarial nature of fault-based divorce would also deter victims from pursuing divorce in the first place. By requiring victims to prove that they have experienced abuse, the fault-based system creates "an arena for couples to portray one another in as negative a light as possible."<sup>66</sup> Hostility would necessarily thrive in such a situation.<sup>67</sup> A survivor of domestic violence would likely remain in an abusive relationship rather than provoke the animosity of her abuser or face his retaliation.<sup>68</sup> Conversations with Legal Aid attorneys in the Dallas area and the experiences of the Hunter Center's own clients demonstrate that many victims of domestic violence, who could technically plead cruelty and have the evidence to make a successful claim, prefer no-fault divorce to avoid antagonizing the abuser.

As described in detail in Section II above, expenses unique to fault-based divorce, such as the inability to retain counsel or pay for necessary expenses, create barriers that prevent a victim from collecting the evidence she needs to obtain a divorce. In addition, the low reporting rates of domestic violence mean that a victim may not have sufficient documentation of abuse to prove fault, as explained in Section I. These barriers, created by a fault-based system, may deter a victim from pursuing a divorce or lead to the denial of her request altogether.<sup>69</sup>

**C. Survivors of domestic violence will be re-victimized when trying to prove fault.**

In most fault-based divorces, a survivor's testimony is essential; the case cannot proceed without it.<sup>70</sup> The only way to prove that abuse occurred may be to hear the survivor describe it, especially because (as explained in Section I) survivors often do not report the violence they have suffered to law enforcement. If a victim does not testify, due to fear of retaliation or re-victimization, she would not be

able to prove the abuse required in a fault-based system and would not be granted the divorce she needs to permanently separate from her abuser.

Under a no-fault system, victims would not have to testify to abuse and as such would not be forced to re-live their traumatic experiences in the courtroom. Conversely, the fault-based system necessitates the re-victimization of domestic violence survivors by requiring them to publically recount the violence they have suffered, often in excruciating detail. Yet, trauma may prevent survivors from testifying to the violence they endured. For example, when a survivor in Dallas took the stand in the presence of her abuser, she blacked out and could not describe her abuse.<sup>71</sup>

A survivor who is asked to prove spousal abuse oftentimes “experiences guilt, fear, and uncertainty” which could prevent her from being able to adequately testify to all the facts needed to obtain a fault-based divorce.<sup>72</sup> Furthermore, research has shown that in as many as half of all cases, the survivor is afraid of retaliation from the abuser and in 30 percent of the cases the batterer has actually assaulted their victim in the time between case filing and the trial date.<sup>73</sup> In such cases, fear of retaliation would deter the survivor from testifying fully about the history of abuse.

Even if the survivor was to testify, in most cases, she would have to face the abuser and answer all of his questions challenging her account of the cruelty and violence she endured. In 2016, 71,300 family law cases in Texas had a pro-se petitioner.<sup>74</sup> This means that a significant number of survivors have to face their abusers, who are permitted to question and cross-examine them, directly in court. A fault-based system would therefore increase survivors’ fear of testifying and deter them from pursuing divorce, as the abuser would have direct access to re-victimize a survivor, especially during cross-examination.

#### **D. A fault-based system will trap children in hostile environments, increasing their risk of physical and psychological harm.**

Domestic violence has a negative impact on children. The Department of Justice reports that “nearly one in four intimate partner violence cases involves a child witness.”<sup>75</sup> Living in a violent home is damaging to a child’s mental and physical state. A national survey revealed that 50 percent of men who frequently assaulted their wives also regularly abused their children.<sup>76</sup> Even where children are not abused themselves, but instead live in a household where their mother is abused, the children are more likely to have behavioral problems than other children.<sup>77</sup> A study showed that children had strong physical reactions such as stomach ulcers and chronic vomiting due to the hostile home environment created by domestic violence.<sup>78</sup> The same study also revealed that 50 percent of children found the pre-divorce stage to be the most stressful stage of the divorce process.<sup>79</sup>

Additionally, children’s cognitive skills suffer when they remain in homes with domestic violence. Studies have shown that such hostile environments have negative impacts on a child’s school performance, basic skills, and verbal skills.<sup>80</sup> Children experiencing abuse at home tend to be more aggressive, antisocial, and show lower social competency to other children.<sup>81</sup> These children have also been found to show more anxiety, depression, anger, temperamental problems, and lower self-esteem.<sup>82</sup>

The elimination of no-fault divorce would only exacerbate these detrimental impacts on children. As explained above, fault-based divorce may trap a woman in an abusive relationship. When this occurs, the children are also trapped in the hostile home environment. A fault-based system thus increases the likelihood of the child being negatively affected, for when a victim is unable to leave an abusive home she is unable to protect her children from the abuser and both the long- and short-term harm he may cause them.

#### **Conclusion**

Eliminating no-fault divorce would cause significant hardships to both victims of domestic abuse and the State of Texas. Taking the Texas family law system back half a century to an entirely fault-based system would perpetuate family violence by placing power and control back into the hands of abusers. To ensure the safety and well-being of domestic violence victims, including mitigating adverse economic impacts and the increased risks of both physical and mental harm, the current no-fault system should remain in place.

## End Notes

- 1 [H.B. 93](#), 85th Leg., R.S. (2017); [H.B. 4093](#), 84th Leg., R.S. (2015).
- 2 *Learn the Facts*, TEXAS COUNCIL ON FAMILY VIOLENCE, <http://tcfv.org/resource-center/learn-the-facts/>. [hereinafter *Learn the Facts*].
- 3 *Facts about Domestic Violence and Economic Abuse*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE (2015), [https://ncadv.org/assets/2497/domestic\\_violence\\_and\\_economic\\_abuse\\_ncadv.pdf](https://ncadv.org/assets/2497/domestic_violence_and_economic_abuse_ncadv.pdf). [hereinafter *Economic Abuse*].
- 4 *Honoring Texas Victims: Family Violence Fatalities in 2015*, TEXAS COUNCIL ON FAMILY VIOLENCE 4, [http://2mg7g749lu2112sis323nkkn.wpengine.netdna-cdn.com/wp-content/uploads/2016/10/2015\\_HTV\\_Report\\_web.pdf](http://2mg7g749lu2112sis323nkkn.wpengine.netdna-cdn.com/wp-content/uploads/2016/10/2015_HTV_Report_web.pdf). [hereinafter *Honoring Texas Victims 2015*].
- 5 *Id.*
- 6 Shannan Catalano et al., *Bureau of Justice Statistics Selected Findings: Female Victims of Violence*, U.S. DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 3, <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.
- 7 *When Men Murder Women: An Analysis of 2010 Homicide Data: Females Murdered by Males in Single Victim/Single Offender Incidents*, VIOLENCE POLICY CENTER 3, <http://www.vpc.org/studies/wmmw2012.pdf>.
- 8 *Learn the Facts*, *supra* note 2.
- 9 *2009-2013 Case Review Report*, DALLAS COUNTY ADULT INTIMATE PARTNER VIOLENCE FATALITY REVIEW TEAM 8, <https://www.genesisshelter.org/wp-content/uploads/2016/08/Fatality-Review-Five-Year-Report-WEB.pdf>. For example, in Dallas County in 2011 Zina Bowser began divorce proceedings against her husband Erbie Bowser. When he threatened her and her three children, she obtained a protective order. Then, on August 7, 2013, Erbie shot and killed Zina in her home. He also shot and killed her daughter and injured her two sons. This attack took place hours after Erbie had killed his girlfriend Toya Smith and her daughter and injured her son and her daughter's friend. *Id.* at 39.
- 10 *Honoring Texas Victims 2015*, *supra* note 4, at 3.
- 11 *Id.*
- 12 Domestic violence is a pattern of intentional behaviors in any relationship “used by one partner to gain or maintain power and control over another intimate partner.” An isolated incident is insufficient, there must be a pattern of the abusive behavior whether it is physical, sexual, emotional, economic, or psychological abuse. Domestic violence, or intimate partner violence, is not limited to current spouses and partners but also includes former spouse and partners. *Domestic Violence*, U.S. DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw/domestic-violence>.
- 13 *Learn the Facts*, *supra* note 2.
- 14 *The Texas Uniform Crime Reporting Program*, TEXAS DEPARTMENT OF PUBLIC SAFETY 36, <https://www.txdps.state.tx.us/crimereports/15/citCh5.pdf> [hereinafter *Texas Uniform Crime Reporting*].
- 15 Nationally, from 2003 to 2012, 82 percent of intimate partner violence was committed against females compared to 18 percent committed against males. Jennifer L. Truman, Ph.D., and Rachel E. Morgan, Ph.D., *Nonfatal Domestic Violence, 2003-2012*, U.S. DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 6, <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf> [hereinafter *Nonfatal Domestic Violence, 2003-2012*].
- 16 *Honoring Texas Victims 2015*, *supra* note 4, at 8.
- 17 *Id.*
- 18 Jody Raphael and Richard M. Tolman, Ph.D., *Trapped by Poverty, Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare*, The Taylor Institute 5, <http://www.icadvinc.org/wp-content/uploads/2012/10/Trapped-By-Poverty-Trapped-By-Abuse.pdf>.
- 19 *Honoring Texas Victims 2015*, *supra* note 4, at 5.
- 20 *Id.*
- 21 Under-reporting of intimate partner violence has been prevalent from the mid-1980s to the present day. The August 1986 Report on Violence Against Women revealed that 48 percent of intimate partner violence was not reported. Patrick A Langan, Ph.D., and Christopher A. Innes, Ph.D., *Preventing Domestic Violence Against Women*, U.S. DEPARTMENT OF JUSTICE: BUREAU OF JUSTICE STATISTICS 1, <https://www.bjs.gov/content/pub/pdf/pdvaw.pdf>. Between 1998 and 2002, roughly 60 percent of family violence victimizations were reported to police. Matthew R. Durose et al., *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, U.S. Department of Justice: Office of Justice Programs, Bureau of Justice Statistics 2, <https://www.bjs.gov/content/pub/pdf/fvs02.pdf>. From 2003 to 2012, only about 55 percent of domestic violence was reported to police. *Nonfatal Domestic Violence, 2003-2012*, *supra* note 15, at 9. The trend in decreased reporting of domestic violence has continued post-2013. Michael G. Planty, Ph.D., *Domestic Violence*, U.S. Department of Justice: Office of Justice Programs, Bureau of Justice Statistics 8, [https://www.bjs.gov/content/pub/pdf/C-SPAN\\_DV2\\_oct2014\\_5.pdf](https://www.bjs.gov/content/pub/pdf/C-SPAN_DV2_oct2014_5.pdf).
- 22 *Family Violence Statistics in Texas*, TEXAS COUNCIL ON FAMILY VIOLENCE, [http://tcfv.org/pdf/2003\\_fact\\_sheet.pdf](http://tcfv.org/pdf/2003_fact_sheet.pdf). [hereinafter *Family Violence Statistics in Texas*].
- 23 Planty, *supra* note 21, at 9.
- 24 *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey*, U.S. DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE 51, <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> *Power and Control Wheel*, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/PowerControlWheelNOSHADING.pdf>. The Power and Control Wheel is attached herein at Appendix A.

<sup>29</sup> *Learn More*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/learn-more>.

<sup>30</sup> See H.B. 65, 85th Leg., R.S. (2017); H.B. 454, 84th Leg., R.S. (2015).

<sup>31</sup> Robert M. Gordan, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1461 (1998); Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, 8 CONFLICT RESOL. Q. 15, 19 (1990).

<sup>32</sup> Kelly, *supra* note 31, at 23-25.

<sup>33</sup> Interview with attorneys of Legal Aid of NorthWest Texas, Family Unit, Dallas, Tex. (Oct. 19, 2017) [hereinafter Legal Aid Interview].

<sup>34</sup> Kelly, *supra* note 31, at 25.

<sup>35</sup> Legal Aid Interview, *supra* note 33; Martindale-Nolo Research, *Divorce in Texas: How Much does it Cost? How Long will it Take?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/family-law/divorce/divorce-in-texas.html>.

<sup>36</sup> Economic abuse is a strategy of abuse through which the abuser controls or limits access to shared or individual assets or the victim's earning potential. Economic Abuse, *supra* note 3.

<sup>37</sup> *Id.*

<sup>38</sup> Harry Reasoner, *Finding New Ways to Give Access to Justice to Those Who Cannot Afford Lawyers*, 79 TEX. B. J. 366, 366 (2016) (stating that those who "need legal representation the most and cannot afford it are often the least likely to obtain it").

<sup>39</sup> See *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVICES CORPORATION 1, <https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGainAmerica2009.authcheckdam.pdf>; Reasoner, *supra* note 38, at 366.

<sup>40</sup> See, e.g., *Eligibility Guidelines*, LEGAL AID OF NORTHWEST TEXAS, <https://internet.lanwt.org/gethelp/eligibility-guidelines> (last visited Oct. 28, 2017).

<sup>41</sup> Legal Aid Interview, *supra* note 33.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; Interview with family law attorneys of Genesis Women's Shelter & Support, Dallas, Tex. (Oct. 10, 2017) [hereinafter Genesis Interview]. The attorneys interviewed, who all routinely or exclusively handle divorce proceedings where there has been domestic violence, repeatedly stated that an abuser will never agree to a divorce alleging domestic violence.

<sup>44</sup> Local Legal Aid attorneys stated that abusers who risk losing their guns or having their immigration record impacted by a finding of domestic violence argue most aggressively against the cruelty ground. Legal Aid Interview, *supra* note 33.

<sup>45</sup> Legal Aid Interview, *supra* note 33.

<sup>46</sup> The percentage of pro se litigants is likely to increase given Texas has one of the highest poverty rates in the nation. Reasoner, *supra* note 38, at 366.

<sup>47</sup> Christie Loveless, *Evaluating Pro Se Litigation at the Tarrant County Family Law Center*, INST. FOR CT. MGMT. 14, <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2012/Evaluating%20Pro%20Se%20Litigation.ashx>.

<sup>48</sup> Legal Aid Interview, *supra* note 33; Reeve Hamilton, *Going It Alone*, TEX. TRIB. (Apr. 13, 2010), <https://www.texastribune.org/2010/04/13/law-community-considers-help-for-pro-se-litigants/> (discussing how the increase in pro se litigants is viewed as "a problem that some say is going to shut down the court system").

<sup>49</sup> Legal Aid, *supra* note 33. Pro se litigants receive a pro se packet but are typically unable to complete it correctly on their own. *Id.* See also Reasoner, *supra* note 38, at 367; Loveless, *supra* note 47, at 38.

<sup>50</sup> *Honoring Texas Victims 2015*, *supra* note 4, at 5.

<sup>51</sup> *Domestic Violence*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE 2, [https://ncadv.org/assets/2497/domestic\\_violence.pdf](https://ncadv.org/assets/2497/domestic_violence.pdf).

<sup>52</sup> Ileana Aria, Ph.D., et al., *Costs of Intimate Partner Violence Against Women in the United States*, DEPARTMENT OF HEALTH AND HUMAN SERVICES: CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL 2, <https://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

<sup>53</sup> *Id.*; Economic Abuse, *supra* note 3, at 2.



- <sup>54</sup> Maris A. Bondi, MPH et al., *Domestic Violence and the Workplace*, PARTNERSHIP FOR PREVENTION 2, <http://www.caepv.org/membercenter/files/Partnership%20For%20Prevention%20briefing%20%28confidential%20document%29.pdf>.
- <sup>55</sup> *Family Violence Statistics in Texas*, *supra* note 22, at 4.
- <sup>56</sup> *Texas Uniform Crime Reporting*, *supra* note 14, at 37.
- <sup>57</sup> *Domestic Violence*, HOPE ALLIANCE CRISIS CENTER, <https://www.hopealliancetxt.org/domestic-violence-information/>.
- <sup>58</sup> *Id.*
- <sup>59</sup> Jennifer L. Hardesty, *Separation Assault in Context of Postdivorce Parenting*, 8 VIOLENCE AGAINST WOMEN 597, 600, <http://journals.sagepub.com/doi/pdf/10.1177/107780120200800505>.
- <sup>60</sup> *Honoring Texas Victims 2015*, *supra* note 4, at 5.
- <sup>61</sup> *Id.*
- <sup>62</sup> *Id.*
- <sup>63</sup> Genesis Interview, *supra* note 43.
- <sup>64</sup> *Honoring Texas Victims: Their Stories*, TEXAS COUNCIL ON FAMILY VIOLENCE 28, [http://2mg7g749lu2112sis323nkkn.wpengine.netdna-cdn.com/wp-content/uploads/2017/10/2016\\_HTV\\_Narratives2.pdf](http://2mg7g749lu2112sis323nkkn.wpengine.netdna-cdn.com/wp-content/uploads/2017/10/2016_HTV_Narratives2.pdf).
- <sup>65</sup> Claire Ballor et al., *Murder of 8 in Plano shows family violence extends beyond an abusive relationship*, Dallas Morning News (Sept. 16, 2017), <https://www.dallasnews.com/news/domestic-violence/2017/09/16/murder-8-plano-shows-family-violence-extends-beyond-abusive-relationship>.
- <sup>66</sup> Martha Heller, *Should breaking-up be harder to do: The Ramifications a Returns to Fault-Based Divorce would have upon Violence*, 4 Va. J. Soc. Pol'y & L. 263, 273 (1996).
- <sup>67</sup> *Id.*
- <sup>68</sup> *Id.*
- <sup>69</sup> Genesis Interview, *supra* note 43; Legal Aid Interview, *supra* note 33.
- <sup>70</sup> Texas Office of Court Administration, *The Texas Family Violence Benchbook*, THE STATE OF TEXAS 391, <http://www.txcourts.gov/media/478288/domesticviolencebenchbook.pdf>, [hereinafter Texas Family Violence Benchbook]
- <sup>71</sup> Legal Aid Interview, *supra* note 33.
- <sup>72</sup> Heller, *supra* note 66, at 273.
- <sup>73</sup> Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 769 (2005).
- <sup>74</sup> *Annual Statistical Report for the Texas Judiciary*, TEXAS OFFICE OF COURT ADMINISTRATION 12, <http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf#page=26>.
- <sup>75</sup> Sherry Hamby, David Finkelhor, Heather Turner, and Richard Ormord, Children's Exposure to Intimate Partner Violence and Other Family Violence, Department of Justice Juvenile Justice Bulletin 1, <https://www.ncjrs.gov/pdffiles1/ojdp/232272.pdf>.
- <sup>76</sup> Texas Family Violence Benchbook, *supra* note 70, at 551.
- <sup>77</sup> J. McFarlane et al., Behaviors of Children Who are Exposed and Not Exposed to Intimate Partner Violence, 112 Pediatrics 202 (2003).
- <sup>78</sup> Deborah A Lupentiz, *Which Aspects of Divorce Affect Children?*, 28 FAM. COORDINATOR 79, 80, <http://www.jstor.org/stable/583272>.
- <sup>79</sup> *Id.*
- <sup>80</sup> Karestan C. Koenen, Terrie E. Moffit, Avshalom Caspi, Alan Taylor, and Shaun Purcell, *Domestic violence is Associated with Environmental Suppression of IQ in Young Children*, 15 DEVELOPMENT AND PSYCHOPATHOLOGY 297, 298, <https://pdfs.semanticscholar.org/67a7/addec3bf22f13920eb73533581201e940ad4.pdf>.
- <sup>81</sup> Jeffery L. Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, National Online Resource center on Violence Against Women 1, [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_Witness.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_Witness.pdf).
- <sup>82</sup> *Id.*

## DOES HEATHER REALLY HAVE TWO MOMMIES?

By Georganna L. Simpson and Beth M. Johnson<sup>1</sup>

Erica H. and Monique J., who had lived and loved together for years in Texas, married the day after the United Supreme Court issued *Obergefell v. Hodges*. Three months previously, based upon the written agreement of both parties, Erica became pregnant through artificial insemination. For the next nine months, they shared the news with both families, had several joint baby showers, and had a joint reveal party. At all times, both Erica and Monique referred to themselves and represented to others that they were both mommies of the soon to be born baby. On January 1, 2016, Erica gave birth to Heather. After which both Erica H. and Monica J. were listed as Heather's mothers on the birth certificate, sent out a joint birth announcement, and gave Heather both of their last names, Heather H-J. Erica and Monique then jointly raised Heather—taking her to day care, staying home with her when she was sick, taking her to the doctor, and feeding and clothing her. Unfortunately, On January 1, 2018, Erica confessed to Monique that she had found someone else and moved out of the parties' jointly-owned residence with Heather. In response, Monique filed for divorce, along with a SAPCR. Erica then filed a motion to dismiss the SAPCR asserting that she alone was Heather's mother under the Texas Family Code because the parental presumption does not apply to same-sex spouses. The Court must now decide does Heather have one mommy or two mommies?

### A. Procedural history

#### 1. *Obergefell* and *Pavan*

In 2015, the United States Supreme Court held that same-sex couples have a right to "civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). In 2017, the Court reaffirmed that holding. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam). In reaching its holding, the Court held that same-sex couples are entitled to the full "constellation of benefits that the States have linked to marriage" *Obergefell*, 135 S.Ct. at 2601; *Pavan*, 137 S. Ct. at 2077. Married same-sex couples have a right to "civil marriage on the same terms and conditions as opposite-sex couples." See *Obergefell*, 135 S. Ct. at 2605. Thus, states are barred from denying benefits to same-sex couples that are available to couples of the opposite sex. *Id.* at 2607.

In *Obergefell*, the Court explicitly struck down the DOMA laws of Kentucky, Michigan, Ohio, and Tennessee. 135 S. Ct. at 2605. Additionally, the Court held that the laws challenged by each petitioner in the suit were invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite couples. *Id.* at 2605. The petitioner's complaints included issues relating to access to health insurance, inheritance tax, and recognitions on birth and death certificates. *Tanco v. Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 546 (W.D. Ky. 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1041 (S.D. Ohio 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 976 (S.D. Ohio 2013).

The Court intended its holding to be inclusive of all the benefits associated with marriage. "Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Obergefell*, 135 S. Ct. 2606.

Additionally, the court recognized that the purpose of marriage is to safeguard children and families. *Id.* at 2600. With that premise in mind, it should be noted that more than 125,000 same-sex couples are raising nearly 220,000 children in the United States, see Gary J. Gates, Williams Inst., UCLA Sch. of Law, LGBT Parenting in the United States. 1 (Feb. 2013).<sup>2</sup> In 2016, an estimated 23% of same-sex couples in Texas (11,000 couples) were raising more than 18,000 children. See Williams Inst., LGBT People in Texas.<sup>3</sup>

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<sup>2</sup> <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

<sup>3</sup> <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Texas-fact-sheet.pdf> (last visited Oct. 19, 2017).

Where a statute unconstitutionally excludes a class of litigants, the court may either nullify the entire statute “or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.” *Califano v. Westcott*, 443 U.S. 76, 89 (1979). The court must either extend the benefit to all who are similarly situated or strike the law as a nullity. *Session v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017).

