SECTION REPORT
FAMILY LAW
http://www.sbotfam.org Volume 2023-3 (Summer)

SECTION INFORMATION

IN THIS MONTH'S REPORT

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FAMILY LAW SECTION, STATE BAR OF TEXAS
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MESSAGE FROM THE CHAIR

What an honor it is to be the Chair of your Family Law Section! I am standing on the shoulders of giants, which is a handy way to appear tall. Thank you, Joe Indelicato, our Immediate Past Chair, for passing on to me a section that is in such fine shape. Thank you also, Jonathan Bates, our outgoing Immediate Past Chair, for your years of dedicated service and wise counsel.

These are challenging times to practice family law. In a piece entitled "Do We Need Family Lawyers Anymore?" in the Section's May Section Update emailed to members on May 26, 2023, I wrote about the Texas Supreme Court directing the Texas Access to Justice Commission to examine existing rules and to propose modifications by this September. These modifications could include allowing non-attorney paraprofessionals to provide limited legal services, possibly without attorney supervision, and could include allowing non-attorneys to have economic interests in entities that provide legal services. I strongly encourage you to read the article, not because I wrote it, but because these or similar changes could radically change the practice of law, particularly family law. You have a voice, and you should express your opinions after investigating the issues, but the time for you to make a difference is running out.

These are also exciting times to practice family law in our great state. In late June, Cindy Tisdale, former Chair of the Family Law Section and my former mentor, will take over as President of the State Bar of Texas. We know she will do an outstanding job, but she needs our support. We always need family law practitioners to run as directors of the Bar. Please consider doing so.

Exciting changes are coming to the Family Law Section as well. With a goal of expanding benefits Section members enjoy, plans for this year include:

- Exploring more ways to increase pro bono service by Section members.
- Further improving the Section's stellar publications program and the Texas Bar Books's exceptional Family Law Practice Manual (a/k/a the Formbook).
- Developing new ideas for State Bar family law CLE programs, including programs that highlight interaction between family law and other areas of the law.
- Establishing resources for persons wanting to speak at State Bar family law seminars.
- Developing a mentorship program for future family law leaders.
- Identifying the important appellate opinions as they are issued and reporting them to section members in the Section's monthly emails.
- Monitoring and reporting legislative and judicial trends and developments to the membership.
- Surveying Section membership to learn members' opinions on issues that affect the practice of family law and then reporting those survey results.
- Drafting changes to court rules, such as discovery rules, to present to the Supreme Court Advisory Committee for adoption by the Supreme Court.
- Drafting legislation related to the legal profession or the improvement of legal services that is consistent with the opinion in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *cert. denied sub nom. McDonald v. Firth*, 142 S. Ct. 1442 (2022).

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- Spotlighting Texas family law legends and heroes in the Section Report, the monthly Section emails, and a Section YouTube channel.
- Working with law schools to encourage student enrollment in family law classes and participation in family law clinics and organizations.
- Promoting law school clerkships with family law practitioners and courts.
- Encouraging graduating law students to practice family law and join the Family Law Section.

If you have suggestions or opinions affecting the Section, please share them with a Family Law Council member. Council members' names and email addresses appear on the Section's website at https://sbotfam.org/the-family-law-section/officers/. Included among those officers and council members are our incoming Secretary, Lon Loveless, and new council members Adam Dietrich (returning for a second term), Christina Hollwarth, Lauren Melhart, Justin Morley, Rocky Pilgrim, Aaron Reimer, and Kimberly Pack Wilson. These new Council Members bring great energy and intelligence to the Council, as well representing diverse parts of Texas. Together with the rest of the Family Law Council, non-Council members serving on committees, liaisons to Council, and past chairs, you and I have a team of hard-working family law leaders and experts supporting us.

I hope we will see each other at the upcoming CLE seminars and meetings:

- The State Bar of Texas Annual Meeting will be held on June 22-23, 2023 at the JW Marriott Austin. Lisa Richardson and Sarah Keathley are Course Directors for the family law program the afternoon of June 22nd.
- The Advanced Family Law Seminar will be held on August 7-10, 2023 at the Marriott Rivercenter in San Antonio. Course Directors are Lon Loveless and Mary Evelyn McNamara. Tammy Moon is the Course Director of the 101 Course on August 6, 2023. Section awards will be given after the presentations end on August 7th, and there is a Section meeting after the presentations finish on August 9th.
- The New Frontiers in Marital Property Seminar will take place October 5-6, 2023 at the Francis Marion Hotel in Charleston, South Carolina. Course Director is Kelly Fritsch.
- The Advanced Family Law Drafting Course will take place December 14-15, 2023 at the Omni Hotel in Fort Worth. Course Director is Dwayne Smith.

And speaking of Dwayne Smith of Fort Worth, it is my honor to highlight Dwayne, who is also a council member.

Chris Wrampelmeier
Chair, Family Law Section

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SPOTLIGHT

DWAYNE SMITH

I am “that guy” that went to law school with the intention of practicing family law. My years in law school convinced me to take a detour through a tall building working as a corporate lawyer, but I quickly found my way into family court. I’ve learned two very valuable lessons during my career.

The first lesson is the importance of finding a good mentor. I was lucky enough to find that in Terry Gardner. Tom Vick once said of Terry in the Texas Bar Journal that he is “the most well-prepared, graceful, articulate, respectful gentleman that ever tried a lawsuit. He is a lawyer’s lawyer. I wanted to be like him since the first day I saw him in the courtroom.” Tom couldn’t be more right, and I feel very lucky to have been taken under Terry’s wing. None of us knew anything about practicing law when we graduated law school (or maybe it was just me…). It’s easy to develop bad habits if you’re not guided by someone who has been there before. I try to encourage all new lawyers to take the time to find not just a good lawyer, not just a good mentor, but also a good person to help show you the ropes. This only works if those of you on the other side of your career take the time to mentor those that come behind you. Our profession is better when we all work together to advance our knowledge and professionalism.

The other lesson that I’ve learned is the value of being involved in the Family Law Section. It took years of me checking the section membership box on my annual dues form before I had the curiosity to look into what the section does. I had no idea how involved the section was in my life! If you don’t already know, it is responsible for the Texas Family Law Practice Manual, the predicates manual, the Family Law at Your Fingertips series of books, and it presents the major CLEs and pro bono CLEs throughout the year. And that is just the tip of the iceberg! The members of the Family Law Council, along with countless volunteers from our section, improve the practice of family law every day.

I got involved in the section at the suggestion of Chris Nickelson, and I did so simply by walking up to the section booth at Marriage Dissolution and asking to volunteer. The folks at the booth couldn’t have been more welcoming. They immediately embraced me as a newcomer, invited me to dinner, and we became friends. That is not a unique experience. If you read through the spotlight articles from past Section Reports, you’ll find similar stories from nearly all of the authors. Getting involved is easy, and there are innumerable ways to find your place in the section. If you email any of the Council members, I’m confident that they’ll offer you the opportunity to get involved and get to know other volunteers. I look forward to meeting you at the section booth at Advanced!

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IN THE LAW REVIEWS AND LEGAL PUBLICATIONS

Texas

Out of the Shadows: The Hidden Foster Care System in Texas, Vianey **Martinez**, 101 Tex. L. Rev. 1495 (May 2023).

Non-Texas

Unwed Parents: The Limits of the Constitution, Albertina **Antognini**, 35 J. Am. Acad. Matrim. Law 425 (2023).
Out of Bounds?: Abortion, Choice of Law, and a Modest Role for Congress, Susan Frelich **Appleton**, 35 J. Am. Acad. Matrim. Law 461 (2023).
The Blue Family Constitution, Naomi **Cahn** & June **Carbone**, 35 J. Am. Acad. Matrim. Law 505 (2023).
Constitutional Issues in Assisted Reproduction, Gary A. **Debele** & Sydnie M. **Peterson**, 35 J. Am. Acad. Matrim. Law 537 (2023).
Family, Religion and the Constitution: Penumbras of Sovereignty, Nan D. **Hunter**, 35 J. Am. Acad. Matrim. Law 571 (2023).
How Functional Parent Doctrines Function: Findings From an Empirical Study, Courtney G. **Joslin** & Douglas **NeJaime**, 35 J. Am. Acad. Matrim. Law 589 (2023).
Ordered Liberty After Dobbs, Linda C. **McClain** & James E. **Fleming**, 35 J. Am. Acad. Matrim. Law 623 (2023).
The Thirteenth Amendment in Family Law: The "Involuntary Servitude" of Support Obligations, Laura W. **Morgan** & Jennifer Koiles **Pratt**, 35 J. Am. Acad. Matrim. Law 647 (2023).
Choosing Parentage Laws in Multistate Conduct Cases, Jeffrey A. **Parness**, 35 J. Am. Acad. Matrim. Law 669 (2023).
The Legal Basis for Homeschooling in a Pandemic and Beyond, Margaret **Ryznar**, 35 J. Am. Acad. Matrim. Law 711 (2023).
Home is a Body Where You Get to Be You: The Intersection of Minor Guardianship and Transgender Youth, Leigh **Hunnicutt**, 35 J. Am. Acad. Matrim. Law 735 (2023).
Swimming Free of Regulation: The Need for a National Regulatory System for Sperm Donation, Ashley **Rogers**, 35 J. Am. Acad. Matrim. Law 757 (2023).
Would you Make it to the Future?: Teaching Race in an Assisted Reproductive Technologies and the Law Classroom, Sonia M. **Gipson Rankin**, 56 Fam. L.Q. 1 (2022-23).
Un-Erasing American Indians and the Indian Child Welfare Act from Family Law, Neoshia R. **Roemer**, 56 Fam. L.Q. 31 (2022-23).
Black Families Overlooked, Misunderstood, and Underserved in the Family Courts, Janaé **Anderson**, Zenell **Brown**, & Viola **King**, 56 Fam. L.Q. 77 (2022-23).

IN BRIEF

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

Evidence: The Washington Supreme Court reversed a court's juvenile shelter care order because the court relied "on the enormous amount of hearsay evidence," consisting of the testimony of two social workers who based their testimony "largely on secondhand reports and statements" and their conversations with "various hospital staff, nurses, police, therapists," and other witnesses, none of whom testified at trial. *In re Dependency of A.C.,* 525 P.3d 177 (Wash. 2023) (en banc). In a later case, the court held that if a parent invokes the 5th Amendment in a termination case, a court may not terminate parental rights based solely on the negative inference resulting from refusal to testify. *In re Dependency of A.M.F.,* 526 P.3d 32 (Wash. 2023) (en banc). A California juvenile court did not err by excluding from evidence a mother's self-made recordings during visitation with her child because without the child's consent, the recordings could not be used as evidence, and the mother could not consent for the child because the child was a ward of the state. *In re L.J.,* 89 Cal.App.5th 741 (2023).

Military retirement: The Wyoming Supreme Court reversed a trial court that denied a motion to correct a divorce decree to change how to measure the length of time the ex-husband had in service from "months" to "reserve points" because the change did not amount to a modification of the original judgment and therefore was clerical in nature. *Stone v. Stone,* 525 P.3d 634 (Wyo. 2023). The Supreme Court of Virginia upheld an indemnity provision in an agreed divorce decree stating that if any of the ex-husband's disposable military retired pay (his retirement) was converted to disability pay (not retirement, and not divisible upon divorce), so that the amount payable to the ex-wife as her 30% share of the ex-husband's retirement pay declined, the ex-husband would make up the difference. *Yourko v. Yourko,* 884 S.E.2d 799 (Va. 2023). A California appellate court held that a navy lawyer stationed in San Diego consented to California's jurisdiction to divide her military retirement benefits upon divorce for purposes of the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA) because she filed suit in California, requested confirmation of her separate property, asked the court to determine any community assets and requested appointment of an expert to divide the parties' property. *Marriage of Sullivan,* 89 Cal.App.5th 585 (2023).

Modification: In North Dakota, the parties can waive the two-year waiting time from a past order establishing primary residential responsibility of children to file another request for such an order. *Brockmeyer v. Brockmeyer,* 987 N.W.2d 671 (N.D. 2023). The Vermont Supreme Court affirmed the transfer of custody of a 13-year-old to his father, observing that the mother had failed to "follow the recommendations stated in the case plan" because the mother "believed she did not require any mental health services." *In re Z.P.,* ___ A.3d ___, No. 22-AP-271, 2023 VT 17 (2023). An Idaho trial court did not abuse its discretion when it left unchanged the parents' joint legal and physical custody of their children "but amended the visitation schedule to minimize interactions between the parents" because they couldn't get along. *Plasse v. Reid,* ___ P.3d ___, No. 50208, 2023 WL 3184626 (Ida. May 2, 2023). A California trial court abused its discretion when it ordered father and children to participate in a therapy program by "Family Bridges," designed to resolve severe parental alienation, which required that the children have no contact with their mother for 90 days. *Johnston-Rossi v. Rossi,* 88 Cal.App.5th 1081 (2023).

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Procedure: A divided Hawai'i Supreme Court held that no "structural error" occurred when a family court appointed counsel at the onset of a termination case, then discharged that counsel when the parents failed to appear for a hearing, then appointed replacement counsel for them. *In re JH,* 526 P.3d 350 (Haw. 2023). In a termination case, the Wyoming Supreme Court held that the trial court did not abuse its discretion when it denied a mother's late jury trial request, even though the trial court did not appoint counsel for the mother until after the deadline for requesting a jury trial had passed, because the mother then decided not to make a jury demand after she had counsel, but then changed her mind. *In re L.C.B.*, 525 P.3d 1030 (Wyo. 2023). A California appellate court affirmed a trial court's application of the "disentitlement doctrine," which requires a party to obey a court order while attempting to challenge it, when an obligor wholly failed to pay child and spousal support after filing a motion to modify until threatened with contempt, yet had the ability to pay support at least in part. *Cohen v. Cohen,* 89 Cal.App.5th 574 (2023).

Property: A North Dakota trial court erred when it included within the marital estate financial accounts the husband opened after the agreed-upon valuation date. *Crichlow v. Andrews,* 2023 ND 45 (N.D. Mar. 16, 2023). Nebraska's "active appreciation rule," which states that marital contributions to nonmarital property are marital property, can be applied to agricultural land, but the spouse who owned the land failed to prove that the appreciation in value was due to anything other than the market. *Parde v. Parde,* 986 N.W.2d 504 (Neb. 2023). The Maine Supreme Court held that a district court erred when, in a divorce case, it ordered the dissolution of an LLC owned 50% by each spouse because the LLC was not a party to the case, divorce is not a statutory ground for dissolution of an LLC, and LLC dissolution proceedings must be brought in the Superior Court, not the District Court. *Littell v. Bridges,* ___ A.3d ___, 2023 ME 29, 2023 WL 3360535 (Me. May 11, 2023).

Tort claims: In Idaho, magistrates can hear civil actions only when the amount of damages does not exceed $10,000, so a magistrate had no authority to grant a spouse damages of $20,000 for emotional trauma, physical abuse and stress inflicted during marriage when granting the parties a divorce. *O'Holleran v. O'Holleran,* 525 P.3d 709 (Ida. 2023). In Mississippi, an ex-husband sued his ex-wife and her former lover for alienation of affection, intentional infliction of emotional distress and fraud, and obtained a verdict of $700,000 against both defendants based on alienation, but the Mississippi Supreme Court reversed, holding that the cause of action was barred by limitations plus the ex-wife could not be held liable for alienation of affection. *Davis v. Davis,* ___ So.3d ___, 2023 WL 2533266, No. 2020-CA-01304-SCT (Miss. Mar. 16, 2023).

Why not to sue in federal court: The domestic relations exception to federal jurisdiction keeps the federal courts out of state court divorce, support and custody matters. But the federal 7th Circuit acknowledged "the natural temptation for losing parties to keep fighting and to look for new forums" in *Hadzi-Tanovic v. Johnson,* 62 F.4th 394 (7th Cir. 2023), in which the ex-wife sued her ex-husband, the children's guardian ad litem and the state court judge, alleging a corrupt conspiracy among them in violation of federal civil rights statutes. A panel of the 7th Circuit affirmed dismissal of the case, invoking the *Rooker-Feldman* doctrine, which forbids federal appellate courts other than the Supreme Court from reviewing state court judgments. Given that the federal suit was inextricably intertwined with the state court case, *Rooker-Feldman* applied. The panel expressly overruled prior 7th Circuit holdings to the contrary and in a split decision, the court denied rehearing en banc.

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

Like you, I worry about the aging of the Baby Boomers, even though that's not what I want to write about here. Still, though, once the Baby Boomers exit stage left, who will make the Dad jokes? What happens to cargo shorts, Hawaiian shirts, and Facebook? The last lawyers who did their research from actual books, with pocket parts, will soon fade away, leaving behind poor fluorescent lighting and Folgers coffee crystals, before good coffee was invented. Pleated pants and three-piece suits will need to find a new home.

But no, what we need to discuss is the importance of presentation, for lawyers of all ages. It is not enough to simply be good at your job because, after all, artificial intelligence will soon displace us from most of the tasks that lawyers have been doing for generations. What's required of us is to look marvelous while lawyering.

For example, in the world of mediation in which I reside, I am considering a theme song, just some jaunty little ditty to play when I enter a conference room first thing in the morning as I greet a new client and her lawyer. Sure, they may be nervous or angry, but how can they stay that way if "Let's Groove" from Earth, Wind, and Fire blasts forth, and I saunter in, slamming down my legal pad and computer, spin once on my heels, and earnestly intone, "Let this groove, light up your fuse. Alright." We'll have a signed MSA by noon.

But that's not all.

I foresee a quiet courtroom, packed with litigants and their champions, nothing but the sound of a bailiff ticking her fingers on a desk. Then an "Applause" sign behind the bench lights up bright red, and in walks the Honorable Judge Shecky Smith. As the cheering dies down, Judge Shecky revs it up again with upraised palms. "Am I right? Huh? Hey folks, it's great to be here, you look fantastic. But yesterday's docket! Oof. I held the lawyers' *parents* in contempt just for having them! Ah, thanks, you're too kind. Okay, first case …"

Client interviews need to be updated with a call and response singalong that elicits the necessary information.

"Husband left you for the new woman at work?"

"No, he took off with the guy next door, the jerk!"

"But what about the money?"

"He said, 'You'll be just fine, honey!"

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

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“Let’s get a TRO!”

“Okay, but make it painful, bro!”

And there are things that AI can’t replicate, yet, like your physical office. Lawyers' offices need to incorporate unusual visual elements, like Escape Rooms do. Is that Mont Blanc a clue? Maybe if I press “Brew” on the Keurig, I can escape this divorce hell and reconcile? Maybe you could play “telephone tag” for real.

This the kind of innovative thinking that will keep us relevant and one step ahead of the robots. On the other hand, it could well be that this was all written by a chatbot.

WHAT KIND OF HIRED GUN EXPERT ARE YOU FACING?
By John A. Zervopoulos, Ph.D., J.D., ABPP[1]

You’re pleased—but also concerned. During your contentious child custody case, the 90-page, court-ordered child custody evaluation report landed in your inbox. You quickly open it and jump to the evaluator’s recommendations in the last few pages. A sigh of relief: the recommendations favor your client. What’s not to be pleased about?

But later, while reviewing the report, your concern surfaces. You realize that the evaluator’s reasoning, lacking sufficient clarity, gives opposing counsel an opening to challenge the recommendations—you’d do that if the shoe were on the other foot. Two days later, you learn that opposing counsel has retained a psychologist to testify against the report. Will the expert be a straight shooter or a hired gun who will conform their testimony to opposing counsel’s views?

Federal Rule of Evidence 702, Texas Rules of Evidence 702, and attendant caselaw reflect long-held concerns about whether courts can trust retained expert testimony. Also, expert witnesses can have “an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as an expert” and because of the inherent difficulty evaluating scientific evidence. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 SW2d 549, 553 (Tex. 1995). These sources stress that an expert’s opinions must be supported by more than the expert’s qualifications and assertions. The *Daubert* case notes that courts give experts “wide latitude” to offer opinions “on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.” *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 592 (1993). Hired-gun experts violate *Daubert’s* assumption, which also echoes *Robinson* caselaw.

But a suspicion that an expert is a hired gun only begins to address the problem. Hired guns, not all alike, present lawyers with different challenges. Look for one or a combination of three hired-gun types:

Type One hired guns, offering their opinions for pay, shape their testimony to fit the hiring lawyer’s case theories. Their knowledge of the professional literature on the testimony’s subject is usually thin. When questioned about their opinions, they try to hide their biases by responding with abstract psychology jargon and “cookbook” test interpretations from computer reports or manuals. *The key to exposing Type One experts is to focus deposition and examination questions on their methods*. Responses usually

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[1] ***John A. Zervopoulos, Ph.D., J.D., ABPP***, a lawyer and board-certified forensic psychologist, directs *PsychologyLaw Partners*, an expert consulting service that helps family lawyers understand, critique, and use psychological materials and evidence in their cases, and helps lawyers edit and draft motions and briefs that relate to experts' work and testimony. His most recent book, *How to Examine Mental Health Experts: A Family Lawyer's Handbook of Issues and Strategies—Second Ed.,* was published by the ABA in 2020. *Confronting Mental Health Evidence: A Practical PLAN to Examine Reliability and Experts in Family Law—Second Ed.* was released in 2015. He is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.

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reveal their methods as shoddy: their interviews are incomplete; their test interpretation is slanted; their selected collateral sources, interviewed or reviewed, lean favorably towards the client.

Type Two hired guns are fervent advocates of causes related to their testimony. They present a greater challenge than Type One hired guns because they are familiar with the research and professional literature related to their testimony, and their methods usually pass muster as generally accepted. But the competence that these experts portray on the stand glosses over the biases that infuse their opinions. They rarely testify where the litigant's position differs from their firmly held views. Typically, these experts cherry-pick favorable research. *The key to exposing Type Two experts is to focus on their reasoning. These experts don't fairly consider reasonable alternative explanations of their data or case facts*—an essential de-biasing technique and a *Daubert*-related reliability factor. See Fed. R. Evid. 702 advisory committee note (2000 amendment); *duPont v. Robinson,* 923 S.W.2d 549, 559 (Tex. 1995).

Type Three hired guns are therapists of litigants who confuse their supportive therapist role with *Daubert's* requirement that they offer reliable, trustworthy testimony. These therapists rely primarily on their counseling experiences and education from selected workshops to support their opinions. During questioning, these experts' unfamiliarity with generally accepted professional literature and evaluation methods related to their testimony is striking, and the faulty reasoning these experts use to support their opinions is obvious. These experts' testimonies may include: "I've seen dozens of abused children draw these kinds of pictures"; "In my experience, persons who say they are anxious and suffer intense fear must have PTSD." *The key to exposing Type Three experts is to focus on how offering testimony counter to their patients' wishes would compromise the trust essential to a continuing therapist–patient counseling relationship.*

Not all retained experts are hired guns. But hired guns differ in their presentation and how they support their opinions. When you know what kind of hired gun expert you are facing, you'll be better able to develop compelling questions to challenge their testimony.

ATTACKING A FLAWED BUSINESS VALUATION
By Aaron Ballard, CPA/ABV[1]

In divorce cases involving a closely-held business, it is fairly common for disputes to arise regarding the value of the business. The business valuation profession is not black and white, and valuation experts can disagree about any number of assumptions or methodologies. Sometimes the disagreements between two valuation experts can be chalked up to legitimate differences of professional opinion, with neither expert necessarily "right" or "wrong" and both experts falling within a range of reasonableness. Other times, however, one expert's valuation may be materially flawed or unreliable for a variety of reasons.

When dealing with a flawed or unreliable business valuation, it is often necessary to go on the offensive. When faced with two disparate business valuations, understanding the issues causing the disparity is the first step that must be taken. Once the key differences and weaknesses have been identified, a plan of attack can be formulated. In a Texas divorce case, there are five primary venues through which an unreliable business valuation can be attacked:

[1] Aaron Ballard, CPA/ABV is a partner in the Forensic, Litigation & Valuation Services group at Whitley Penn. He has spent his entire 13+ year career providing litigation support and expert testimony regarding business valuations, tracing and characterization of marital assets, forensic accounting, and other financial issues. The majority of his practice is within the context of Texas divorce cases. Mr. Ballard can be reached at aaron.ballard@whitleypenn.com.

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1. Rebuttal report;
2. Deposition;
3. Mediation;
4. *Daubert* challenge; and
5. Trial.

Rebuttal Report

The first opportunity for attacking a flawed business valuation is to consider having your expert prepare a rebuttal report critiquing the flaws in the opposing expert's analysis. Some of the advantages of a rebuttal report include the following:

- Helps ferret out the areas of disagreement between two experts;
- Gives your expert an opportunity to formulate a clear and concise argument for his or her position and against the opposing expert's position;
- Potentially increases the chances for settlement by showing each side where the weaknesses are in their case; and
- Provides an opportunity to get persuasive written materials in front of the trier of fact.

Disadvantages of issuing a rebuttal report include the following:

- May be unnecessary or redundant if the differences between two valuations are already obvious without the rebuttal report;
- Provides the other side a clear roadmap as to how you plan to pick apart their expert's valuation at trial, giving them ample time to formulate a response; and
- Adds to the cost of the case, which some clients cannot afford.

If the case involves a meaty valuation dispute—particularly if the dispute represents the biggest or only issue in the case—the rebuttal report can provide an invaluable opportunity to thoughtfully and persuasively explain why your side is right and the other expert is wrong. Trial is a minefield, and you may not have an opportunity at trial to lay out your case as clearly as you do in the controlled environment of a written report.

Deposition

The next venue that is available for attacking a flawed business valuation is the deposition of the valuation expert. Deposing a valuation expert is obviously not required, but it can be a useful tool. In my view, the primary goals of an expert deposition are twofold: (1) get any questions answered with regard to the expert's qualifications, sources of information, analysis, and conclusions, and (2) limit the expert's testimony at trial as much as possible. Some attorneys also like to use the expert deposition as an opportunity to poke holes and attack, while others prefer to save this for cross examination at trial. Either route can be effective assuming it fits within a broader case strategy. If nothing else, the deposition is a good opportunity to get a feel for an expert's testifying demeanor and abilities, in order to help prepare the most effective cross examination at trial. Deposing a valuation expert may also help increase the chances of settlement to the extent it injects uncertainty and fear into the other side and makes them less confident in their valuation.

Mediation

Mediation provides another opportunity to gain a better understanding of any business valuation differences and to attack a flawed business valuation if necessary. In a hotly contested valuation dispute, attorneys should strongly consider having the valuation expert attend mediation, or at the very least be available via phone/Zoom. Although having your expert attend mediation will increase costs, the expert will likely be the one best suited to explain to the mediator the strengths of his or her position and the weaknesses of the opposing expert's position, so it's likely dollars well spent. Mediation also provides a test run for how your valuation dispute will play out in front of the trier of fact, with the mediator serving as a stand-in for the judge or jury. Gauge how your arguments play and get feedback from the mediator. This also gives attorneys a chance to see their own experts at work.

In addition, mediation can be an invaluable opportunity to conduct informal discovery, particularly if rebuttal reports were not prepared by the experts or expert depositions were not taken. Sometimes, if both experts are in attendance, it is a good idea to have the experts confer during mediation to the extent that might help shed light on disagreements or bridge valuation gaps. The effectiveness of any conference among experts will depend on the specific experts involved and issues in dispute.

Daubert Challenge

In some circumstances, the flaws in an expert's business valuation may rise to the level of a *Daubert* challenge. When is a *Daubert* challenge to the admissibility of a valuation expert's testimony appropriate?

To answer this, one must consider the rules governing expert testimony, particularly Rule 702 of the Texas Rules of Evidence. An expert witness may testify regarding scientific, technical, or other specialized matters if the expert is qualified, the expert's opinion is relevant, the opinion is reliable, and the opinion is based on a reliable foundation. With these rules in mind, a *Daubert* challenge may be appropriate in a business valuation dispute if the valuation expert:

- Lacks the necessary knowledge, skill, experience, training, and education to perform a business valuation;
- Relies on unaccepted or unreliable valuation methodology;
- Applies accepted or reliable valuation methodology in an unreliable way;
- Makes material errors which cause the analysis to be unreliable;
- Assumes facts in the valuation which vary from the actual facts of the case; or
- Relies on incorrect legal theories.

Even if you think the *Daubert* challenge is likely going to be denied, you may still want to pursue it for three reasons: (1) to preserve the error on appeal, (2) to begin to educate the judge on the severity of the problems with the expert's analysis, and (3) to ratchet up the maximum amount of pressure on the other side and thus increase the chances of settlement.

Trial

The final battleground in a business valuation dispute is trial. As trial approaches and it is time to prepare, it is imperative for attorneys and valuation experts to work together. If the case revolves around a valuation dispute, the valuation expert is likely going to be the most important witness. Attorneys and valuation experts must work together so both understand the issues involved. A successful direct examination of an expert is dependent on both expert and attorney understanding the critical concepts that need to be relayed to the trier of fact. The goal in the direct testimony is to both teach the trier of fact about the complex valuation issues involved and to tell the story from your side's perspective. Attorneys should lean on the expert to draft cross examination questions for the opposing expert, and then spend time to walk through those questions before trial so that the attorney fully understands what is being asked and why.

Whenever possible, use visuals at trial to highlight differences between the experts' opinions and emphasize weaknesses in the opposing expert's analysis. Business valuation can be a technical topic, and visuals can distill complex concepts into powerful takeaways. Focus on the big picture and avoid getting too deep in the weeds.

THE END TO TITLE 42 ALONG THE SOUTHERN BORDER—WHAT NOW?
By Angelique Montano[1]

The media has been abuzz with news about the end of Title 42 and how the U.S. immigration system will be affected. But what exactly was Title 42 and what does its end mean for our country?

In response to the COVID-19 pandemic, the United States under the Trump Administration, through the Centers for Disease Control (CDC), introduced Title 42, which is an emergency health authority that began in March 2020. Title 42 allowed U.S. Customs & Border Protection (CBP), which is part of the U.S. Department of Homeland Security (DHS), to turn away migrants who came to the U.S.-Mexico border on the grounds of preventing the spread of COVID-19. These migrants were returned abroad and were denied the right to apply for asylum. There were some exceptions. However, some estimates say that CBP turned away migrants more than 2.8 million times during Title 42.

Title 42 officially ended on May 11, 2023, as announced by the Biden Administration. Now DHS and CBP return to the former law, Title 8, to deal with migrants trying to enter the United States. However, under the Biden Administration, DHS has announced several new initiatives post-Title 42. These initiatives include (not an exhaustive list):

1) Deploying Additional Troops (military) to support CBP;
2) Web-Based Immigration Bond Program, which allows people to post immigration bonds online instead of going to the local U.S. Immigration & Customs Enforcement (ICE) office to pay;
3) Increased Detention Housing Capacity, where ICE is increasing the number of people it can detain by several thousand (up to 34,000 people a day);
4) Home Curfew/Electronic Monitoring for Some Families, where some families who are caught by CBP or ICE will be enrolled in an “alternative to detention” supervision program;
5) Opening 100 Regional Processing Centers in countries located in the Western Hemisphere through the U.S. Department of State with the mission to direct migrants to lawful pathways early in their journey and before reaching the southwest border; and
6) Expanding Access to Appointments to Arrive at the Southern Border and request asylum, wherein noncitizens will have the opportunity to request an appointment at a CBP office/center on the border to request for asylum.

At this time, the United States, and the Biden Administration, face real challenges on how to control illegal immigration along the Southern Border – including high numbers of migration caused by a number of factors including four failed nation states (Cuba, Venezuela, Haiti, and Nicaragua), the effects of the pandemic, global inflation, and other factors. However, the issue in general is not new—It is something with which the United States has struggled for decades.

What is the best solution in dealing with this issue? Democrats and Republicans disagree. In the meantime, border towns in Texas and other states deal with the reality of illegal immigration while desperate migrants fleeing from political, economic, societal, and natural disasters continue coming to the United States for its promise of freedom and a better life.

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ARTICLES

LESSONS FROM A LEGEND
by Susan F. McLerran[1]

Family law lost a legend last month when Donn Charles Fullenweider passed away peacefully at the age of 88. While his loss is immeasurable, his legacy will continue to influence and shape the law practices (and lives) of attorneys who worked with him and those individuals fortunate enough to cross into his extraordinary path. Reflecting on his distinguished career and very full life, a few lessons emerge that may help us capture some of the magic that Donn seemed to have on tap.

(1) Be Creative, Be Bold and Forge New Paths

Undeniably, Donn was a creative thinker, and he had a creative approach to legal issues. For the linear thinkers within his ranks, it wasn't always easy to follow the direction his mind was moving. Many strive to think "outside of the box," but Donn's mind never entered the box—he didn't even see a box! He preferred to allow his thoughts and ideas to travel widely; approaching every problem or challenge assuming all options were on the table. This creativity and refusal to be constrained by conventionalism served him throughout in his career as he impacted and changed Texas law. To forge new paths and passionately advocate for our client's interests, we need to open our minds to innovative ideas and approaches that may be untested. Of course, pushing innovative ideas requires boldness and Donn's confidence was inspiring. Law evolves over time because of those lawyers who are willing to take risks and push the envelope. We should all cultivate the confidence to advocate new concepts that will continue to refine and improve the landscape of Texas family law.

(2) Work Hard – It Will Pay Off

The success enjoyed by Donn was not accidental—Donn worked hard. He arrived to work early and stayed until his work was complete. Donn loved the law. He was deeply committed to his clients and finding solutions to their problems dominated his thoughts. During a law firm dinner several years ago, there was a moment when Donn described how some of his best ideas came to him in the shower. What followed was laughter and jokes about how his showers had become billable. Donn wasn't joking, though, and he conveyed that, when at rest, the mind would generate new ideas, hypotheses, or solutions to problems and provide greater insight. That he spent shower time contemplating his cases exemplifies his unflagging work ethic.

On an occasion when Donn had a case requiring him to attack an especially one-sided post-marital agreement, he acquired books and literature on the topic of coercive control to understand the dynamics involved in the abusive marital relationship. During another period of his career, he devoted time to the study of neuropsychology. He frequently enlisted the help of experts to provide a comprehensive understanding of different topics to give him an edge in his cases. Donn always looked to expand his knowledge and took the time to learn new subjects that would strengthen his ability to serve clients. Family law is a tough practice area, but it can also be a one of the most rewarding fields. As is true with most professions, there is no shortcut to becoming an outstanding lawyer or winning cases. Success requires effort. If we acknowledge this and devote meaningful time and energy to continue studying the law, sharpening new skills, and developing specialized knowledge, like Donn, we will find genuine and lasting success in our law practices.

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(3) Embrace Self-Care and Find Balance

Many studies show that chronic stress creates a response in the brain that impairs higher cognition, including working memory, creativity, problem solving, and abstract thought. Donn was keenly aware that the stress of representing family law clients could bleed over into the life of the family law attorney. He often spoke about the importance of self-care for lawyers and believed it involved a mix of physical activity, lifelong learning, creative outlets, and spirituality. Until the end of his life, Donn was fit and physically active. He was avid swimmer and would routinely leave the office in the middle of the day to swim laps at the club down the street from his office. Well into his 80s, he still enjoyed snow skiing in Colorado and ocean kayaking near his summer home in Castine, Maine. Donn also developed outlets to express and cultivate his creativity. He was always interested in art and art history and took up painting as a hobby at the age of 60. Donn became a talented artist and, if you visit the law offices of Fullenweider Wilhite, you will see pieces of his original artwork on display. Donn believed that spirituality included religion, meditation, and mindfulness, and during a recent conversation about stress management, Donn encouraged the development of a daily meditation practice and discussed his personal mantras.

While Donn loved his work and worked hard, he understood the value of downtime and a balanced life. Long before the emergence of Zoom technology, Donn had mastered the art of working remotely from Maine. He might start the day on his sailboat, returning to his home office to connect with his clients and colleagues to stay on top of his docket. This should be an important lesson for all of us. Becoming an accomplished attorney should never come at the expense of one's wellbeing. Self-care should not be an afterthought—it should be scheduled and planned. We should strive for a full and balanced life and encourage the same for our colleagues. Taking time for self-care will not only enhance physical health, but also promote focus and productivity, improve problem-solving skills, stimulate creativity, and build resilience. Each of these qualities is essential to building a personal and professional life that is fulfilling and rewarding, so we need to take good care of ourselves.

(4) Professionalism and Respect are Important

Donn was a powerful advocate in the courtroom, but he advocated respectfully and professionally. He pursued challenges with unwavering determination, grace, and resilience. He exhibited courteous demeanor and was unflappable in the face of adversity. He was always a gentleman, no matter the circumstances. He treated people with respect; whether he was dealing with his client, the opposing party or attorney, or the janitor who emptied his trash can during late-night work sessions. Donn was endlessly humble and never one to dominate a conversation. He perfected the skill of active listening and welcomed different viewpoints and perspectives. Having all perspectives was valuable to him and often helped him settle cases. Active listening during trial could often mean the difference between winning and losing a case. Though his courtroom talent was exceptional, he realized the impact that litigation could have on families and children, so he looked for alternative solutions whenever possible. When there were two ways to handle a situation, he always selected the way that he believed was most ethical. He worked with his colleagues and never looked to benefit from "gotcha" moments—Donn Fullenweider did not need to do that.

These qualities helped Donn build a well-known reputation for professionalism and excellence in the practice of family law. When we practice law with this level integrity on a consistent basis, over time we will gain the trust and confidence of our colleagues and the judiciary. This can be career changing. It will allow us to forge productive working relationships and create new communication lines to resolve conflicts. It will create new opportunities for collaboration. It will increase positive interactions and help reduce the stress that comes with this job. It will absolutely serve our clients' interests and inspire them to refer your services to others. It is never too late to begin practicing with professionalism and integrity. It is a choice we make each day, with each phone call, each email, and each court appearance. In honoring the memory of Donn and the other titans of family law who preceded him, we should all make professionalism a priority.

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(5) Use Your Bar Card to Helps Others

Donn felt called to the practice of family law. When ask why he chose this area of practice, Donn responded with, "I've always thought I could help these people who are hurting, confused, and frightened, and caught up in a legal system that they don't understand." The influence we have as family lawyers really touches a family's day-to-day life. Donn's service to others was not limited to clients, he believed that giving back truly mattered and he served as a mentor to many of us. He once commented "mentoring new attorneys is something that I enjoy and am happy to do. I love the practice of law and am always looking for ways to improve the profession. There is no better way to learn how to practice law than through mentorship and learning from others around you."

Donn was a founding member of several organizations created to help attorneys further their skills and practice, including the Texas State Bar litigation section, the ABA Family Law Trial Advocacy Institute, and the Burta Rhoads Raborn Family Law Inn of Court. He led each of those organizations and served as a leader to a long list of other professional organizations. He did not hesitate to give his time to improve the practice of family law. In a recent interview, Donn made the following statement about practicing law:

> The biggest thrill for me is to go into a courtroom and stand up in front of a judge and advocate a position for a client. There is nothing more empowering. Even when you've got a hostile judge or a bad case, the ability to advocate for a client is all that lawyering is about. It may take you weeks or months to prepare, it takes your skill, it takes your brain, your endurance, your cleverness, all those things must really come together. The honor that is bestowed on you as a lawyer to do that is kind of what keeps me going. And, when you're able to settle a case that they didn't expect could settle, that's also great. I'm using an old-fashioned term, but there's an honor in doing this. There's a responsibility to being a lawyer that transcends working just on any one case or with any one client. The lawyer has a responsibility to society, a responsibility to the Court System, the Justice System, in all its levels. It really is something that we are blessed to be able to participate in and to make better.

We are all in a unique position to improve the lives of others. We possess the expertise required to support clients during their most challenging moments. We are equipped with specific skills that can ease their worries and resolve their problems. And our impact is not limited to our clients; each year, a fresh wave of aspiring family lawyers joins our profession and begins searching for their own path. They look to seasoned attorneys for guidance and it is our responsibility to be positive role models. Like Donn, we too need to embrace the role of mentor and spend time sharing our experiences, offering insights, and providing guidance. We need to engage with professional organizations to help other lawyers reach their potential. We should all take pride in possessing the ability to meaningfully influence the lives of our clients and colleagues. It is our responsibility to take the honor bestowed on us as family lawyers and use it to make things better.

Donn possessed both passion and purpose. His impact on others was profound and his legacy leaves an inspiring and enduring imprint on the family law community. His extraordinary life and career serve as a reminder of the infinite potential that lies within each of us—may we all follow Donn's lead to advocate boldly, make time for self-care, think outside the box, pursue opportunities to learn new things, find creative outlets, commit to hard work, use our skills to help others, find balance in life, and exhibit integrity and professionalism in all that we do.

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AVAILABLE TORTS AND WHAT TO CONSIDER BEFORE ASSERTING THEM IN A TEXAS DIVORCE SUIT

By Jake Elmore[1]

What torts can be brought with a divorce?

Texas common law and the Texas Family Code provide practitioners with various tort claims covering a range of bad acts that they should consider when bringing a divorce action on behalf of their clients. The following is a non-exhaustive list of available tort claims that can be brought with a suit for divorce in Texas:

- Invasion of privacy, *see Miller v. Talley Dunn Gallery, LLC*, 05–15–00444–CV, 2016 WL 836775 (Tex. App.—Dallas Mar. 3, 2016, no pet.) (mem. op.);
- Physical beatings and abuse, see *Mogford v. Mogford,* 616 S.W.2d 936 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.);
- Transmission of venereal disease, *see Stafford v. Stafford*, 726 S.W.2d 14 (Tex. 1987);
- Fraud on the community/waste, *see Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998) and Tex. Fam. Code § 7.009;
- Interference with child custody or possession under Chapter 42 of the Texas Family Code;
- Conversion of a spouse's separate property by the other spouse, see *Belz v. Belz,* 667 S.W.2d 240 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); and
- Intentional infliction of emotional distress, *see Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993)

Note that negligent infliction of emotional distress is not included in the above list. Intentional infliction of emotional distress occurs when the defendant acts intentionally or recklessly with extreme and outrageous conduct to cause the plaintiff severe emotional distress and the emotional distress suffered by the plaintiff was severe. The defendant's conduct must be extreme and outrageous and this extreme and outrageous conduct must proximately cause the plaintiff's emotional distress. *See Hersh v. Tatum*, 526 S.W.3d 462, 468 (Tex.2017).