## 2. Other states

An Arizona case challenged a paternity statute similar to the one found in Texas but was denied certiorari by the United States Supreme Court. *McLaughlin v. McLaughlin*, 138 S. Ct. 1165 (2018). In that case, the trial court found that a non-biological mother in a same-sex marriage was a presumed parent of the couple’s child. *McLaughlin* Petition for Writ of Certiorari.<sup>4</sup> By denying certiorari, it may reasonably be inferred that the United States Supreme Court believed that this issue had already been addressed in *Obergefell*.

A recent Illinois appellate court case, which had very similar facts to those found here, the court held that the non-biological partner was a parent of the child. *In re Marriage of Dee J. and Ashlie J.*, 2018 IL App.(2d) 170532, \_\_\_ N.E.3d \_\_\_ (2018). In that case, a lesbian couple, who married in Iowa in 2009, who had a child conceived through artificial insemination in 2014 while living in Illinois, and who separated when the child was seven months old. The biological mother filed for divorce and asserted that the child was not of the marriage. In response, the non-biological mother sought a declaration of her parent-child relationship with the child on the basis of marital contract and promissory estoppel. The trial court declared that there was a parent-child relationship between the child and the non-biological partner. The biological mother appealed. On appeal the court found that the parties had both agreed to the artificial insemination, both partners participated with the non-biological mother giving hormone shots to the biological mother, with both partners choosing the sperm donor. They specifically choose a donor that had a lot of the non-biological mother’s characteristics. Also, they jointly paid for the medical and fertility treatment. The couple also jointly chose the name and held a joint baby shower. Further, the non-biological mother was present at the child’s birth, jointly completed the birth certificate, and were identified as co-parents on the birth certificate. Even after separation, the parties actively co-parented the child. Because Illinois had already revised its parentage statute to be gender neutral, the appellate court affirmed the trial court and determined that it did not need analyze the effect of *Obergefell* or *Pavan*.

In addition to Illinois, to date, eight states have already amended their paternity statutes to include parents in same-sex marriages. *Paranen v. Gallagher*, 59 N.E.3d 1133, 1137 (Mass. 2016); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 499–500 (N.H. 2014); *St Mary v. Damon*, 309 P.3d 1027, 1033 (Nev. 2013); *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 586–87 (Colo. Ct. App. 2013); *Frazier v. Goudschaal*, 295 P.3d 542, 552–53 (Kan. 2013); *Chatterjee v. King*, 280 P.3d 283, 287–88 (N.M. 2012); *Elisa B. v. Superior Court*, 117 P.3d 660, 666–67 (Cal. 2005); *Rubano v. DiCenzo*, 759 A.2d 959, 969–70 (R.I. 2000).

## B. Texas policies for the benefit of children and families

It is the policy of this state:

- that parents, rather than tax payers, pay for support of children, *Gribble v. Layton*, 389 S.W.3d 882, 890 (Tex. App.—Houston 2012, pet. denied);
- to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child, *Tex. Fam. Code* § 153.251; and
- to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, *Tex. Fam. Code* § 153.001.

<sup>4</sup>[http://www.supremecourt.gov/DocketPDF/17/17878/24277/20171218151547560\\_USSC%20Petition%20for%20Writ%20of%20Certiorari%20without%20Appendix.pdf](http://www.supremecourt.gov/DocketPDF/17/17878/24277/20171218151547560_USSC%20Petition%20for%20Writ%20of%20Certiorari%20without%20Appendix.pdf).

By applying the parental presumption to same-sex couples, all three of these policies are achieved. Ignoring these policies—and denying same-sex couples the same parental presumption that applies in opposite-sex marriages—potentially places an added financial burden on the state and discourages children’s frequent and continuing contact with parents who have shown the ability to act in the children’s best interests. *Cf. Gribble*, 389 S.W.3d at 890; *Tex. Fam. Code* §§ 153.001, 153.251.

Additionally, part of the basis of United State Supreme Court’s rationale in *Pavan* was based on the fact that Arkansas law includes a statute that provides that when a child is conceived to a married couple through anonymous sperm donation, the married couple’s names—not the sperm donor’s—are listed on the child’s birth certificate. *Parvan*, 137 S.Ct. at 2078. Similarly, in Texas, a sperm donor is not a parent. *Tex. Fam. Code* § 160.702. Rather, if a husband consents to artificial insemination through sperm donation, the husband is the father of the child. *Tex. Fam. Code* § 160.703. Thus, the presumption of paternity is tied to the legal parental rights and responsibilities rather than biological paternity. Furthermore, it is unconstitutional to create a presumption in favor of a male spouse while denying that right to similarly situated female spouses. See *Obergefell*, 135 S. Ct. at 2606.

### C. Statutory construction

#### 1. The Texas UPA is gender neutral per the UPA and Code Construction Act

The fundamental rule of statutory construction is that the intention of the Legislature must be ascertained from the entire Act, and not from isolated portions thereof. *Calvert v. Texas Pipe Line Co.*, 517 S.W.2d 777, 781 (Tex. 1974); see also *Cities of Austin, Dallas, Ft. Worth & Hereford v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002). When construing Texas statutes, words of one gender include the other genders. *Tex. Gov’t Code* § 311.012(c); *In re M.M.M.*, 428 S.W.3d 389, 396 (Tex. App.—Houston 2014, pet. denied). In enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended. *Tex. Gov’t Code* 311.021(1); *In re Green*, 221 S.W.3d 645, 649 (Tex. 2007) (per curiam); *Zanchi v. Lane*, 408 S.W.3d 373, 383 (Tex. 2013) (Hecht, J., concurring).

#### 2. The Texas courts that held the other way are failing to abide by precedent and are ignoring the mandates listed above

At least one Texas court has declined to extend to same-sex couples the right to be a presumptive parent to a child of a same-sex marriage. See *In re A.E.*, No. 09-16-00019-CV, 2017 WL 1535101 (Tex. App.—Beaumont 2017, pet. filed). In doing so, the court deprived the same-sex couple of a portion of their “constellation of benefits that the States have linked to marriage” *Obergefell*, 135 S.Ct. at 2601. Moreover, the analysis ignored the Government Code’s instruction that words of one gender include the other gender. *Tex. Gov’t Code* § 311.012(c). The court in *A.E.*, specifically dismissed the idea: “*Obergefell* did not hold that every state law related to the marital relationship or the parent-child relationship must be ‘gender neutral.’” *A.E.*, 2017 WL 1535101, at \*8. However, this assertion ignores the base premise that the essential difference between same-sex and opposite-sex marriages is gender and that by refusing to acknowledge the import of gender specificity is a refusal to treat same-sex couples the same as opposite-sex couples.

#### 3. The proposed UPA

The Texas UPA—Chapter 160 of the Texas Family Code—is based on the Uniform Parentage Act of 2000 (“UPA”). Tex. Office of H.B. Analysis, H.B. 920, 77th Leg. Reg. Sess. 2001. Revisions have been proposed based on the United States Supreme Court’s holding in *Obergefell*.

#### SECTION 204. PRESUMPTION OF ~~PATERNITY~~ PARENTAGE

- (a) ~~A~~ An individual man is presumed to be the ~~father~~ parent of a child if:
- (1) ~~he~~ the individual and the ~~mother~~ of woman who gave birth to the child are married to each other and the child is born during the marriage;

- (2) ~~he the individual~~ and the ~~mother of~~ woman who gave birth to the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, ~~or~~ divorce, or dissolution[, or after a decree of separation];
  - (3) before the birth of the child, ~~he the individual~~ and the ~~mother of the child~~ woman who gave birth to the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination, death, annulment, declaration of invalidity, ~~or~~ divorce, or dissolution[, or after a decree of separation];
  - (4) after the birth of the child, ~~he the individual~~ voluntarily asserted his ~~paternity~~ parentage of the child, and
    - (A) the assertion is in record filed with [state agency maintaining birth records];
    - (B) ~~he the individual~~ agreed to be and is named as the child's ~~father~~ parent on the child's birth certificate; or
    - (C) ~~he the individual~~ promised in a record to support the child as ~~his~~ the individual's own; or
  - (5) for the first two years of the child's life, ~~he the individual~~ resided in the same household with the child and openly held out the child as ~~his~~ the individual's own. A period of temporary absence is part of the period.
- (b) A presumption of ~~paternity~~ parentage established under this section may be rebutted, and competing presumptions of parentage may be resolved, only by an adjudication under [Article] 6.

## Reporter's Comment

### 1. MARITAL PRESUMPTIONS AND GENDER NEUTRALITY

To comply with the Supreme Court's decision in *Obergefell v. Hodges*, the marital presumptions have been amended to apply to any spouse – male and female – of the woman who gave birth. A number of states have made similar changes to their marital presumptions. See, e.g., [Cal. Fam. Code § 7611](#); [D.C. Code Ann. § 16-909](#); [750 Ill. Comp. Stat. Ann. § 46/204](#); [Me. Stat., tit. § 1881\(1\)](#); [N.H. Rev. Stat. § 168-B:2\(V\)](#).

One state – Washington State – has gone further than the above draft goes. The newly revised Washington marital presumption is fully gender neutral; it establishes a presumption of parentage in any spouse – male or female – of any parent – male or female. Specifically, [Wash. Rev. Code Ann. § 26-26-116](#) provides that “a person is presumed to be the parent of a child if: The person and the mother or father of the child are married to each other ... and the child is born during the marriage.” Thus, under the Washington Statute, a wife is presumed to be the legal parent of the biological child of her husband conceived in an extramarital relationship and born to a woman not his wife.

The committee decided not to adopt a fully gender-neutral marital presumption for number of reasons. First, of the seven states that have amended their marital presumptions to account for same-sex marriage, only one state – Washington State – has adopted a fully gender-neutral version of the marital presumption. The other six states have adopted provisions similar to the provision above.

Second, in practice, a fully-gender neutral marital presumption would rarely establish the parentage of the spouse of the male parent. This is the case because the act provides that the woman who gives birth is a legal parent. Section 201(a)(1). Thus, in the hypothetical described above where a male spouse conceives a child with a woman not his wife, despite the fully gender-neutral marital presumption, a court nonetheless would be likely to conclude that the legal parents of the resulting child are the male spouse and



the woman who gave birth to the child. The court would be unlikely to conclude that the man's wife was a legal parent.

## 2. HOLDING OUT PRESUMPTION – SECTION 204(A)(5)

There was a discussion at the in-person drafting meeting about making the “holding out” period more flexible. Language has been added to the holding out provision to account for situations where the person is absent only temporarily. The language is taken from the UCCJEA's definition of “home state.” See [UCCJEA § 102\(7\)](#) (“A period of temporary absence of any of the mentioned persons is part of the period.”). Some members of the committee expressed interest in eliminating the requirement of a two-year holding out period.

## 3. COMPETING PRESUMPTIONS

The 1973 UPA contained a provision addressing cases involving competing presumptions. Section (4)(b) of the 1973 UPA provides, in relevant part: “If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”

The 2002 UPA contains no provision addressing how courts should resolve cases in which there are competing presumptions of parentage. Given that there is a range of circumstances that could result in more than one person claiming a presumption of parentage, it is important for the act to address this possibility. Section 204(b) now references the possibility that a court might have to resolve competing presumptions of parentage. Newly added Section 612 provides factors that a court must consider in resolving such cases.

While these suggested amendments to the code provide clarity, they should be unnecessary given that even under the current version of the statute, when construing Texas statutes, words of one gender include the other genders. [Tex. Gov't Code § 311.012\(c\)](#).

## 4. **Presumptions**

Statutory estoppel applies when “a man knows that a child is not, or may not be, his genetic child, but the man has affirmatively accepted his role as child's father and both the mother and the child have relied on that acceptance.” [Strickland v. Day](#), No. 2016-CA-01504-SCT, 2018 WL 1660573, at \*6 (Miss. 2018); [McLaughlin v. Jones ex rel. Cnty. of Pima](#), 401 P.3d 492, 501 (Ariz. 2017).

In *Shockley*, a boyfriend and girlfriend were in a sexual relationship but not married. 123 S.W.3d at 644 (Tex. App.—El Paso 2003, no pet.). During the relationship, the girlfriend had sex with another man and became pregnant. *Id.* The boyfriend asked if there was any chance he was not the father, and the girlfriend assured him that he was the father. *Id.* The boyfriend's name was listed on the child's birth certificate as the father. *Id.* The man with who the girlfriend had an affair realized he could have been the child's father. *Id.* at 645. He offered to take a paternity test, but the girlfriend refused the offer. *Id.* Over the next few years, the boyfriend acted as the child's father, although boyfriend and girlfriend were no longer in a relationship with each other. *Id.* Just over four years after the child's birth, a paternity test revealed that the child was the product of the affair. *Id.* In an effort to restrict the boyfriend's access to the child, the girlfriend filed a suit asserting that the boyfriend was not the child's father. *Id.* The other man—the child's biological father—filed a petition in intervention seeking to be named the child's father. *Id.* at 646. However, after the boyfriend filed a motion for summary judgment, the biological father nonsuited his petition. *Id.* The trial court adjudicated the boyfriend as the child's father, and the mother appealed.

It took a ruling by the United States Supreme Court to force Texas to recognize the rights of illegitimate children to obtain child support via involuntary paternity suits. [Shockley](#), 123 S.W.3d at 649 (citing [Gomez v. Perez](#), 409 U.S. 535 (1973)).

Estoppel in paternity actions is merely the legal determination that because of a person's conduct, that person, regardless of biological status, will not be permitted to litigate parentage. It operates both

offensively and defensively. [Shockley, 123 S.W.3d at 651](#). The application of estoppel in paternity actions is aimed at achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child. Estoppel is based on the public policy that children should be secure in knowing who their parents are. [Shockley, 123 S.W.3d at 651–52](#). If a person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father she has known all her life is not in fact her father. [Id. at 652](#). In determining whether the doctrine should be applied in a particular case, the child's best interests are paramount. [Id.](#) To that end the courts are more inclined to impose equitable estoppel to protect the status of a child in an already recognized and operative parent-child relationship. [Id.](#)

The statute placing a time limitation on a challenge to paternity was designed to prevent the disruption in a child's life caused by a Johnny-come-lately who appears on the scene after significant emotional and psychological bonding has occurred. [Shockley, 123 S.W.3d at 650](#).

Thus, even though there was no marriage, the court upheld the trial court finding that judicial estoppel prevented the girlfriend from challenging the boyfriend's presumed paternity of the child. [Shockley, 123 S.W.3d at 653](#).

## 5. Conclusion

When a couple marries, regardless of gender, the intention is to create a family. That may be a two-person family, or a family full of children. Regardless, the decision to bring children into the family is one of the essential aspects of the "constellation of benefits" linked to marriage. When the United States Supreme Court held that same-sex couples have a right to civil marriage on the same terms and conditions as opposite sex couples, it intended that holding to include **all** aspects of marriage. See [Obergefell, 135 S. Ct. at 2605](#). This holding is the law of the land, and Texas cannot pick and choose which marital benefits it wishes to extend to same-sex couples.

Moreover, the courts cannot on gender distinctions in the plain language of statutes as a basis for denying a benefit of marriage to same-sex couples. First, the Texas Government Code provides that words of one gender include the other gender. [Tex. Gov't Code § 311.012\(c\)](#). Second, a construction of Texas statutes to exclude same-sex marriages from certain benefits of marriage would be an unconstitutional construction under *Obergefell*, and statutes are to be construed as though they are in compliance with the constitutions of this state and of the United States. See [Tex. Gov't Code 311.021\(1\)](#); [Green, 221 S.W.3d at 649](#). Third, if—when relying on gender specific terms within the statute—the statute unconstitutionally excludes a class of litigants—like same-sex spouses—the court may either:

- nullify the entire statute; or
- extend the coverage of the statute to include those who are aggrieved by the exclusion—same-sex spouses.

See [Califano, 443 U.S. at 89](#); [Morales-Santana, 137 S. Ct. at 1701](#).

Therefore, because the Texas statute regarding presumption of paternity unconstitutionally excludes same-sex couples, Texas courts must either find that the statute has been nullified by *Obergefell* as unconstitutional or interpret the statute to extend coverage—presumptions of parentage—to same-sex couples. See [Califano, 443 U.S. at 89](#); [Morales-Santana, 137 S. Ct. at 1701](#).

**So yes, Heather, you really do have two mommies.**

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## Texas and the Hague Convention

### By Jimmy L. Verner, Jr.<sup>1</sup>

The United States and ninety-seven other countries<sup>2</sup> are signatories to the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention” or “Convention”).<sup>3</sup> Article 1 of the Convention states its purposes:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State;<sup>4</sup> and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

To accomplish these goals, the Convention puts into place what might be best described as an international habeas corpus procedure with some special requirements.<sup>5</sup> If those requirements are met, and none of the defenses apply, a child taken wrongfully from one country to another, or wrongfully retained, must be returned.

Congress implemented the Convention in the United States by passing the International Child Abduction Remedies Act (“ICARA”), 22 U.S.C. § 9001 *et seq.*<sup>6</sup> ICARA sets forth the requirements for a *prima facie* case under the Convention and lists affirmative defenses to that *prima facie* case. 22 U.S.C. § 9003(e). Although ICARA is a federal statute, it grants concurrent jurisdiction to state courts to hear Hague petitions. *Id.* § 9003(a).

The Hague Conference on Private International Law published the Convention’s final and official version in 1980. Since that time, a number of federal and state courts have considered Hague petitions. Some differences of interpretation have occurred among the federal circuits and, presumably, among and within the various state courts. However, this article considers only precedent authoritative in Texas because the Family Law Section Newsletter is written for Texas practitioners.<sup>7</sup>

### The *Prima Facie* Case & Affirmative Defenses

Before proceeding, the article sets forth the *prima facie* case and the affirmative defenses to a Hague Convention petition, with reference to the Convention when ICARA refers to it. Following this section, the article focuses on the most common issues litigated in Hague cases. They are (a) whether a child was wrongfully removed or retained from its “habitual residence;” and (b) whether there is a grave risk that the child will be exposed to physical or psychological harm if returned.

#### A. The *Prima Facie* Case

ICARA implements the Convention largely by making reference to it such that it is necessary to review both the Convention and ICARA to ascertain the elements of a *prima facie* case and the various defenses.

The *prima facie* case requires a showing of four elements:

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<sup>2</sup> Hague Conference on Private International Law, Status Table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (Last Update Aug. 2, 2017).

<sup>3</sup> Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11 (Treaty Doc.) (Oct. 25, 1980). <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> (accessed Feb. 15, 2019).

<sup>4</sup> The Convention uses the word “state” in the international law sense where nations or countries are referred to as “states.” To avoid confusion, the word “country” is used in this article from this point forward.

<sup>5</sup> *Cf.* Tex. Fam. Code Ch. 157, Subch. H (“Habeas Corpus”) (embodying some of the same concepts as the Hague Convention).

<sup>6</sup> ICARA was formerly codified at 42 U.S.C. § 11601 *et seq.* but was later moved to 22 U.S.C. § 9001 *et seq.* The older court opinions cite to ICARA’s prior codification which of course makes Hague research confusing.

<sup>7</sup> For those interested in a broader analysis of the Hague Convention, the Federal Judicial Center’s *Guide for Judges* is an invaluable resource. Hon. James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* (2d ed. 2015), <https://www.fjc.gov/sites/default/files/2015/Hague%20Convention%20Guide.pdf>.

1. The petitioner must show that “the respondent removed or retained the child somewhere other than the child’s habitual residence.”<sup>8</sup>
2. The removal or retention violated the petitioner’s custodial rights under the law of the country of habitual residence.<sup>9</sup>
3. The petitioner was actually exercising custodial or visitation rights or would have but for the respondent’s wrongful removal or retention.<sup>10</sup>
4. The child is under 16 years of age.<sup>11</sup>

## B. The Affirmative Defenses

There are six affirmative defenses to a Hague petition. They are:

1. Clear and convincing evidence that there is a grave risk of exposing the child to physical or psychological harm should the child be ordered returned.<sup>12</sup>
2. Clear and convincing evidence that return of the child would violate fundamental principles of the requested country relating to the protection of human rights and fundamental freedoms.<sup>13</sup>
3. The petition is filed one year or more from the date of the wrongful removal or retention. If so, the respondent must demonstrate that the child is now settled in its new environment.<sup>14</sup>
4. The court may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.<sup>15</sup>
5. The petitioner was not actually exercising the custody rights at the time of removal or retention.<sup>16</sup>
6. The petitioner consented to or subsequently acquiesced in the removal or retention.<sup>17</sup>

## Habitual Residence

To conclude that a child’s removal or retention is wrongful, the courts look to the child’s country of “habitual residence.” Habitual residence normally is the country from which the child was removed. In *Larbie v. Larbie*, 690 F.3d 295 (5<sup>th</sup> Cir. 2012), cert. denied, 133 S.Ct. 1455 (2013), the Fifth Circuit adopted the majority rule among the federal circuits that for a child to acquire a new habitual residence, both of the child’s parents must intend for the child to abandon its old habitual residence. Then, the country to which the child was removed, or where it is retained, normally has become the child’s habitual residence such that removal or retention is not wrongful.

The *Larbie* court held that a child whose mother took it from the United States to the United Kingdom had not changed the child’s habitual residence. Although the father consented to the child living in the United Kingdom during his military deployment, that consent did not amount to an intent to make a permanent change of habitual residence. There was no evidence that the father intended that the United Kingdom supplant the United States as the child’s habitual residence.

The Fifth Circuit followed the *Larbie* test in *Headifen v. Harker*, 549 F. App’x 300 (5<sup>th</sup> Cir. 2013), cert. denied, 134 S. Ct. 1951 (2014), when it concluded that a family had not intended to supplant the United States in favor of New Zealand as the country of the child’s habitual residence. In *Sealed Appellee v. Sealed Appellant*, No. 13-10987 (5<sup>th</sup> Cir. July 22, 2014) (per curiam),<sup>18</sup> the court again applied

<sup>8</sup> *Larbie v. Larbie*, 690 F.3d 295, 307 (5<sup>th</sup> Cir. 2012), cert. denied, 133 S.Ct. 1455 (2013) (citation omitted); Convention art. 3(a); ICARA, 22 U.S.C. § 9003(e)(1)(A) & (B). *Larbie* is required reading for those litigating Hague cases in Texas.

<sup>9</sup> *Larbie*, 690 F.3d at 307 (citation omitted); Convention art. 3(a); ICARA, 22 U.S.C. § 9003(e)(1)(A).

<sup>10</sup> *Larbie*, 690 F.3d at 307; Convention art. 3(b); ICARA, 22 U.S.C. § 9003(e)(1)(B).

<sup>11</sup> Convention art. 4. This element is rarely, if ever, an issue.

<sup>12</sup> Convention art. 13(b); ICARA, 22 U.S.C. § 9003(e)(2)(A).

<sup>13</sup> Convention art. 20; ICARA, 22 U.S.C. § 9003(e)(2)(A).