What is the remedy?

Fraud on the community is not an independent tort cause of action. *See Schlueter v. Schlueter,* 975 S.W.2d 584 (Tex. 1998). Texas recognizes that a fiduciary duty exists between spouses such that they should interact with trust, good faith, and fair dealing. *See Carnes v. Meador*, 533 S.W.2d 365, 370–72 (Tex. App.—Dallas 1975, writ ref'd n.r.e.). A spouse may breach this fiduciary duty by committing either actual or constructive fraud in connection with community property. A spouse commits actual fraud when that spouse transfers or expends (i.e., wastes) community property with the intent of depriving the other spouse of the property. *See Strong v. Strong*, 350 S.W.3d 759, 771 (Tex. App.—Dallas 2011, pet. denied).

A spouse need not prove intent when claiming constructive fraud, and a presumption arises if one spouse disposes of the other spouse's community property interest without the other spouse's knowledge of consent. *Id.*, *Jackson v. Smith*, 703 S.W.2d 791, 796 (Tex. App.—Dallas 1985, no pet.). Moreover, a claim for constructive fraud may be supported when a spouse cannot account for missing funds formerly in that spouse's control. *See Puntarelli v. Peterson*, 405 S.W.3d 131, 137–38 (Tex. App.—Houston [1st Dist.] 2013, no pet.)

The remedy available to the wronged spouse who prevails on a claim for fraud on the community is not only limited due to the nature of the wrongful conduct, but also by the guidelines set forth in the Texas Family Code. Specifically, Section 7.009(b) of the Texas Family Code states that upon a finding of actual or constructive fraud on the community, the trier of fact shall calculate the amount the community estate was depleted by the fraud and calculate the amount of the "reconstituted estate" (the total value of the community estate if the fraud had not occurred). After making this calculation, Section 7.009(c) provides that the court may grant "any legal or equitable relief necessary to accomplish a just and right division," which includes a disproportionate share of the community estate, a money judgment, or a combination

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of both. However, based on the calculations set forth in Section 7.009(b) the money judgment available for a fraud claim is limited to the defrauded spouse's share of the lost community property and cannot include "separate damages." *See Matter of Moore*, 890 S.W.2d 821 (Tex. App.—Amarillo 1994, no writ).

When it comes to separate tort claims that can be alleged outside of the divorce context, a spouse will have to seek either a money judgment from the tort claim or a disproportionate award of the community estate to avoid the judgment being reversed as a double recovery. The practitioner should advise the client based on the size of the estate, the likelihood of recovery of a money judgment, and the likelihood of an unequal division of property. Moreover, if the other spouse's conduct that precipitated the tort claim is so egregious as to give rise to punitive and exemplary damages, the practitioner should keep this in mind when deciding to elect a money judgment. However, a spouse can recover a disproportionate share of the estate and tort damages that are not connected to the cruel treatment alleged as the grounds for divorce. See *Toles v. Toles,* 45 S.W.3d 252, 264 (Tex. App.—Dallas 2001, pet. denied) for a detailed discussion of this issue in a case involving intentional infliction of emotional distress from one spouse to the other.

Res Judicata and what that means when bringing, or not bringing, tort claims in a divorce

Res judicata precludes the relitigating of any and all claims or causes of action that have been finally adjudicated in addition to related matters that should have been litigated in the prior suit with the use of due diligence. *Barr v. Resolution Trust Corp. ex rel. Sunbelt Federal Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). As such, a final judgment in a lawsuit relinquishes a party's right to bring a subsequent lawsuit on the transaction, or a series of connected transections, out of which the original lawsuit arose. Id.
Thus, a spouse that alleges cruel treatment as the grounds for the dissolution of the marriage in order to receive a disproportionate share of the estate must assert all of their claims for cruel treatment and any other tort claims arising out of the cruel treatment or these claims will be precluded from later litigation under the doctrine of res judicata. Naturally, a spouse seeking a claim for fraud on the community will need to bring that claim while the community estate still exists.

Editor Georganna L. Simpson (*G.L.S.)* and Guest Editors this month include: Sallee S. Smythe (*S.S.S.*), Jimmy Verner (*J.V.)*, Michelle May O'Neil *(M.M.O.)*, Rebecca T. Rowan *(R.T.R.)*, Jessica H. Janicek (*J.H.J.*), Beth M. Johnson (*B.M.J.), and Holly J. Draper (H.J.D.).*

DIVORCE
PROCEDURE AND JURISDICTION

THE JUSTICE COURT AND COUNTY COURT AT LAW LACKED JURISDICTION TO RENDER A JUDGMENT THAT AFFECTED THE PARTIES' DIVISION OF PROPERTY ORDERED BY THE DISTRICT COURT.

¶23-3-01. *Nadar v. Nadar,* No. 05-21-00647-CV, 2023 WL 2472888 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (03-13-23).

Facts: The District Court entered a Final Decree. Although the 469th Court awarded the parties' marital home in Plano to Mr. Nadar, Ms. Nadar and the parties' daughter continued to live in the home, as they had since 2013. Additionally, The District Court ordered Mother to sign a special warranty deed transferring her interest in the marital residence to Father. Thereafter, Father filed a forcible entry and detainer suit against Mother in the county's Justice Court. Following a hearing on Father's suit, the Justice Court awarded possession of the marital residence to Father and ordered Mother to vacate the premises. Thereafter, Mother appealed the ruling, and the County Court of Law presided over the trial. At the conclusion of trial, the County Court of Law upheld the Justice Court's ruling and awarded Father possession of the marital residence. Mother appealed.

Holding: Reversed and Remanded.

Opinion: Mother argues that the County Court of Law erred in entering a final order because it lacked jurisdiction to do so. Here, the Final Decree provided that the parties would execute any and all documents necessary to fulfill the division of property ordered by the District Court; however, neither party offered any evidence to show that they complied with this provision of the Final Decree. Specifically, neither party transferred title to the property as required by the Final Decree. Consequently, eviction is not the appropriate remedy for Father. Rather, Father should have sought a clarification or enforcement action against Mother in the District Court since it still retained exclusive jurisdiction over the Final Decree's division of property. Therefore, the County Court of Law erred by rendering a final order because it lacked jurisdiction over Father's claims.

Editor's comment: *The Court of Appeals correctly states that a forcible entry and detainer ("FED") action decides only the right of possession to realty, regardless of "any other issue in controversy relating to the realty in question." In a non sequitur, the Court then holds that "eviction is not the proper remedy" for Father because "the parties have not yet taken the necessary steps to modify title to the marital home." Mother said she had not transferred title to Father because Father had not transferred title to property in India to Mother per the divorce decree. (Sound familiar, family law attorneys?). IMHO, Mother's contention was irrelevant because the trial court had awarded the residence to Father, so Father had the right to possess it. The Court of Appeals should have affirmed the FED and dismissed the title issues for lack of jurisdiction. J.V.*

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TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PROCEEDING TO TRIAL BECAUSE WIFE DID NOT REBUT THE PRESUMPTION THAT SHE WAS GIVEN PROPER NOTICE.

¶22-3-02. *Jones-Gilder v. Gilder*, No. 05-22-00517-CV, 2023 WL 3114675 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (04-27-23).

Facts: Husband filed for divorce. Thereafter, an associate judge entered temporary orders appointing the parties as JMCs. At trial, Wife failed to appear, and Husband's counsel informed the trial court that the trial was set six months ago at a pretrial hearing. The trial proceeded with trial and entered a final default judgment. Wife appealed.

Holding: Affirmed.

Opinion: Wife argues that the trial court abused its discretion by holding trial when it did not provide her proper notice of the trial date. Specifically, Wife states that the record of the pre-trial hearing does not indicate whether Wife was present. Here, the recitation in the Final Decree that Wife was duly notified of trial but failed to appear is evidence that Wife received notice of the final hearing. Further, the transcript of the pre-trial hearing does not affirmatively show that Wife did not receive notice, and Wife did not request the transcript or provide it to the trial court. Accordingly, Wife did not provide the information necessary to rebut the trial court's determination that notice was provided to Wife. Therefore, because the trial court did not abuse its discretion by proceeding to trial.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING MOTHER'S MOTION FOR NEW TRIAL AS SHE SUBMITTED AN AFFIDAVIT THAT SATISIFIED THE ELEMENTS FOR A NEW TRIAL.

¶23-3-03. *IMOMO Ramos and Shafer,* No. 13-22-00061-CV, 2023 WL 3240787 (Tex. App.—Corpus Christi-Edinburg 2023, no pet. h.) (mem. op.) (05-04-23).

Facts: Father filed an Original Petition for Divorce nearly a year after the birth of the parties' second child. Mother never filed an answer and after conducting a trial, the trial court appointed Father as sole managing conservator of both children and granted Mother visitation rights contingent upon clean drug tests. Thereafter, Mother filed a Motion for New Trial accompanied by an affidavit that claimed she was unaware that no answer was filed by her attorneys on her behalf, and that she had evidence of cruelty and threats by Father. The trial court granted Mother's motion and she then proceeded to file an Original Answer and Cross-petition for Divorce. At trial, Father testified that he has lived with both children since 2020 when the police removed the children from Mother pursuant to the original divorce decree. Father also testified that Mother has only seen the children two times since their removal from her. Father stated that he allowed the children to visit Mother's residence while being present and claims that Mother was too inebriated to care for the children. Mother responded by submitting her own testimony and photos of Father's alleged abuse. Subsequently, the trial court rendered a final decree of divorce that appointed Mother as sole managing conservator of the parties' two children and granted Father supervised visitation. Father appealed.

Holding:

Opinion: Father argues that the trial court abused its discretion by granting Mother's motion for new trial because she did not satisfy any of the elements to be eligible for a new trial. Here, Mother meets the first element under the Texas Supreme Court standard for a new trial as she pleaded uncontroverted facts that her failure to file was not intentional or the result of conscious indifference. Next, Mother satisfied her burden of alleging facts in the affidavit she submitted along with her motion for new trial that, if true, would be properly considered in the best interest of the child analysis. Despite Father's contention that Mother does not provide enough evidence to support the allegations, there is no authority that requires Mother

to specify the evidence she intended to use to support the allegations. Finally, Mother satisfied the burden of showing that Father would not be injured if the trial court were to grant her motion for new trial, as Father did not respond to Mother's motion and claim that the new trial would injure him. Mother stated in her motion that the "granting of a new trial would not injure [Father]," and Father does not point to anything in the record to controvert Mother's contention. Therefore, the trial court did not abuse its discretion in finding that Mother had satisfied all the elements required for a new trial.

Father also argues that the trial court abused its discretion by appointing Mother as sole managing conservator and granting him supervised visitation. Here, photographs submitted by Mother showed her with bruises and blood on her head and face, and Mother testified that Father had caused these injuries. At first, Father denied having committed these injuries but refused to answer any further questions on this subject based on Fifth Amendment grounds. Accordingly, the trial court could have disbelieved Father's denial, and could have inferred from Father's refusal to answer that, had he answered, he would have incriminated himself. Moreover, there was no evidence in the record to show that either party offered greater stability in their homes or had better plans for the children. Therefore, the trial court did not abuse its discretion in determining that it was in the best interests of the children for Mother to be named sole managing conservator and for Father to have supervised visitation.

HUSBAND'S MISTAKEN BELIEF REGARDING THE TRIAL PROCEEDING AND HIS ATTORNEY'S FAILURE TO APPEAR FOR TRIAL DUE TO A SURGERY BY ITSELF IS NOT SUFFICIENT TO MEET THE *CRADDOCK* FACTORS.

¶23-3-04. *In re Y.B.*, No. 05-21-00915-CV, 2023 WL 3451041 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (05-15-23).

Facts: Wife filed for divorce. Thereafter, Wife served Husband via publication, and after Husband failed to file an answer, the trial court granted a default judgment against Husband. Upon learning of the divorce, Husband filed a Motion for New trial and Counterpetition for Divorce. Subsequently, the parties reconciled and continued to live together as spouses. After the trial court dismissed the divorce proceeding for want of prosecution, the parties requested that the trial court reinstate the case. At trial, Husband and his counsel failed to appear, and the trial court entered a default judgment. Husband then filed a Motion to Set Aside the Default Judgment and a Motion for New Trial. In Husband's attorney's affidavit, she stated that she slept through her alarm on the day of trial due to prescription medication she was required to take after going to the emergency room the day before trial. The trial court denied Husband's post-trial motions and Husband appealed.

Holding: Affirmed as Modified.

Opinion: Husband argues that the trial court erred by failing to grant his Motion to Set Aside the Default Judgment. Specifically, Husband argues that he is entitled to a new trial because his counsel was incapacitated and asserts that Wife misrepresented her intentions to proceed with the trial. Here, Husband and his attorney failed to demonstrate that their failures to appear were due to mistake or accident. Moreover, Husband's attorney indicated their knowledge of the trial setting the week prior and requested to reset the trial so that further discovery could be conducted. At that time, Husband's attorney failed to request a continuance. Therefore, the trial court did not err by denying Husband's post-trial motions because Husband's mistaken belief and his attorney's failure to appear did not satisfy the *Craddock* factors.

Next, Husband argues that the trial court erred by awarding Wife attorney's fees. Here, Wife's attorney failed to testify regarding his experience, his hourly rate, the nature of preparation or complexity of the case, and the number of hours he spent on the divorce. Therefore, the trial court erred by awarding Wife attorney's fees because the evidence is insufficient to support the award.

PROCESS SERVER'S STATEMENTS MADE WITHIN THE RETURN OF SERVICE FAILED TO INDICATE THE METHOD OF SERVICE USED IN SERVING WIFE AND WHETHER SUCH WAS IN ACCORDANCE WITH THE TRIAL COURT'S ORDER GRANTING SUBSTITUTE SERVICE.

¶23-3-05. *IMOMO Beal*, No. 04-22-00070-CV, 2023 WL 3487035 (Tex. App.—San Antonio 2023, no pet. h.) (mem. op.) (05-17-23).

Facts: Husband filed for divorce and thereafter attempted to serve Wife on three separate occasions. Subsequently, the trial court granted Husband's Motion for Alternative Service, which authorized service either by delivering a copy of the citation and petition to any person over the age of sixteen at the specified address or attaching same on the gate or front door of the address. After the process server effectuated service, Wife failed to make an appearance and the trial court granted a default judgment. Wife filed a restricted appeal.

Holding: Vacated and Remanded.

Opinion: Wife argues that the trial court erred by granting a default judgment because service was defective. Specifically, Wife asserts that Husband's supporting affidavit was insufficient and that the trial court's order granting substitute service did not comply with TRCP 106. Here, the process server stated in the Return of Service that service was effectuated "by delivery to [Wife] as per Motion for Alternative Service under Rule 106a…." This statement fails to specify how the process server effectuated service in accordance with the trial court's order. Thus, it is impossible to determine whether the process server acted in accordance with the trial court's Order on substitute service. Finally, it is irrelevant that the process server effectuated service per Husband's motion since it is the trial court's order on substitute service that is controlling. Therefore, the trial court abused its discretion by granting a default judgement because it did not have personal jurisdiction over Wife.

TRCP 166(a)(i) REQUIRES THAT A NO-EVIDENCE MSJ SPECIFICALLY STATE THE ELEMENT OR ELEMENTS FOR WHICH THERE IS NO EVIDENCE.

¶23-3-06. *Aleman v. Aleman*, No. 14-22-00313-CV, 2023 WL 3641122 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (mem. op.) (05-25-23).

Facts: Husband filed for divorce. During the divorce proceeding, Husband filed a no-evidence MSJ on Wife's claim for spousal maintenance. Therein, Husband argued that there was no evidence of "one or more of the following elements" and listed every element of Wife's claim for spousal maintenance. Following a hearing on Husband's no-evidence MSJ, the trial court granted Husband's motion. Thereafter, the parties attended trial and the trial court signed a Final Decree. Wife appealed.

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

Opinion: Wife argues that the trial court abused its discretion by granting Husband's no-evidence MSJ. Here, filing a no-evidence MSJ that asserts a party possesses no evidence to support "one or more" or "any of" the elements is insufficient under TRCP 166(a)(i). Instead, TRCP 166a(i) requires that a no-evidence MSJ specifically state the element or elements for which there is no evidence. Thus, Husband's MSJ is insufficient to support summary judgment because the language contained within his motion does not clearly identify which elements are challenged. Still, Husband argues that Wife waived her argument because she did not present it to the trial court. However, on appeal, the nonmovant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment. Therefore, the trial court abused its discretion by granting Husband's no-evidence MSJ.

Editor's comment: *A no-evidence MSJ has to meet specific criteria to be granted and upheld on appeal. One of those criteria is that the motion must allege the specific element of proof for which there is zero evidence. A general allegation is insufficient. M.M.O.*

TRIAL COURT ERRED BY ENTERING A DEFAULT FINAL DECREE WHEN WIFE FAILED TO EFFECTUATE SERVICE UPON HUSBAND AND FILE A RETURN OF SERVICE WITH THE COURT.

¶23-3-07. *Cato v. Smith-Cato*, No. 05-22-00068-CV, 2023 WL ####### (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (05-26-23).

Facts: Wife filed a pro se Petition for Divorce. Within Wife's petition, Wife stated "I cannot find my spouse. I ask that my spouse be served by posting or publication." Thereafter, Wife filed a Motion for Citation, which stated that Wife made diligent attempts to locate Husband that were unsuccessful. Despite Wife's filing, Wife failed to file a return of service. After Wife filed an Affidavit for Prove-Up of Default Divorce Without Children, an AJ signed a default Final Decree without conducting a hearing. The judgment recited that "[Husband] was not present but was served and has defaulted." Regarding jurisdiction, the judgment provided the following: "The Court heard evidence and finds that it has jurisdiction over this case and the parties, that the residency and notice requirements have been met, and the Petition for Divorce meets all legal requirements." Subsequently, Husband filed a Motion to Set Aside Default Judgment, which the trial court denied. Husband appealed.

Holding: Reversed and Remanded.

Opinion: Husband argues that the trial court abused its discretion by granting a default divorce because it did not possess personal jurisdiction over him. Here, Wife failed to file a return of service with the trial court as required by TRCP 107. Consequently, the TRCP prohibited the trial court from rendering a default judgment against Husband. Further, without proof of service, it cannot be presumed that service upon Husband is valid. Therefore, the trial court erred because it did not have personal jurisdiction over Husband, and thus, the Final Decree is void.

DIVORCE
INFORMAL MARRIAGE

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT FATHER AND GIRLFRIEND DID NOT HAVE A COMMON-LAW MARRIAGE.

¶23-3-08. *In re Estate of Martin,* No. 06-22-00061-CV, 2023 WL 3185811 (Tex. App.—Texarkana 2023, no pet. h.) (mem. op.) (05-02-23).

Facts: Father died, and his friend ("Representative") filed an application to determine heirship on behalf of his only child. The application alleged that Father died intestate and unmarried, but Father's death certificate stated that he was married to Girlfriend. Girlfriend opposed the application and alleged that they had a common-law marriage. At trial, an Upshur County justice of the peace ("Witness") who also signed the death certificate of Father, gave testimony that she did not believe that Father and Girlfriend were married based on her interactions with the funeral home and counsel for Girlfriend. Witness testified that after growing suspicious of Father's marital status, she requested other proof of common-law marriage from the funeral home and Girlfriend, but no proof was provided. Despite believing that there was no common-law marriage, Witness was not allowed to amend the death certificate. Subsequently, a

Marion County jury heard the testimony from both sides and determined that Father was not married at the time of his death and entered a judgement declaring the child to be Father's sole heir. Girlfriend appealed.

Holding: Affirmed.

Opinion: Girlfriend argues that the evidence is factually insufficient to support the jury's finding that Father was unmarried at the time of his death because she proved the existence of a common-law marriage. Here, although Girlfriend introduced evidence that she and Father agreed to be married and stated that they had signed an agreement attesting to the marriage, no such document was produced. Further, although the parties lived together for a period of time, Father's best friends gave testimony that Father did not view his relationship as a marriage and had explicitly stated that he never intended to get married. Finally, when Girlfriend moved out, Father's neighbor proposed to her suggesting that he also believed Girlfriend to be unmarried. Accordingly, as the fact finder, the jury was free to conclude that Girlfriend and Father did not meet the elements of common-law marriage. Therefore, the evidence was factually sufficient to support the jury's finding.

Editor's comment: *Hmmm . . . . Would-be common law Wife testified that photos of herself and alleged common law Husband were lost when alleged Husband's house burned down within days after his death, and of the fireproof safe would-be Wife said contained their 2015 signed marriage agreement, "there was no budging it." J.V.*

DIVORCE
PROPERTY AGREEMENTS

TRIAL COURT DID NOT ERR IN FINDING THE POSTNUPTIAL AGREEMENT BETWEEN THE PARTIES TO BE VALID, AND SUBSEQUENTLY REFERING THEM TO ARBITRATION.

¶23-3-09. *In re I.F.,* No. 05-21-00530-CV, 2023 WL 2300539 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (03-01-23).

Facts: Husband and Wife signed a postnuptial agreement ("the Agreement") that instructed the parties to attend a binding arbitration in the event of a divorce. Subsequently, Wife filed for divorce. After conducting an evidentiary hearing on the validity of the Agreement, the trial court found the Agreement to be enforceable and signed an order referring the case to arbitration. Even though both parties appeared at arbitration, Husband's attorneys refused to proceed, and Husband provided no testimony regarding custody, possession and access, support for the children, or a proposed division of the parties' estate. Thereafter, the arbitrator rendered an Award, which Wife requested the court confirm. The trial court then conducted a hearing and confirmed the Award and entered the parties' Final Decree in accordance with same. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court abused its discretion because it did not possess the authority to address the validity of the Agreement. Here, Husband never objected to the trial court's ability to determine the Agreement's validity and instead only presented evidence challenging the validity of the Agreement itself. Thus, Husband waived this issue. Still, even if Husband had preserved the issue on appeal, Husband fails to demonstrate that the trial court lacked the authority to determine the validity of the Agreement. Therefore, the trial court did not err by addressing the validity of the Agreement.

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Next, Husband asserts that the trial court abused its discretion by referring the case to arbitration, because the arbitration clause is not enforceable. Husband also claims that the Agreement is not the agreement that he signed. Here, the Wife admitted the Agreement into evidence, and the Notary Public then testified that she had signed same. Additionally, Wife admitted pages from the notary book containing information related to the identity of the parties. Therefore, the trial court did not err in finding the Agreement to be valid and enforceable, and by subsequently referring the parties to arbitration.

Editor's comment: *In family law cases, the trial court determines the validity of the agreement, including any arbitration agreement contained therein, prior to referral to arbitration. M.M.O.*

TRIAL COURT ERRED IN FINDING THAT PARTIES DID NOT HAVE AN ENFORCEABLE PREMARITAL AGREEMENT AT THE TIME OF DIVORCE BECAUSE HUSBAND ADMITTED DURING DISCOVERY THAT HE VOLUNTARILY SIGNED A PREMARITAL AGREEMENT PRIOR TO HIS MARRIAGE WITH WIFE.

¶23-3-10. Perez v. Perez, No. 01-22-00290-CV, 2023 WL 3235831 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (mem. op) (05-04-23).

Facts: Wife filed a Petition for Divorce that requested a disproportionate share of the community estate and claimed that she and Husband had entered into a premarital agreement prior to their marriage. Wife served Husband a Request for Admissions, and in his response, Husband admitted to signing a premarital agreement that Wife had attached as Exhibit "A" to her request for admissions. However, when the parties took the signed premarital agreement to get notarized, the notary public refused to notarize Husband's signature as he did not have a driver's license present. At trial, despite his response to Wife's Request for Admissions, Husband stated that Wife admitted separately at trial the premarital agreement was different than the one that he signed. Thereafter, the trial court found that there was no enforceable premarital agreement and awarded Husband all the community estate accounts with Bank of America, and $259,069.00 of the contested property from the "community cash proceeds" that were being held in an escrow account. Wife appealed.

Holding: Reversed and Remanded.

Opinion: Wife argues that the trial court erred in determining that the parties did not have an enforceable premarital agreement at the time of divorce. Here, Husband admitted in his response to Wife's Request for Admissions that he and Wife voluntarily signed the premarital agreement that Wife had attached to her request for admissions. Further, Husband did not raise unconscionability as an affirmative defense in either his pleadings or at trial. Husband also admitted that the premarital agreement that he signed provided a fair and reasonable disclosure of the property and financial obligations of Wife, and that he voluntarily signed the waiver of any right to disclosure of the property and financial obligations of Wife. Moreover, his signature warranted that he investigated Wife's property and financial obligations sufficiently to "satisfy any questions" he might have regarding the disclosures of property and financial obligations. Finally, Husband never attempted to amend or withdraw his admission about his execution of the premarital agreement. Therefore, because Husband's admission served to conclusively establish the elements for enforceability of a premarital agreement, the trial court erred by finding that the parties did not have enforceable premarital agreement at the time of their divorce.

Editor's comment: *Rare is the occasion when a trial court sets aside a premarital agreement. But where the spouses admit that they both voluntarily signed the agreement, they cannot then deny the agreement, and the trial court cannot invalidate it. Here, Husband admitted in response to request for admissions that he signed it voluntarily. That was enough. M.M.O.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

MEDIATOR, WHO WAS ACTING AS AN ARBITRATOR, DID NOT SHOW PARTIALITY TO HUSBAND BY ALLOWING HIS WITNESSES TO OBSERVE THE ARBITRATION PROCEEDING.

¶23-3-11. *Franco v. Orozco*, No. 14-21-00696-CV, 2023 WL 2486829 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (mem. op.) (03-14-23).

Facts: The parties entered into an MSA that settled their divorce. After disputes arose from the interpretation of the MSA, Wife hired new counsel who attacked Mediator's partiality and refused to attend arbitration with him. In response, Mediator explained that he had disclosed his past working relationship with Husband's counsel to Wife's attorneys and that they did not object to his role as mediator. Subsequently, Husband filed a Motion to Compel Arbitration. In response, Wife filed a Motion to Vacate the MSA and for Sanctions. Following a hearing, the trial court signed an order compelling arbitration and found Wife's misrepresentations to be sanctionable. The parties attended arbitration and Mediator signed an arbitration award. Thereafter, Husband filed a Motion to Enter and the trial court signed the parties' Final Decree. Wife appealed.

Holding: Affirmed.

Opinion: Wife argues that the Mediator abused his discretion and showed partiality towards Husband's attorney when he permitted Husband's witnesses to stay and observe the arbitration proceeding. Additionally, Wife asserts that the parties expressly agreed to exclude outside witnesses from the proceedings. Here, Wife did not object to Mediator allowing Husband's witnesses to "remain and observe [the arbitration] with their microphones muted." Thus, Wife waived her complaint. Further, Wife fails to cite any authority that supports her contention that permitting a party's witnesses to stay and observe the arbitration proceeding evidences an arbitrator's impartiality. Moreover, Wife does not explain how permitting witnesses to observe the proceedings harmed her, especially when neither witness provided testimony. Therefore, Arbitrator did not err by allowing Husband's witnesses to observe the arbitration proceeding.

Editor's comment: *Once an arbitrator issues a final determination in a case, there are very few ways to set asides its finding effect. Here, allegation that arbitrator showed partiality because witnesses were allowed to observe the proceedings was insufficient to show actual partiality. M.M.O.*

HUSBAND'S REQUEST FOR ATTORNEY'S FEES DID NOT INVOKE THE JUDICIAL PROCESS OR WAIVE HIS RIGHT TO ARBITRATION.

¶23-3-12. *IMOMO Herrera and Roman*, No. 13-22-00533-CV, 2023 WL 3116753t (Tex. App.—Corpus Christi – Edinburg 2023, no pet. h.) (mem. op.) (04-27-23).

Facts: The Court of Appeals previously remanded the parties' divorce to the trial court and instructed the trial court to reconsider its denial of Husband's Motion to Compel Arbitration. Upon remand, Husband requested $45k in appellate attorney's fees before the parties attended arbitration. Thereafter, the trial court determined that it did not possess authority to award him attorney's fees and Father filed a Motion to Compel Wife to comply with the terms of the parties' PMA by naming an arbitrator. Following a hearing on Husband's motion, the trial court determined that Husband had substantially invoked the judicial

process by pursuing an award of interim attorney's fees, and as a result, he waived his right to arbitration. Husband filed an interlocutory appeal.

Holding: Reversed and Remanded.

Opinion: Husband argues that the trial court abused its discretion by finding that he had waived his right to arbitration when he requested attorney's fees. Here, this Court previously determined that the parties' PMA contained a valid agreement to arbitrate the underlying divorce proceeding. The Supreme Court of Texas has repeatedly admonished lower courts that waiver should only be found "in the most unequivocal of circumstances." Given the strong presumption against waiver of arbitration and the facts in this case, Husband did not express an "unequivocal" intent to waive his right to arbitration. In Husband's motion requesting attorney's fees, Husband did not state an independent ground for awarding attorney's fees and did not request that the trial court award him fees as a sanction against Wife. Instead, Husband requested the trial court to award him fees incurred defending against "unnecessary litigation" that Wife initiated. Thus, Husband's request for attorney's fees is not a request for affirmative relief. Additionally, Husband's request for attorney's fees did not substantially invoke the judicial process because his request was related to the issue of arbitration rather than the merits of the case. Moreover, following this Court's remand, Husband quickly invoked his right to arbitrate the merits of the case. Accordingly, despite his request for attorney's fees, Husband's overall litigation conduct is not "unequivocally inconsistent with claiming a known right to arbitration." Finally, the delay and additional litigation expenses caused by Husband's request did not create a significant delay in the case. Therefore, the trial court erred by finding that Husband had waived his right to arbitration.

Editor's comment: *The Court observes that if a claim for attorney's fees is based "solely on defending against the other party's claims," the claim is not a request for affirmative relief. But "if the fees claim is based on an independent ground or sanction, it is a request for affirmative relief." J.V.*

Editor's comment: *One way to waive the right to arbitration is to continue to litigation without invoking the arbitration process. Here, one party seeking an award of interim attorney's fees was not sufficient to waive arbitration. M.M.O.*

DIVORCE
PROPERTY DIVISION

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ENTERING A FINAL DECREE THAT DENIED FATHER POSSESSION OF OR ACCESS TO THE CHILD, AND AWARDED MOTHER ONE HUNDRED PERCENT OF THE COMMUNITY ESTATE GIVEN FATHER'S CONVICTIONS FOR SEXUAL ABUSE TOWARDS HIS DAUGHTER AND CRUEL TREATMENT OF MOTHER.

¶23-3-13. *Simons v. Simons,* No. 11-21-00066-CV, 2023 WL 2415209 (Tex. App.—Eastland 2023, no pet. h.) (mem. op.) (03-09-23).

Facts: After the State convicted Father of aggravated sexual assault of a child and aggravated assault with a deadly weapon, Father filed for divorce. Within Father's petition, he alleged that Mother had treated him cruelly and committed adultery. In response, Mother filed a counterpetition, contending that Father had treated her cruelly and had abused her and their child. Father then filed a motion for summary judgement, which the court denied. Subsequently, Father filed a request for a jury trial. Following trial, the trial court entered an order consistent with the jury's findings. Specifically, the trial court appointed Mother as SMC, appointed Father as a possessory conservator with no rights of possession or access to the child and awarded Mother one hundred percent of the community estate. Father appealed.

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Holding: Affirmed.

Opinion: Father argues that the court abused its discretion by denying Father possession and access to the child. Specifically, Father contends that the trial court did not provide him with a termination hearing and the evidence does not rise to the "extreme circumstances" in which complete denial of access is appropriate. Here, the complete denial of possession of or access to a child in a conservatorship dispute does not constitute a de facto termination of one's parental rights; thus, this denial does not implicate Father's constitutional due process rights that would be afforded to him in a termination hearing. Further, the record shows that the State convicted Father for sexually assaulting the child on multiple occasions. Accordingly, the trial court's decision to completely deny Father possession of or access to the child is reasonable, appropriate, and justified. Moreover, the evidence supports the trial court's finding that the denial of Father's possession and access to the child was in the child's best interest. Therefore, the trial court did not abuse its discretion when it denied Father any possession of or access to the child.

Next, Father asserts that the trial court abused its discretion by awarding Mother one hundred percent of the community estate. Additionally, Father claims that the trial court abused its discretion in making a disproportionate division of the community estate based upon Father's criminal history and convictions. Here, Father's abusive and criminal history can be considered in awarding a disproportionate share of the community estate to a spouse. Further, Texas Courts have upheld decisions that awarded a spouse one hundred percent of the community estate when such factual findings exist. Thus, a spouse's criminal convictions are an appropriate consideration for the trial court in making its property division in a fault-based divorce setting. Therefore, the trial court did not abuse its discretion by awarding Mother one hundred percent of the community estate.

Editor's comment: *Regarding the de facto termination, the Family Code provides avenues for unlimited future modifications, which supports the conclusion that this was not a de facto termination. Compare this case to Stary v. Ethridge, currently pending in the Texas Supreme Court, where a lifetime protective order is being compared to a de facto termination. Will the fact that a lifetime protective order only provides two opportunities to modify, rather than unlimited opportunities to modify as with a SAPCR, change the outcome? H.J.D.*

Editor's comment: *Yes, you can be a possessory conservator yet have no rights to possession of or access to a child. TFC 153.004(c) says that the trial court "shall consider the commission of family violence or sexual abuse in determining whether to deny, restrict or limit the possession of a child by a parent who is appointed as a possessory conservator." J.V.*

Editor's comment: *Another case that supports awarding 100% of the community property and denying access to child was supported based on husband's bad conduct. M.M.O.*

TRIAL COURT ERRED BY CHARACTERIZING THE MARITAL RESIDENCE AS COMMUNITY PROPERTY BECAUSE THE PARTIES BUILT THE HOUSE ON LAND IN WHICH THEY EACH HAD A 50% SP INTEREST.

¶23-3-14. *Garcia v. Mascorro*, No. 04-21-00394-CV, 2023 WL 2588189 (Tex. App.—San Antonio 2023, no pet. h.) (mem. op.) (03-22-23).

Facts: Husband and Wife sought a divorce. At trial, the parties each agreed that Husband's mother transferred two lots of land to her "beloved son and daughter-in-law, [Husband and Wife]," via a gift deed. Thereafter, both parties testified that they built the marital residence on the two lots. Following trial, the trial court found the parties' marital residence to be community property, ordered it to be sold, and ordered that its net sales proceeds be split 75/25 in favor of Husband. Wife appealed.

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

Opinion: Wife argues that the trial court erred by characterizing the marital residence as community property. Instead, Wife asserts that the lots were given to the parties as gifts and are thus their separate property. In response, Husband contends that the parties built the marital residence with community funds. Consequently, Husband claims that the real property should be characterized as community property. Here, it is undisputed that the lots are Husband and Wife's separate property. Although the parties constructed the marital residence during the marriage, "it is well-established that any improvements made to a spouse's separate property during marriage, including the construction of a residence or other buildings thereon, are considered the spouse's separate property, and the community receives no 'right, title or interest in or to the land." Accordingly, the marital residence should be characterized as separate property because the parties built it on separate property. Therefore, the trial court erred by characterizing the marital residence as community property.

Editor's comment: *So on remand, it seems that the trial court will be constrained to grant each former spouse an undivided 50% separate property interest in the house and lots and can't order them sold, unless the court finds that a community property reimbursement claim exists. Much better for ex-Wife instead of a 75/25 split in ex-Husband's favor. J.V.*

Editor's comment: *Inception of title determines the characterization of the property. A house is built as an improvement on land, so the inception of title to the land controls the characterization, not the details regarding improving the land by building a home. M.M.O.*

TRIAL COURT POSSESSES DISCRETION TO APPOINT A RECEIVER FOLLOWING THE SIGNING OF A FINAL DECREE.

¶23-3-15. *S.T. v. H.K.*, No. 02-21-00408-CV, No. 02-21-00420-CV, 2023 WL 2607751 (Tex. App.—Fort Worth 2023, no pet. h./orig. proceeding) (mem. op.) (03-23-23).

Facts: Wife filed for divorce. Shortly after, the parties signed agreed temporary orders that allowed Wife to remain in the marital residence "unless otherwise agreed to in writing or until further order." Thereafter, Wife moved out of the marital residence and filed a Motion to Modify Temporary Orders and requested that the marital residence be listed and sold. The trial court denied Wife's request, and the parties eventually attended trial. Following trial, the trial court ordered that the marital residence be listed for sale, that its proceeds be split equally, and that a receiver would be appointed in the event that the parties failed to list the house for sale. Subsequently, Husband filed a Motion to Clarify the trial court's ruling regarding the sale of the marital residence, arguing that he could not make necessary repairs before the listing deadline. After an entry hearing, the trial instructed the parties to list the marital residence by a date certain "in accordance with the current market evaluation." Subsequently, the trial court signed a Final Decree, and a month later, signed an Order Appointing a Receiver to Sell the Marital Residence. Husband filed a Motion to Suspend Enforcement of Final Decree and Receiver-Appointment Order and two notices of appeal. The trial court denied Husband's motions, and this Court granted Husband's Emergency Motion for Stay in the Original Proceedings.

Holding: Affirmed/Mandamus denied.

Opinion: Husband argues that the trial court erred by ordering the sale of the marital residence and finding that the marital residence was not subject to an in-kind division. Instead, Husband asserts that the trial court should have awarded Wife a money judgment for her share of the marital residence's equity as opposed to ordering its sale. Here, Wife testified regarding her need for the sales proceeds from the residence and that Husband's inability to make an off-setting payment to her. Further, Husband appraised the marital residence at 406k, while Wife appraised it at $670k; however, Husband's appraisal was

outdated and did not rely upon as many comparable sales as Wife's did. Additionally, the community estate did not possess enough liquid nonretirement assets to award a lump-sum money judgment for Wife's equity in the marital residence and still maintain a 50/50 division. Finally, Husband failed to offer a proposal that demonstrated his ability to pay a money judgment to Wife. Therefore, the trial court did not err in ordering the sale of the marital residence.

Next, Husband argues that the trial court erred by appointing a receiver to sell the martial residence. Specifically, Husband asserts that the trial court did not have the authority to enter a receiver-appointment order after signing the Final Decree. Here, the trial court's receiver-appointment order merely effectuated what the trial court had conditionally ordered in its judgment. Because the parties failed to list the marital residence for sale, the receiver-appointment order contemplated by and conditionally ordered in the final judgment took effect. Therefore, the trial court did not err by appointing a receiver to sell the marital residence and Husband's Petition for Writ of Mandamus is denied.

Finally, Husband asserts that the trial court erred by violating his due process rights by appointing a receiver without sufficient prior notice and the opportunity to be heard. Here, the record demonstrates that Husband received prior notice that Wife sought a sale of the marital residence as a part of the just-and-right division and that Husband had an opportunity to be heard. Specifically, Husband argued against the appointment of a receiver at a temporary orders' hearing and at trial. Therefore, the trial court did err because it did not violate Husband's due process rights.

Editor's comment: *A money judgment is nothing more than a hunting license, even if the judge orders the other spouse to pay. The Court can't incarcerate the other spouse by contempt for failing to pay because that order would amount to imprisonment for debt. J.V.*

Editor's comment: *Appointing a receiver to sell property should be a harsh remedy only ordered after notice and opportunity to be heard. M.M.O.*

IN DIVIDING A MARITAL RESIDENCE AND AWARDING A LIEN ON THE PROPERTY SECURED BY AN OWELTY LIEN, TRIAL COURT NOT REQUIRED TO INCLUDE AN INTEREST RATE, A PAYMENT SCHEDULE, OR A REQUIREMENT THAT THE MARITAL RESIDENCE BE SOLD WITHIN A CERTAIN TIME.

¶23-3-16. ***IMOMO Cote,*** ___ S.W.3d ___, No. 08-22-00016-CV, 2023 WL 2632108 (Tex. App.—El Paso 2023, no pet. h.) (03-24-23).

Facts: Father filed for divorce and requested that the child's geographic restriction be limited to Brazos County. In response, Mother filed an Answer and requested that Father take nothing. Thereafter, Mother requested that she be awarded the exclusive right to designate the child's primary residence and a ½ interest in the "market value" of the marital residence. At trial, Mother testified that the parties agreed to exchange the child in-between their two counties (Liberty County and Brazos County) during the divorce, which required each party to drive 1 to 1.5 hours. Further, Mother testified that Father did not communicate to her when the child was in his possession, did not follow their agreements, and that the child had separation anxiety when away from her. Following trial, the trial court awarded Mother the exclusive right to designate the child's primary residence within Brazos or Liberty County. Additionally, the trial court ordered that the martial residence be divided equally and awarded Mother a $45k lien on the marital residence secured by an owelty lien. Subsequently, at an entry hearing, Mother requested that the trial court modify the Final Decree to include a mechanism for payment. The trial court denied Mother's request and signed the presented Final Decree. Mother appealed and Father cross appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred by including Liberty County in its geographic restriction. Here, each party testified regarding the support systems they possessed in their respective counties.