<sup>14</sup> Convention art. 12 paras. 1 & 2; ICARA, 22 U.S.C. § 9003(e)(2)(B).

<sup>15</sup> Convention art. 13(a), para. 2; ICARA, 22 U.S.C. § 9003(e)(2)(B).

<sup>16</sup> Convention art. 13(a), para. 1; ICARA, 22 U.S.C. § 9003(e)(2)(B). This affirmative defense is also listed as part of the *prima facie* case. See note 10 & accompanying text *supra*.

<sup>17</sup> Convention art. 13(a), para. 1; ICARA, 22 U.S.C. § 9003(e)(2)(B).

<sup>18</sup> Although this case’s style appears to be backwards – appellee is listed first – the case is thus styled.

*Larbie*'s rule, finding that the parents of a child had not intended that Mexico become a child's habitual residence, supplanting the United States.

The Fifth Circuit discussed the necessity of the parents' shared intent in [Berezowsky v. Ojeda](#), 765 F.3d 456 (5<sup>th</sup> Cir. 2014). The court considered whether a child's parents had come to an agreement that Mexico would be the child's habitual residence. The child's parents were both Mexican nationals. The child had been born in the United States after the parents separated. Extensive proceedings followed in both Mexican courts and Texas state courts.

The dispute entered the federal courts when the mother, living in Mexico, filed a Hague petition at a time when the father had taken the child from Mexico to Texas. The mother argued that the parents had each separately formed an intent that Mexico would be the child's habitual residence rather than the United States. Therefore, the child should be returned to Mexico.

The district court found that the parents intended to make Mexico the child's habitual residence. But the Fifth Circuit reversed:

In reaching this conclusion, it appears that the district court misunderstood what is required to form a shared parental intent for purposes of the habitual residence determination. A shared parental intent requires that the parents actually share or jointly develop the intention. In other words, the parents must reach some sort of meeting of the minds regarding their child's habitual residence, so that they are making the decision together.

*Id.* at 468. Accordingly, the court vacated the district court's ruling and remanded the case with instructions to dismiss.

The Fifth Circuit's opinions to this point faced the issue of whether parents had agreed to "supplant" a child's habitual residence with a new habitual residence. In [Delgado v. Osuna](#), 837 F.3d 571 (5<sup>th</sup> Cir. 2016), the court held that the Convention requires only an intent to abandon the country of habitual residence. No shared, specific plan on where a child should relocate is necessary. In this case, because of political violence and personal threats to the mother and children in Venezuela, the family decided to leave without definite plans about where to relocate. The possibilities included the United States, Spain, Panama and Ecuador. *Id.* at 575.

After a previously planned trip to the United States, the father returned to Venezuela and later filed a Hague petition. The Fifth Circuit quoted from the district court, that the parents' "last shared intent . . . regarding their children's future was that they would leave their habitual residence, Venezuela, and would not return." *Id.* at 578. Thus, the Convention requires only a shared intent to abandon a habitual residence, not an additional intent to settle in another, specific country.

The federal appellate courts consider the determination of a child's habitual residence as a mixed question of fact and law. Factual findings are binding on the appellate court unless they are clearly erroneous. *E.g.*, [Delgado v. Osuna](#), 837 F.3d 571, 577 (5<sup>th</sup> Cir. 2016) (citations omitted). The evidence in cases addressing the issue of habitual residence tends to be granular. For example, did the family take with them important documents such as birth certificates, medical records, school records or a marriage license? *Id.* Was the child enrolled in school in the new country? *Id.* (Frisco, Texas schools); [Cartes v. Phillips](#), 865 F.3d 277 (5<sup>th</sup> Cir. 2017) (Paraguayan preschool). These and like factors can evidence an intent that the new country be the child's habitual residence.

## Grave Risk

One of the more common but difficult to prove affirmative defenses is establishing, by clear and convincing evidence, that should the child be returned, there is a grave risk that the child will be exposed to physical or psychological harm.

### A. Federal Cases

In [England v. England](#), 234 F.3d 268 (5<sup>th</sup> Cir. 2000), the district court held that two children wrongfully removed by their mother from Australia to the United States need not return because, *inter alia*, the return would expose them to a grave risk of psychological harm. The Fifth Circuit reversed, quoting [Friedrich v. Friedrich](#), 78 F.3d 1060 (6<sup>th</sup> Cir. 1996).



If we are to take the international obligations of American courts with any degree of seriousness, the exception to the Hague Convention for grave harm to the child requires far more evidence than Mrs. Friedrich provides. Mrs. Friedrich alleges nothing more than *adjustment* problems that would attend the relocation of most children.

*Id.* at 1067 (emphasis in original).

In *Madrigal v. Tellez*, 848 F.3d 669 (5<sup>th</sup> Cir. 2017), both parents were Mexican citizens. The mother traveled to the United States with the children and wrongfully retained them here, claiming that the children would not be safe in Mexico if returned. The trial court granted the father's Hague petition. The mother filed a post-trial Rule 60(b) motion claiming a grave risk to the children because the mother had received an anonymous death threat. Further, she had been charged with a crime in Mexico for which no bail was allowed. Thus, she would be separated from her children if they returned to Mexico.

The Fifth Circuit affirmed the trial court's order. Although the Fifth Circuit noted that a death threat to the mother could pose a grave danger to the parties' children, in this case the evidence was not clear and convincing. The court also flatly held "that the possible separation of a child from a parent is not sufficient to trigger the grave risk of harm exception." *Id.* at 677.

In *Sanchez v. R.G.L.*, 761 F.3d 495 (5<sup>th</sup> Cir. 2014), the Fifth Circuit considered the effect of findings in an asylum grant on a Hague Convention proceeding. A Mexican mother sought return of her three children from the United States where they were staying with their aunt and uncle. The children expressed a fear of returning to Mexico because they said the mother's boyfriend was a member of the Azteca gang. The boyfriend used drugs, engaged in drug trafficking and abused the children. The district court found that the children were wrongfully retained in the United States and that none of the Convention's exceptions to return applied.

During an appeal of the district court's decision, the children received a grant of asylum in the United States. According to the Immigration and Nationality Act, to qualify for asylum, an applicant must either have suffered past persecution or have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A), incorporated by 8 U.S.C. § 1158(b)(1)(B)(i). The children argued that the grant of asylum prevented their return to Mexico. The court found no authority "to support the argument that the discretionary grant of asylum confers a right to remain in the United States despite judicial orders under [the] Convention." *Id.* at 510. But the court also held that the asylum findings were relevant to Hague Convention defenses, especially the "grave risk" defense. Accordingly, the court vacated the district court's order and remanded the case with instructions to consider the asylum findings and any other evidence not previously considered on the Hague Convention's defenses.

In 2018, the Fifth Circuit addressed the "grave risk" defense in *Soto v. Contreras*, No. 16-11541 (5<sup>th</sup> Cir. Jan. 23, 2018). In that case, the father sought return of the parties' child A.O.L. from the United States where the mother had taken it. The mother raised the grave risk defense in the district court, but the district court ordered return of the child.

The hearing before the district court was hotly contested. The mother accused the father of "physically abusing her and their daughter, A.O.;<sup>19</sup> psychologically abusing the entire family; committing acts of violence against extended family members; and committing adultery." The father accused the mother of "committing adultery, incurring excessive debts, and assaulting him." The father did admit physically assaulting A.O. on one occasion.

The district court found no clear and convincing evidence to support the grave risk defense. It reasoned that all the evidence had been testimonial. In the absence of "objective" evidence, there was no proof by clear and convincing evidence of grave risk to A.O.L. if returned. The Fifth Circuit agreed with the district court's conclusion, if not its exact reasoning. Citing *Madrigal*, *supra*, the court affirmed the district court's decision because, although the father had behaved violently toward his wife, there was no evidence that the father had harmed or would harm A.O.L. The court acknowledged that some case law held that a showing of spousal abuse "could support a finding of grave risk to a child," a "bright-line

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19 A.O. was over 16 years of age at the time of the hearing such that she could not be the subject of a Hague Convention petition. See Convention art. 4.



rule that allegations of spouse abuse created grave risk to a child” would circumvent the purposes of the Hague Convention.

## B. Texas Case

As previously noted, Petitioners may file Hague cases in state courts as well as in federal courts. In *In re A.V.P.G.*, 251 S.W.3d 117 (Tex. App.—Corpus Christi-Edinburg 2008, no pet.), a Belgian father sought return of the children whom the mother had taken to Texas. The Corpus Christi-Edinburg Court of Appeals analyzed the grave risk defense. The court emphasized that the grave risk must be to the child. The court stated:

The focus is on the children. It does not matter if [Mother] is the better parent in the long run, had good reason to leave her home in Belgium and terminate her marriage, or whether she will suffer if the children are returned to Belgium.

*Id.* at 127 (citation omitted). The court continued:

Only severe potential harm to the child will trigger this exception. The harm must be greater than normally to be expected when taking a child away from one parent and passing the child to another parent. The harm of separating a child from the primary caretaker does not satisfy the Article 13b exception. Adjustment problems that would attend the relocation of most children is not sufficient.

*Id.* at 127-28 (citation omitted). The mother testified that the father had physically abused her. But because she introduced no evidence that the Father had abused the children, she did not prove grave risk to them.

Finally, referring to a Sixth Circuit case, the court stated:

Moreover, this exception applies only 1) when returning the child meant sending him to a zone of war, famine or disease, or 2) in cases of serious abuse or neglect, or extraordinary emotional dependence, when the country of habitual residence for whatever reasons may be incapable or unwilling to give the child adequate protection.

*Id.* at 128 (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996)). The court reversed and rendered judgment.

## Comments & Conclusion

This brief overview of certain aspects of Hague cases yields two general observations. First, the law is clear that Hague cases do not, and may not, determine any custody issue between the parents in the courts of the country of habitual residence. Article 19 of the Convention so states: “A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.”

Having said that, Hague cases tend to be evidence-intensive. Detailed evidence can be necessary to establish the country of habitual residence, whether there is a grave risk to a child if returned, as well as other issues not discussed in this article. Even though Hague cases are not suits affecting the parent-child relationship, the evidence presented to the court can substantially overlap with the evidence one would present in a custody hearing. Accordingly, counsel should take great pains to provide such evidence to the court.

Second, it is clear that “mere” adjustment problems will not subject a child to grave risk within the meaning of the Hague Convention. Further, even if a parent has been subjected to physical abuse by the other parent, that evidence does not, in and of itself, show a risk of grave harm to the child.

Family law practitioners are aware of the substantial body of social science research concluding that there is a link between spousal abuse and child abuse. This research dates back to 1975.<sup>20</sup> In a 1998 meta-analysis of thirty-one studies, two professors at the University of Texas at Austin concluded

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<sup>20</sup> Moore, *Yo-Yo Children--Victims of Matrimonial Violence*, 8 Child Welfare 557 (1975); Levine, *Interparental Violence and its Effect on the Children: A Study of 50 Families in General Practice*, 15 Med. Science Law 172 (1975).

that those studies provided “overwhelming evidence that children who live in maritally violent homes are at risk for being physically abused.”<sup>21</sup> This conclusion has remained unchanged over time.<sup>22</sup> Why, then, did the court in *In re A.V.P.G.*, *supra*, conclude that the mother could not show a grave risk of physical abuse to the children by testimony that the father had physically abused her?

The answer to this question lies in the lack of expert testimony and in the nature of expert testimony. The former point is simple: Although there was expert testimony about adjustment problems, there was none about the increased likelihood of child abuse occurring when there is parental abuse. On the latter point, the opinion of an expert who brings to the court “little more than his credentials and a subjective opinion”<sup>23</sup> will not be relevant to the issue of whether spousal abuse leads to child abuse in that particular case. Although the facts an expert relies upon need not be admissible into evidence,<sup>24</sup> the expert must have delved into the facts of the case to form a relevant opinion. Given that Hague petitions are supposed to be decided within six weeks of filing,<sup>25</sup> finding and qualifying an expert within that time frame could prove challenging.

Despite *In re A.V.P.G.*’s strong wording that showing physical danger to the mother does not show physical danger to the child, there is no indication that the court was aware of the social science research outlined above or could have considered it absent relevant expert testimony. Accordingly, it is respectfully suggested that when evaluating a grave risk defense, a court should consider expert testimony that under the facts of the case before it, spousal abuse likely would lead to child abuse if the court ordered the child returned.

Hague cases are legally complex, factually detailed, often involve non-English speaking litigants and proceed on a short time fuse. Many issues arise in such cases that are not discussed in this brief overview of the Hague Convention in Texas. Nevertheless, counsel who enjoy a fast-paced practice might consider taking on a Hague case.

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21 Appel & Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. Fam. Psych. 578, 583 (1998).

22 Jouriles, McDonald, Slep, Heyman & Garrido, *Child Abuse in the Context of Domestic Violence: Prevalence, Explanations, and Practice Implications*, 23 Victims & Violence 221 (2008).

23 *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 421 (5th Cir.1987)).

24 Tex. R. Evid. 703.

25 Convention art. 11.

Editor: Georganna L. Simpson (G.L.S.) and Guest Editors this month include: Sallee S. Smyth (S.S.S.); 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 GROUNDS FOR DIVORCE

### EVIDENCE SUPPORTED FINDING OF ADULTERY AS GROUND FOR DIVORCE.

¶18-3-01. *In re Marriage of Nadar*, No. 05-17-00537-CV, 2018 WL 1373900 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (03-19-18).

**Facts:** Husband and Wife married in India and had one Child. A few years later, Husband moved to the U.S., and Wife and the Child joined him a year after that. However, soon afterwards, Wife and the Child returned to India, where they remained until the Child wanted to go to college in the U.S. At that point, Husband arranged for the Child and Wife to live with him in the U.S. Husband then filed for divorce. At trial, Husband testified that Wife lived with another man in India for two years. Wife testified that she lived with the man, with whom she was friends, and “there was some intimacy, but it was not a full-blown affair the way [Husband’s] trying to make out....” The trial court granted the divorce on the grounds of adultery. Wife appealed, arguing in part that her testimony only showed a friendship, or an “intimate relationship,” but that there was no evidence of sexual intercourse.

#### **Holding: Affirmed**

**Opinion:** The English language contains many facially innocuous terms that are also euphemisms for sexual intercourse. “Intimate” is one such euphemism. It appears frequently in Texas case law as a synonym for sex from the 1880s to the present day. Wife admitted to having “some intimacy” and an “intimate relationship” with Satinder. Whether Wife meant only a “deep friendship” or “sexual relations” was a matter within the trial court’s role as the trier of fact to determine. That the trial court concluded Wife’s testimony of having some intimacy and an intimate relationship meant sexual relations was a matter within the discretion of the court.

**Editor’s Comment:** *Anyone remember this? “I did not have sexual relations with that woman.” J. V.*

## DIVORCE ALTERNATIVE DISPUTE RESOLUTION

### TRIAL COURT ERRED BECAUSE WIFE REVOKED CONSENT BEFORE TRIAL COURT RENDERED A FINAL JUDGMENT.

¶18-3-02. *Hall v. Hall*, No. 05-16-01141-CV, 2018 WL 1373951 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (03-19-18).

**Facts:** During a final hearing in Husband and Wife’s divorce, they reached an agreement, which the court stated it would accept. Before a final order was signed, Wife revoked her consent, arguing in part that Husband failed to disclose his pension to her. The trial court held another hearing on the issue of

the pension, and at that hearing's conclusion, the trial court signed a final order reflecting the parties' prior agreement and included a division of the pension. Wife appealed.

### **Holding: Reversed and Remanded**

**Opinion:** Here, the issue turned on whether the trial court's oral pronouncement at the hearing's conclusion constituted a rendition of judgment thereby defeating Wife's withdrawal of consent.

The trial court stated "I'll grant the divorce. I'll approve the agreement of the parties," followed with a request for a written decree he agreed to "get it signed." These statements indicated future action, not a clear intent to render a full, final, and complete judgment. Thus, Wife was entitled to withdraw her consent.

***Editor's Comment:** I think this one is a close call. The Judge said, "I'll grant the divorce. I'll approve the agreement of the parties" but even that is not enough to signify a present rendition of judgment. If you are proving up a settlement on the record, make sure and ask the Judge to say something like, "I am approving the agreement of the parties and rendering judgment on the settlement terms today." R.T.R.*

***Editor's Comment:** This isn't the first time an appellate court considered a divorce not rendered because the trial court used the future tense. It would be much better if trial court judges would say something like "I hereby grant the divorce." J.V.*

***Editor's Comment:** You can revoke a rule 11 final agreement as long as the court hasn't rendered judgment. Here, at the proveup, the judge didn't presently render; instead, the judge expressed an intent to render in the future. This is an important distinction. When you do a proveup and plan to present the decree later, you want to make sure the judge says "I grant the divorce", like in the present, not the future. Otherwise, you risk a party withdrawing consent to the agreement. M.M.O.*

***Editor's Comment:** I find this interesting, because it's pretty common to go get a "rendition" on the records to avoid someone withdrawing consent. But the way the Judge worded the "rendition", it does appear the judge indicated a future intention to do something. If you are trying to get a rendition on the record, make it clear on the record that the granting of the divorce or confirmation of the order is done immediately, and the signing of a document is nothing more than a ministerial duty. J.H.J.*

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**MSA NOT AMBIGUOUS, AND IN THE ABSENCE OF ANY OBJECTION TO THE PROPOSED DECREE, TRIAL COURT DID NOT ABUSE DISCRETION BY ENTERING A FINAL DECREE THAT VARIED FROM THE TERMS OF THE MSA.**

¶18-3-03. *In re T.L.T.*, No. 05-16-01367-CV, 2018 WL 1407098 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (03-21-18).

**Facts:** During divorce proceedings, Husband and Wife signed an MSA that divided "the community portions of" the parties retirement. Attached to the MSA was a spreadsheet showing community values, but the spreadsheet included a note that the values were guidelines only. The paragraph referencing the retirement account division provided that evidence of separate property "shall be produced" fifteen days later. The parties subsequently disputed the process for dividing the retirement accounts. Wife filed a motion to enter a proposed order that awarded Husband and Wife 50 percent of the values of the retirement as shown on the spreadsheet. Husband failed to file any objections to the proposed decree of divorce. Husband did file a motion for new trial, to which he attached evidence. However, no evidence was presented during the hearing on his motion. Husband asserted that the decree divested him of his separate property interest in his retirement accounts. The trial court denied Husband's motion for new trial and ordered him to pay attorney's fees. Husband appealed.

### **Holding: Affirmed as Modified**

**Opinion:** The appellate record contained no written response to Wife's motion to enter; nor was there a reporter's record of the hearing on the motion or anything else in the record to show Husband objected to the proposed decree or complained that it was inconsistent with the MSA. Husband bore the burden to establish by clear and convincing evidence the separate origin of each asset. The MSA spreadsheet provided a guideline for the values of the community property, and nothing in the Final Decree varied from that agreement. The trial court properly implemented and effectuated the division of those retirement plans.

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**PARTIES EXPLICITLY WAIVED RIGHT TO APPEAL IN BODY OF INFORMAL SETTLEMENT AGREEMENT; IMPLEMENTATION OF AN OWELTY LIEN DID NOT SUPPLY AN ADDITIONAL TERM, IT MERELY EFFECTUATED THE AGREED DIVISION OF THE PROPERTY.**

¶18-3-04. *Huber v. Huber*, No. 04-17-00326-CV, 2018 WL 1831655 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-18-18).

**Facts:** After years of litigation, the parties reached an informal settlement agreement in their divorce proceeding. In the agreement, Wife was awarded certain real property, and Husband agreed to pay and indemnify and hold Wife and her property harmless from the payment of two loans secured by the real property awarded to Wife. Subsequently, Wife filed a motion to enter, and Husband filed a motion to clarify. Husband asserted that he believed Wife intended to immediately sell the property and that the sale of the property should relieve him of the obligation to pay the loans secured by the property. The trial court disagreed and imposed an owelty lien to secure Husband's obligation to pay the loans. Husband appealed, arguing that the owelty lien supplied a term not agreed to by the parties. Wife responded that Husband had explicitly waived his right to appeal in the parties' agreement.

### **Holding: Affirmed**

**Opinion:** The parties' agreement provided in one paragraph that they waived their right to appeal unless there was evidence of extrinsic fraud. In another paragraph, they unconditionally waived their right to appeal. Neither party asserted extrinsic fraud. Thus, by the terms of their agreement, both parties waived their right to appeal.

Further, the implementation of an owelty lien on the homestead did not add an additional term to or modify the agreement; rather, it was simply a means of implementing and effectuating the agreed division of the property.

Finally, the parties agreed to submit disputes to the trial court for resolution, so Husband could not later complain of the trial court's resolutions of those disputes.

**Editor's Comment:** *I feel like there is case law all over the place on whether and how and when a trial court can add a term to a decree based on a settlement agreement. It often boils down to the specific facts, and the specific action of the trial court. Here, the trial court adding an owelty lien is held to be okay for a number of reasons, but I think it could have easily gone the other way. Notably, wife's cross-appealed the denial of attorney's fees and the court of appeals overrules her issue in part because she signed the final decree that denied her request for fees and moved for husband to sign the decree as well. Remember that if you think there is even a CHANCE your client may want to appeal (or cross-appeal), be very wary of having your client sign the decree or move for entry. R.T.R.*

## DIVORCE PROPERTY DIVISION

### **RATHER THAN PROVE FRAUD, HUSBAND IMPROPERLY ATTEMPTED TO SHIFT BURDEN TO WIFE TO DISPROVE FRAUD.**

¶18-3-05. *Willmore v. Alcover*, No. 13-16-00180-CV, 2018 WL 1417556 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (03-22-18).

**Facts:** During the divorce proceedings, one issue presented by Husband involved a claim of fraud. Husband alleged that Wife deposited all paychecks from her teaching job into a separate account for the entire duration of their seven-year marriage without his knowledge. The trial court rejected his claim. Husband appealed.

#### **Holding: Affirmed**

**Opinion:** Typically, family lawyers are faced a six element common law actual fraud claim that can sometimes be hard to fit into a family law fact pattern. This opinion offers a very good 8 element fraud claim that seems more in line with what family lawyers face. To establish fraud in case involving marital property, Husband had the burden to establish:

- 1) Wife failed to disclose the separate account to him;
- 2) Wife had a duty to disclose the separate account;
- 3) the separate account was material;
- 4) Wife knew that Husband was ignorant of the separate account and Husband did not have an equal opportunity to discover the existence of the separate account;
- 5) Wife was deliberately silent when she had a duty to speak;
- 6) by failing to disclose the separate account, Wife intended to induce Husband to take some action or refrain from acting;
- 7) Husband relied on Wife's nondisclosure; and
- 8) Husband was injured as a result of acting without that knowledge

Here, rather than addressing the above factors, Husband attempted to conclusively establish fraud by pointing not to what the evidence showed, but instead to what the evidence allegedly did not show. Husband argued there was no evidence he knew of the paychecks. By framing the argument in such a way, he attempted to shift the burden to Wife to disprove fraud.

**Editor's Comment:** *You can't appeal a case on no-evidence grounds when you have the burden of proof. You must demonstrate that as a matter of law, the evidence establishes every element of your claim. J.V.*

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### **CONSIDERATION OF MURFF FACTORS WARRANTED 75/25 SPLIT IN WIFE'S FAVOR.**

¶18-3-06. *Christensen v. Christensen*, No. 01-16-00735-CV, 2018 WL 1747260 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (04-12-18).

**Facts:** Wife filed for divorce after discovering Husband had been using dating sites. During the marriage, Husband managed most of the couple's finances. At the time of divorce, he produced very little evidence to support his assertion of the current state of the couple's finances. Husband was unable to explain certain discrepancies noticed by Wife. Husband admitted to taking his masseuse on vacation with him but denied any romantic involvement with the woman. Husband spent a large amount of com-



munity funds on his new home when the couple separated. After a bench trial, the trial court granted the divorce on the grounds of Husband's adultery and awarded Wife a vastly disproportionate division of the community estate. Husband and Wife disagreed on the percentage of the division—Husband believed it was an 80/20 split, while Wife believed it was a 75/25 split. Husband appealed.

### **Holding: Affirmed**

**Opinion:** While the evidence was disputed, the trial court found that Husband's testimony was not credible, and the trial court did not abuse its discretion in discrediting Husband's evidence.

The trial court found that: (1) Husband had committed adultery and was at fault for the break-up of the marriage; (2) Husband's annual income was over twice Wife's annual income; and (3) Husband had wasted community assets.

*Editor's Comment: A 75/25 split is a HUGE difference. I wanted to point this case out because there are lawyers that argue that anything this large is an abuse of discretion—it's not. The court has pretty wide discretion to divide the estate in what it deems just and right. Here, the record had ample evidence, and the decision was not to be disturbed.J.H.J.*

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### **HUSBAND'S MOTHER'S CONVEYANCE OF PROPERTY NOT A GIFT BECAUSE IT LACKED DONATIVE INTENT.**

¶18-3-07. [Knowlton v. Knowlton](#), No. 04-17-00257-CV, 2018 WL 2222621 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (05-16-18).

**Facts:** In a divorce proceeding, Husband and Wife disputed the character of property obtained from Husband's mother during the marriage. Husband asserted the property had been gifted to him and was his separate property. Wife asserted it was not a gift and was community property. After a trial, the court determined that the property was community property, ordered that the property be sold and that the net proceeds be divided equally between the parties. Husband appealed.

### **Holding: Affirmed**

**Opinion:** Because a conveyance of property from a parent to a child is presumed to be a gift, the burden was on Wife to show that the transfer was not a gift. Husband testified that he did not intend to gift the property to Wife, but his intent was irrelevant to the determination of whether his mother intended to gift the property. Wife testified about the facts and circumstances surrounding the execution of the deeds. Husband's mother signed the quitclaim deed for the purpose of Husband and Wife obtaining an equity loan. The quitclaim deed recited that the conveyance was done in exchange for consideration of \$10, which indicated the conveyance was not a gift. The quitclaim deed failed to adequately describe the property. Upon learning that the loan could not be obtained with the quitclaim deed, Husband's mother executed a general warranty deed conveying the property to both Husband and Wife in exchange for cash and other valuable consideration. The cumulative evidence supported a finding that Husband's mother lacked the requisite donative intent, and contrary to Husband's assertions, the trial court's decision did not appear to rest on any single piece of evidence.

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## HUSBAND AWARDED MOST OF THE COMMUNITY'S DEBTS AND WIFE AWARDED MOST OF THE COMMUNITY'S ASSETS TO FULFILL THE REIMBURSEMENT AWARD FROM HUSBAND'S SEPARATE ESTATE TO THE COMMUNITY ESTATE.

¶18-3-08. *In re Marriage of Slagle*, No. 14-16-00113-CV, 2018 WL 2306736 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (05-22-18).

**Facts:** Husband owned a business before marriage that was profitable. During the marriage, circumstances changed, and Husband began losing money. Husband sued the company he believed was responsible for the lost income and spent all of his time and a significant amount of money pursuing the lawsuit. During the marriage, the community estate loaned large sums of money to Husband's business. Wife filed for divorce. In the final decree, the trial court determined the business was Husband's separate property and that Husband's separate property owed the community reimbursement for the loans. Husband appealed the property division, arguing that the trial court abused its discretion in awarding Wife "100% of the community's assets and appoint[ing him] 100% of the community liabilities.

### Holding: Affirmed

**Opinion:** Husband's uncontroverted testimony established that the company was his before marriage, which was sufficient to establish that it was his separate property. The court determined that the community estate was entitled to reimbursement of its loan to Husband's separate property company, which meant Wife was entitled to half of the reimbursement award in the division of the community. The trial court did not abuse its discretion in awarding more assets to Wife and more debt to Husband to effectuate this division.

*Editor's Comment: I am not clear how the reimbursement even harmed the husband. The reimbursement was based on community monies expended to benefit the husband's separate estate. The wife was already entitled to an equitable division of the existing community estate, so when the trial court awarded existing community assets to her to satisfy the community's claim for reimbursement against the husband's separate estate, how does this even count as reimbursement? The court of appeals does not address this but it seems to me that the wife is the party who should have challenged the manner in which the trial court decided to handle the reimbursement claim. Oh well?! S.S.S.*

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## ATTORNEY'S FEES ONLY ONE FACTOR IN MAKING AN EQUITABLE PROPERTY DIVISION.

¶18-3-09. *Gadekar v. Zankar*, No. 12-16-00209-CV, 2018 WL 2440393 (Tex. App.—Tyler 2018, no pet. h.) (mem. op.) (05-31-18).

**Facts:** Husband and Wife's divorce proceedings lasted four years. After a jury trial, Wife was appointed sole managing conservator of the Child, and Husband was awarded a possession schedule on condition that he attend therapy. Husband had a history of mistreating Wife and the parties' Child. The trial court confirmed Wife's separate property, some of which was located in India, divided the community estate, and awarded Wife her attorney's fees. Husband appealed on a number of grounds, including the court's denial of his motion for a continuance after his fifth attorney withdrew, the exclusion of testimony from the parenting facilitator, and the division of the community estate.

### Holding: Affirmed

**Opinion:** Husband argued that although the trial court claimed to be awarding a roughly equal division of the community estate, it failed to consider the award of Wife's attorney's fees. However, attorney's fees are but a factor to be considered in making an equitable division. Further, the failure to list attor-

ney's fees as "property" is not an indication that they were not considered, only that the award was not considered "property."

**Editor's Comment:** *Husband's complaint on appeal boiled down to the trial court including the attorney's fees award in the "other findings" section of the Findings of Fact instead of in the "property" section. But that doesn't mean that the trial court failed to consider attorney's fees when dividing the community estate. J.V.*

## DIVORCE SPOUSAL MAINTENANCE/ALIMONY

### MERE POSSESSION OF MONEY TO SATISFY SPOUSAL MAINTENANCE ALONE CANNOT SUPPORT THE AWARD.

¶18-3-10. *Mathis v. Mathis*, \_\_\_ S.W.3d \_\_\_, No. 12-17-00049-CV, 2018 WL 771000 (Tex. App.—Tyler 2018, no pet. h.) (03-15-18).

**Facts:** Husband had a substance abuse problem that led to criminal activity and incarceration. Husband was incarcerated twice during the marriage. Between the periods of incarceration, he was involved in an accident and received a \$900,000 personal injury settlement. During the divorce proceedings, he was incarcerated again and was sentenced for seventeen years. After a final hearing, the trial court divided the community estate, confirmed separate property, and awarded Wife spousal maintenance for three years. Husband appealed, arguing that the trial court abused its discretion by ordering spousal maintenance when he had no income to pay the award. He contended that the court improperly considered his personal injury settlement as a source of income.

#### **Holding: Affirmed as Modified**

**Opinion:** Incumbent in a spousal maintenance award is the obligor spouse's ability to earn income to satisfy the maintenance obligation. Husband was imprisoned with no indication for when he might be released on parole. Husband had no source of income. Based on the plain language of the Family Code proceeds used for spousal maintenance are expected to be realized after the divorce is final.

**Editor's Comment:** *Among other things, the trial court commented that Husband's child support obligation was based on the minimum wage presumption, which the court of appeals said implied that Husband's post-incarceration income earning capacity was "limited and inconsistent" with an income level high enough to warrant \$1,200 monthly in spousal maintenance. J.V.*

**Editor's Comment:** *Interesting, and maybe obvious, but even though the statute doesn't say that the obligor must have the ability to pay, now the Tyler court tells us. A court can't order maintenance if the obligor has no means to pay it. M.M.O.*

## FINDINGS OF FACT: WHO, WHAT, WHERE, WHEN, WHY, AND HOW.

### WIFE NOT ENTITLED TO SPOUSAL MAINTENANCE WITHOUT PRESENTING EVIDENCE OF WHAT CONSTITUTED HER MINIMUM REASONABLE NEEDS.

¶18-3-11. *Howe v. Howe*, \_\_\_ S.W.3d \_\_\_, No. 08-16-00070-CV, 2018 WL 1737083 (Tex. App.—El Paso 2018, no pet. h.) (04-11-18).

**Facts:** After a contentious divorce proceeding, Husband/Father appealed, raising numerous complaints, including the award to Wife of spousal maintenance and court's failure to award him expanded standard possession despite his request for same.

#### **Holding: Affirmed in Part; Reversed and Rendered in Part**

**Opinion:** Because Husband did not request additional findings, the appellate court presumed that any unrequested findings supported the judgment if the evidence was legally and factually sufficient to support the judgment. Further, although the findings were contained within the judgment—and not in a separate document—neither party complained of that error. Thus, the appellate court accepted the findings within the judgment as the findings of fact for the purposes of appeal.

The trial court found the amount of Husband's net resources but did not make a finding regarding Wife's available resources. Further, the record was devoid of any evidence of what constituted Wife's minimum reasonable needs.

*Editor's Comment: Proof of minimum reasonable needs is a must to be entitled to spousal support. M.M.O.*

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### WIFE'S TESTIMONY FAILED TO ESTABLISH DILIGENCE IN EARNING SUFFICIENT INCOME TO PROVIDE MINIMUM REASONABLE NEEDS TO SUPPORT AWARD OF SPOUSAL MAINTENANCE.

¶18-3-12. *Quijano v. Amaya*, No. 13-16-00485-CV, 2018 WL 1870476 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (04-19-18).

**Facts:** Husband and Wife were married for over thirty years. Husband was self-employed and operated a pest control business. Wife was not authorized to work in the U.S., but she had a degree in counseling from Mexico. Wife filed for divorce. After a bench trial, the court granted the divorce, divided the marital estate, ordered Husband to pay spousal maintenance for one year, and ordered Husband to pay child support for their minor child. Husband appealed.

#### **Holding: Affirmed in Part; Reversed and Rendered in Part**

**Opinion:** Wife offered no evidence or testimony that she made any attempts to develop the necessary skills to become self-supporting during the period of separation and during the time the suit was pending. She testified that she did not have permission to work in the U.S. She offered no evidence that she sought authorization to do so or to become a legal resident. Further, Wife was wholly unaware of what her monthly expenses were until Husband stopped paying them, and during the proceedings, she paid her expenses with gifts from her father.

*Editor's Comment: Would the result have been different had Wife unsuccessfully sought authorization to work in the United States, or attempted to become a legal resident but failed? J.V.*

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**WIFE ENTITLED TO SPOUSAL SUPPORT BECAUSE SHE PRESENTED SUFFICIENT EVIDENCE THAT SHE EXERCISED DILIGENCE IN EARNING SUFFICIENT INCOME TO PROVIDE FOR HER MINIMUM REASONABLE NEEDS.**

¶18-3-13. *Castillo v. Castillo*, No. 13-16-00174-CV, 2018 WL 1960168 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (04-26-18).

**Facts:** Wife filed for divorce. Three years later, Husband filed for bankruptcy. The bankruptcy court made findings regarding characterization and divided the community estate's assets and debts. The bankruptcy court enjoined the parties from retrying those issues to the family court and directed the parties to try the issue of spousal maintenance to the family court. Neither party appealed the bankruptcy judgment. After a hearing before the trial court, the court granted the divorce and awarded spousal maintenance. On appeal, Husband argued that Wife failed to provide evidence that she exercised diligence in earning sufficient income to provide her minimum reasonable needs during the almost four years since she petitioned for divorce.

**Holding:** Affirmed

**Opinion:** Wife had little work experience and did not have any vocational training during the marriage because the parties agreed that it was Wife's job to stay at home with the Children. Wife applied to several jobs with local politicians and worked for a candidate's campaign part-time. She provided the voice for some commercials for a Supreme Court candidate. She was paid a little bit to work as a ro-bocall lady. She worked for Houston Can Academy and was paid for "getting golf teams for their golf tournament." She had an upcoming job with a state representative that would pay \$100 a day. Wife intended to serve as an election judge at primary and general elections, which paid \$230. Despite efforts to acquire a high-paying job, Wife had been unable to do so possibly because of her lack of experience and training. She had interviewed for several positions. She sought loans to make payments for debts awarded her in the bankruptcy proceeding. Since filing for divorce, she attempted to pursue business opportunities to build her resume in order to support her children.

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**WIFE PRESENTED SUFFICIENT AND PROBATIVE EVIDENCE IN SUPPORT OF HER REQUEST FOR SPOUSAL SUPPORT TO ESTABLISH DISABILITIES THAT PREVENTED HER FROM OBTAINING GAINFUL EMPLOYMENT.**

¶18-3-14. *Stewart v. Stewart*, No. 09-18-00142-CV, 2018 WL 2343215 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (05-24-18).

**Facts:** Husband and Wife were married 14 years. Wife suffered from deteriorated discs in her neck and lower back, vertigo, high blood pressure, type-one diabetes, depression, psoriasis, arthritis in her back and hands, and tremors in her right hand. Wife stopped working after receiving back surgery. Her condition prevented her from returning to her job as a bank teller because she could not stand for long periods of time, and pain and spasms prevented her from standing for long periods. Arthritis and tremors limited her ability to write. Wife was 64 years old at the time of the divorce. During the divorce proceeding, Wife sought \$2000 a month in spousal maintenance for an indefinite period of time. The trial court awarded her \$1200 a month for 60 months. Husband appealed.

**Holding:** Affirmed

**Opinion:** A spouse's evidence must rise above a mere assertion that unsubstantiated symptoms collectively amount to an incapacitating disability. Here, Wife testified as to her conditions and offered her doctor's notes, which included test results.



**Editor's Comment:** Wife wisely iced the cake with her doctor's medical records. As the court notes, a spouse's testimony alone can support a finding of disability provided that it is "sufficient and probative to establish that a disability exists and that the disability prevents the spouse from obtaining gainful employment." (citation omitted). But it's better to overprove than to underprove something. J.V.

## DIVORCE ENFORCEMENT OF PROPERTY DIVISION

### BECAUSE DECREE AMBIGUOUS, TRIAL COURT HAD AUTHORITY TO CLARIFY DIVISION OF REAL PROPERTY

¶18-3-15. *In re Marriage of Manor*, No. 07-16-00143-CV, 2018 WL 1415407 (Tex. App.—Amarillo 2018, pet. filed 06/07/18) (mem. op.) (03-21-18).

**Facts:** Husband and Wife divorced and signed an agreed final decree. Among other provisions, the decree divided a tract of real property. Because the portion awarded to Wife contained improvements, Husband was awarded more acreage. Exhibits A and B purported to describe how the real property was to be divided. Subsequently, the parties disputed the division. Husband filed a motion for clarification. The trial court determined that the decree was ambiguous and issued a clarifying order dividing the property. Wife appealed, arguing the clarification order improperly modified, altered, or changed the division of property.

#### **Holding: Affirmed**

**Opinion:** The divorce decree provided that the land would be divided as provided in Exhibit A and Exhibit B of the decree; however, the descriptions in the two exhibits contradicted each other and could not be reconciled. Thus, the decree was ambiguous. Thus, the trial court had the authority to issue an order clarifying the division, and it was within its discretion to agree with Husband's interpretation of the parties' intent.

**Editor's Comment:** What is a clarification versus a substantive alteration of the property division? PFR has been filed. M.M.O.

## SAPCR PROCEDURE AND JURISDICTION

### TERMINATION ORDER VOID BECAUSE TRIAL COURT LACKED JURISDICTION UNDER UCCJEA.

¶18-3-16. *In re D.S.*, \_\_\_ S.W.3d \_\_\_, No. 05-17-01066-CV, 2018 WL 1835695 (Tex. App.—Dallas 2018, no pet. h.) (04-18-18).

**Facts:** Mother, who was an attorney, and Father reached an agreement in their divorce proceeding. Mother drafted all the pleadings. Although the parties did not mediate with a mediator, they signed a "mediated settlement agreement" reflecting their agreement. Father signed a voluntary relinquishment of his parental rights and agreed to maintain a life insurance policy with the Child as beneficiary and contribute \$3500 a month to a trust account or college savings account for the Child. The trial court

signed an order terminating Father's parental rights and a final decree of divorce pursuant to the parties' agreement.

Subsequently, Father filed two petitions for bill of review alleging that both orders were void. Father asserted that Massachusetts was the Child's home state at the time the termination petition was filed, so Texas never had subject matter jurisdiction under the UCCJEA. Further, Father argued that if the termination order was void, then the trial court could not have considered the rights of the Child in the property division, so the property division should be retried.

In its findings of fact and conclusions of law, the trial court found that Massachusetts was the Child's home state at the time of filing. However, the trial court also determined that it could not consider extrinsic evidence when ruling on Father's petition for bill of review and, thus, denied both of his petitions. Father appealed.

### **Holding: Reversed and Rendered in Part; Affirmed in Part**

**Opinion:** Extrinsic evidence generally may not be used to establish lack of jurisdiction in a collateral attack on a judgment. However, evidence outside the record may be used to collaterally attack a void judgment if the trial court lacked any possible power to act.

The UCCJEA is a subject matter jurisdiction statute. A judgment rendered without subject matter jurisdiction is void. Subject matter jurisdiction cannot be gained through waiver or agreement and must exist at the time a suit is filed. Here, nothing in the record of the termination pleading showed that Texas did not have subject matter jurisdiction under the UCCJEA. Thus, without extrinsic evidence, the trial court would have no basis to grant Father's petition for bill of review.

However, Texas statutorily withdrew a trial court's jurisdiction to make an initial child custody determination if Texas is not the child's home state. Therefore, the "no possible power to act" exception to the no-extrinsic-evidence rule applied, and the trial court should have permitted Father to present extrinsic evidence that the court lacked jurisdiction to render the termination order. Moreover, because the trial court issued a finding that Texas was not the Child's home state at the time the termination petition was filed, the appellate court rendered the termination order void.

Although conservatorship of a child is a factor that can be considered in the division of marital property, any error on conservatorship does not necessarily render the entire divorce decree void. Here, the property was divided pursuant to the parties' agreement, and Father did not show the divorce decree was void for lack of jurisdiction.

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### **MOTHER COULD NOT BE EXCLUDED FROM POSSESSION OF HER CHILD ABSENT A VERIFIED PLEADING OR SUPPORTING AFFIDAVIT.**

¶18-3-17. [In re Barrera](#), No. 03-18-00271-CV, 2018 WL 1916023 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (04-23-18).

**Facts:** Mother considered giving her Child up for adoption and allowed Petitioners to take the Child home from the hospital after its birth. Subsequently, Mother changed her mind and asked Petitioners to return the Child, but Petitioners refused. Mother asserted that she never signed an affidavit relinquishing her parental rights, but she did sign an affidavit revoking any relinquishment. Petitioners filed a petition to terminate Mother's parental rights, and the trial court signed a TRO preventing Mother from having access to the Child. She filed a petition for writ of mandamus.

### **Holding: Writ of Mandamus Conditionally Granted**

**Opinion:** Except on a verified pleading or an affidavit in accordance with the Tex. R. Civ. P., an order may not be rendered that excludes a parent from possession or access to a child. Petitioner's pleading was not verified, and their affidavit was filed nearly 3 hours after the TRO was signed, and nearly 5

hours after their petition was filed. Moreover, the affidavit acknowledged that Mother revoked any relinquishment of her rights and included no facts supporting allegations that Mother endangered the Child.

**Editor's Comment:** *Ick, a procedural nightmare. Just know the rules—you don't want to be the lawyer that gets a case reversed simply because the rules weren't followed. J.H.J.*

## GRANDMOTHER WAS A NECESSARY PARTY TO MOTHER'S SUIT TO REMOVE GRANDMOTHER'S PREVIOUSLY-ORDERED VISITATION.

¶18-3-18. *In re T.R.H.*, No. 09-17-00001-CV, 2018 WL 2246545 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (05-17-18).

**Facts:** In an agreed order, Mother and Father awarded Grandmother an annual 2-week visitation period with the Child provided that she gave timely notice to Mother. Grandmother was also awarded the first right of refusal if Mother desired to place the Child in daycare. Subsequently, an order appointed Mother and Grandmother joint managing conservators. Because Mother failed to comply with the order, Grandmother was forced to file a motion to enforce her right to visitation with the Child.

A few years later, Grandmother filed a motion to grant visitation, and Mother filed a motion to dismiss for lack of standing. Despite the prior orders, the trial court did not view Grandmother as a party affected by the order and dismissed Grandmother's pleadings. Mother then filed her own motion to modify to remove Grandmother's right to possession and served Grandmother with citation. Grandmother filed a motion for reconsideration of her prior pleadings. Without allowing Grandmother to present any evidence, the trial court denied Grandmother's pleadings, finding she lacked standing. After a bench trial, in which Grandmother was not allowed to participate, the trial court signed an order removing Grandmother's right to possession. Grandmother appealed.

### Holding: Reversed and Remanded

**Opinion:** Tex. Fam. Code 156.002(a) gives standing to initiate a modification proceeding to parties affected by an order. Grandmother was named in a prior order and successfully brought a motion to enforce. When Mother filed her motion to modify, she named Grandmother as a party and had Grandmother served with citation. The prior order granted Grandmother with visitation and possession of the Child, and she had substantial contact with the Child.

## SAPCR TEMPORARY ORDERS

### TEMPORARY ORDERS FOR ATTORNEY'S FEES NOT SUPPORTED WITHOUT EVIDENCE THAT FEES WERE NECESSARY FOR SAFETY AND WELFARE OF THE CHILDREN.

¶18-3-19. *In re Payne*, No. 03-17-00757-CV, 2018 WL 1630933 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (04-05-18).