Further, Mother offered evidence that Liberty County had a good school system that the child could attend. Additionally, Mother testified regarding her future employment opportunities near her home. Therefore, the trial court did not abuse its discretion by ordering that the child's geographic restriction be within either Liberty or Brazos County.

Mother argues that the trial court erred by failing to clarify how or when her interest in the martial residence will be satisfied. Specifically, Mother asserts that the Final Decree lacks specificity to be enforced by contempt. Here, if and when the marital residence is sold, the lien must be satisfied, and Mother will receive her 50 percent interest in the martial residence. Thus, the Final Decree's division of property is specific enough to be enforceable by contempt. The trial court did not commit error by not including an interest rate, a payment schedule, or a requirement that the martial residence be sold within a certain time. Therefore, the trial court did not err in dividing the marital estate.

TRIAL COURT ERRED IN CONFIRMING THE MONTHLY ANNUITY PAYMENTS FROM A SETTLEMENT AGREEMENT IN A LAWSUIT AS HUSBAND'S SEPARATE PROPERTY BECAUSE HUSBAND FAILED TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE PAYMENTS WERE INTENDED TO BE USED SOLELY FOR HIS PERSONAL INJURIES, PAIN, AND SUFFERING.

¶23-3-17. ***Thornhill v. Thornhill***, ___ S.W.3d ___, No. 14-21-00324-CV, 2023 WL 2876725 (Tex. App.—Houston [14th dist.] 2023, no pet. h.) (04-11-23).

Facts: Prior to the parties' divorce action, Husband suffered serious injuries from an accident, resulting in a personal injury lawsuit. Husband was declared to be incapacitated, and Wife assumed the role of Husband's guardian. Thereafter, Husband and Wife reached a settlement agreement with Defendants, and Wife signed the agreement on behalf of herself and Husband. In the settlement agreement, the parties agreed to release all claims against Defendants involved in Husband's personal injury case. In return, Defendant's insurers agreed to make certain cash payments to Husband, as well as monthly payments for the duration of Husband's life. The parties' settlement agreement identified the cash payments as follows: (1) $200,000.00 to Husband and the law firm representing the parties; and (2) $1 million to Husband, the specific lawyer representing the parties, and Texas Mutual Insurance. Additionally, the agreement stated that the cash payments were to be divided by "Plaintiffs as follows: $50,000 to [Wife], individually [and] $1,150,000 for the benefit of [Husband]." Subsequently, Wife filed for divorce and Husband regained 70 percent of his health back. At trial, the only contested issue was the characterization of the monthly payments from the annuity paid to Husband. Following trial, the trial court confirmed the monthly annuity payments as Husband's separate property. Specifically, the trial court found that the annuity payments were funded exclusively by Husband's personal injury award and ordered Husband to pay Wife spousal support maintenance of $1,500 a month for two years. Wife appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Majority Opinion: (Christopher, C.J.; Bourliot J.) Wife argues the trial court erred in characterizing the annuity payments as Husband's separate property. Here, the settlement agreement did not expressly segregate the awarded amounts into specific types of damages. In response, Husband argues that the monthly annuity payments should be characterized as his separate property since they are for his pain and suffering. However, the settlement agreement provides that the annuity payment awarded to Husband are "for the benefit of [Husband], and not that it was intended for pain and suffering, lost wages, medical expenses, or anything else." Further, both parties testified that the money they received from the settlement agreement benefited both of them, and the plain language of the settlement stated that the attorney's fees, medical expenses, and worker's compensation lien obligations were to be satisfied from this settlement. Although, the settlement agreement awarded monies to Husband partially for his "personal physical injuries," this does not conclusively mean that the proceeds were solely Husband's separate property, especially since the settlement agreement also includes community property damage elements. Thus, Husband failed to meet his burden by clear and convincing evidence to show that the

monthly annuity was his separate property. Therefore, the trial court erred in characterizing Husband's annuity payments as his separate property.

Concurring and Dissenting Opinion: (J. Spain) This court's judgement correctly decided all issues except for the last sentence of the opinion in which the court affirmed the remainder of the decree. This sentence should be omitted from the opinion because this Court did not review the entirety of the Final Decree.

Editor's comment: *While certain aspects of a personal injury settlement can have separate property characterization, the community property presumption applies unless the settlement is parced into the specific amounts for the specific types of damages that would be separate property. M.M.O.*

TRIAL COURT FOUND THAT HUSBAND AND WIFE POSSESSED AN EQUAL, UNDIVIDED SEPARATE PROPERTY INTEREST IN A HOUSE THAT HUSBAND HAD PURCHASED A YEAR PRIOR TO MARRIAGE DUE TO THE CIRCUMSTANCES SURROUNDING THE PURCHASE.

¶23-3-18. *Folsom v. Folsom*, No. 01-22-00426-CV, 2023 WL 2976271 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (mem. op.) (04-18-23).

Facts: Before marriage, Husband purchased a house ("the House"); however, while he signed a Deed of Trust and Note ("Purchase Documents"), Husband failed to make a down payment. The Purchase Documents provided that Husband purchased the House as a "single man[,]" and did not mention Wife's name. Subsequently, the parties moved into the House and opened a joint bank account. To pay the House's mortgage and property taxes, the parties used funds deposited into the joint account. A year after they moved into the House, the parties married. Wife then filed for divorce. In a Statement of Relief Requested, Wife prayed for the House to be awarded as fifty percent her separate property and fifty percent Husband's separate property. At trial, Wife testified that prior to marriage, the parties combined finances and opened a joint bank account where both of their paychecks were deposited. Moreover, Wife informed the trial court that the House's expenses, including the mortgage, taxes, and utilities were paid from their joint account. In response, Husband testified that the parties did not move into the House until after its purchase was completed. On cross examination, Husband testified that the parties moved into the House together as a couple and that its expenses were paid from a joint account. Following trial, the trial court confirmed the House as the equal, undivided separate property of both spouses. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court erred by finding that the parties each possessed a 50% separate property interest in the House. Further, Husband asserts that his purchase of the House, in his sole name, nearly eleven months before his marriage to Wife is dispositive. In response, Wife contends that all payments on the House were paid from the parties' joint account and that the parties intended that they would jointly own the residence. Here, the Inception of Title Doctrine suggests that the House is Husband's separate property. However, the intention of the spouses as shown by the circumstances surrounding the purchase of the House casts doubt upon the argument that the House is Husband's separate property. Specifically, the parties were attempting to find a residence to move into together and used a joint account to pay for the House's mortgage, taxes, and utilities. Moreover, there is no indication that Husband signed an earnest money contract or that he paid the closing costs or other expenses associated with the House from his separate funds. Finally, based upon both parties' testimony, Husband never intended for the House to be his alone. Therefore, the trial court did not abuse its discretion by finding that the House was the equal, undivided separate property of both spouses.

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WIFE AND HUSBAND EACH POSSESSED A 50% SP INTEREST IN REAL PROPERTY AND THE RESIDENCE BUILT THEREON BECAUSE HUSBAND'S MOTHER HAD GIFTED THEM THE FUNDS TO PURCHASE AND CONSTRUCT THE ASSETS.

¶23-3-19. ***Despain v. Despain*****,** ___ S.W.3d ___, No. 04-22-00115-CV, 2023 WL 3103860 (Tex. App.—San Antonio 2023, no pet. h.) (04-27-23).

Facts: Husband and Wife invited Husband's mother (Mother) to live with them due to Mother's deteriorating health. Thereafter, Husband's Mother inherited $500k and deposited same into a bank account ("the Account"). For convenience, Mother added Husband as a signatory on the Account. While Mother deposited additional funds into the account, Husband never deposited any of his own funds into the account. After the spouses and Mother had discussions about building a house, Mother used the funds from the Account to purchase 19.72 acres ("the Land"). Subsequently, Husband and Wife entered into a farm and ranch contract to purchase the Land. After closing, Grantor executed a deed conveying the Land to both Husband and Wife. A year later, the parties completed the construction of the home ("the Residence"), which Mother funded through the Account. Husband filed for divorce. Following trial, the trial court found that the funds used to purchase the Land and build the Residence were a gift to both Husband and Wife. Alternatively, the trial court found that "if [Mother] did not intend to give the funds to purchase [the Land] and construct the home thereon to both [Husband and Wife], [Mother] nevertheless gave one-half of the funds and/or 19.72 acres and funds used to construct the home thereon to [Wife]." Accordingly, the trial court characterized the parties' interest in the the Land and the Residence as the separate property of Husband and Wife. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court erred by divesting him of his 50% interest in the Residence and ordering that the proceeds from the sale of the Land be equally divided between the parties. According to Husband, the evidence established that Mother gifted him a portion of her inheritance to purchase the Land. Additionally, Husband argues that the fact that Mother placed his name on her bank account created a presumption that she gifted him the funds in her bank account. Here, despite Husband characterizing himself as a co-owner on the Account, he admitted no documents supporting this contention and a family friend testified that Mother placed Husband's name on the account as protection against her estranged daughters. Moreover, Husband never deposited funds into the Account, all the funds therein belonged to Mother, and Mother continued to exercise control and dominion over the Account. Thus, the evidence does not establish as a matter of law that the funds in the Account were a gift from Mother to Husband. Still, Husband asserts that the evidence is legally and factually insufficient to support the finding that Mother gifted Wife a portion of the funds. According to Husband, when he "removed funds from the [Account] with [Mother's] consent to buy the property, delivery of the gift to [Husband] was completed." However, the evidence indicated that Mother placed Husband's name on the Account for convenience. Further, at the time of the purchase, the parties were married for 15 years, Wife had assumed the role as Mother's primary caretaker, and the parties (including Mother) had discussed the purchase of the Land and construction of the Residence. Then at trial, Wife testified that Mother "said she would give [Husband and Wife]" the funds for the property, so long as the Residence included living quarters for her. Finally, the Land's closing documents (the farm and ranch contract and the cash warranty deed) included both Husband and Wife's respective names. Consequently, when the funds were used to purchase the Land and the Residence, Husband delivered a gift to Wife. Therefore, the trial court did not err by finding that Husband and Wife each possessed a 50% separate property interest.

TRIAL COURT ABUSED ITS DISCRETION BY ORDERING HUSBAND TO PAY WIFE AN ENFORCEMENT AWARD FOR A DECREASE IN THE VALUE OF THE MARITAL RESIDENCE BECAUSE HE ONLY VIOLATED THE TEMPORARY ORDERS REQUIRING HIM TO PAY WIFE HALF OF THE MORTGAGE FEES.

¶23-3-20. *IMOMO Johnston*, No. 07-22-00069-CV, 2023 WL 3199996 (Tex. App.—Amarillo 2023, no pet. h.) (mem. op.) (05-02-23).

Facts: Wife filed for divorce. Trial court entered temporary orders requiring Husband to pay child support for the parties' minor child and pay half of the mortgage payments for the marital residence. Subsequently, Wife filed a Motion for Enforcement and Contempt complaining that Husband failed to make timely payments, causing her to incur overdraft fees and forcing her to withdraw money from her IRA account to pay the bills. The trial court then entered Final Decree of Divorce that ordered Husband to pay child support for an indefinite period, along with an enforcement judgment that awarded Wife $37,187.08. The enforcement judgement also included a $21,550.47 award for the decrease in value of the marital residence from the amount the mortgage was delinquent upon sale of the residence. Husband appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Husband argues that the trial court abused its discretion with respect to Wife's $21,550.47 enforcement award for the decrease in value of the marital residence. Here, no evidence was presented establishing the value of the home before the mortgage became delinquent and no evidence was presented to show how the value of the home was diminished for failure to pay the mortgage. As such, Husband's failure to pay the mortgage is a violation of the temporary orders, which required Husband to pay the cost of half of the mortgage payments. Accordingly, for his violation of not paying his share of the mortgage fees pursuant to the temporary orders, Husband would only be deficient for $10,775.23. Therefore, the trial court abused its discretion by awarding Wife a $21,550.47 enforcement award for the decrease in value of the marital residence.

Husband also argues that the trial court abused its discretion by failing to account for his other child and ordering indefinite child support. Here, Husband did not prove that he owed any obligation to this other child during the divorce proceeding by establishing that he was the parent of another child under TFC section 160.302. In addition, the trial court made a specific finding that his child with Wife had a serious disability that required substantial care and personal supervision, which would meet the requirements for indefinite child support under TFC section 154.302(a). Accordingly, the trial court followed the statutory guidelines for calculating child support, as Husband did not establish paternity of another child and the trial court established that the child had a disability that required substantial care and personal supervision. Therefore, the trial court did not abuse its discretion by ordering Husband to pay indefinite child support without considering Husband's other child.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING WIFE A DISPROPORTIONATE SHARE OF THE COMMUNITY ESTATE AS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT HUSBAND COMMITTED ADULTERY.

¶23-3-21. *Fitzpatrick v. Fitzpatrick,* No. 05-22-00001-CV, 2023 WL 3300560 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (05-08-23).

Facts: During Husband's and Wife's divorce proceeding, Husband filed a motion for continuance to extend the date for final trial. The trial court granted Husband's continuance; however, the trial court's order expressly stated that "no pretrial deadlines" would be extended. Subsequently, after the pre-trial discovery deadline had already passed, Husband supplemented his discovery and designated an expert to testify about tracing his separate property. Wife moved to strike Husband's supplemental discovery and expert designation as untimely. Husband's counsel withdrew shortly before the hearing on Wife's motion,

and the trial court granted Wife's motion after the hearing. Thereafter, the case was tried, and the trial court issued a memorandum decision and awarded Wife a disproportionate share of the community estate after finding that Husband guilty of adultery and cruel treatment. Husband then filed a motion for reconsideration, which the trial court denied. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court abused its discretion by excluding Husband's tracing expert. Here, Husband had the burden to establish good cause, or the absence of unfair surprise or unfair prejudice, to introduce his untimely expert designation. However, although Husband stated that Wife was aware of his separate property, this does not establish that the late designation of an expert would not unfairly surprise Wife. Moreover, the record demonstrates that Husband failed to establish good cause to allow the expert designation, as Husband testified that the expert's testimony would be "helpful," but not necessary to prove that he owned separate property. Therefore, the trial court did not abuse its discretion by denying Husband the opportunity to call an expert witness that was not timely designated.

Next, Husband argues that the trial court abused its discretion by finding that he was guilty of adultery and cruel treatment. Here, there was sufficient evidence to support the conclusion that Husband committed adultery. Wife presented hundreds of sticky notes with women's names and phone numbers on them, text messages between the parties that established that Husband was intimate with other people, and receipts from lingerie stores and luxury women's brands purchased with Husband's card. Therefore, the trial court did not abuse its discretion in concluding that Husband committed adultery, and the adultery finding is sufficient to support a finding of fault by Husband in the breakup of the marriage.

Finally, Husband argues that the trial court abused its discretion by awarding Wife a disproportionate share of the community estate. Here, the record shows that Husband cancelled Wife's access to community funds and accounts, forcing Wife to use her separate property to pay living expenses, and that Husband failed to timely make court ordered spousal support payments. Accordingly, even without the finding of fault, the evidence supports the trial court's decision to award Wife a disproportionate share of the community estate. Therefore, the trial court did not abuse its discretion by awarding Wife a disproportionate share of the community estate.

TRIAL COURT DID NOT ERR BY GRANTING SON'S SUMMARY JUDGMENT MOTION AGAINST WIFE'S CLAIMS BECAUSE A COURT MAY NOT AMEND OR CHANGE THE DIVISION OF PROPERTY MADE OR APPROVED IN THE DECREE OF DIVORCE.

¶23-3-22. *Shippy v. Boyd,* 07-22-00188-CV, 2023 WL 3319934 (Tex. App.—Amarillo 2023, no pet. h.) (mem. op.) (05-09-23).

Facts: Wife and Husband divorced in 2013, and when dividing the marital estate the trial court ordered a receiver to gather certain personality and realty (the "Exhibit C Property") for purposes of sale with the proceeds to be divided between the parties. However, the receiver never took possession of the property and the property remained in Husband's estate. Years later, after Husband died, Wife filed a notice of a claim as a part of the administration of Husband's estate, claiming that she owned a joint undivided interest in the Exhibit C Property. Subsequently Wife demanded an accounting, and attempted to consolidate the probate proceeding with the divorce action that was finalized years before. The parties' son ("Son") and the executor of Husband's estate moved for summary judgment on Wife's claim, claiming that "any action to enforce the 2013 divorce decree or for conversion is barred by limitations as a matter of law." The trial court granted Son's summary judgment motion, and in its final order stated that Wife was aware of any claims for the property under the divorce decree but waived any claims by waiting too long to bring them. Wife appealed.

Holding: Affirmed.

Opinion: Wife contends that Son failed to meet his summary judgment burden to overcome Wife's claim that she had a joint undivided interest in the Exhibit C Property pursuant to the divorce decree. Specifically, Wife claims that her property rights did not disappear over time. Here, the divorce decree ordered the property to be sold, and neither spouse was awarded the property itself, but rather, the proceeds of the sale. Son attacked Wife's claim of joint ownership in the property by contending that Wife was only seeking to re-divide the marital property, which would contravene section 9.07 of TFC. Therefore, the trial court did not err in granting Son's summary judgment motion on Wife's claim because a court cannot amend, modify, alter, or change the division of property made or approved in the divorce decree.
Wife also argues that the trial court erred when it granted sanctions against her relating to her post-judgment discovery efforts, as she was still an interested party in the probate estate and was entitled to proceed with discovery "in advance of any outcome determinative presentation." Here, Wife served Son with a notice of for deposition after the trial court signed its final summary judgment order. Son moved to quash the notice and for sanctions, and the trial court granted both. Accordingly, the summary judgment against Wife's claims was an "outcome determinative presentation," and Wife was no longer entitled to discovery as a part of her claims. Therefore, the trial court did not err by granting Son's motion to quash and for sanctions.

TRIAL COURT DID NOT ERR BY REFUSING TO TREAT WIFE'S COPORATION AS HER ALTER EGO FOR PURPOSES OF PROPERTY DIVISION BECAUSE THERE WAS NO EVIDENCE THAT WIFE SPENT COMMUNITY FUNDS TO IMPROVE THE CORPORATION.

¶23-3-23. *IMOMO Moore,* No. 12-22-00286-CV, 2023 WL 3369399 (Tex. App.—Tyler 2023, no pet. h.) (mem. op.) (05-10-23).

Facts: Wife filed an Original Petition for Divorce and requested a confirmation of separate property for certain assets, including her 100% ownership of a corporation, ("Shawna, Inc."). Husband then filed a Counterpetition that included Shawna, Inc. as a third-party and requested the trial court to disregard the corporate form of Shawna, Inc. and treat the corporation as Wife's alter ego. Husband also requested the trial court to order the partition and sale of a half-acre piece of land (the "martial residence") with both parties owning an undivided one-half community interest. At trial, Wife testified that she inherited the marital residence and Shawna, Inc. from her father; and the personal accountant at Shawna, Inc. testified to Wife's use of the interest payments she received as an owner of Shawna, Inc. Husband also gave his personal testimony regarding Wife's intent to gift them the marital residence via a transfer from Shawna, Inc. Subsequently, the trial court rendered a final decree of divorce that treated the marital residence as the parties' community property, and refused to treat Shawna, Inc. as her alter ego. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that that the trial court erred by not finding Shawna, Inc. as Wife's alter ego. Here, Husband has not shown that the improper use of the community estate by Wife damaged the community estate beyond what could be remedied by a claim for reimbursement. Further, Husband submitted no evidence that Wife deposited community funds back into the corporate account. Rather, the community estate was damaged from the parties having high living expenses with no employment or income other than the interest paid to Wife due to her ownership of the company. Therefore, the evidence was sufficient for the trial court to find that Shawna, Inc. was not Wife's alter ego, and the trial court did not err in finding that the assets of Shawna, Inc. are not community property.

Husband also argues that the trial court erred in classifying the marital residence as community property, and not jointly held property with each party owning a one-half undivided separate interest. Here, the martial residence was deeded from Shawna, Inc., a third-party corporation, to both Husband and Wife. A corporation cannot gift property to people, and because the deed transferred an interest to both parties, it is presumed to be community property and Husband had the burden to rebut this presumption. Accordingly, Husband only offered his testimony regarding Wife's intent to gift them the

property from Shawna, Inc., and offered no other documentary evidence to rebut the presumption of community property. Therefore, the trial court did not err in finding that the marital residence was community property, as it could have resolved the disputed evidence in favor of its finding.

HUSBAND FAILED TO OVERCOME THE COMMUNITY PROPERTY PRESUMPTION BECAUSE THE DEED TO PROPERTY ACQUIRED DURING MARRIAGE DID NOT CONTAIN A SEPARATE PROPERTY RECITAL.

¶23-3-24. *IMOMO Ustanik*, No. 06-22-00077-CV, 2023 WL 3612367 (Tex. App.—Texarkanna 2023, no pet. h.) (mem. op.) (05-24-23).