**Facts:** Mother and Father were joint managing conservators of their Children, with Mother having the exclusive right to designate the Children's primary residence. While Mother worked overseas, Father acted as the primary caregiver. When Mother returned, Father filed a SAPCR seeking to be named as the parent with the exclusive right to designate the Children's primary residence. The trial court signed temporary orders limiting Mother's access to the children. At a subsequent hearing, Father sought inter-

im attorney's fees. The trial court signed an order for fees, including partial fees for an anticipated jury trial. Mother filed a petition for writ of mandamus.

**Holding: Writ of mandamus conditionally granted**

**Opinion:** [Tex. Fam. Code § 105.001\(a\)\(5\)](#) allows for temporary orders for the safety and welfare of the child, including payment of reasonable attorney's fees and expenses. Here, however, Father did not present any evidence that attorney's fees were necessary for the safety and welfare of the children. Moreover, at the time of the hearing on attorney's fees, temporary orders had already been issued that limited Mother's access to the Children, so the safety and welfare of the Children had already been addressed before fees were requested.

***Editor's Comment:** A good refresher read for anyone wanting to request interim attorney's fees in a SAPCR (or defend against same). It's a fairly high burden of proof, and you need to get your evidence in line if you want to stand a chance! R.T.R.*

***Editor's Comment:** In a SAPCR, the standard for awarding interim attorney's fees is "safety and welfare." Pretty high burden. M.M.O.*

**SAPCR**  
**AMICUS ATTORNEYS/AD LITEMS/  
PARENTING FACILITATORS & COORDINATORS**

**MOTHER FAILED TO ESTABLISH THAT AMICUS SHOULD HAVE BEEN PERMITTED TO TESTIFY AS A FACT WITNESS.**

¶18-3-20. [Jackson v. Jackson](#), No. 09-16-00189-CV, 2018 WL 1320242 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (03-15-18).

**Facts:** After a bifurcated jury and bench trial, the trial court signed a final decree of divorce that included orders for the couple's children. Mother appealed, asserting that the trial court erred in denying her request that the amicus attorney testify as a fact witness.

**Holding: Affirmed**

**Opinion:** The Tex. Fam. Code prohibits an amicus attorney from testifying except under certain circumstances. Mother did not argue those circumstances existed and made no offer of proof regarding what she believed the amicus's testimony would be.

**PARENTING FACILITATORS STATUTORILY PROHIBITED FROM MAKING RECOMMENDATIONS REGARDING CONSERVATORSHIP OF AND POSSESSION AND ACCESS TO CHILD.**

¶18-3-21. [Gadekar v. Zankar](#), No. 12-16-00209-CV, 2018 WL 2440393 (Tex. App.—Tyler 2018, no pet. h.) (mem. op.) (05-31-18).

**Facts:** Husband and Wife's divorce proceedings lasted four years. After a jury trial, Wife was appointed sole managing conservator of the Child, and Husband was awarded a possession schedule on condition that he attend therapy. Husband had a history of mistreating Wife and the parties' Child. The trial court confirmed Wife's separate property, some of which was located in India, divided the community

estate, and awarded Wife her attorney's fees. Husband appealed on a number of grounds, including the court's denial of his motion for a continuance after his fifth attorney withdrew, the exclusion of testimony from the parenting facilitator, and the division of the community estate.

**Holding: Affirmed**

**Opinion:** A parenting facilitator is statutorily prohibited from making recommendations as to the conservatorship or possession or access to the Child. Husband's arguments regarding the trial court's exclusion of the parenting facilitator's testimony all related to his complaint that the trial court erred in its rulings regarding conservatorship and possession. Thus, the trial court did not abuse its discretion in excluding the testimony.

**SAPCR  
ALTERNATIVE DISPUTE RESOLUTION**

**MOTHER COULD NOT REVOKE CONSENT TO AGREEMENT AFTER COURT ORALLY RENDERED FULL AND FINAL JUDGMENT; ATTORNEY'S FEES NOT ASSOCIATED WITH CHILD SUPPORT ENFORCEMENT COULD NOT BE AWARDED AS CHILD SUPPORT.**

¶18-3-22. *In re R.F.*, No. 09-16-00240-CV, 2018 WL 2054930 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (05-03-18).

**Facts:** During a suit to modify the parent-child relationship, the parents entered a Rule 11 agreement that resolved the parties' issues. The agreement was read into the record, and the trial court orally rendered judgment. Nearly two months later, the trial court signed an order prepared by Father's attorney. Mother appealed, arguing in part that she had revoked her consent to the agreement before it was finalized and that the trial court erred in ordering Mother to pay the attorney's fees for the attorney that she hired to represent the Child (the attorney ad litem), as child support. Mother asserted that at the hearing at which the Rule 11 agreement was read into the record she told her attorney she no longer consented and that the judgment could not be entered because she revoked her consent before the written order was signed.

**Holding: Affirmed in Part; Reversed and Remanded in Part**

**Opinion:** At the hearing's conclusion, the judge orally rendered a full and final judgment. Further, the judge's language and the subsequent findings of fact and conclusions of law indicated the present intent to render judgment on the date of that hearing. Thus, even if Mother revoked her consent after the oral rendition but before the written order was signed, any revocation was ineffective. Additionally, even if Mother commented to her attorney during the hearing that she no longer agreed to the Rule 11, those comments were ineffective to revoke consent because they were not made known to the trial court. Finally, during the hearing, Mother testified that no one influenced or forced her agreement, the agreement was in the Child's best interest, and Mother wanted an order based on the agreement.

Attorney's fees can only be awarded as child support when incurred in conjunction with an enforcement proceeding. This was not an enforcement proceeding, so the trial court could not award fees as child support, and the order of withholding was improper.

*Editor's Comment: Further, the ad litem's testimony that she had produced her invoices to Mother and that Mother had agreed to pay them was not sufficient evidence to establish the reasonableness or necessity of the ad litem's \$16,729 in attorney's fees, costs and expenses. But why not? Wouldn't Mother's agreement to pay constitute some evidence that the fees were reasonable and necessary? Won't it now get a lot harder to find willing ad litem's? J.V.*



**Editor's Comment:** Contrast this case with *Hall* above, here the judge rendered in the present sense so it was too late to revoke agreement to the rule 11 settlement. M.M.O.

**SAPCR  
PATERNITY**

**MOTHER'S CROSS-CLAIMS IN HER CHILDREN'S SUIT TO DETERMINE BOYFRIEND'S PATERNITY BARRED BY COLLATERAL ESTOPPEL BECAUSE MOTHER PARTICIPATED IN TWO PRIOR SUITS ADJUDICATING HUSBAND AS FATHER.**

¶18-3-23. *In re J.A.C.*, No. 05-17-00768-CV, 2018 WL 2191604 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-14-18).

**Facts:** Mother and Husband married and divorced in North Carolina. Subsequently, they remarried and divorced in Georgia. In both cases, Husband was adjudicated—in agreed orders—the father of Mother's four children "of the marriage," including her Twins. Before marrying Husband and during the marriage, Mother maintained a sexual relationship with Boyfriend. When the Twins were 13-years-old (one year after Mother and Boyfriend broke up), the Twins filed suit through Mother seeking to adjudicate Boyfriend to be their father and to terminate Husband's parent-child relationship with them. Boyfriend challenged the Twins' standing, but the court of appeals held that the Twins had standing to seek an adjudication of parentage. On remand, Mother filed a cross-claim asking that if the trial court terminated Husband's parental rights that it name her the sole managing conservator and enter appropriate orders regarding conservatorship, possession, and support. Boyfriend filed a motion for summary judgment, asserting Mother's cross-claims were barred by collateral estoppel and res judicata. The trial court granted Boyfriend a summary judgment as to all of Mother's claims. After a bench trial and genetic testing, the court adjudicated Boyfriend to be the Twins' father and ordered their birth certificates be amended. Mother appealed, challenging the summary judgment and the trial court's failure to terminate Husband's parental rights.

**Holding: Affirmed**

**Opinion:** Mother was a party to the two prior divorces that adjudicated Husband to be the Twins' father. Mother sought to litigate the same issues of child support, conservatorship, and custody that had been litigated in the prior cases. These issues were essential to the two prior judgments. Finally, when evoking collateral estoppel, it is only necessary that the party *against whom* the doctrine is asserted was a party or in privity with a party in the first action. Because Mother was a party in the prior action, it was not relevant that Boyfriend was not.

Additionally, because Mother did not establish how she was personally aggrieved by the trial court not terminating Husband's parental rights, Mother lacked standing to raise the issue on appeal.

## SAPCR CONSERVATORSHIP

### FATHER FAILED TO OVERCOME BURDEN THAT APPOINTING PARENTS JOINT MANAGING CONSERVATORS WAS IN CHILD'S BEST INTEREST.

¶18-3-24. *Martinez v. Gonzalez*, \_\_\_ S.W.3d \_\_\_, No. 08-14-00170-CV, 2018 WL 1181310 (Tex. App.—El Paso 2018, no pet. h.) (03-07-18).

**Facts:** During the divorce proceedings, the Child lived with Mother. Father asserted that the Child was not well cared for by Mother, including claims that the Child was not bathed often and was forced to wear dirty clothes. Mother disputed this testimony. At the trial's conclusion, the trial court appointed the parents joint managing conservators and gave Mother the exclusive right to designate the Child's primary residence. Father appealed arguing that the conservatorship orders were not in the Child's best interest.

**Holding: Affirmed**

**Opinion:** It was Father's burden to overcome the presumption that appointing the parents as joint managing conservators was in the best interest of the Child. Father's expert witness testified that Father was capable of being a managing conservator, but the expert did not evaluate Mother. Mother disputed much of Father's testimony, and the trial court was within its discretion in crediting Mother's testimony while discounting Father's.

## SAPCR POSSESSION

### FINDINGS OF FACT: WHO, WHAT, WHERE, WHEN, WHY, AND HOW.

### FATHER NOT ENTITLED TO EXPANDED STANDARD POSSESSION BECAUSE HE REQUESTED EXPANDED STANDARD POSSESSION TOO LATE—AFTER RENDITION.

¶18-3-25. *Howe v. Howe*, \_\_\_ S.W.3d \_\_\_, No. 08-16-00070-CV, 2018 WL 1737083 (Tex. App.—El Paso 2018, no pet. h.) (04-11-18).

**Facts:** After a contentious divorce proceeding, Husband/Father appealed, raising numerous complaints, including the award to Wife of spousal maintenance and court's failure to award him expanded standard possession despite his request for same.

**Holding: Affirmed in Part; Reversed and Rendered in Part**

**Opinion:** Because Husband did not request additional findings, the appellate court presumed that any unrequested findings supported the judgment if the evidence was legally and factually sufficient to support the judgment. Further, although the findings were contained within the judgment—and not in a separate document—neither party complained of that error. Thus, the appellate court accepted the findings within the judgment as the findings of fact for the purposes of appeal.

Section 153.317 requires the possessory conservator to make the election for expanded standard possession "*before or at the time of the rendition of a possession order.*" Here, the court rendered its

possession order on February 17, 2016, but did not sign the final decree until a hearing on March 2, 2016, which included a recitation that the divorce had been judicially pronounced and rendered on February 17, 2016. Because Father did not make his election prior to February 17, 2016 and did not challenge the recitation in the decree by post-judgment motion, he made his election too late.

**Editor's Comment:** *The election for expanded SPO must be at the time of rendition or before. Waiting until after rendition is too late. I've seen people start putting the election in initial pleadings, which may be a good idea to prevent a late election (aka malpractice claim). M.M.O.*

**Editor's Comment:** *I feel like this is unfair. Yes, I understand father was late in designating, but couldn't he file a post-trial motion like a motion for new trial or motion to reconsider or motion for leave of court to designate? It seems just from the best interest of the child, that should be been an ultimate consideration, rather than "sorry, so sad, you were late."*

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### **ORDER GRANTING GRANDMOTHER ACCESS AND POSSESSION NOT SUFFICIENTLY SPECIFIC ENOUGH TO BE ENFORCEABLE BY CONTEMPT.**

¶18-3-26. *In re Silva*, No. 04-18-00112-CV, 2018 WL 1935192 (Tex. App.—San Antonio 2018, orig. proceeding) (mem. op.) (04-25-18).

**Facts:** An adoption order granting Mother's adoption of three Children referenced an Exhibit A, in which Grandmother was appointed a possessory conservator and was granted a possession schedule. Subsequently, when Mother prevented Grandmother's access to and possession of the Children, Grandmother filed a petition for enforcement by contempt. The trial court assessed a \$100 fine for 3 of the violations, confinement in jail for 3 of the violations, and awarded Grandmother her attorney's fees. The trial court suspended commitment and placed Mother on unsupervised community supervision for ten years. Mother filed a petition for writ of mandamus.

#### **Holding: Writ of Mandamus Conditionally Granted**

**Opinion:** Although it was clear the trial court intended to provide Grandmother with access to and possession of the Grandchildren, Exhibit A never mentioned Mother by name and did not order Mother to take any action or facilitate Grandmother's access or possession. Exhibit A did not specify what consequences applied or what enforcement mechanisms existed if Mother did not comply.

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### **EVIDENCE SUPPORTED ORDER GRANTING FATHER NO VISITATION AND ORDERING HIM TO PAY MONTHLY AND RETROACTIVE CHILD SUPPORT.**

¶18-3-27. *In re J.M.M.*, \_\_\_ S.W.3d \_\_\_, No. 08-16-00091-CV, 2018 WL 1940558 (Tex. App.—El Paso 2018, no pet. h.) (04-25-18).

**Facts:** The OAG filed a petition to adjudicate parentage and to obtain orders for conservatorship of, possession of and access to, and support for the Child. Mother and Father each separately filed counter-petitions. Subsequently, Father's attorney filed a motion to withdraw, which was granted. At a final hearing, Mother and the OAG appeared, but Father did not. After the presentation of evidence, Mother was appointed managing conservator. Father was appointed possessory conservator with no visitation and was ordered to pay monthly and retroactive child support. Some months later, Father filed a restricted appeal challenging the sufficiency of the evidence.

#### **Holding: Affirmed**

**Opinion:** Because the Child was only 18 months old, the presumption that a standard possession order is in a child's best interest did not apply. Mother testified she cared for the Child and provided health insurance, while Father had not provided any support, had not attempted to visit the Child or contact her, and asked his attorney to discuss with Mother's attorney the possible termination of Father's parental rights. This evidence supported the trial court's determination that it was in the Child's best interest to suspend access and possession until Father presented himself to the court.

Mother subpoenaed Father's commissions and records to show that he worked as a real estate agent and earned in excess of \$73,000 in 2014 and that amount was approximately what he made regularly. Additionally, Mother testified that Father had another Child that should be considered in calculating his support obligation. Although the information provided was "imprecise," the information was sufficient to support the child support order.

Retroactive child support is presumed reasonable and in the best interest of the Child if it does not exceed the amount that would have been due for the prior four years.

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### **LACK OF GEOGRAPHIC RESTRICTION ON CHILDREN'S RESIDENCE DID NOT INDICATE THAT MOTHER ANTICIPATED MOVING IN THE FUTURE.**

¶18-3-28. [In re C.F.M., No. 05-17-00141-CV, 2018 WL 2276351 \(Tex. App.—Dallas 2018, no pet. h.\)](#) (mem. op.) (05-18-18).

**Facts:** When the parties divorced, Mother was granted the exclusive right to designate the Children's primary residence without regard to any geographic restriction. Father was awarded supervised possession at FLP. Father never exercised his possession. Subsequently, Mother moved to Kansas. She filed a petition to modify the parent-child relationship to move Father's possession to a facility in Kansas. Father filed a motion to enforce his visitation in Dallas. Father argued that Mother's move to Kansas was anticipated at the time of divorce and, thus, could not constitute a material and substantial change in circumstances.

**Holding: Affirmed**

**Opinion:** The fact that no geographic restriction was placed on Mother's right to designate the Children's primary residence did not indicate that she anticipated a move to Kansas at the time of the divorce.

## **SAPCR CHILD SUPPORT**

### **ABSENT ACTUAL EVIDENCE, MERE SPECULATION FATHER COULD WORK AS PERCUSSIONIST WAS INSUFFICIENT TO SHOW INTENTIONAL UNDEREMPLOYMENT.**

¶18-3-29. [In re I.Z.K., No. 04-16-00830-CV, 2018 WL 1176646 \(Tex. App.—San Antonio 2018, no pet. h.\)](#) (mem. op.) (03-07-18).

**Facts:** In their divorce decree, Mother and Father were appointed joint managing conservators, and Father was ordered to pay child support. Later, Father filed a SAPCR seeking to reduce his child support obligation to zero. Father had been discharged from the army due to a disability, and his only source of income was his disability retirement pay, which was less than a quarter of his previous pay. Father's attorney argued that disability payments could not be included as income when calculating child support. The OAG argued that it should be included. Mother argued that Father was intentionally

underemployed, to which Father objected because Mother had not previously raised this affirmative defense. The trial court overruled Father's objection to Mother's claim and agreed with the OAG that the disability retirement pay should be included. Further, the court found that Father was capable of being a percussionist or giving music lessons and estimated the amount he could earn doing that. After determining that Father's monthly net resources were about 150% of his actual earnings, the court signed an order for Father's new child support obligation. Father appealed.

**Holding: Reversed and Remanded**

**Opinion:** Father produced evidence of his actual pay. Pursuant to *Iliff*, the burden then shifted to Mother to demonstrate that Father was intentionally un- or underemployed. Mother merely stated that "I don't know how he's not employable with skills as a musician. I don't know how he can't give music lessons." There was no evidence that Father could work as a percussionist despite his medical condition and no evidence he could earn the amount estimated by the trial court.

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★★★TEXAS SUPREME COURT★★★

**PRACTITIONERS AND THE LOWER COURTS SHOULD BE MINDFUL OF THESE UNANSWERED QUESTIONS WHEN LITIGATING SECTION 154.302 ISSUES RELATED TO COURT-ORDERED SUPPORT FOR DISABLED CHILD.**

¶18-3-30. *In re D.C.*, \_\_\_ S.W.3d \_\_\_, No. 16-0543, 2018 WL 1444071 (Tex. 2018) (03-23-18).

**Facts:** The Child's parents divorced when he was fourteen years old. Relying on lay testimony, the trial court found section 154.032's requirements were satisfied and, on that basis, ordered Father to pay a fixed sum of child support indefinitely. Neither party requested an independent medical examination or appealed the final divorce decree.

More than a decade later, Father filed a motion to terminate the monthly support ordered for the Child, who by then had attained the age of majority, lived on his own in a dormitory, graduated from college with a double major, and began pursuing a master's degree. The trial court declined to modify the support obligation but ordered Mother to apply for all government services the Child might qualify for, including Social Security benefits. The court stated that the parties could seek further orders if the Child began receiving government benefits. The court of appeals affirmed, concluding the trial court did not abuse its discretion in determining Father failed to meet his burden of proving the child's circumstances had "materially and substantially changed" since the time of the initial decree or that termination of support would be in the child's best interests. Father sought review from the Texas Supreme Court.

**Holding: Petition for Review Denied**

**Concurring Opinion:** (J. Guzman) While this particular case faced procedural issues preventing its review, the case did present questions on which it would be beneficial for practitioners and the lower courts to have guidance.

- What are the criteria for determining whether a child has a mental or physical disability? Is the standard determined by common understanding or do we look to other sources such as, the federal Social Security Act, state and federal anti-discrimination laws, or something else?
- Is expert testimony required—either through a proffered expert or a Rule 204 medical examination—or is lay testimony from a parent or caregiver sufficient?
- What type of evidence is required to support a finding that a child is incapable of self-support? Must there be evidence that the child has tried and failed to obtain or maintain gainful employment? Is evidence of eligibility for or receipt of government disability benefits necessary? Is it sufficient?

The statute is silent regarding the most basic evidentiary issues, many of which played out to some degree in this case.



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## TRIAL COURT'S FAILURE TO ISSUE FINDINGS REGARDING DEVIATION FROM CHILD SUPPORT GUIDELINES WAS HARMLESS ERROR.

¶18-3-31. *In re Q.D.S.*, No. 04-17-00105-CV, 2018 WL 1831686 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-18-18).

**Facts:** Mother and Father entered an agreed order providing that no child support was due. However, after two modifications, both initiated by the OAG, Father was ordered to pay monthly child support, and an order was entered finding Father in arrears. Father appealed, arguing in part that the trial court erred in ordering child support retroactive to a date before the initiation of the most recent modification proceeding and that the trial court failed to issue findings pursuant to the Texas Family Code when the award deviated from the guidelines.

### Holding: Affirmed

**Opinion:** Retroactive child support is available in two circumstances. Father correctly asserted that [Tex. Fam. Code § 154.009](#) did not apply because child support had been previously ordered. However, in this case, retroactive child support was available under [Tex. Fam. Code § 154.401\(b\)](#), which allows retroactive support back to the earlier of the date of service or the appearance in the suit to modify. Although the retroactive support was ordered back to April 1, 2015, and the modification petition was not filed until April 23, 2015, the parties had signed an agreement that “[a]ny modification in child support is to be retroactive to April 1, 2015.” Accordingly, the trial court did not abuse its discretion in awarding child support retroactive to April 1, 2015.

A trial court must issue findings on a child support award if the award deviates from the guidelines. Thus, although Father’s request was untimely, the trial court was still required to issue findings. Nevertheless, the record clearly established the basis for determining Father’s income, net resources, and child support obligation. Therefore, Father was not required to guess upon the basis for the award and was not harmed by the trial court’s failure to issue findings.

*Editor’s Comment: Father claimed that he brought home only \$900 per month. Mother presented evidence that Father’s gross monthly income equaled \$5,835. Based on the \$5,835, the trial court incorrectly calculated monthly child support at \$1,192.63 instead of \$1,042.41, a difference of \$150.22. The court of appeals characterized this amount as a “slight variance” from guideline child support. Father is paying 114.5 % of what he should be under the law. Depending on one’s circumstances, \$150 can be a lot of money. J.V.*

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## EVIDENCE SUPPORTED AWARDING MOTHER CHILD SUPPORT FOR AN ADULT DISABLED CHILD WHO LIVED AWAY FROM HOME BUT WHO REQUIRED SUBSTANTIAL CARE AND SUPERVISION.

¶18-3-32. *In re C.J.N.-S.*, No. 13-14-00729-CV, 2018 WL 1870430 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (04-19-18).

**Facts:** The Child moved out at the age of 20 but had medical problems that started several years before age 18. She had a job caring for children, but she lost her job when she was diagnosed with gastroparesis, which required daily medication and the use of a feeding tube. Mother assisted the Child three days a week with chores and household tasks. Mother transported the Child to and paid for at least 23 medical appointments. Mother asked Father for financial assistance, but he refused. Mother filed a petition for adult disabled child and medical support. Father asserted that Mother lacked standing because she was not the Child’s court-ordered guardian. The trial court found Mother had standing and

awarded her support. Father appealed, and the court of appeals agreed with Father that Mother lacked standing and dismissed the case. Mother petitioned to the Texas Supreme Court, which determined Mother—as the Child’s parent—had standing to seek support. On remand, the appellate court was asked to address Father’s issues regarding the sufficiency of the evidence to support the support order.