Facts: Prior to the parties' divorce proceeding and during their marriage, Husband acquired property ("the Property") from his parents. The deed to the Property recited that "[Husband, A MARRIED PERSON," was the grantee. The deed further stated, "Grantor, for the consideration…, grants, sells, and conveys to Grantee the property." At trial, Wife testified that Husband paid his parents $1.7k for the Property from a joint bank account, which Husband denied. Further, Wife admitted the loan application for the marital residence which listed that title would be held "Jointly with Spouse." In response, Husband characterized the Property as his "inheritance," and testified that his parents intended to gift him the Property. Following trial, the trial court found that the deed was unambiguous and did not reflect any intent to gift the Property. Additionally, the trial court found that parol evidence suggesting that the Property was a gift was barred by the four corners of the deed. Consequently, the trial court concluded that Husband failed to rebut the community property presumption, characterized the Property and martial residence as community property, and granted the divorce. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court abused its discretion by characterizing the marital residence as community property. Here, the deed conveying property to Husband (during his marriage) did not contain a separate property recital specifying that his parents conveyed him the property as his "sole and separate property." Thus, the presumption of community property prevailed. Still, Husband argues that he rebutted the community property presumption by testifying that his parents gifted him the Property. However, parol evidence is not admissible to contradict the recital of consideration in a deed if a party seeks to prove that the deed is a gift deed. Therefore, the trial court did not err by characterizing the Property as community property.

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING WIFE SPOUSAL MAINTENANCE BECAUSE SHE DID NOT PRESENT EVIDENCE THAT SHE LACKED SUFFICIENT PROEPRTY AFTER THE DISSOLUTION OF THE MARRIAGE TO MEET HER MINIMUM REASONABLE NEEDS.

¶23-3-25. *In re B.P.,* No. 05-22-00040-CV, 2023 WL 3735237 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (05-31-23).

Facts: Husband filed an Original Petition for Divorce and Wife filed a Counterpetition for Divorce alleging that Husband had committed adultery and requesting spousal maintenance. At trial, it was discovered that Husband had a relationship with a woman ("Girlfriend") prior to filing for divorce and that he spent a significant amount of community funds on her, including building her a home, and buying her jewelry and vehicles. No exhibits were admitted into evidence at trial from either side. Both parties had asked for a continuance of the trial setting. They did not submit their exhibits because they expected the court to grant a continuance. The continuance was instead denied, and the trial court refused to allow the untimely exhibits. Subsequently, the trial court went forward with the trial, after which it awarded Wife spousal maintenance of $5,000 a month for the earlier of seven years or until she remarries or resides with

someone she is in a relationship with, along with the marital home and other assets. The trial court also ordered the sale of a Lamborghini, with the proceeds to be divided equally between the parties. Husband appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Husband argues that the trial court abused its discretion in awarding Wife spousal maintenance as there is no evidence Wife lacked sufficient property to provide for her minimum reasonable needs, and no evidence that she is unable to earn sufficient income to meet those minimum reasonable needs. Here, Wife obtained an accounting degree and was the CFO for a company that the parties owned. Wife held this position until the company went out of business, and then worked as a stay-at-home mom until she started a contract job as a payroll analyst during the pendency of this suit. Further, Wife did not present any evidence of her minimum reasonable needs, nor did she show that she lacked sufficient property to provide for those needs after the dissolution of the marriage. Therefore, the trial court abused its discretion by awarding Wife spousal maintenance because Wife failed to show that she was unable to provide for her reasonable minimum needs.

Husband argues that the trial court abused its discretion in characterizing the Lamborghini as community property because it was purchased by Girlfriend. Here, Husband did not present any documentary evidence to support his claim, and upon the examination of Girlfriend it was established that her income in the previous year was $40,000. Further, Husband's had originally told the trial court that he and Girlfriend were not in a relationship, then later admitted to being in a relationship. Accordingly, the determination of who owned the Lamborghini hinged on the credibility of the witnesses. Therefore, the trial court did not abuse its discretion in determining that Husband failed to demonstrate that the Lamborghini was not community property.

Editor's comment: *I guess the parties got their continuance. Surely would have been faster and cheaper if the trial court had just granted it when BOTH parties requested one instead of forcing them to go forward without any evidence… B.M.J.*

Editor's comment: *This case serves as another reminder that Texas law is very unkind to stay-at-home parents. H.J.D.*

DIVORCE
SPOUSAL MAINTENANCE

WIFE EXERCISED DILIGENCE IN FINDING EMPLOYMENT TO SUPPORT HER MINIMUM REASONABLE NEEDS; THUS, TRIAL COURT DID NOT ERR BY ORDERING HUSBAND TO PAY SPOUSAL MAINTENANCE.

¶23-3-26. *Marin v. Marin,* No. 03-22-00013-CV, 2023 WL 2776296 (Tex. App.—Austin 2023, no pet. h.) (mem. op.) (04-05-23).

Facts: During the parties' marriage, Wife primarily stayed home to care for the parties' two children and Husband's two children from a prior marriage. Further, the parties resided in a residence purchased by Husband prior to marriage; however, throughout the marriage, the parties made significant improvements to the residence. Husband filed for divorce. After a three-day bench trial, the trial court granted Wife's reimbursement claim and awarded her $137,641 for improvements made to the marital residence during the marriage. Additionally, the trial ordered Husband to pay Wife $2.5k per month in spousal maintenance for four years. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court abused its discretion by ordering him to pay spousal maintenance. Specifically, Husband contends that Wife did not offer evidence showing that she had exercised diligence in finding employment or that in developing the necessary skills to provide for her minimum reasonable needs. Here, Wife testified that she was currently taking courses to obtain a real estate license and that she was taking steps to reactivate her law license. Thus, the evidence is legally sufficient to support a finding that Wife exercised diligence in earning sufficient income to provide for her minimum reasonable needs. Therefore, the trial court did not abuse its discretion by awarding Wife spousal maintenance.

Next, Husband argues that the trial court abused its discretion by granting Wife's reimbursement claim. Here, Wife admitted multiple appraisals that demonstrated that the value of the Husband's residence increased improved between $59,450 to $150,700 due to the improvements made thereon. Still, Husband contends that Wife failed to present evidence to establish the value of the residence before the improvements were made. However, the residence's enhancement value is the difference between the property with and without the improvement at the time of the dissolution of the marriage, and thus, the appraisement needs only to assess the value of the residence without the improvement at the time of the divorce proceeding. Therefore, the trial court did not abuse its discretion by granting Wife's reimbursement claim.

Editor's comment: *This case seems to say the opposite of In re B.P. above on spousal maintenance with a stay-at-home mom with a high level degree. H.J.D.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING HUSBAND TO PAY SPOUSAL MAINTENCE TO WIFE BECAUSE THERE WAS EVIDENCE THAT SHE EXERCISED DILIGENCE IN SEARCHING FOR EMPLOYMENT TO MEET HER MINIMUM REASONABLE NEEDS.

¶23-3-27. *IMOMO Lavender*, No. 06-22-00070-CV, 2023 WL 3333634 (Tex. App.—Texarkana 2023, no pet. h.) (mem. op.) (05-10-23).

Facts: During the parties' marriage, Husband and Wife had three children and Wife was a primary homemaker and caretaker of the children. Subsequently, Husband filed for divorce, and Wife filed a counter-petition seeking a disproportionate share of the estate and requesting spousal maintenance. After a final hearing, the trial court awarded Wife a disproportionate share of the community estate and ordered Husband to pay $1,200 a month to Wife as spousal maintenance for 81 months. Husband appealed.

Holding: Affirmed; Reversed and Remanded.

Opinion: Husband argues the trial court abused its discretion by ordering him to pay spousal maintenance because Wife failed to rebut the presumption against the award of spousal maintenance by not presenting evidence that she exercised diligence in providing for her minimum reasonable needs. Here, Wife gave testimony that she had searched for low paying jobs, given she only had a high school education, and that she applied for government assistance. Wife also took loans from her parents to help pay living expenses and attorney's fees during the proceeding and was planning to be a teacher's aide during the next school year. Accordingly, Wife's testimony is evidence of diligence, and there was more than a scintilla of evidence to support the trial court's finding of diligence to overcome the presumption that spousal maintenance is not warranted. Therefore, the trial court did not abuse its discretion by ordering Husband to pay spousal maintenance.

Next, Husband argues that the trial court erred by ordering him to pay spousal maintenance longer than the statutory minimum time period of five years. Here, the marriage was over 10 years but less than 20 years, as such, the trial court may award spousal maintenance for up to five years. Therefore, the trial court erred by ordering Husband to pay spousal maintenance longer than the statutory minimum.

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TRIAL COURT ERRED IN ORDERING HUSBAND TO PAY WIFE SPOUSAL MAINTENANCE BECAUSE WIFE FAILED TO ADMIT EVIDENCE INDICATING HER MONTHLY MINIMUM REASONABLE NEEDS.

¶23-3-28. *Mehta v. Mehta*, No. 02-22-00069-CV, 2023 WL 3521901 (Tex. App.—Fort Worth 2023, no pet. h.) (mem. op.) (05-18-23).

Facts: Due to the child's extensive medical issues, Wife stopped working and dedicated her life to caring for the child. After 19 years of marriage, Husband filed for divorce. Following temporary orders, the trial court ordered Husband to pay $2.7k per month in child support and $2k in spousal maintenance (which stepped down to $1k after 7 months). During the divorce, Wife obtained a paid executive-director position which paid her $30k per year. Following trial, the trial court awarded Wife a disproportionate division of the community estate. Additionally, the trial court ordered Husband to pay Wife $2k in monthly spousal maintenance for 36 months and $2.7k per month in child support. Husband appealed.

Holding: Affirmed as Modified.

Opinion: Husband argues that the trial court abused its discretion by awarding Wife spousal maintenance. Here, Wife failed to testify regarding her monthly expenses and did not admit any evidence showing these expenses. While Wife admitted evidence that showed that her monthly house payments totaled $2.7k, Wife did not inform the trial court of the costs for her food, utilities, clothing, medical expenses, child-care costs, or automobile payments. Without any evidence of her non-housing-related expenses, Wife established that her monthly minimum reasonable needs were only $2.7k. Further, the trial court awarded Wife $13.5k in liquid assets, which when divided over a 36-month term results in Wife receiving $375 per month in additional assets. Considering this amount, along with monthly child support of $2.7k and Wife's monthly salary of $2.5k, Wife will receive $5.6k per month. As a result, Wife's monthly income exceeds Wife's minimum reasonable needs by $2.8k. Accordingly, Wife did not provide sufficient evidence demonstrating that she would lack sufficient property on the marriage's dissolution to provide for her minimum reasonable needs. Therefore, the trial court abused its discretion by ordering Husband to pay spousal maintenance.

Editor's comment: *This case details the method of determining whether the liquid assets and other income meet minimum reasonable needs. M.M.O.*

DIVORCE
ENFORCEMENT

TRIAL COURT ERRED IN FINDING THAT AN AGREED ENFORCEMENT ORDER MODIFIED THE PARTIES' FINAL DECREE SINCE THE TRIAL COURT SIMPLY CHANGED THE PAYEE.

¶23-3-29. *Gaffen v. Puls*, No. 02-19-00337-CV WL 2325188 (Tex. App.—Fort Worth 2023, no pet. h.) (mem. op.) (03-02-23).

Facts: In 2003, the Court signed an Agreed Final Decree that required Husband to pay for the children's private school and college tuition and related expenses and as part of the property divisions, to pay Wife $192,000 in installments. In 2007, Wife filed a Motion for Enforcement alleging that Husband stopped making these payments as ordered. In 2009, the trial court signed an agreed enforcement order, which awarded Wife damages for payments not received plus interest and changed the payee for the children's

tuition from the school to Wife. Neither party appealed this order. Subsequently, Wife sought satisfaction of the 2009 Enforcement Order through Husband's law-firm distributions, and the trial court signed a turnover order. When Husband did not comply with the turnover order, the trial court rendered an order that vacated the turnover order and awarded Wife a money judgement. Thereafter, Husband filed a motion requesting the trial court to set aside the 2009 Enforcement Order. After a hearing on Husband's motion, the trial court found that Husband had fulfilled the payment provisions in the Final Decree and that the 2009 Enforcement Order was void because the trial court had impermissibly modified the Final Decree. Wife appealed.

Holding: Reversed and Remanded.

Opinion: Wife argues that the trial court erred by vacating the 2009 Enforcement Order because the trial court did not have jurisdiction or plenary power to vacate the order. Further, Wife argues that the trial court erred by finding that the 2009 Order was void because the trial court had continuing exclusive jurisdiction to modify the payment provisions in the Final Decree. Here, the change from the school to Wife as the payee is not an alteration or modification of the order for support and division of property contained within the Final Decree. Consequently, the trial court possessed jurisdiction to enter the 2009 Enforcement Order. Therefore, trial court erred in finding that the 2009 Enforcement Order was void.

Editor's comment: *The Court focused on the fact that Husband agreed to pay tuition, so designating Wife as the payee rather than the educational institution did not modify or alter the agreed decree. J.V.*

HUSBAND WAS NOT ENTITLED TO AN OFFSET OF A MONEY JUDGEMENT ORDERED TO WIFE BECAUSE HIS SELLING OF COMPANY PROPERTY DID NOT CONSTITUTE A FORECLOSURE BY A LIEN HOLDER.

¶23-3-30. *Bernhardt v. Bernhardt*, No. 02-22-00206-CV, 2023 WL 2607753 (Tex. App.—Fort Worth 2023, no pet. h.) (mem. op.) (03-23-23).

Facts: The parties' Final Decree awarded Wife a judgment of $1.6 million and required Husband to pay Wife $5k a month to satisfy same. Further, the Final Decree incorporated by reference the terms of an agreement incident to divorce (the "AID"). The AID awarded Husband certain properties that were pledged as security for notes relating to a business (the "Business") that he co-owned. Additionally, the AID granted Husband an offset against what he owed Wife if the properties that had been pledged as collateral were foreclosed upon by a lienholder. After the business sold, Husband ceased making payments to Wife. According to Husband, he had sold the assets listed in the AID and had used the proceeds to pay down the debt owed to lienholders. Subsequently, Wife filed a Motion for Enforcement, asserting that Husband had not made required payments under the AID and Final Decree. At trial, Husband testified that he no longer had any property that would be sufficient to pay Wife and admitted that did not provide Wife with documentary evidence of the sold assets. Following trial, the trial court signed an Enforcement Order that denied Husband an offset and granted Wife a judgment against Husband for $690k. Moreover, the trial court found that none of the properties listed in the AID were foreclosed upon by the lienholder of any loan existing at the time of the AID. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court abused its discretion by failing to consider the evidence of his offsets under the AID. Additionally, Husband contends that the parties never intended that a legal foreclosure proceeding would be required before he could be entitled to an offset. Under its legal and common usage, foreclosure relates to a process taken by the lienholder to recover property that is securing the lien. Here, Husband selling his encumbered property himself and using the proceeds to pay down his debts does not qualify as a foreclosure by a lienholder. While Husband may have felt pressure

from the bank to sell assets to obtain funds to pay his debt, none of the sales he made were a foreclosure by a lienholder. Consequently, Husband selling the Business property did not qualify him for an offset. Moreover, the AID is unambiguous, and Husband cannot introduce extrinsic evidence to add to, alter, or contradict the agreement's text. Therefore, the trial court did not err by entering its Enforcement Order that denied Husband's claim for an offset.

TRIAL COURT DID NOT ERR BY ENTERING A CLARIFICATION ORDER THAT EMPLOYED A FORMULA TO CALCULATE WIFE'S INTEREST IN HUSBAND'S RETIREMENT PLAN.

¶23-3-31. *Sigee v. Sigee*, No. 09-21-00335-CV, 2023 WL 3114659 (Tex. App.—Beaumont 2023, no pet. h.) (mem. op.) (04-27-23).

Facts: The parties' modified Final Decree did not specify Wife's interest in Husband's "disposable retired pay" that resulted from his service in the US military. Thereafter, the Defense Finance and Accounting Services ("DFAS") mailed a letter to Wife stating that the Final Decree did not contain acceptable award language necessary for the military to comply with awarding Wife a portion of Husband's retirement benefits and requested for a clarification. Wife then filed a Motion for Clarification, which provided that the parties' Final Decree did not contain specific enough language for her to receive a portion of Husband's retirement benefits. After this Court remanded the trial court's initial clarification due to the formula it applied, the trial court issued additional Findings of Facts and Conclusions of Law. Therein, the trial court found that: "[Wife] is entitled to a percentage of [Husband's] disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 213 (total months of marriage) divided by the member's total number of months of credible service." Wife appealed.

Holding: Affirmed as Modified.

Opinion: Wife argues that the trial court abused its discretion by entering a clarification order that implemented a formula to calculate her interest in Husband's retirement pay. Here, the plain language of the Final Decree supports the interpretation that it awarded Wife a percentage of Husband's retirement pay that would be modified by a formula. In calculating the amount owed to Wife, the trial court properly employed a formula that calculated Wife's percentage interest in Husband's retirement based upon the value of the retirement at the date of the divorce, which is consistent with *Berry*. Further, the utilized formula will provide DFAS with the information necessary to calculate the monthly amount payable to Wife, which is what DFAS originally requested for. Therefore, the trial court did not abuse its discretion in entering a clarification order. However, this Court modifies the date of divorce used by the trial court, the number of months the parties were married, and the number of months Husband served in the military at the time of divorce.

SAPCR
Procedure and Jurisdiction

TRIAL COURT ABUSED ITS DISCRETION BY ISSUING A LETTER RULING THAT MODIFIED EXISTING TEMPORARY ORDER'S WITHOUT PROVIDING NOTICE TO PARTIES AND CONDUCTING AN EVIDENTIARY HEARING.

¶23-3-32. *In re Farmer,* No. 10-23-00017-CV, 2023 WL 2308232 (Tex. App.—Dallas 2023, orig. proceeding) (mem. op.) (03-01-23).

Facts: Father filed a Petition to Modify the Parent-Child Relationship and sought to restrict Mother's possession of the children. Thereafter, Father filed a Motion for Enforcement of the trial court's child-support order. After a hearing on Father's enforcement, the trial court found Mother in contempt. After the State arrested Mother for injuring a child in her household, Father filed a Motion to Modify Temporary Orders and a Request for a TRO against Mother, which the trial court granted. Following a hearing, the trial court awarded Mother supervised visitation once per week. The trial court then conducted a second hearing on Mother's failure to comply with the trial court's child-support orders. Subsequently, the trial court issued a letter ruling sentencing Mother to 180 days in the county jail. However, following its ruling, the trial court conferred with the children, and removed the restrictions on Mother's possession of the children. In response to the trial court's ruling, Mother filed a Motion for Emergency Hearing to Reinstate the Standard Possession Order. Afterwards, the trial court issued a second letter ruling stating that it did not require a hearing on Mother's Motion because its previous letter ruling effectively awarded Mother standard possession. Father filed a Petition for Writ of Mandamus.

Holding: Petition for Writ of Mandamus Conditionally Granted.

Opinion: Father argues that the trial court abused its discretion by reinstating the standard possession order without providing notice or conducting a hearing. Here, the trial court's second letter ruling, which lifted Mother's supervised possession, is an order modifying a prior temporary order. Consequently, the trial court needed to provide Father with notice and the opportunity to participate in an evidentiary hearing before entering a new temporary order that modified the existing temporary orders. In this case, the trial court failed to provide notice to Father that the existing temporary orders would be modified, nor did the trial court conduct a hearing on Mother's Motion to Reinstate the Standard Possession Order before granting her requested relief. Accordingly, the trial court deprived Father of the opportunity to present evidence regarding the safety and welfare of the children, and to rebut Mother's request to reinstate the standard possession order. Therefore, the trial court abused its discretion.

MOTHER'S REQUEST FOR SANCTIONS AGAINST THE OAG DID NOT IMPLICATE SOVEREIGN IMMUNITY; THEREFORE, TRIAL COURT POSSESSED JURISDICTION TO RENDER SANCTIONS UNDER ITS INHERENT AUTHORITY.

¶23-3-33. ***In re E.M.***, ___ S.W.3d ___, No. 14-21-00274-CV, 2023 WL 2530273 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (03-16-23).

Facts: Initially, the trial court ordered Mother to pay child support; however, in a later order, the trial court terminated Mother's child support obligation and shifted the obligation to Father. Thereafter, Mother filed a Motion to Compel Termination of Wage Withholding Order and Motion for Sanctions. Therein, Mother accused the OAG of submitting writs of withholding to her employer and denying her child support payments made by Father. Additionally, Mother requested the trial court compel the OAG to withdraw the

wage withholding order and assess sanctions against the OAG for its failure to withdraw same in violation of the trial court's temporary orders. Particularly, Mother requested sanctions under the trial court's inherent authority. In response, the OAG filed an answer and asserted a plea to the jurisdiction. Specifically, the OAG claimed that the trial court did not have jurisdiction to order or award sanctions against the OAG based upon its sovereign immunity and the separation of powers doctrine. Following a hearing, the trial court denied the OAG's plea to the jurisdiction and provided that it reserved the determination of sanctions until a later hearing. Subsequently, the OAG filed a notice of interlocutory appeal on the denial of its plea to the jurisdiction.