**Holding: Affirmed**

**Opinion:** Although the Child lived away from her parents and had a job for eight months, she was living with a boyfriend at that time. She lost her job when her employer learned of her diagnosis. Mother spent 16–20 hours a week assisting the Child with chores, and Mother drove the Child to appointments because the Child was unable to drive. Father cited no authority to support his assertion that Mother needed to show that the Child needed care 24 hours a day, 7 days a week.

When determining adult disabled child support the court should consider:

- any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
- whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;
- the financial resources available to both parents for the support, care, and supervision of the adult child; and
- any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.

Here, Father did not provide any care for the Child and only paid a little over \$1000 towards a health savings account, while the outstanding medical debts exceeded \$70,000. Mother had lost her job due to the amount of time she had spent caring for the Child. Additionally, Mother had attempted to obtain government benefits for the Child but was never approved.

**SAPCR  
MODIFICATION**

**TRANSFER OF CHILD SUPPORT PORTION OF FATHER’S MODIFICATION PROCEEDING TO ILLINOIS NOT PERMISSIBLE UNDER UIFSA.**

¶18-3-33. *In re Meekins*, \_\_\_ S.W.3d \_\_\_, No. 01-17-00696-CV, 2018 WL 1801321 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (04-17-18).

**Facts:** Mother, who lived in Texas, travelled frequently for work and met Father in Illinois, where he lived. The couple had a Child who lived in both Texas and Illinois. At some point, a Texas court signed orders adjudicating Father as the father, appointing the parents joint managing conservators, awarding Mother the exclusive right to designate the Child’s primary residence, granting Father a possession schedule, and ordering Father to pay child support. Despite the orders, the Child continued to spend a large portion of her time in Illinois, though the parents disputed the amount of time spent in each state. Father filed a modification suit and a motion to transfer the case to Illinois, asserting that the Child’s primary residence was in Illinois. Over Mother’s objections, the trial court transferred the entire case. Mother filed a petition for writ of mandamus.

**Holding: Writ of Mandamus Conditionally Granted in Part; Denied in Part**

**Opinion:** While there was conflicting evidence as to whether Texas was an inconvenient forum, the trial court had discretion to believe Father's evidence and to transfer the custody issues to Illinois under UCCJEA. However, under UIFSA, once a Texas Court that has jurisdiction enters a support decree, that court is the only court entitled to modify the decree as long as it retains continuing, exclusive jurisdiction. A court of another state may enforce the Texas support decree, but that court has no authority to modify the support decree so long as one of the parties remains in Texas, the issuing state. UIFSA, unlike the UCCJEA, provides no mechanism for the issuing tribunal of a support order to decline to exercise continuing exclusive jurisdiction and transfer jurisdiction to modify a support order to a court in another state.

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### **COUNSELOR'S AFFIDAVIT SUFFICIENT TO SUPPORT ORDER EXCLUDING PARENT FROM HAVING ACCESS TO THE CHILD.**

¶18-3-34. *In re K.M.*, No. 12-18-00044-CV, 2018 WL 1837029 (Tex. App.—Tyler 2018, orig. proceeding) (mem. op.) (04-18-18).

**Facts:** A final order based on an MSA appointed the parents joint managing conservators. Subsequently, Father filed a petition to modify and requested an ex parte TRO. He attached an affidavit of an LPC, who averred that she observed Mother's interactions with the Child and that Mother projected herself as a victim of Father and his family, discussed Father with the Child in an inappropriate manner, was unable to discern what was appropriate behavior for a mother figure, had very blurred boundaries, and showed a clear desire for revenge against Father for which she manipulated the Child to achieve. The trial court granted the TRO, and Mother filed a petition for writ of mandamus.

### **Holding: Writ Denied**

**Opinion:** An order excluding a parent from possession or access to a child must be supported by a verified pleading or supporting affidavit. Here, the petition was filed with an affidavit from a licensed professional counselor that included sufficient facts to support the temporary order.

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### **MOTHER FAILED TO PRODUCE EVIDENCE TO SUPPORT MODIFICATION OF CHILD SUPPORT OR THAT CHILD REQUIRED ADDITIONAL FINANCIAL SUPPORT BECAUSE OF A DISABILITY.**

¶18-3-35. *Dobyanski v. Breshears*, No. 01-17-00407-CV, 2018 WL 2049345 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (05-03-18).

**Facts:** Shortly after the Child's birth, Mother and Father signed an MSA that was incorporated into a final order for conservatorship, possession, and support of the Child. Five years later, Mother sought to modify the order. Father was served but did not appear. Mother provided evidence that the Child had been diagnosed with vaccination delay, oppositional defiance disorder, ADHD, developmental language disorder, and autism. She testified that the Child saw a psychiatrist every two weeks and had been prescribed Abilify. Mother believed the Child's disability would prevent her from getting a full-time job. Mother provided the trial court with a cause number of a case in which Father had been ordered to pay child support for another child. Although Mother did not offer any orders or other documents from that case, she testified as to what his gross monthly resources were in that case. She requested an amount that exceeded guidelines based on that number because that would account for any increases in Father's income since the prior case. Mother believed that Father was making more money because he frequently cancelled his visitations with the Child because he was working. Additionally, Mother believed additional child support was necessary given the Child's disability. The trial court granted Mother a default judgment and ordered Father's child-support obligation be set at the amount requested by

Mother and that the obligation would continue after the Child's eighteenth birthday. Subsequently, Father filed a restricted appeal.

### **Holding: Reversed and Remanded**

**Opinion:** Mother admitted that even based on highest income she adduced of Father's income, the requested child support was beyond the statutory guidelines. Further, Mother offered evidence of Father's income in an intervening year, not the year of the prior order or the year of the current modification suit. Thus, the court had no basis to find a material and substantial change in circumstances. While Mother testified that the Child had a number of diagnoses and that the Child required substantial supervision, she did not offer any evidence of the severity of the Child's conditions or offer any specificity of the type or cost of care she provided.

*Editor's Comment: To get support above guidelines based on child's disability, you have to offer evidence of the amount of money spent over the guidelines on behalf of the child, allocating the child support to the first amount, then showing what the needs are that are not being met by the guideline amount. M.M.O.*

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**WITHOUT CONTROVERTING AFFIDAVIT, TRIAL COURT HAD MINISTERIAL DUTY TO TRANSFER SAPCR; FATHER'S ALLEGATIONS INSUFFICIENT TO SUPPORT TEMPORARY ORDERS CHANGING THE PERSON WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILDREN'S PRIMARY RESIDENCE.**

¶18-3-36. *In re Rusch*, No. 03-18-00163-CV, 2018 WL 2123384 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (05-09-18).

**Facts:** A final divorce decree appointed the parents joint managing conservators, and Mother had the exclusive right to designate the Children's primary residence. Subsequently, Father filed a petition to modify, seeking the exclusive right to designate the Children's primary residence. Mother filed an answer and motion to transfer, to which she attached an affidavit stating that she and the Children had lived in a different county for nearly nine years. Father filed a response to Mother's motion to transfer, to which he attached an affidavit that did not dispute the Children's residence but raised concerns about Mother's ability to care for the Children. Nine days after Mother filed her motion to transfer, the trial court held a hearing. Father argued that the trial court could not hear Mother's motion because he was not afforded ten-days' notice. The court stated that it would not consider any transfer. After the presentation of evidence, the court signed temporary orders changing the person with the exclusive right to designate the Children's primary residence from Mother to Father. Mother filed a petition for writ of mandamus.

### **Holding: Writ of Mandamus Conditionally Granted**

**Opinion:** Although Father filed a document entitled "Controverting Affidavit," it did not actually contain any facts controverting Mother's assertion that the Children had lived in a different county for at least six months. Thus, Father was not entitled to a hearing, and the trial court had a ministerial duty to transfer the case.

Despite the ministerial duty to transfer, the trial court had jurisdiction to enter temporary orders. However, even if the facts asserted by Father were true, they did not rise to the level of serious acts or omissions from which the court could imply the necessary findings that the Children's present circumstances would significantly impair their physical health or emotional development. Father's evidence predated the prior order, was based on allegations that had been ruled out by CPS, or did not relate to the Children's *present* circumstances.

**SAPCR**  
**CHILD SUPPORT ENFORCEMENT**

**FATHER CONFINED TO COUNTY JAIL FOR FAILING TO PAY CHILD SUPPORT ENTITLED TO BE CONSIDERED FOR GOOD-CONDUCT CREDIT.**

¶18-3-37. *In re Harris*, No. 06-18-00015-CV, 2018 WL 1734294 (Tex. App.—Texarkana 2018, orig. proceeding) (mem. op.) (04-11-18).

**Facts:** Father was found in contempt for failing to pay child support and sentenced to confinement. Father argued that he had served 130 days of his 180-day sentence and was being denied equal protection under the law because the sheriff denied good-time credit on his sentence.

**Holding:** Writ of Habeas Corpus denied

**Opinion:** Tex. Code Crim. Proc. art. 42.032 § 2 allows a county sheriff to adopt a policy affording good-conduct time credit to those in ordinary jail. However, even though Father was entitled to be considered for good-time credit, he failed to present a record to support this claim for relief.

**FATHER NOT ENTITLED TO SUSPENSION OF ENFORCEMENT OF JUDGMENT PENDING APPEAL.**

¶18-3-38. *Nixon v. OAG*, No. 05-17-01080-CV, 2018 WL 2126823 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-08-18).

**Facts:** After appealing a judgment finding Father in child support and medical support arrearages, Father asked the trial court to suspend enforcement of the judgment pending appeal. The trial court denied Father's request. Father filed a motion in the appellate court asking the court to set a supersedeas bond or, in the alternative, suspend enforcement of the judgment without requiring security.

**Holding:** Affirmed

**Opinion:** While Father asserted that he would suffer irrevocable harm and hardship without a suspension of the judgment, he did not elaborate on the claim. Additionally, Father had a combined arrearage of \$86,822.02 and had begun consistently paying \$385 a month toward the arrearage. Given Father's history of noncompliance, the trial court did not abuse its discretion in denying Father's request. Further, Father failed to present the appellate court with any circumstances to support suspending enforcement pending appeal.

**MOTHER FAILED TO MEET CONDITION PRECEDENT TO ESTABLISH HER ENTITLEMENT TO UNINSURED MEDICAL REIMBURSEMENT.**

¶18-3-39. *In re C.P.K.*, No. 07-17-00287-CV, 2018 WL 2170821 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (05-10-18).

**Facts:** Mother sought to modify pick-up and drop-off times for the Child because the timing was inconvenient for her and her other child. Additionally, Mother asserted that applying the guidelines to Father's income over a 9-month period required an increase in child support. Mother further claimed that she was entitled to uninsured medical reimbursement. The trial court denied the medical reimbursement



and Mother's request to change the pick-up and drop-off times. The court increased Father's child support but for a lesser amount than requested by Mother. Mother appealed.

**Holding: Affirmed**

**Opinion:** Mother argued that the modification of pick-up and drop-off times would be more convenient for herself and her other child and that Father's schedule was flexible enough to accommodate her. However, little evidence was offered as to how the change would be in the best interest of the Child the subject of the suit.

When Mother calculated her estimate for what Father's child support obligation allegedly should have been, she based her calculation on Father's deposits over a nine-month period. The Texas Family Code provides that the calculation should be based on *annual* basis, so Mother's initial premise was based on too short a period. Additionally, Mother did not account for the fact Father was self-employed. While his tax returns alone were not determinative, they did indicate that Father had many business expenses for which Mother failed to account in her calculations.

Finally, although Wife alleged she was entitled to some medical reimbursement, under the order, she was required to produce to Father evidence of her actual expenses. Rather than produce evidence of her expense, she produced summary-of-benefits information from the insurance company, which did not appear to correlate to Mother's actual out-of-pocket costs.

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**PAYMENT OF ATTORNEY'S FEES AWARD IMPROPERLY INCLUDED AS REQUIREMENT FOR FATHER TO BE PURGED OF CIVIL CONTEMPT.**

¶18-3-40. *In re O'Keeffe*, No. 05-18-00371-CV, 2018 WL 2296495 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (05-21-18).

**Facts:** Father was held in contempt for failing to pay child support, medical support, and uninsured medical expenses. He was sentenced to six months' confinement for criminal contempt and an additional six months' confinement for civil contempt. To purge himself of the civil contempt, Father would have to pay the full arrearages plus the attorney's fees award against him for fees and costs incurred in the enforcement proceeding. After serving his criminal sentence, Father filed a petition for writ of habeas corpus arguing that (1) the civil contempt order was void because he had no apparent means to pay the arrearage, and therefore, confining him until he pays the arrearages violates his due proceed; and (2) the payment of fees and costs as a condition to purge contempt was improper.

**Holding: Writ of Habeas Corpus Granted in Part and Denied in Part**

**Opinion:** A contempt order imposing a coercive restraint is void and subject to collateral attack by habeas corpus if the condition for purging the contempt is impossible of performance. A person who is obligated to pay child support may plead, as an affirmative defense to an allegation of contempt, that he: (1) lacked the ability to provide support in the amount ordered; (2) lacked property that could be sold, mortgaged, or otherwise pledged to raise the needed funds; (3) attempted unsuccessfully to borrow the needed funds; and (4) knew of no source from which the money could be borrowed or legally obtained. The contemnor must establish all four elements of the defense. *Contrary to Father's assertion, the standard for establishing indigency for appointment of counsel is different from the standard for establishing an inability to pay arrears.* The inability-to-pay threshold is necessarily higher than the indigence threshold. Thus, Father being approved for indigency status and appointment of an attorney, alone, was insufficient to establish his affirmative defense of inability to pay.

The portion of the order including the fees and costs award as part of the amount required for Father to purge himself of contempt was void because Father was not held in contempt for failing to pay those costs and fees. Additionally, the fees and costs were not due until approximately 30 days after

Father would be released, and a party may not be confined for failure to pay a judgment that is not yet due.

***Editor's Comment:** Affidavit of indigency uses a lower standard than an inability to pay defense. So, just because an obligor gets a court-appointed attorney does not mean that the inability defense is automatically proven. For example, the indigency standard doesn't look to retirement assets or to the ability to borrow from family. To show inability to pay, the obligor must check off those additional boxes. M.M.O.*

**SAPCR**  
**FAMILY VIOLENCE/PROTECTIVE ORDERS**

**REGARDLESS OF PROTECTIVE ORDER AGAINST MOTHER, COURT ENTITLED TO RECEIVE FATHER'S PHYSICAL ADDRESS IN CAMERA**

¶18-3-41. *In re* OAG, No. 05-18-00086-CV, 2018 WL 1725069 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (04-10-18).

**Facts:** Mother and Father agreed to a protective order against her. The parties additionally agreed that Mother's possession of the Children would be supervised. Mother was ordered to pay child support, but because she did not do so, the parties agreed to a judgment for arrearages. Over the next few years, both parents sought modifications. In a motion, Mother complained that she had not seen the Children in two years and that, although Father had been instructed to work towards reunification, he had not done so. During a hearing, at which Father did not appear, the trial court asked if anyone knew where the Children were. Neither Mother nor the OAG knew. The judge expressed concern with continuing a child support obligation for someone who had "disappeared" and "where we don't even know where the children are or if they're alive." The court noted that the "last thing we heard" was one child was suicidal and was ordered to undergo a psychological evaluation. Thus, the trial court signed an order requiring the OAG produce Father's address and phone number to the court in camera. The OAG appealed, arguing that due to the protective order, it was prohibited from releasing Father's contact information.

**Holding:** Writ of Mandamus denied in part and conditionally granted in part

**Opinion:** The Texas Family Code provides that a Title IV-D agency may release privileged or confidential information to administer child support. However, the Code also prohibits releasing information of a person's physical location if a protective order has been entered with respect to the person and if there is reason to believe that the release of the information may result in harm. No one disputed that Mother was not entitled to receive the information. The record showed that the trial court was concerned about the health and safety of the children, given that no one before the court knew the children's location or welfare. The statute's purpose is to protect the Children and Father from the release of information to Mother, not to protect the children and Father from the release of the information to the court with continuing, exclusive jurisdiction.

## PROTECTIVE ORDER SUPPORTED BY IMPLIED FINDING THAT FAMILY VIOLENCE WAS LIKELY TO OCCUR IN THE FUTURE.

¶18-3-42. *In re M.I.W.*, No. 04-17-00207-CV, 2018 WL 1831678 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-18-18).

**Facts:** During a temporary orders hearing, evidence established Father had used methamphetamines, abused Mother, and attempted to kill Mother. The trial court signed a protective order in favor of both Mother and the Child. Father appealed, arguing in part that the trial court erred in failing to make an express finding that family violence was likely to occur in the future and that the written order conflicted with the oral pronouncement.

### Holding: Affirmed

**Opinion:** Although the Tex. Fam. Code requires a finding that family violence is likely to occur in the future, there is no requirement that finding be express. Further, Father did not properly request findings of fact and conclusions of law. Moreover, the evidence supported an implied finding that family violence was likely to occur in the future.

The trial court orally granted a protective order in favor of Mother. The written order granted a protective order in favor of both Mother and the Child. The written order did not “conflict” with the oral pronouncement, and even if there was a conflict, a written order prevails over a conflicting oral pronouncement.

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## TESTIMONY OF MOTHER’S HUSBAND’S EX-GIRLFRIEND REGARDING HUSBAND’S PAST ACTS OF VIOLENCE RELEVANT TO MOTHER’S ACCESS TO CHILDREN.

¶18-3-43. *in re E.J.P.*, No. 07-17-00304-CV, 2018 WL 2325564 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (05-22-18).

**Facts:** Father filed a motion to modify the parent-child relationship because Mother’s new husband was threatening and mistreating the Children. At trial, over Mother’s objection, her husband’s ex-girlfriend testified about the husband’s past. The trial court entered an order barring Mother from exposing the Children to her husband until he successfully completed a parenting class and a Batterers Intervention Prevention Program. Mother appealed.

### Holding: Affirmed

**Opinion:** Past conduct of a parent can be indicative of how a parent will act in the future. Additionally, the individuals with whom the parent associates and to whom the child is exposed can hardly be ignored. Just as a parent’s history is relevant in deciding matters of custody, the history of those with whom the parent associates and to whom the child is exposed also has relevance.

**SAPCR**  
**REMOVAL OF CHILD AND**  
**TERMINATION OF PARENTAL RIGHTS**

**BECAUSE ANOTHER COURT HAD CONTINUING EXCLUSIVE JURISDICTION, TERMINATION ORDER WAS VOID.**

¶18-3-44. *In re L.S.*, \_\_\_ S.W.3d \_\_\_, No. 06-17-00113-CV, 2018 WL 1281692 (Tex. App.—Texarkana 2018, no pet. h.) (03-09-18).

**Facts:** TDFPS filed a suit to terminate the parental rights of the Child and his two half-siblings. After the trial court terminated Father's parental rights to the Child, Father appealed.

**Holding: Trial Court Judgment Vacated and Dismissed**

**Opinion:** Before the TDFPS termination proceeding, a different county had rendered a final judgment adjudicating Father as the Child's father, appointing him joint managing conservator, giving him a possession schedule, and ordering him to pay monthly child support. Thus, that court had acquired continuing exclusive jurisdiction.

Chapter 262 allows TDFPS to seek emergency and temporary orders in a court even if another court has continuing exclusive jurisdiction, but only the court with continuing exclusive jurisdiction can render final orders.

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**MOTHER FAILED TO PRESERVE FACTUAL SUFFICIENCY COMPLAINT AFTER JURY TRIAL.**

¶18-3-45. *In re E.J.Z.*, \_\_\_ S.W.3d \_\_\_, No. 06-17-00109-CV, 2018 WL 1612597 (Tex. App.—Texarkana 2018, no pet. h.) (04-04-18).

**Facts:** TDFPS sought to terminate the parents' parental rights to their two Children because one of the Children sustained massive injuries, which the other Child witnessed. The primary issue presented to the jury was whether the injuries were a result of abuse or an illness. After reviewing the evidence, the jury found that termination was supported by both an endangerment finding (subsection E) and by Father's failure to comply with a court order (subsection O). Mother and Father both appealed. Mother challenged only the factual sufficiency of the jury's verdict. Father challenged the factual sufficiency and complained that the trial court refused his request for a jury instruction that his failure to comply with a court order could be excused if it was unreasonable for him to be required to comply.

**Holding: Affirmed**

**Opinion:** To preserve a factual sufficiency complaint for appeal after a jury trial, an appellant must file a motion for new trial. Mother failed to file a motion for new trial, so her sole issue was not preserved.

Although Father complained about the jury instruction related to its finding that termination was supported under [Tex. Fam. Code § 161.001\(b\)\(1\)\(O\)](#), the evidence supported the finding that termination was supported under [Tex. Fam. Code § 161.001\(b\)\(1\)\(E\)](#). Accordingly, the appellate court was not required to address Father's jury instruction complaint.

**Editor's Comment:** *This is a good reminder to know when, in a bench v. jury trial, it's necessary to file a motion for new trial. Here, not doing so meant the issue wasn't preserved on appeal, so the COA couldn't review the issue. J.H.J.*

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### **HOLLEY FACTORS SUPPORTED TERMINATION.**

¶18-3-46. *In re A.R.C.*, \_\_\_ S.W.3d \_\_\_, No. 08-17-00220-CV, [2018 WL 1663819 \(Tex. App.—El Paso 2018, no pet. h.\)](#) (04-06-18).

**Facts:** Mother had a long history of drug use and violence. The Children were frequently exposed to her bad acts and could demonstrate a knowledge of the terms “blow job” and “humping.” Mother was caught trying to sneak drugs in her private parts and had used methamphetamine. After a bench trial, the trial court terminated her rights on endangerment grounds and on the fact that she had been convicted of a criminal offense that resulted in her not being able to care for the Children for at least two years. Mother appealed, challenging only the best interest finding.

**Holding: Affirmed**

**Opinion:** After reviewing the *Holley* factors, the evidence supported a finding that termination was in the Children’s best interest.

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### **EVIDENCE OF VIOLENCE AND DRUG USE SUPPORTED TERMINATION OF PARENTS’ PARENTAL RIGHTS.**

¶18-3-47. *In re K-A.B.M.*, \_\_\_ S.W.3d \_\_\_, No. 08-17-00228-CV, [2018 WL 1940519 \(Tex. App.—El Paso 2018, no pet. h.\)](#) (04-25-18).

**Facts:** The termination proceeding began when Mother and Father were arrested for possession of 102 pounds of marijuana; although, the criminal case was dismissed for lack of probable cause to support the search. Mother and Father had a history of drug use and violence. After a final hearing, the trial court terminated both parents’ parental rights to their Children. Both parents appealed.