Holding: Affirmed.

Opinion: The OAG argues that the trial court erred by denying its plea to the jurisdiction. Specifically, the OAG asserts that the trial court lacks jurisdiction to impose any sanctions under its inherent authority because of the doctrine of sovereign immunity. Additionally, the OAG claims that the trial court's inherent authority is "limited," and as a result, it lacks jurisdiction to assess sanctions. Here, Mother's suit is akin to a suit against the government for a determination of rights and is not barred by sovereign immunity. Further, "[i]t is well established that when the State enters the courts as a litigant, it must observe and will be bound by the same evidentiary and procedural rules that apply to all litigants." While the OAG does not dispute that it may be sanctioned under TRCP 13, it still claims that an "express rule of civil procedure" should be treated differently. However, the OAG provides no argument as to why such a distinction should be made between an "express rule" and the trial court's inherent authority. Finally, trial "[c]ourts possess inherent powers that aid the exercise of their jurisdiction, facilitate the administration of justice, and preserve the independence and integrity of the judicial system." Thus, the trial court possesses jurisdiction to render sanctions against the OAG under its inherent authority. Therefore, the trial court did not err by denying the OAG's plea to the jurisdiction.

Editor's comment: *The OAG is subject to sanctions for filing frivolous pleadings just like all other attorneys. M.M.O.*

A MOTION TO TRANSFER IS TIMELY IF IT IS MADE "ON OR BEFORE THE FIRST MONDAY AFTER THE 20TH DAY AFTER THE DATE OF SERVICE OF CITATION OR NOTICE OF THE SUIT OR BEFORE THE COMMENCEMENT OF THE HEARING, WHICHEVER IS SOONER."

¶23-3-34. ***In re Bass,*** ___ S.W.3d ___, No. 07-23-00017-CV, 2023 WL 3021086 (Tex. App.—Amarillo 2023, no pet. h.) (04-20-23).

Facts: The County Court at Law Two signed the parties' Agreed Final Decree. Thereafter, Mother filed a Petition to Modify the Parent-Child Relationship, a Motion to Enforce Child Support, and a Motion to Enforce a Protective Order. Mother filed these pleadings in the County Court at Law Two ("the trial court"), the court of continuing jurisdiction. From October 2019 to February 2021, the trial court issued temporary orders, modified temporary orders, enforced the protective order, and issued a second protective order. Subsequently, Mother requested a bench trial on her modification suit; however, Mother relocated with the children to a different county, and Father relocated to New Mexico. Mother then filed her third application for protective order. In response, Father filed an answer, a motion to vacate the protective order, and a motion to transfer venue. Following a hearing, the trial court granted Father's motion to transfer. Mother filed a Petition for Writ of Mandamus.

Holding: Petition for Writ of Mandamus Granted.

Opinion: Mother argues that the trial court abused its discretion by granting Father's motion to transfer because it was untimely. Here, the County Court at Law Two acquired continuing, exclusive jurisdiction over the matters in the Final Decree when it signed the decree. Further, a motion to transfer is timely if it

is made "on or before the first Monday after the 20th day after the date of service of citation or notice of the suit or before the commencement of the hearing, whichever is sooner." In this case, Father filed his motion to transfer three years after the deadline set forth in TFC 155.204(b) had expired. Therefore, the trial court abused its discretion by granting an untimely motion to transfer.

TRIAL COURT DID NOT ERR BY MODIFYING ITS ORAL RULINGS IN THE FINAL-WRITTEN JUDGMENT AFTER MOTHER COMMITTED FAMILY VIOLENCE AGAINST FATHER.

¶23-3-35. *In re M.C.M.*, No. 05-21-00242-CV, No. 05-21-00373-CV, 2023 WL 3089813 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (04-26-23).

Facts: Father filed an Original Petition to Modify the Parent-Child Relationship. In response, Mother filed for divorce and contended that the parties were informally married. Following temporary orders, Mother tested positive for methamphetamine and avoided further testing. Consequently, the trial court entered an order conditioning Mother's possession upon her submission of a negative 10-panel or higher drug test. After Mother withdrew the child from school, Father filed an Amended Second Emergency Ex Parte Application for Writ of Habeas Corpus and Writ of Attachment, which the trial court granted. Additionally, the trial court suspended Mother's possession until further order by the court. Following a bench trial on the divorce action, the trial court dismissed the suit. The next day, the trial court held a bench trial in the SAPCR suit. At the conclusion of trial, the trial court entered oral orders that appointed the parties JMCs and awarded Mother a step-up possession schedule. Thereafter, Mother withdrew the children from school, and police arrested Mother for assaulting Father. As a result, Father requested a temporary ex parte TRO and a two-year protective order against Mother. The trial court held an evidentiary hearing, and after its conclusion, appointed Father as SMC in a final SAPCR order and entered a protective order against Mother. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court abused its discretion by entering a void SAPRC order and protective order. Specifically, Mother asserts that the trial court's final orders should be void because (1) dismissal of the divorce suit resulted in the dismissal of the SAPCR; (2) the final SAPCR order improperly modified the oral orders made by the trial court at the conclusion of the SAPCR bench trial; and (3) the SAPCR order "superseded" the final protective order. Here, the divorce suit and the SAPCR suit, although consolidated, are separate and distinct suits. Further, after the dismissal of the divorce suit, Mother expressed her understanding of the trial court's decision and proceeded to present her case in the SAPCR trial. While the trial court rendered oral orders following the SAPCR trial, Mother thereafter assaulted Father. Despite the trial court's oral pronouncement, the trial court reduced its controlling written order following the assault. Under the circumstances, the trial court possessed the ability to: (1) consider evidence of Mother's family violence against Father in determining whether to appoint Mother as JMC; and (2) modify its oral orders. Moreover, under TFC 85.002(b), the trial court is permitted to restrict Mother's possession of and access to the children. Consequently, the protective order is not superseded by the SAPCR order. Therefore, the trial court did not err by rendering its final SAPCR order or protective order.

Editor's comment: *It isn't unusual to have intervening bad facts between a trial and entry of final order. It appears you do not need to have the final order entered and file a motion to modify but rather you can modify the court's ruling prior to entry of a final order based on intervening facts. Could the same be done if the parties entered into an MSA instead of having a final trial if these bad facts occurred before entry of the final order? I don't think so, but I didn't think you could do it after a final trial, either. H.J.D.*

TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING FATHER TO PRESENT FACTS AND LEGAL ARGUMENTS BEFORE IT DETERMINED WHETHER IT POSSESSED JURISDCITION OVER THE CHILD, WHO ORIGINALLY LIVED IN VIRGINIA.

¶23-3-36. ***In re Muldoon,*** ___ S.W.3d ___, No. 04-22-00685-CV, 2023 WL 3082408 (Tex. App.—San Antonio 2023, orig. proceeding) (04-26-23).

Facts: Father and Mother had a child and lived together in Virginia until Mother moved to Texas with the child. Thereafter, Father filed a petition for custody of the child in Virginia, alleging that Virginia was the child's home state and best positioned to make an initial custody determination for the child. After Father served Mother with the Virginia suit, Mother filed her own action in the Bexar County trial court ("the trial court") and requested that the parties be appointed JMCs with Mother possessing the exclusive right to designate the primary residence of the child. Subsequently, the trial court and the Virginia court held a UCCJEA court conference. After the conference the trial court announced that it would accept jurisdiction of the underlying case and the Virginia court announced that it would dismiss Father's case and Father moved for a reconsideration of the trial court's order, which the trial court denied without holding a hearing. Father then filed a Petition for Writ of Mandamus.

Holding: Petition for Writ of Mandamus Granted.

Opinion: Father argues that the trial court abused its discretion because it failed to notify him of the conference with the Virginia court and did not provide him with an opportunity to present facts and legal arguments before making a decision on jurisdiction. In response, Mother argues that the language of the trial court's order indicates that all parties were given notice of the conference and that a record of the conference was made. Here, despite the language itself in the order, the mandamus record contains no evidence that the trial court provided notice of the conference to either party or to their counsel. Additionally, the record does not indicate that the trial court permitted either party the opportunity to present facts and legal arguments before deciding the jurisdictional issue. The law does not require the trial court to allow the parties to participate in the conference, but TFC 152.110(c) requires trial courts to allow the parties to present facts and legal arguments before a decision on jurisdiction is made when the parties are unable to participate in the conference. Therefore, the trial court abused its discretion because the jurisdictional decision was made between the two courts without allowing the parties to present legal and factual arguments.

TRIAL COURT ERRED WHEN IT GRANTED GRANDFATHER'S PLEA TO THE JURISDICTION BECAUSE STEPFATHER ESTABLISHED STANDING UNDER TFC 102.003(a)(9).

¶23-3-37. ***In re J.N.M.,*** ___ S.W.3d ___, No. 04-22-00430-CV, 2023 WL 3081771 (Tex. App.—San Antonio 2023, no pet. h.) (04-26-23).

Facts: Mother married Stepfather while she carried the child of another man. After the child's birth, Stepfather raised the child as his own. Years later, the child's biological father voluntarily relinquished his parental rights to the child in a SAPCR ("2007 SAPCR") filed by Mother. Thereafter, Mother and Stepfather had a child together and later divorced. Mother and Stepfather's Final Decree contained a possession order, which only referenced the child of the marriage, and not the one that Stepfather raised as his own. Despite the lack of a possession order, Stepfather cared for the child and his half-sibling pursuant to the standard possession order contained within the Final Decree. Subsequently, Mother died and Stepfather filed a Motion to Modify Parent-Child Relationship. Stepfather also sought and obtained an Emergency Ex Parte TRO that prevented the child from being removed from his school or from Stepfather's possession. Maternal Grandfather and Maternal Grandmother ("Grandparents") filed a Petition in Intervention in the 2007 SAPCR and a Plea to the Jurisdiction, arguing that Stepfather lacked standing to bring the modification suit. Following a hearing on Grandparents' plea to the jurisdiction, the trial court

granted it and prohibited Stepfather from participating in subsequent proceedings. The trial court then appointed Grandfather and Grandmother as JMCs of the child. Stepfather appealed.

Holding: Reversed and Remanded.

Opinion: Stepfather argues that the trial court erred in granting Grandparents' plea to the jurisdiction. Specifically, Stepfather asserts that he possesses standing under Texas Family Code Section 102.003(a)(9). Here, Stepfather had possession of J.N.M. for 231 days which did not end more than 90 days prior to the filing of his petition. Therefore, Stepfather possesses standing under section TFC 102.003(a)(9) and the trial court erred in granting the plea to the jurisdiction.

Next, Stepfather argues that the temporary orders and final order rendered after the trial court granted plea to the jurisdiction denied him his right to be present and present evidence at trial. Here, the trial court granted the plea to the jurisdiction and prohibited Stepfather from participating in the entry of the temporary orders as well as the final order appointing Grandparents as JMCs. Thus, because Stepfather maintained standing under subsection (a)(9), he was entitled to participate in those proceedings. Although an interlocutory appeal is not available for temporary orders, Stepfather appeals the final order. Therefore, the trial court abused its discretion because it denied Stepfather his due process rights for all subsequent orders entered after the trial court granted Grandparents plea to the jurisdiction.

Editor's comment: *I am surprised by the finding of standing under 102.003(a)(9) because the Stepfather's residence was not the child's primary residence for some time prior to the mother's death. H.J.D.*

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY APPOINTING GRANDMOTHER AS A NON-PARENT JOINT MANAGING CONSERVATOR.

¶23-3-38. *In re A.L.C.,* No. 07-21-00203-CV, 2023 WL 3255031 (Tex. App.—Amarillo 2023, no pet. h.) (mem. op.) (05-04-23).

Facts: Mother and maternal Grandmother ("Grandmother") permanently moved to Lubbock, Texas with Mother's and Father's children. Father remained in Colorado and had limited contact with Mother and Grandmother. Thereafter, Mother died, and Father filed a Petition for Writ of Habeas Corpus in Lubbock County to obtain the children from Grandmother, which the trial court denied. Grandmother then filed a SAPCR for conservatorship of the children, and after a final hearing the trial court appointed Grandmother as a non-parent JMC with the exclusive right to designate the primary residence of the children. Father appealed.

Holding: Affirmed.

Opinion: Father argues that Grandmother does not have standing to bring a suit for custody of the children. Here, at the time of Mother's death Father already abandoned his very young children emotionally, physically, and financially, and the children were being raised by Grandmother in Lubbock. Accordingly, the present circumstances of the children when Grandmother initiated her suit for conservatorship, and the children's physical health or emotional development would significantly be impaired if they were separated from Grandmother. Therefore, Grandmother satisfied the elements for standing under section 102.004(a)(1) of TFC in her suit for conservatorship.

Father argues that the evidence was legally and factually insufficient to support the decision to appoint Grandmother as non-parent JMC. Here, the trial court considered evidence that established Father's absence in his children's lives, both physically and emotionally. In addition, there was evidence that Father used improper and threatening language with Grandmother and others, took the children to undisclosed locations outside his visitation periods, and regularly used marijuana. Accordingly, because the appointment of Father as sole managing conservator would significantly impair the children's physical health or emotional development, the sum of the evidence and its application to section 153.131 of TFC

support the trial court's decision to appoint Grandmother as a non-parent JMC. Therefore, the trial court did not abuse its discretion by appointing Grandmother as a non-parent JMC.

Editor's comment: *This case is kind of an outlier in parent v. non-parent child custody litigation because proving significant impairment has historically been extremely difficult. This gives grandparents and other non-parents some hope when an otherwise fit parent has essentially abandoned his children. H.J.D.*

TRIAL COURT LACKED SUBJECT MATTER JURISIDCITION TO HEAR GRANDMOTHER'S PETITION TO MODIFY THE PARENT-CHILD RELATIONSHIP BECAUSE GRANDMOTHER DID NOT HAVE THE REQUISITE STANDING TO SUE FOR CONSERVATORSHIP.

¶23-3-39. *Bridges v. Pugh,* No. 01-22-00027-CV, 2023 WL 3357669 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (mem. op.) (05-11-23).

Facts: While Mother and Father were incarcerated for aggravated robbery, paternal Grandmother ("Grandmother") filed a Petition to Modify in a SAPCR for conservatorship of the child. The trial court had continuing and exclusive jurisdiction over the child after having entered an order (the "2016 Order") that appointed Mother and Father as JMCs. Grandmother alleged that the child's circumstances had materially and substantially changed because both parents were incarcerated and requested rights as a JMC. Both parents were served with citation but neither answered. Subsequently, the trial court held a hearing on Grandmother's petition, took notice of the parents' failure to answer, and heard testimony from Grandmother about the current living situation of the child. Thereafter, the trial court appointed Mother, Father, and Grandmother as JMCs, granted Grandmother her requested rights as a non-parent JMC, and awarded Mother standard possession of the child. Mother then timely filed a motion to set aside the default judgment and for new trial. The trial court denied Mother's motion and in a written order stated that Mother had no evidence that her failure to answer was due to accident or mistake. Mother appealed.

Holding: Reversed and Remanded.

Opinion: Mother argues that Grandmother does not have standing under section 102.004(a)(1) to seek a modification of the 2016 Order and that the trial court lacked subject-matter jurisdiction to render the default judgment in Grandmother's favor. Here, the trial court's decision to appoint Grandmother as a JMC implies that the trial court found that Mother's and Father's joint managing conservatorship of the child would significantly impair the child's physical health or emotional development. However, Grandmother failed to show by a preponderance of the evidence that "some specific, identifiable behavior or conduct" of the parents would likely cause significant impairment of the child the child's physical health or emotional development. Accordingly, Grandmother only presented evidence that the parents were incarcerated, which does not raise more than a "surmise or speculation of possible harm," and Grandmother did not present any evidence as to the child's current circumstances that would show the risk of harm to the child. Therefore, Grandmother failed to establish standing to seek a modification of the trial court's conservatorship order, and the trial court lacked subject-matter jurisdiction to hear Grandmother's petition.

Editor's comment: *I find this result shocking. How does having* ***both*** *parents incarcerated not qualify as significant impairment sufficient to grant standing to a grandparent? Who is supposed to be responsible for the children while the parents are incarcerated? Perhaps the real problem here was that the grandmother failed to put on sufficient evidence during the default hearing. H.J.D.*

SAPCR
PATERNITY

TRIAL COURT DID NOT ERR IN GRANTING THE SUMMARY JUDGEMENT CLAIM AGAINST FATHER BECAUSE FATHER FAILED TO TIMELY REGISTER WITH THE PATERNITY REGISTRY AND WAS NOT ENTITLED TO NOTICE OF A PETITION FOR TERMINATION SUIT.

¶23-3-40. *In re S.W.,* No. 02-22-00189-CV, 2023 WL 3127086 (Tex. App.—Fort Worth 2023, no pet. h.) (mem. op.) (04-27-23).

Facts: Shortly after giving birth, Mother signed an affidavit voluntarily relinquishing her parental rights and placed the child up for adoption with a third-party adoption agency ("the Agency"). Thereafter, the trial court signed an order terminating the parental rights of Mother and the child's biological father and named the Agency as a managing conservator. Mother and Father then filed Joint Amended Petition for Bill of Review seeking to set aside the trial court's order of termination. In response, the Agency filed a motion for summary judgement, which the trial court granted. Thereafter, both Mother and Father appealed, and this court affirmed the summary judgement as to Mother but reversed as to Father since Father was not a party to the original termination suit. On remand, the Agency filed a traditional motion for summary judgement as to Father's remaining claims. At the hearing, the Agency argued that Father was not entitled to notice of the termination proceeding because Father failed to register with the paternity registry. Following the hearing, the trial court granted the Agency's summary judgment motion in its entirety. Father appealed.

Holding: Affirmed.

Majority Opinion: (C.J. Sudderth; J. Kerr) Father argues that the trial court erred by granting the Agency's motion for summary judgment. Specifically, Father claims that he could not register with the paternity registry in compliance with TFC 160.402(a) because he was not aware that he had a child until after his rights were terminated. To support his argument, Father claims that the Agency instructed Mother to keep Father's name off of the child's birth certificate. Here, there is no evidence that the Agency and Mother fraudulently prevented Father from registering. Moreover, the evidence merely establishes that the Agency and the parties failed to identify Father even though they possessed knowledge of his existence. Further, access to the registry remained open to Father, and Mother and the Agency were under no duty to disclose the child's birth to Father, or Father's identity in a birth certificate or parental termination proceeding. Therefore, the court did not err in granting the summary judgment motion with respect to Father's defense for not registering with the paternity registry.

Next, Father argues that the Agency's intentional fraud not to acknowledge him as the father of the child violated his right to due process under the Texas and US Constitutions. Specifically, Father claims that the termination of his alleged parental rights without notice deprived him of his due process rights. Here, there is no requirement that an alleged father must be identified or located if he fails to register. If the child is less than a year of age when the petition for termination or adoption is filed, the rights of the unregistered father may be terminated without notice. Therefore, the statutory paternity registration scheme is not unconstitutional as applied to Father.

Concurring Opinion: (Birdwell, J.) This court correctly decided all issues by determining that the Agency and Mother did not fraudulently prevent Father from registering. Upon a closer examination of the evidence in the record, it appears that Father was aware of the birth of a child within the paternity registry registration timeline. Further, the evidence demonstrates that Father had reason to believe that Mother could be pregnant, and despite having this information, he failed to take any steps to register his intent to claim paternity in a timely manner.

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TRIAL COURT ERRED BY RENDERING A DEFAULT ORDER AGAINST MOTHER BECAUSE FATHER'S AFFIDAVIT DID NOT ESTABLISH THAT SERVICE BY POSTING ON FACEBOOK WAS REASONABLY EFFECTIVE TO GIVE MOTHER NOTICE OF THE SUIT.

¶23-3-41. *In re V.R.W.,* No. 05-22-00631-CV, 2023 WL 3735234 (Tex. App.— 2023, no pet. h.) (mem. op.) (05-31-23).

Facts: Father filed a petition to adjudicate the child's parentage when the child was five months old. Several weeks after filing, Father filed an Unsworn Motion for Alternative Service alleging that his attempts to serve Mother in person had failed. The motion was accompanied by the affidavit of a process server ("Server"), who testified that she attempted to serve Mother in person and left two voicemails. Father also stated in his motion that reasonably effective notice of the suit may be given to Mother by posting on Facebook. Thereafter, the trial court granted Father's motion, ordering that service on Mother be effected by posting on Facebook, with no indication in the order as to how or why service in this manner would be reasonably effective to give Mother notice of the suit. Subsequently, Server filed a Declaration of Service, stating that she served Mother by delivering a copy of the citation, petition, and notices of hearing via Facebook messenger. Mother did not file an answer, and Father then filed an affidavit stating that he was the child's father and that Mother had been served but failed to answer. The trial court then signed default temporary orders and an order adjudicating Father's parentage giving Father conservatorship and possession and access of the child. The order recited Mother's failure to appear and noted that she was "duly and properly cited." Mother appealed.