**Holding: Affirmed**

**Opinion:** Both Mother and Father engaged in verbal and physical altercations requiring police intervention so frequently that several of the police officers working the local substation became familiar with them. Police found a methamphetamine pipe in Mother’s purse a month before the termination hearing. Mother failed to participate in outpatient drug therapy and refused to submit to drug testing on three occasions. Father was arrested for violation of a protective order. Father was arrested for theft of a pack of beer from a convenience store. Father failed to participate in therapy to address domestic violence. Additionally, after applying the *Holley* factors, the evidence supported a finding that termination was in the Children’s best interest.

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### **BECAUSE THE ONLY RELIEF AVAILABLE WAS TO COMPEL TRIAL COURT TO HOLD AN ADVERSARY HEARING, FATHER’S PETITION FOR WRIT OF MANDAMUS WAS MOOT BECAUSE HEARING HELD BY THE TIME HE FILED.**

¶18-5-48. *In re Justin M.*, \_\_\_ S.W.3d \_\_\_, No. 06-18-00014-CV, [2018 WL 2011906 \(Tex. App.—Texarkana 2018, orig. proceeding\)](#) (05-01-18).

**Facts:** TDFPS removed four children from Mother and Father’s care. Mother was the mother of all four children, and Father was the presumed Father of the Child. Father filed a petition for writ of mandamus



complaining that the trial court abused its discretion in failing to timely hold an initial and adversary hearing and in naming TDFPS temporary managing conservator of the Child.

**Holding: Writ of Mandamus Denied**

**Opinion:** The scheduling requirements for the initial and adversary hearings after removal are procedural, not jurisdictional. If a court fails to timely schedule a hearing, the parent may file a petition for writ of mandamus to compel the court to promptly conduct a hearing. Additionally, the purposes of the initial and adversary hearings are essentially the same except the adversary hearing additionally affords the parents the opportunity to present evidence and to hear and challenge TDFPS's evidence. Here, by the time Father filed his petition for writ of mandamus, the court had already held the adversary hearing, so Father's issue was moot.

When determining whether continuing danger to a child warrants continued removal from a parent, the court may consider a parent's abuse or neglect to another child. Here, while there was no direct evidence of abuse to the Child, there was ample evidence that Father had abused the Child's three siblings. Further, Father had sexually assaulted another child in the past.

**MISCELLANEOUS**

**PETITIONER UNABLE TO ARTICULATE COHERENT REASON TO CHANGE NAME.**

¶18-3-49. *In re Muse*, No. 09-17-00388-CV, 2018 WL 1097668 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (03-01-18).

**Facts:** Shawn Lee Muse sought to change his first name to "Lord Shawn-Lee House of Muse." He stated that he did not want a middle name or surname; that the change would be in the community's interest because "I will no longer be contributing to the public debt in operating a bankruptcy;" and that "nobody spells their name in all caps."

**Holding: Affirmed**

**Opinion:** Muse's unverified petition failed to comply with [Tex. Fam. Code § 45.102\(a\)](#).

★★★TEXAS SUPREME COURT★★★

**ERROR TO EXCLUDE VIDEO EVIDENCE REFUTING EMPLOYEE'S CLAIM WITHOUT FIRST VIEWING THE VIDEO'S CONTENTS; VIDEO IMPROPERLY EXCLUDED BECAUSE DID NOT UNFAIRLY PREJUDICE EMPLOYEE'S CASE.**

¶18-3-50. *Diamond Offshore Servs., Ltd. v. Williams*, \_\_\_ S.W.3d \_\_\_, No. 16-0434, 2018 WL 1122368 (Tex. 2018) (03-02-18).

**Facts:** Employee was injured while working on an off-shore drilling rig. He sued his employer in a personal injury suit. During trial, Employer claimed that Employee had been exaggerating his injuries and sought to enter into evidence a video filmed by a private investigator that showed Employee doing tasks around his home that allegedly caused the Employee immense pain. Employee argued that he did those tasks despite the pain, he could not do them for as long as he used to, and he had to take many pain killers to endure the pain during and after completing those activities. The trial court informed Employer that the videos could be used as rebuttal evidence only, and because Employee ad-

mitted to the jury that he attempted to do those tasks to the extent he was able, there was nothing to rebut. After a jury trial, Employee was awarded \$10 million in damages, including about \$4 million for pain and suffering. Employer appealed, arguing the trial court erred in excluding the video.

**Holding: Reversed and Remanded**

**Opinion:** “If, as it is often said, a picture is worth a thousand words, then a video is worth exponentially more.” As a general rule, a trial court should view evidence before ruling on admissibility when the contents of the video are at issue. Exceptions exist if viewing the video is unnecessary or extremely onerous; however, no such exception existed here.

Here, the contents of the video went to the heart of the defense’s case. Evidence should not be set aside merely because it is prejudicial, but rather only when it is *unfairly* prejudicial. Mere damage to a case does not constitute unfair prejudice. The video did not appear to be altered in any way, and the filming was clearly done on two different days. Employee was free to explain to the jury what was not shown in the videos.

*Editor’s Comment: Before excluding evidence the court should examine it. If its video evidence, the court should review it before ruling. M.M.O.*

*Editor’s Comment: Wow. A \$10 million verdict reversed over an evidence ruling! It’s a unicorn, as that never seems to happen. Evidence should be excluded only if it is unfairly prejudicial. Here, it seems the court excluded it just because it damaged employee’s case. That doesn’t make sense—that’s the point of evidence. Evidentiary rulings rarely ever cause the reversal of a verdict or rendition, because there is normally just harmless error. It’s fascinating to me that this one video caused such harm to overturn the verdict. J.H.J.*

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**EX-WIFE FAILED TO ESTABLISH A PRIMA FACIE CLAIM TO PREVENT DISMISSAL OF HER CAUSE OF ACTION PURSUANT TO TCPA.**

¶18-3-51. *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (03-15-18).

**Facts:** During the divorce proceeding, Husband averred by affidavit that he had no interest in a particular company. Subsequently, in a separate proceeding, Husband introduced a contract signed during the marriage that specified an employment agreement and contingent compensation structure. A year after the divorce, he married Widow. Upon Husband’s death, Widow was named the administrator of Husband estate. Ex-Wife filed a claim in the probate court, alleging common-law fraud, fraud by non-disclosure, and conversion. She sought a partition of the property interest. Widow filed a motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). Ex-Wife argued that because the divorce involved a private matter, not one of public concern, the TCPA did not apply. The probate court denied the motion to dismiss, and Widow filed an interlocutory appeal.

**Holding: Reversed and Rendered and Remanded**

**Opinion:** The TCPA exists to safeguard the constitutional rights of people to petition, speak freely, associate, freely, and otherwise participate in government to the maximum extent permitted by law while simultaneously protecting an individual’s right to file meritorious lawsuits for demonstrable injury. The TCPA is sometimes referred to as an anti-SLAPP (strategic lawsuit against public participation) law. The TCPA’s dismissal procedure is a two-step process. First, the movant must show that the legal action against her is based on, relates to, or is response to her exercise of the right of free speech, right to petition, or right of association, as defined by the TCPA. Second, the nonmovant must establish by clear and specific evidence a prima facie case for each essential element of the claim in question. This requires more than mere notice pleading.

The TCPA specifies the scope of communications included within the definitions of the “exercise of the right to free speech” and the “exercise of the right to petition.” Whatever might be connoted by a reference to “free speech” in other contexts, for purposes of the TCPA the “exercise of the right of free speech” is defined as “a communication made in connection with a matter of public concern.” Similarly, the “Exercise of the right to petition” is defined to include, among other things, “a communication in or pertaining to...a judicial proceeding...” Critically, the words “matter of public concern” are not included as any part of the statutory definition of the “exercise of the right to petition” for purposes of the TCPA. “‘Communication’ includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.”

Pursuant to the plain language and definitions of the TCPA, Widow established that Ex-Wife’s claims were based on Husband’s exercise of the right to petition, and thus, the TCPA applied. However, in her response to the motion to dismiss, Ex-Wife presented neither argument nor evidence to establish a prima facie case to support her claims. Accordingly, the probate court was required to dismiss Ex-Wife’s claims and to award Widow costs, fees, and expenses.

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### **WITHOUT FINAL ORDER SIGNED WITHIN TRIAL COURT’S PLENARY POWER, NO NEW TRIAL COULD BE GRANTED.**

¶18-3-52. *In re Johnson*, \_\_\_ S.W.3d \_\_\_, No. 10-17-00320-CV, 2018 WL 1415724 (Tex. App.—Waco 2018, orig. proceeding) (03-21-18).

**Facts:** After a default judgment, Respondent sought a new trial, which was orally granted by the trial court. The court then issued a letter ruling to the parties. Subsequently, the trial court signed a final order granting the new trial. Petitioner filed a petition for writ of mandamus, arguing that the letter ruling was not a final order and that the actual final order was not signed until after the trial court’s plenary power expired. Respondent argued that the letter ruling granting the new trial was issued within the court’s plenary power and was sufficient to make the judgment valid.

### **Holding: Writ of Mandamus Conditionally Granted**

**Opinion:** Although some appellate courts look to the trial court’s intent when issuing a letter ruling, the Waco court determined that the inquiry must be restricted to the four corners of the document. Here, the letter stated, “The Court *will* sign an order consistent with this ruling when presented.” (emphasis added) The language indicates future action, which meant the letter ruling was not a final order. The subsequent final order was not signed until after the court’s plenary power expired and was, thus, void.

**Editor’s Comment:** *Motion for new trial following default, the judge’s letter ruling said the court “will” sign an order for new trial. So, the letter ruling wasn’t an order. No order was signed before plenary power expired. Oops. M.M.O.*

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### **TRIAL COURT HAD NO BASIS FOR RULE 13 SANCTIONS.**

¶18-3-53. *In re E.V.*, No. 04-16-00626-CV, 2018 WL 1402064 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (03-21-18).

**Facts:** Mother filed a divorce in Bexar County. The court entered an order that the case would be dismissed if Mother did not pay certain costs by a date certain. Although Mother did not pay, the case was not dismissed. Mother then filed a petition for divorce in San Carlos Apache Trial Court and obtained a default decree. Father then filed an answer and counter-petition in Bexar County. The Bexar County court dismissed the cause upon learning of the tribal court’s final decree. Father appealed that order.

While the appeal was pending, Father filed a motion for emergency relief pursuant to [Tex. Fam. Code 152.204](#) (UCCJEA), seeking to be named the conservator with the exclusive right to designate the Children's primary residence. The court determined it did not have emergency jurisdiction under the UCCJEA. Mother sought sanctions, but no order was signed.

The appellate court later determined that the tribal court did not have jurisdiction to render a decree and Bexar County had not been divested of jurisdiction.

Mother then sought to dismiss the suit in which Father sought emergency relief because, after the appeal had remanded the original divorce, two Bexar proceedings were simultaneously pending. Mother sought sanctions against Father for filing the second Bexar petition and for Father obtaining an ex parte TRO in that cause without first attempting to contact opposing counsel pursuant to one of the local rules. The trial court granted Mother's request and ordered Father to pay \$1,000 in sanctions under Rule 13. Father appealed the sanctions order.

### **Holding: Reversed in Part; Affirmed in Part**

**Opinion:** Father could not have filed a pleading seeking immediate relief in a cause that had been dismissed, and the appellate court had no authority to exercise temporary jurisdiction under the UCCJEA. However, the UCCJEA does provide a means by which Father could seek emergency relief from the trial court under a new cause number. That he ultimately did not establish that he was entitled to emergency relief is not a basis for sanctions because he had a basis in law for filing his pleading.

Rule 13 provides that sanctions are available for violations of that rule, not for violations of other rules. Regardless of whether Father violated a local rule, nothing in the record demonstrated that Father violated Rule 13.

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### **MOTHER FAILED TO PRESERVE SUFFICIENCY COMPLAINTS AND WAS NOT ENTITLED TO COMPLAIN OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

¶18-3-54. *In re A.B.*, \_\_\_ S.W.3d \_\_\_, No. 09-17-00365-CV, [2018 WL 1414412](#) (Tex. App.—Beaumont 2018, no pet. h.) (03-22-18).

**Facts:** TDFPS filed a petition for the protection of the Child. During the proceedings, the Child's Half-Sister and another blood relative each filed petitions in intervention seeking sole managing conservatorship of the Child. After a jury trial, Half-Sister was appointed managing conservator, and Mother was appointed possessory conservator. Mother appealed, challenging the factual and legal sufficiency of the judgment and complaining of ineffective assistance of counsel.

### **Holding: Affirmed**

**Opinion:** To preserve a factual sufficiency complaint after a jury trial, a party must file a motion for new trial. To preserve a legal sufficiency complaint in a jury trial, a party must: move for instructed verdict, move for JNOV, object to a jury question, move to disregard the jury's answer to a vital fact question, or move for a new trial. Mother did not preserve her issues for appeal.

A parent facing a petition to terminate his or her parental rights is entitled to an attorney and may raise a claim of ineffective assistance of counsel. Here, although a request to terminate was included in TDFPS's first petition, that request was not sought at trial.

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## FATHER FAILED TO ESTABLISH ERROR IN THE ADMISSION OR EXCLUSION OF EVIDENCE DURING JURY TRIAL.

¶18-3-55. *In re C.F.M.*, No. 05-16-002865-CV, 2018 WL 1704202 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (04-09-18).

**Facts:** Father filed for divorce in 2009. Father had a narcissistic personality disorder with antisocial traits. He and Mother had two Daughters. One of the Daughters made an outcry of sexual abuse against Father, but the Daughter later recanted. The trial court rendered temporary orders that Father's access to the Daughters be supervised. Asserting that supervised possession was hard on the Daughters, Father failed to consistently exercise his access. By the time of trial, he had gone over two years without seeing the Daughters as provided in the court order. Despite the orders, Father saw one of the Daughters at least twice unsupervised by showing up at sporting events. Over the course of the proceedings, Father failed to comply with many of the court's orders and was subjected to discovery sanctions. Father was twice jailed for contempt but was released after petitioning for writs of habeas corpus. After a jury trial, Mother was appointed managing conservator, Father was appointed a possessory conservator with supervised possession, and Father was found to have committed fraud with damages to Mother of approximately \$1.1 million.

### Holding: Affirmed

**Opinion:** Father argued that the trial court erred in excluding his therapists as an expert witness as a discovery sanction. However, Father did not challenge any of the findings issued by the trial court supporting the exclusion.

Father argued the trial court erred by admitting evidence that he assaulted a fellow student at SMU 25 years before the trial. However, Mother's attorney asked Father about the alleged assault, and Father denied it. Questions asked by attorneys are not evidence, and Father did not object to the question on the ground it had no basis in fact and was unfairly prejudiced. Father objected only on relevance grounds.

Father complained of the admission of evidence that he was arrested and charged with criminal fraud. However, his objection to documentary evidence supporting the claim was sustained, and no testimony addressed an arrest or charges. Father admitted without objection that he switched tags on a shirt in a department store. Further, the evidence was relevant to the issues of his narcissistic and antisocial tendencies.

Father complained of the admission of a 911 call from his attorney's office about him exhibiting rage. Father asserted the evidence was "rank hearsay" but cited no authority to support that assertion. He further offered no evidence why it was not admissible under the public records exception to hearsay.

Father complained of the admission of evidence of a civil suit against him because the judgment against him was reversed on appeal. However, Father cited no authority to support why the reversal would make the evidence inadmissible. Moreover, Father had claimed that the judgment was the basis for his failure to pay child support and, thus, was relevant to the issues at trial.

Father complained of the admission of evidence of a lawsuit in which he was accused of "fraud" because the claims were "immediately dismissed." Father cited no authority to support why the dismissal would make the evidence inadmissible. Further, the evidence was used as impeachment evidence; the claims included appropriating embezzled funds, conversion, conspiracy, unjust enrichment, and money had and received, not fraud, and evidence showed the case was pending for four to sixteen months and was not immediately dismissed.

Father complained of the admission of evidence that he shoulder checked two women in his gated community. However, when the issue was first addressed, Father's objections were sustained. The second time the issue came up, testimony of the court-appointed psychiatrist was entered without objection. Thus, the issue was not preserved for appeal.

Father complained of the admission of evidence of his prior bad acts, asserting that the evidence was inadmissible character evidence under [TRE 404\(b\)](#). However, the evidence was used to support Mother's position that Father had a narcissistic personality disorder and antisocial traits. Additionally, although on appeal Father complained the evidence was inadmissible under [TRE 608 and 609](#), he failed to raise those objections to the trial court.

Father complained that certain prior court orders should not have been admitted because they included court findings and, thus, were judicial testimony. However, the Texas Supreme Court has held that findings are not testimony but are comments on the weight of the evidence. While such statements should have been redacted, Father failed to raise that complaint to the trial court, and thus the issue was not preserved for appeal.

Father complained of the exclusion of Mother's bankruptcy plan in his bankruptcy pleading for the purpose of showing characterization of assets. He asserted that Mother's plan was an admission by party opponent and that Mother opened the door to the evidence by addressing the bankruptcy in her case in chief. Father failed to raise the party-opponent-admission argument to the trial court, so that argument was not preserved. Additionally, Mother relied on the bankruptcy documents solely to establish Father's untruthfulness because the assets included in his bankruptcy schedules did not match the assets disclosed in his inventory and appraisal in the divorce proceeding. Therefore, Mother did not open the door to use the evidence for characterization purposes. Moreover, the bankruptcy schedules did not include any tracing of Father's alleged separate property and, thus, could not be considered clear and convincing evidence to support his separate property claims.

Father complained that the trial court erred in allowing the amicus attorney to participate in the trial beyond the limits of the Family Code. However, contrary to Father's assertion, the amicus did not testify, rather the amicus offered a recommendation at the end of the trial. Moreover, the trial judge instructed the jury that argument of attorneys was not evidence and that only testimony given in the witness stand was to be construed as evidence.

Father further complained that the trial court erred in admitting emails from the amicus attorney as evidence because the emails constituted improper testimony. Father only preserved error as to one email that was admitted. Even if the trial court erred in admitting that email, Father failed to show how the admission of that email probably caused the rendition of an improper judgment.

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### **ABUSE OF DISCRETION TO AWARD ALL COSTS, FEES, AND EXPENSES INCURRED BY WIFE IN THE FUTURE ENFORCEMENT AND COLLECTION OF JUDGMENT WHEN NO EVIDENCE SUPPORTED SUCH REQUEST.**

¶18-3-56. [Riley v. Riley, No. 05-17-00385-CV, 2018 WL 1790067 \(Tex. App.—Dallas 2018, no pet. h.\) \(mem. op.\) \(04-16-18\).](#)

**Facts:** The parties' divorce decree required Husband to pay attorneys' fees to Wife's attorneys, but he failed to do so. Wife filed a motion for enforcement by contempt. The trial court granted Wife a judgment for the fees, pre- and post-judgment interest, reasonable attorney's fees incurred in the enforcement proceeding, and "all costs, fees, and expenses, including reasonable and necessary attorneys' fees incurred by [Wife] in the enforcement and collection of this Judgment." Husband raised a number of complaints on appeal, including a complaint that the evidence did not support an award of future costs and fees. Wife responded that because Husband failed to raise that complaint to the trial court, it was waived for appeal.

**Holding: Reversed and Rendered in Part; Affirmed in Part**

**Opinion:** In a civil nonjury case, a complaint regarding the legal or factual insufficiency may be made for the first time on appeal. Wife presented no evidence respecting future costs, fees, and expenses.

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## **MOTHER'S NOTICE OF RESTRICTED APPEAL FILED 6 CALENDAR MONTHS AFTER THE ORDER WAS TIMELY.**

¶18-3-57. *In re A.B.S.*, No. 04-17-00642-CV, 2018 WL 1935508 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-25-18).

**Facts:** Father filed a SAPCR and obtained a default order. Six months later, Mother filed a notice of restricted appeal. Father argued that Mother notice of restricted appeal was untimely because it was filed more than 180 days (6 months x 30 days) after the order was signed.

### **Holding: Reversed and Remanded**

**Opinion:** A restricted appeal must be filed within 6 months of the order from which it complains. The Tex. Gov't Code defines a "month" as a calendar month. Thus, because the order was signed on April 4, Mother's notice of appeal filed on October 4 was timely.

Although Father asserted Mother was personally served, the only documentary evidence regarding service was a docket sheet entry that showed a return of service months after the order was signed. A failure to strictly comply with rules of service is an error apparent on the face of the record.

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## **NEW TRIAL GRANTED BECAUSE HUSBAND FAILED TO PRESENT VALUES OF COMMUNITY ESTATE'S ASSETS WHEN OBTAINING DEFAULT DECREE.**

¶18-3-58. *Chapa v. Chapa*, No. 04-17-00345-CV, 2018 WL 1934240 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-25-18).

**Facts:** Husband filed for divorce and served Wife with the petition, but Wife did not file an answer. Subsequently, Husband obtained a default divorce decree. Three months later, Wife filed notice of a restricted appeal.

### **Holding: Reversed and Remanded**

**Opinion:** In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer. Husband presented evidence of which assets were to be awarded to which party, but he presented no evidence as to the value of any of those assets. Thus, error was apparent on the face of the record.

**Editor's Comment:** Always remember to PUT ON EVIDENCE OF VALUE when you are defaulting a property division. Don't just go through a list of the property and a proposed division, like this Appellee! R.T.R.

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## **EVIDENCE OF LACK OF CURRICULUM AND ISOLATION OF CHILD SUPPORTED ORDER THAT CHILD ATTEND PUBLIC SCHOOL RATHER THAN BEING HOMESCHOOLED BY MOTHER.**

¶18-3-59. *In re M.C.K.*, No. 14-17-00289-CV, 2018 WL 1955065 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (04-26-18).

**Facts:** When the Child was an infant, orders were entered that gave Mother the exclusive right to make educational decisions for the Child. When the Child was four years old, Father filed a motion to enforce visitation. Mother responded with a petition to modify, seeking supervised visitation for Father. About a year later, the parties attended mediation and were able to resolve many of their issues, but they could not agree on an unpleaded issue: who would make decisions regarding the child's education. Mother

wanted to homeschool the Child, but Father wanted the Child to go to public school. The parties agreed that the issue would be tried to the court. At a hearing, Father sought to present the education issue, but Mother argued that Father had no affirmative pleading on file. The trial court granted Father's oral motion for a trial amendment.

Mother admitted that she followed no curriculum when homeschooling her older children and that she simply looked for used textbooks online or in secondhand stores. Mother could not name any child with whom the Child was friends. When Father asked the Child about what she was learning, the Child "clammed up" and would not say anything.

The trial court determined that the Child should attend public school unless the parents could agree otherwise. Mother appealed.

### **Holding: Affirmed**

**Opinion:** While Father never filed a petition to modify, he did file a motion for enforcement. In the family law context, Father's motion constituted a pleading that could be amended to include his request for the right to make decisions regarding the Child's education. Father was permitted to amend his pleading so long as it would not prejudice Mother. Mother admitted that there was no surprise related to the requested amendment. Her only concern was that Father would be required to establish a material and substantial change. Further, although the amendment was not reduced to writing, Mother failed to raise this objection to the trial court.

Although a change in age alone is insufficient to establish a material and substantial change, Father showed that the parties had never made a plan regarding the Child's education and that the Child's needs were not being met. Additionally, Mother was not adhering to any curriculum, and the choice to homeschool was isolating the Child.

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### **ATTORNEY'S INTERVENTION, MOTION FOR SANCTIONS, AND MOTION TO ENFORCE PRIOR FEES ORDERS WERE COLLATERAL MATTERS AND COULD BE CONSIDERED AFTER HUSBAND AND WIFE FILED NONSUIT.**

¶18-3-60. *In re Bagheri*, No. 05-18-00110-CV, 2018 WL 2126825 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (05-09-18).

**Facts:** During Husband and Wife's divorce proceeding, they agreed to reconcile. Wife's counsel advised against signing an agreed motion to nonsuit and informed Wife that if she chose to move forward with the nonsuit, her counsel would withdraw. Before her counsel could withdraw, Husband's attorney filed a joint motion to nonsuit signed by Husband and Wife. Wife's counsel filed a petition in intervention seeking fees pursuant to its agreement with Wife, to enforce prior orders for Husband to pay attorney's fees directly to Wife's counsel, and seeking sanctions against Husband and his attorney. Husband argued that Wife's counsel could not intervene after the motion for nonsuit was filed. The trial court refused to sign an order of dismissal. Husband filed a petition for writ of mandamus.

### **Holding: Writ of Mandamus Denied**

**Opinion:** Although plaintiffs have a right to nonsuit their claims, and the trial court has no choice but to grant the nonsuit, plaintiffs do not have the absolute right to nonsuit someone else's claims they are trying to avoid. Further, a court retains jurisdiction after a nonsuit and may delay signing an order of dismissal to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit. Wife's counsel's intervention was not an attempt to assert itself into the personal matters of a reconciled couple; rather, the firm sought to recover fees awarded before the nonsuit.

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**ATTORNEY'S FEES AS CHILD SUPPORT IMPROPER WHERE NO FINDING THAT ENFORCEMENT OF POSSESSION NECESSARY TO ENSURE CHILD'S PHYSICAL OR EMOTIONAL HEALTH OR WELFARE.**

¶18-3-61. *In re C.A.C.*, No. 05-17-00602-CV, 2018 WL 2126811 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-09-18).

**Facts:** Father filed a motion to enforce possession or access and a motion to modify the parent-child relationship. Mother filed a counter-petition to modify. After a final hearing, Father's attorney sent a proposed order memorializing the court's rulings to Mother's attorney for review. Instead of sending Father's attorney her objections or revisions, Mother's attorney obtained the court's signature on a different proposed order. Father's attorney filed a motion to set aside the order on the grounds that it contained a number of errors. The trial court set aside the order, entered a new order, and awarded Father his attorney's fees as child support. Mother appealed the attorney's fees award, arguing Father's attorney presented no documentary evidence to support the attorney's fee award and that the fees could not have been awarded as child support.

**Holding: Affirmed as Modified**

**Opinion:** Father's attorney was not required to present documentary evidence because he proved up his fees under the "traditional method" with evidence in the form of testimony. The traditional method requires evidence of:

- (i) the time, labor and skill required to properly perform the legal service;
- (ii) the novelty and difficulty of the questions involved;
- (iii) the customary fees charged in the local legal community for similar legal services;
- (iv) the amount involved and the results obtained;
- (v) the nature and length of the professional relationship with the client; and
- (vi) the experience, reputation and ability of the lawyer performing the services.

In an enforcement of possession suit, a court may only award attorney's fees as child support if the court finds "that the enforcement of the order with which the respondent failed to comply was necessary to ensure the child's physical or emotional health or welfare." Here, the trial court made no such finding, and Father's attorney made no effort to segregate fees incurred in the modification suit from those incurred in the enforcement suit.

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**COMPLAINT REGARDING EXCLUSION OF EVIDENCE WAS NOT PRESERVED FOR APPELLATE REVIEW BECAUSE THERE WAS NO OFFER OF PROOF MADE AT TRIAL.**

¶18-3-62. *Jacob v. Jacob*, No. 01-16-00835-CV, 2018 WL 2141976 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (05-10-18).

**Facts:** Mother was obligated to pay child support for the Child. Subsequently, she had another child and filed a motion to modify her obligation. She asserted in her pleading and response to a request for disclosure that there had been a material and substantial change—in that she had a new baby—and that her obligation should be reduced by 2.5%. At trial, Mother attempted to testify as to increased expenses related to the new child, but Father objected on the grounds that neither her pleadings nor her discovery responses referenced increased expenses. The trial court sustained Father's objections. After the trial court denied Mother's requested relief, she filed a motion for new trial that was overruled by operation of law. Mother subsequently appealed.

**Holding: Affirmed**

**Opinion:** Mother failed to preserve her issue for appeal. To preserve a complaint about excluded evidence, the offering party must include the evidence in the record through an offer of proof or a bill of exception. Mother did not introduce an offer of proof that showed any increased costs in comparison to her net resources. Further, a motion for new trial alone cannot preserve error related to the admission or exclusion of evidence.

***Editor's Comment:** Another example of needing to know the rules. Always think about the record and what the reviewing court will see. If you don't preserve the record properly, you won't be able to make arguments for your client on appeal. J.H.J.*

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## NO FIDUCIARY RELATIONSHIP BETWEEN HUSBAND AND GIRLFRIEND.

¶18-3-63. *Markl v. Leake*, No. 05-17-00174-CV, 2018 WL 2191433 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-14-18).

**Facts:** During Husband and Wife's marriage, Husband met Girlfriend, with whom Husband began an affair that lasted nearly ten years. During that time, Husband and Girlfriend tried to conceive a child, discussed buying property together, traveled together, and shared intimate details of their lives. Girlfriend made Husband a beneficiary in her will, and they each took out life-insurance policies for the benefit of the other. Husband made significant upgrades to Girlfriend's house and another house she inherited. Husband acknowledged that Girlfriend did not pay him for his work on her homes but asserted that she knew that if they separated, he would get back his investment. Husband told Girlfriend he wanted to leave Wife for Girlfriend. He moved in with Girlfriend once, but after Girlfriend presented him with an ultimatum, Husband felt guilty and returned to Wife. Girlfriend threatened that if Husband broke up with her, she would tell Wife about the relationship.

Girlfriend accused Husband of assault when he broke into her house one evening. He claimed that he was preventing her from committing suicide. After returning home, Husband briefly explained to Wife what happened and later pleaded guilty for burglary with intent to commit assault.

Husband and Wife sued Girlfriend for breach of fiduciary duty, fraud, conversion, and promissory estoppel. Husband and Wife sought reimbursement for the expenses Husband made for Girlfriend's benefit. Girlfriend denied the allegations, raised affirmative defenses, and counterclaimed for assault, negligence, and IIED.

After Husband and Wife presented their claims to the jury, Girlfriend was granted a directed verdict as to the breach of fiduciary duty claim. The court held there was no authority that somebody in an extramarital relationship could have a valid claim for breach of fiduciary duty. The jury found that Husband committed assault but awarded Girlfriend no damages. Husband and Wife appealed.

### **Holding: Affirmed**

**Opinion:** Despite evidence that Husband and Girlfriend's relationship was similar to a marriage, there was no evidence that Husband was accustomed to being guided by Girlfriend's advice, that Girlfriend ever gave Husband financial advice, or that Girlfriend had otherwise assumed the role of a fiduciary towards Husband. If Husband wanted out of the relationship with Girlfriend, Girlfriend would tell Wife, and Husband would lose both women. If Girlfriend wanted out of the relationship, she had to "settle up on the property." Thus, each was acting in his or her own interest, not the others'. Moreover, recognizing Husband and Girlfriend's relationship as fiduciary in character, under the circumstances here, would make light of the very notion of concepts of trust and confidence associated with a fiduciary relationship between actual spouses.

***Editor's Comment:** You can't have a fiduciary relationship with both your wife and your girlfriend. I think the basic underlying principle is fairly obvious here. This case is also a good example of why you don't have a wife...and a girlfriend. J.H.J.*

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## EX-SPOUSES DO NOT OWE A FIDUCIARY DUTY TO ONE ANOTHER.

¶18-5-64. *Robbins v. Robbins*, \_\_\_ S.W.3d \_\_\_, No. 02-16-00285-CV, 2018 WL 2248561 (Tex. App.—Fort Worth 2018, no pet. h.) (05-17-18).

**Facts:** The divorce decree included provisions for the sale of the marital residence, including a provision that the parties would each receive 50% of the net sale proceeds. The parties subsequently agreed not to sell the residence until all their Children had finished high school. Twelve years after the divorce, Wife filed a motion for enforcement, claiming Husband failed to comply with the provisions for the sale of the marital residence. Wife also brought a breach-of-fiduciary-duty claim and requested attorney's fees, expenses, costs, and interest.

Wife asserted that at some point the house sustained fire damage, but Husband kept the insurance funds for himself and that, rather than repairing the house, he used the money to buy drugs. The house was condemned by the city, and Wife had to pay for demolition and removal expenses. Husband responded that he had addressed the repairs, that the city approved the rebuilding of the house, and that the house was torn down while he was in jail. He asserted that his accounts were frozen and that he did not have access to his records while he was in jail.

The trial court held that Husband had a fiduciary duty to protect Wife's 50% interest in the net proceeds. The court ordered that the property be sold and that 100% of the proceeds be awarded to Wife as damages. Additionally, the court ordered Husband to pay Wife's attorney's fees. Husband appealed.

### Holding: Reversed and Rendered

**Opinion:** While spouses owe fiduciary duties to one another, ex-spouses generally do not. Further, no evidence in the record indicated that the parties had an informal fiduciary duty to each other. Additionally, attorney's fees are not available for a breach-of-fiduciary-duty claim.

*Editor's Comment: Although divorced spouses no longer owe a fiduciary duty to one another, that fiduciary duty may still exist under other circumstances. When you bring a breach-of-fiduciary-duty claim after divorce (or any other cause of action), be sure to present sufficient facts to prove it up. J.H.J.*

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## DEFAULT JUDGMENT IMPROPER WHEN SERVICE DID NOT STRICTLY COMPLY WITH ORDER FOR SUBSTITUTED SERVICE.

¶18-5-65. *Creaven v. Creaven*, \_\_\_ S.W.3d \_\_\_, No. 14-17-00128-CV, 2018 WL 2306922 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (05-22-18).

**Facts:** Daughter sued Mother for improperly withdrawing funds from Daughter's college fund. An affidavit attached to Daughter's motion for substitute service stated that she had attempted to serve Mother at an address on "Cambrian Park Court." In the order granting substituted service, the court authorized service to an address on "Cambrian Park." In the return of service, the process server averred that he served Mother at an address on "Cambrian Court." Daughter then obtained a default judgment against Mother. Mother appealed.

### Holding: Reversed and Remanded

**Opinion:** There are no presumptions in favor of valid issuance, service, or return of citation. Substituted service must strictly comply with the order granting it.

Daughter asked the appellate court to take judicial notice of the fact that no other street in Houston was named “Cambrian.” The court declined because that evidence was not presented to the trial court. Further, appellate courts are reluctant to take judicial notice of matters that go to the merits of a dispute.

Presuming Daughter actually complied with the order, it was her responsibility to correct any errors in the return of service, which she did not do.

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## PREMATURE POST-JUDGMENT MOTION EXTENDED APPELLATE DEADLINES BECAUSE REQUESTED RELIEF WAS DENIED.

¶18-3-66. *In re D.V.D.*, No. 05-17-00268-CV, 2018 WL 2316014 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-22-18).

**Facts:** After a contentious divorce, Wife appealed a number of issues related to the characterization of property and the just and right division of the community estate. Husband responded that Wife’s notice of appeal was untimely filed.

### Holding: Affirmed

**Opinion:** A premature post-judgment motion is effective to extend appellate deadlines if the subsequent judgment does not grant all the relief requested in the premature motion. Here, the trial court issued a memorandum ruling. Wife filed a motion to reconsider, which was denied. Subsequently, the trial court signed a final decree. Nearly three months later, Wife filed her notice of appeal. Because the trial court denied Wife’s premature motion to reconsider, the appellate deadlines were extended, and Wife’s notice of appeal was timely.

Wife offered no evidence—just mere speculation—to challenge Husband’s tracing evidence that his separate funds were used to purchase a home during the marriage. Thus, the trial court did not err in finding the home was Husband’s separate property. However, with respect to disputed airline miles, the only evidence offered was the parties’ respective inventories. Husband listed the miles as separate, and Wife listed the miles as community. Without more, because the evidence was controverted, Husband did not meet his burden to establish the miles were separate. However, because there was no evidence of the value of the miles, the appellate court could not determine whether the error was harmful.

**Editor’s comment:** *I am concerned about the Court of Appeals treating a “Motion to Reconsider” as a post-judgment motion for purposes of extending the appellate deadlines, without more analysis. There was no indication that the motion to reconsider asked for a new trial, so it would not equate to a Motion for New Trial wherein the movant is required to actually ask for a new trial. See [Barry v. Barry](#), 193 S.W.3d 72, 74 (Tex. App.—Houston [1st Dist.] 2006, no pet.); [Mercer v. Band](#), 454 S.W.2d 833, 836 (Tex. App.—Houston [14th Dist.] 1970, no writ); see, e.g., [Finley v. J.C. Pace Ltd.](#), 4 S.W.3d 319, 320 (Tex. App.—Houston [1st Dist.] 1999, order) (although motion requested rehearing, it was motion for new trial because it sought to set aside judgment for the purpose of litigating the issues). If the motion asks for other relief (e.g., to enter a different judgment), it is not a motion for new trial. [Mercer](#), 454 S.W.2d at 836.*

*Sounds like it might have been more in the vein of a motion to modify, correct, or reform the judgment, but again, not clear because a judgment had yet to be entered because memorandum ruling specifically asked for ruling to be reduced to a judgment. Also, what was the effect of the “motion to reconsider” on the trial court’s plenary power—presumably, since the “motion to reconsider” was denied on the same day as the judgment was signed, did plenary power end 30 days later. Finally, does this “motion to reconsider” now preclude the filing of a real post-judgment, plenary power extending motion? It appears that the most likely reason for this opinion was to bend over backwards for the appellant. I would really suggest to all that reliance on this case to extend your appellate deadlines and/or the trial court’s plenary power would be very, very risky. GLS*



**Editor's Comment:** Ditto to all of the concerns raised by Georganna. I'm also surprised the court of appeals did not jump on any of the multiple waiver arguments raised by the appellee. In addition - be careful when stipulating to the award of certain properties prior to trial because the trial court does not have to consider those items in the just and right division when no one makes a specific request for the trial court to do so. You could end up with a very disproportionate estate by virtue of the parties' stipulations when the value of those assets to each party are not considered. R.T.R.

**Editor's Comment:** I agree with Georganna's comment. The court cited to *Ryland Enterprise, Inc. v. Weatherspoon*, 355 S.W.3d 664 (Tex. 2011) (per curiam), and *Brighton v. Koss*, 415 S.W.3d 864 (Tex. 2013) (per curiam), for the propositions that prematurely filed post-judgment motions may extend the time to file an appeal and that amended judgments that do not address all points of error asserted in a post-judgment motion may extend the time to appeal from the amended judgment. This case, however, deals with a motion to reconsider, not a motion for new trial or a motion to modify, correct, or reform the judgment. Although courts can liberally construe the rules to avoid procedural defects, this seems like a stretch. J.H.J.

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## MOTHER FOUND IN CONTEMPT FOR FAILING TO TRANSPORT CHILD TO MONTHLY COUNSELING SESSION PURSUANT TO AGREED ORDER.

¶18-3-67. *In re White*, No. 01-18-00073-CV, 2018 WL 2305524 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (mem. op.) (05-22-18).

**Facts:** Mother and Father signed an MSA in a prior SAPCR. Father filed a motion to enforce because Mother had not been transporting the Child regularly to counseling sessions related to a reunification plan. The trial court found Mother in contempt for cancelling a counseling session without rescheduling it and for failing to take the Child to counseling at least once a month. The court assessed punishment for each violation of confinement in jail but suspended commitment and placed Mother under community supervision for one year. Mother filed a petition for writ of habeas corpus, or in the alternative, writ of mandamus.

### Holding: Writ of Habeas Corpus Granted in Part; Denied in Part

**Opinion:** Father argued that Mother was not entitled to habeas relief because she was not confined. However, Mother's probation required that she appear for compliance hearings and report monthly to a community supervision office, which constituted a sufficient restraint on liberty to permit habeas relief.

The underlying order required Mother to abide by the counselor's recommendations for frequency of the Child's sessions. Mother's cancellation of a single appointment did not constitute a contemptuous violation of that requirement.

The underlying order also required Mother to transport the Child to counseling sessions at least monthly. However, Mother admitted that over a period of nine months, she only took the Child to four sessions. This was a direct violation of the action required by the order.

Finally, Mother's assertion that she was unable to force a 17-year-old, 6-foot-tall football player to attend counseling sessions against his will was without merit. The only individuals that testified about this conflict were Mother and the Child, who were both interested witnesses. Thus, the trial court was not bound by their testimony if the court disbelieved it.

**Editor's Comment:** Although Father argued that Mother was not entitled to habeas relief, which the court disagreed with, the opinion states that Mother requested mandamus relief in the alternative. If there's a possibility that relief may be unavailable, it's always a safe bet to plead in the alternative. J.H.J.

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## DESPITE ERRORS ON FACE OF RECORD, PROCEDURAL RULES PREVENTED APPELLATE COURT FROM CONSIDERING MOTHER’S LATE-FILED APPEAL.

¶18-5-68. *In re E.D.*, \_\_\_ S.W.3d \_\_\_, No. 02-16-00448-CV, 2018 WL 2343439 (Tex. App.—Fort Worth 2018, no pet. h.) (05-24-18).

**Facts:** Mother and Father had joint managing conservatorship of the Child, and Mother had the exclusive right to designate the Child’s primary residence. Father was granted no access to the Child after the court made a family violence finding against him.

Subsequently, Father sought to modify the prior order but had difficulty serving Mother. After obtaining a promise from Mother’s father to deliver to her the petition, Father obtained an order for substituted service and served Mother’s father. Mother did not answer or appear. In a nunc pro tunc judgment that corrected substantive errors, rather than clerical errors—which is an inappropriate use of a nunc pro tunc—the trial court appointed Father sole managing conservator and restricted Mother’s access to six supervised hours of visitation each month.

More than three months after the default judgment and two months after the nunc pro tunc judgment, Mother filed a motion to set aside the default judgment. The trial court agreed with Father that Mother’s motion was untimely. Mother then appealed.

### Holding: Dismissed

**Opinion:** The appellate court noted that “the trial court record before us is replete with errors,” but Mother’s appeal was untimely and had to be dismissed.

Because Mother had actual knowledge of the judgment 12 days after it was signed, she could not utilize [TRCP 306a](#) to extend the deadline to file a notice of appeal.

Mother argued that the order for substituted service extended her deadline to appeal. If substituted service is authorized by publication ([TRCP 109a](#)), the responding party has two years—rather than the usual thirty days. Here, Father requested substituted service, so he could leave the petition with Mother’s father. Father’s motion referenced [TRCP 106\(b\)](#), and the trial court’s order referenced Father’s motion. Nothing in the appellate record referenced [TRCP 109a](#). Thus, contrary to Mother’s assertions, service was not authorized by publication, she was not afforded two years to raise her appeal, and her appeal was untimely filed more than thirty days after the challenged order.

*Editor’s Comment: This is one of those sad cases where the safety of a child is put at risk because we have to follow the rules and because a parent (or her attorney) failed to follow them. Know the rules of procedure! And be sure that your client stays on top of his or her case. J.H.J.*

## HUSBAND NOT ENTITLED TO CONTINUANCE BECAUSE HIS FAILURE TO BE REPRESENTED AT TRIAL WAS DUE TO HIS OWN FAULT OR NEGLIGENCE.

¶18-3-69. *Gadekar v. Zankar*, No. 12-16-00209-CV, 2018 WL 2440393 (Tex. App.—Tyler 2018, no pet. h.) (mem. op.) (05-31-18).

**Facts:** Husband and Wife’s divorce proceedings lasted four years. After a jury trial, Wife was appointed sole managing conservator of the Child, and Husband was awarded a possession schedule on condition that he attend therapy. Husband had a history of mistreating Wife and the parties’ Child. The trial court confirmed Wife’s separate property, some of which was located in India, divided the community estate, and awarded Wife her attorney’s fees. Husband appealed on a number of grounds, including the court’s denial of his motion for a continuance after his fifth attorney withdrew, the exclusion of testimony from the parenting facilitator, and the division of the community estate.

### Holding: Affirmed

**Opinion:** Husband had five attorneys over a four-year period. The first attorney withdrew after two and a half months. The second after a year and four and a half months. The third, fourth, and fifth, after 28, 32, and 38 days respectively. The third and fourth withdrew because Husband did not cooperate. The fifth because the attorney was unable to effectively communicate with Husband. Husband had already received one continuance. The cumulative evidence supported a finding that Husband's failure to be represented by counsel was due to his own fault or negligence. Thus, the trial court did not abuse its discretion in denying Husband's second motion for continuance.

***Editor's Comment:** I think the problem here poses an interesting balance between denying a continuance and how much an attorney must divulge when withdrawing from a case. Confidences must be kept, but at what point does it become the fault of the client? J.H.J.*

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### **TRIAL COURT ERRED IN REFUSING TO ALLOW MOTHER TO FULLY PRESENT HER CASE AT HEARING ON MOTION FOR NEW TRIAL.**

¶18-3-70. *In re J.L.W.*, No. 05-17-00485-CV, 2018 WL 2749626 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-31-18).

**Facts:** When the Child was 5, Mother sought appointment as sole managing conservator. The trial court appointed the parents as joint managing conservators. Mother filed a motion for new trial, to which she attached an affidavit averring that she became pregnant by Father when she was 14 and he was 18. At the hearing on her motion for new trial, the court refused to allow Mother to testify and denied her motion. Mother appealed.

### **Holding: Reversed and Remanded**

**Opinion:** A trial court may not appoint a parent as joint managing conservator if the trial court receives credible evidence that the parent has committed a sexual assault in violation of [penal code section 22.001](#) resulting in the other parent becoming pregnant with the child.

When a motion presented a question of fact upon which evidence must be heard, the trial court is obligated to hear such evidence when the Motion for New Trial alleges facts, which, if true, would entitle the movant to a new trial and when a hearing for such is properly requested.

***Editor's Comment:** This case is a reminder to allege specific facts in a motion for new trial either by verifying the motion or attaching an affidavit, if those facts are not already a part of the record, and then properly requesting a hearing on your motion. The relief granted here may not have been available without it. J.H.J.*