Holding: Reversed and Remanded.

Opinion: Mother argues that the trial court erred by rendering the default order because she was not served with process. Mother argues that service by social media was not proper, that Father failed to show he used proper due diligence in attempting to serve process, and that there is no evidence to support service by social media. Here, the record does not contain any sworn statement or other evidence to show that that the proposed "posting on Facebook" would be reasonably effective to give Mother notice of the suit. Further, the trial court's order permitted service by posting on Facebook, while the return of service recited that service was made via "Facebook messenger." Therefore, the trial court erred by rendering the default order because Mother was not served with process in accordance with the rules of civil procedure.

SAPCR
CONSERVATORSHIP

TRIAL COURT ERRED IN APPOINTING AUNT AND UNCLE AS MANAGING CONSERVATORS OF THE CHILDREN BECAUSE IT DID NOT APPLY THE FIT-PARENT PRESUMPTION IN FAVOR OF MOTHER, AND THERE WAS LEGALLY INSUFFICIENT EVIDENCE TO SUPPORT MOTHER'S REMOVAL AS JMC.

¶23-3-42. *In re J.O.L.,* No. 04-21-00495-CV, 2023 WL 2290300 (Tex. App.—San Antonio 2023, no pet. h.) (mem. op.) (03-01-23).

Facts: Father and Mother entered into an MSA that appointed them as JMC's and granted Father the right to designate the primary residence of the children. Subsequently Father elected his Brother ("Uncle") and Sister-in-Law's ("Aunt") home as the primary residence of the children. Thereafter, Aunt and Uncle

assumed Father's parenting responsibilities. Mother then filed a Petition to Modify the Parent-Child Relationship and sought to be appointed as the primary managing conservator. Specifically, Mother alleged that Father relinquished control, care, and possession of the children for at least six months. In response, Aunt and Uncle intervened and requested to be appointed SMCs of the children, or in the alternative, JMCs. Prior to the commencement of the jury trial, Mother argued that the fit-parent presumption should be applied. The trial court sustained Aunt and Uncle's objection to Wife's request and concluded that the children's best interest was a factual issue for the jury to decide without the application of the fit-parent presumption. At the charge conference, Mother did not argue that the parental presumption should be included in the jury charge. Following trial, the jury determined that Aunt and Uncle should be appointed as JMC's and that Mother and Father be appointed as possessory conservators. Before finalizing the order, the Texas Supreme Court issued an opinion that explicitly incorporated a fit-parent presumption in modification proceedings, which spurred Mother to file a Motion for Judgement Notwithstanding the Verdict. The trial court denied Mother's motion and entered a final order conforming with the jury's verdict. Mother appealed.

Holding: Reversed and Remanded.

Opinion: Mother argues that the trial court abused its discretion by violating her fundamental rights by refusing to apply the fit-parent presumption. Because Mother was a JMC at the time of trial, Mother is presumed to be a fit parent. Here, Mother failed to object to the jury charge that denied her request to apply the parental presumption, and consequently waived her complaint as it relates to the jury charge.

Next, Mother argues that there is legally insufficient evidence to support her removal as a managing conservator. Specifically, Mother asserts that no evidence supports the jury's verdict that appointed Aunt and Uncle as children's JMC. Additionally, Mother contends that the TXSCT's recent decision required the trial court to apply the fit-parent presumption to the modification proceeding. Here, Aunt and Uncle failed to present evidence that showed that a significant change had occurred in the children's circumstances. Further, Aunt and Uncle did not demonstrate that Mother posed a danger to her children's well-being. Rather, Father's unilateral action in relinquishing the children to Aunt and Uncle represented the most significant change to the children's circumstances. Therefore, the trial court abused its discretion by appointing Aunt and Uncle as JMCs because they failed to overcome fit-parental presumption that applied to Mother.

Editor's comment: *I have heard many attorneys ask whether the application of the fit parent presumption is a jury question or a legal issue for the judge. This opinion seems to suggest it is the latter, since the mother waived her complaint on the jury charge but the court of appeals still overturned the ruling for failure to apply the fit parent presumption. H.J.D.*

TRIAL COURT ERRED IN AWARDING FATHER THE EXCLUSIVE RIGHT TO DESIGNATE THE PRIMARY RESIDENCE OF THE CHILD IN A MODIFICATION SUIT BECAUSE FATHER DID NOT PROVIDE MOTHER WITH FAIR NOTICE OF THE RELIEF HE WAS SEEKING.

¶23-3-43. *In re J.G.G.,* No. 13-22-00002-CV, 2022 WL 2422493 (Tex. App.—Corpus Christi-Edinburg 2023, no pet. h.) (mem. op.) (03-09-23).

Facts: The OAG filed a Petition for Confirmation of Non-Agreed Child Support Review Order, alleging that Father's financial circumstances had changed and that his child-support obligation should be increased. Thereafter, Father filed an Original Petition to Modify Parent-Child Relationship. The trial court then held an evidentiary hearing on Father's and the OAG's respective petitions at which Mother did not appear. At the hearing, Father requested that the trial court modify the parties' SAPCR order and name him as the conservator with the right to designate the primary residence of the child. Following the hearing, Mother filed a Motion to Void the Child Custody Proceeding. Subsequently, the trial court signed a

Final Order in Suit to Modify Parent Child Relationship, which awarded Father the right to designate the child's residence and ordered Mother to pay child support. Mother appealed.

Holding: Reversed and Remanded.

Opinion: Mother argues that the trial court erred by granting Father the exclusive right to designate the primary residence of the child because Father did not request that relief, the parties did not stipulate to the change, and the issue was not tried by consent. Here, in Father's petition, he requested the trial court to render a modified parenting plan that was in the child's best interest. However, because this is not an original custody proceeding, Father's petition did not provide Mother with fair notice that Father would be seeking the exclusive rights which were awarded to him. Moreover, this case arose out of the OAG's petition that sought to increase child support, which Father did not specifically request. Therefore, the trial court erred by granting Father these exclusive rights and ordering Mother to pay child support.

TRIAL COURT DID NOT ERR BY AWARDING MOTHER THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILDREN'S PRIMARY RESIDENCE BASED UPON THE CHILD'S IN-CHAMBERS INTERVIEW AND MOTHER'S INVOLVEMENT IN THE CHILDREN'S UPBRINGING.

¶23-3-44. *IMOMO Smith*, No. 10-21-00299-CV, 2023 WL 2601295 (Tex. App.—Waco 2023, no pet. h.) (mem. op.) (03-22-23).

Facts: Mother filed for divorce. During the divorce proceeding, the child informed the trial court that she would prefer to live with Mother. At trial, Mother testified that she primarily cared for the children and that Father drank frequently around them. Following a bench trial, the trial court designated the parties as JMCs, with Mother possessing the exclusive rights to designate the children's primary residence within a geographic restriction, receive child support, and make decisions concerning the children's education. Further, the trial court awarded Father a standard possession schedule. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court abused its discretion by awarding Mother the exclusive right to designate the children's primary residence and awarding him standard possession. Here, the child informed the trial court that she would prefer to live with Mother as opposed to Father. Moreover, Mother provided extensive testimony regarding her involvement in the children's upbringing, which third-party witnesses confirmed. While both parties attacked the parenting skills of the other, both Mother and Father produced evidence that they were good parents. Therefore, the trial court did not err by awarding Mother primary possession of the children and the exclusive right to designate the children's primary residence.

NAMING FOSTER PARENT AS SMC WAS IN THE CHILD'S BEST INTEREST BECAUSE MOTHER AND FATHER FAILED TO REBUT ALLEGATIONS OF NEGLECT MADE AGAINST THEM AND DID NOT PROPOSE A DETAILED PLAN FOR RETAKING CUSTODY OF THE CHILD.

¶23-3-45. *In re I.K.G.*, No. 10-22-00043-CV, 2023 WL 2601333 (Tex. App.—Waco 2023, no pet. h.) (replacement mem. op.) (03-22-23).

Facts: DFPS filed an Original Petition to Terminate the Parent-Child Relationship, which it non-suited after Mother and Father placed the child in Foster Parent's care. After caring for the child for over a year, Foster Parent filed an Original Petition in Suit Affecting the Parent-Child Relationship, requesting to be named SMC of the child and to limit Mother and Father's access to the child. Following trial, the trial court appointed Foster Parent as SMC, Mother and Father as possessory conservators, and awarded Mother and Father supervised visitation. Father and Mother appealed.

Holding: Affirmed.

Opinion: Father and Mother argue that the trial court abused its discretion by appointing Foster Parent as SMC. Here, Foster Parent testified that she cared for the child for two years and that DFPS had approved her home for placement. Further, Foster Parent informed the trial court that Father and Mother had a history or pattern of neglecting the child, which initially spurred DFPS's involvement in the case. Moreover, DFPS only nonsuited its termination petition after Mother and Father relinquished custody of the child. At the hearing, Mother and Father failed to provide a detailed plan for retaking custody of the child and did not dispute nor provide a defense against the neglect allegations made against them. Therefore, the trial court did not err in appointing Foster Parent as SMC because it was in the child's best interest.

Editor's comment: *The opinion on rehearing removed any reference to sealing of cases under the Rules of Civil Procedure because the process is different in family-law cases, and the initial opinion addressed the process in normal civil cases. B.M.J.*

DESPITE NOT PLEADING FOR A CHANGE TO THE CHILDREN'S GEOGRAPHIC RESTRICTION, BOTH PARTIES TRIED THE ISSUE BY CONSENT BY ELICITING TESTIMONY ON THE ISSUE DURING TRIAL AND REQUESTING SUCH DURING THEIR CLOSING ARGUMENTS.

¶23-3-46. *In re C.G.P.*, No. 08-22-00070-CV, 2023 WL 2733362 (Tex. App.—El Paso 2023, no pet. h.) (mem. op.) (03-30-23).

Facts: Father filed an Original Petition to Modify the Parent-Child Relationship, requesting that he be awarded the exclusive right to designate the children's primary residence and that his child support obligation be terminated. In response, Mother filed a Counterpetition. At trial, Father testified that Mother refused to provide the children with proper medical care and opposed vaccinating the children. Additionally, Father expressed his concerns regarding Mother's dating history and stated that Mother had traveled with the children to a hotel so that she could have sex with a man. Following trial, the trial court ordered that neither conservator could remove the children from a geographic restriction for the purpose of changing their primary residence. Additionally, the trial court awarded the parties a 50/50 possession schedule and ordered that the children's pediatrician resolve all medical disputes between the parties. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court abused its discretion by imposing a geographic restriction to a specific County. Additionally, Mother states that Father neither pleaded for the geographic restriction, nor did she try the issue by consent. Here, during the trial, Father's attorney requested a geographic restriction to which Mother failed to object. Further, Mother testified that she did not oppose a geographic restriction to the State of Texas. Moreover, Mother's attorney addressed a geographic restriction in her closing argument. Thus, Mother tried the issue by consent. Next, Father presented evidence that the children had lived in the same county their entire lives, attended school in the area, and had family there. Finally, neither party presented evidence that either wished to relocate. Therefore, the trial court did not err by imposing a geographic restriction.

Next, Mother argues that the trial court erred by removing her exclusive right to make medical decisions pertaining to the children. Here the trial court found that Mother and Father were "diametrically opposed with regard to their thoughts and beliefs regarding most aspects of the medical care of the children." Additionally, the trial court found that neither party demonstrated that they would make better medical decisions for the children than the other. During trial, each party testified that they had both

chosen the children's pediatrician and trusted them. Therefore, the trial court did not abuse its discretion by ordering that the children's pediatrician serves as a tiebreaker.

SAPCR
Possession

TRIAL COURT ERRED IN GRANTING BOYFRIEND'S MOTIONS FOR SUMMARY JUDGEMENT BECAUSE FATHER PRESENTED SUFFICIENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT.

¶23-3-47. *Barnes v. Walsh,* No. 09-20-00212-CV, 2023 WL 2417974 (Tex. App.—Beaumont 2023, no pet. h.) (mem. op.) (03-09-23).

Facts: Father filed a suit against Mother's boyfriend ("Boyfriend") for committing violations of TFC Chapter 42. Specifically, Father sought both a claim for intentional infliction of emotional distress and interference with his possessory interest. Additionally, Father alleged that Boyfriend aided and assisted Mother in taking their children to Russia, with the intent to remain there, which prevented Father from exercising his extended possession rights. Thereafter, Boyfriend filed a no-evidence and traditional motion for summary judgement, arguing that he had no knowledge of Mother's intent to remove the children from the United States on a permanent basis and that Father could not provide evidence to support his claims. In response, Father submitted Boyfriend's deposition testimony and cited to multiple portions of same in support of his claims. Following trial, the trial court granted Boyfriend's no-evidence and traditional motions for summary judgement and awarded him attorney's fees. Father appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Father argues that the trial court erred in granting Boyfriends no-evidence motion for summary judgment on Father's claim for intentional infliction of emotional distress and interference with a possessory right. Here, a claim for intentional infliction of emotional distress is not an available remedy when a parent merely claims that a parent alienated a child from them. Therefore, the trial court did not err in granting Boyfriend's no-evidence summary judgement as to Father's claim for intentional infliction of emotional distress.

Next, Father argues that the trial court erred in granting Boyfriend's no-evidence motion for summary judgment on Father's claim for interference with a possessory right. Here, Father contends that Boyfriend assisted Mother in interfering with his possessory rights. Additionally, Father asserts that he submitted evidence to establish that Boyfriend knew of Mother's intent to permanently remove the children from the United States and that Boyfriend continued to assist her. Accordingly, Father presented more than a scintilla of evidence to create a genuine issue of material fact that Boyfriend interfered with his possessory right. Therefore, the trial court erred in granting Boyfriend's no-evidence summary judgement as to Father's claim for interference with a possessory right.

Finally, Father argues that the trial court erred in granting Boyfriend's traditional motion for summary judgment for violating the TFC provision for interference with possessory rights. Here, Father claims that Boyfriend had notice of the parties' possession order and that he was aware that his actions in assisting Mother would likely violate Father's possession order. Because Boyfriend assisted Mother after discovering her intent to keep the children in Russia, there is a genuine issue of material fact. Therefore, the trial court erred in granting Boyfriend's traditional motion for summary judgment.

SAPCR
CHILD SUPPORT

TRIAL COURT ERRED BY BASING MOTHER'S CHILD SUPPORT OBLIGATION SOLELY UPON FATHER'S TESTIMONY ON WHAT HE SPECULATED MOTHER COULD EARN.

¶23-3-48. *Kinney v. Batten*, No. 01-21-00394-CV, 2023 WL 2316354 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (mem. op.) (03-02-23).

Facts: In 2011, the trial court issued a SAPCR Order that appointed the parties as JMCs, with Mother possessing the exclusive right to designate the child's primary residence and receive child support. Mother then filed a modification, seeking SMC of the child and termination of Father's parental rights. In response, Father filed a Counterpetition and requested SMC and child support. Per Father's request, the trial court appointed an Amicus Attorney and ordered Father to pay 90 percent of the amicus attorney's fees and that Mother pay the remainder. At the jury trial, Father rebutted Mother's claims that he had poisoned the child. Specifically, Father established that the testing center where Mother sent swabs of the child's hair, blood, and urine did not follow a chain-of-custody and were obtained via an unreliable at-home self-testing kit. Additionally, a doctor, who was an internist and toxicologist testifying as an expert, opined that there was "no evidence of heavy metal poisoning" and "no clinical indication of any sort of poisoning." Finally, Father testified that Mother had taken the child to approximately 75 to 100 doctors. At the end of the jury trial, the jury found that Father should be appointed SMC. Subsequently, the parties participated in a bench trial. Following the bench trial, the trial court appointed Father as SMC, awarded him the exclusive right to designate the child's primary residence, and ordered Mother to pay child support and retroactive support to Father. Mother appealed.

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

Opinion: Mother argues that the trial court abused its discretion by setting her monthly child support obligation at $397. Additionally, Mother asserts that the trial court erred in awarding Father retroactive child support. Here, the trial court found that Mother's monthly net resources equaled $1.9k; however, Mother testified that at the time of trial, she earned $120 per month as a fitness instructor. While Mother testified that she possessed the capability of earning more than $120 per month, neither party presented additional evidence regarding what her income could be. Father merely testified that Mother previously worked as a real estate broker, and after researching the job online, he found that Mother could earn anywhere from "80 to $110,000 a year." This testimony as to what Mother could earn is speculative and does not possess probative value. Consequently, Father's testimony is insufficient to support the trial court's finding that Mother earns a monthly salary of $1.9k. Finally, the record is devoid of Mother's income tax returns for the past two years, a financial statement, or any current paystubs. Therefore, the trial court erred in calculating Mother's child support obligation and in ordering retroactive support because Father failed to present any evidence regarding Mother's monthly net resources.

Next, Mother argues that the trial court erred in denying her motion to remove Amicus Attorney. Specifically, Mother claims that Amicus Attorney failed to interview her witnesses and aligned herself with Father. Here, Amicus Attorney attempted to interview Mother, Maternal Grandmother, and the rest of Mother's family members. Further, Mother does not name any other witnesses with significant knowledge of the child's history or condition that Amicus Attorney failed to interview. While Amicus Attorney informed the jury that "[she] spoke of the child," this does not constitute error since this description of role is consistent with TFC 107.005(a). Moreover, Amicus Attorney filing an emergency motion against Mother to protect the safety and welfare of the child does not evidence a strategic alignment with Father. Therefore, the trial court did not err by denying Mother's motion to remove Amicus Attorney.

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TRIAL COURT PROPERLY CALCULATED FATHER'S NET MONTHLY RESOURCES BY CONSIDERING HIS SEVERANCE PAY, INCOME RECEIVED FROM HIS SELF-EMPLOYMENT CONSULTING WORK, AND MONTHLY LIVING EXPENSES.

¶23-3-49. *In re B.M.R.*, No. 09-21-00397-CV, 2023 WL 2530260 (Tex. App.—Beaumont 2023, no pet. h.) (mem. op.) (03-16-23).

Facts: The parties' Final Decree named Mother and Father as JMCs, with Mother possessing the exclusive right to designate the children's primary residence. Further, the parties' Final Decree ordered Father to pay $2.9k in monthly child support until their fourth child turned 18 or graduated. Thereafter, Father filed a Petition to Modify the Parent-Child Relationship. Specifically, Father requested that the trial court decrease his child-support obligation to $1.1k due to his income and requested a step-down provision. At trial, Father testified that he lost his job and could not find comparable employment. While Father explained that he had earned over $650k/year at the time of the divorce, his 2020 W-2's showed him earning $511k. Additionally, Father testified that his monthly expenses were $11k and failed to provide bank statements, retirement statements, and invoices for his newly created business. Following trial, the trial court reduced Father's child support obligation to $2.7k per month and added a step-down provision. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred by ordering him to pay maximum guideline child support. Here, even though father testified that he expected to earn $72k per year, Father only admitted one monthly invoice for his business in the amount of $6,600. Extrapolating the documentary evidence, the trial court could conclude that Father earned $79.2k from his self-employment consulting work. Further, Father received approximately $10k from his severance proceeds and had $20k in stock that was vesting. Although Father testified that his living expenses were $11k per month, Father provided little documentary evidence regarding his financial earnings other than a monthly invoice from his consulting business and his 2020 W-2. While Father explained that he spent a portion of his severance pay on Mother's vehicle, made an additional lump sum payment on his mortgage, and invested in Mother's separate property business, the trial court did not have to deduct these expenditures from his monthly resources. In considering the evidence, the trial court could have reasonably determined that Father's net resources exceeded $9.2k per month. Therefore, the trial court did not abuse its discretion in calculating Father's child support obligation.

IF THE CHILDREN DO NOT RECEIVE THEIR CHILDREN'S SOCIAL SECURITY BENEFITS, THEN THE OBLIGOR OF CHILD SUPPORT WHO RECEIVES THESE BENEFITS CANNOT SUBSTRACT THAT AMOUNT FROM THEIR CHILD SUPPORT OBLIGATION.

¶23-3-50. ***Banakar v. Krause,*** ___ S.W.3d ___, No. 01-21-00609-CV, 2023 WL 2655743 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (03-28-23).

Facts: After the parties signed their Agreed Final Decree, the trial court entered an Agreed Child Support Review Order ("Agreed Support Order"). Therein, Father agreed to an increase in his child support obligation. Father then filed a Petition to Modify the Agreed Support Order and requested a reduction in his child support obligation. In response, Mother filed a Counterpetition to Modify the Agreed Support Order, requesting that Father's child support payments be increased. At a bench trial, Father testified that he had unique expertise as an engineer for NASA; however, Father informed the trial court that his employer had recently laid him off. As a result, Father claimed that he could no longer pay child support. Despite making this claim, Father's financial information sheet showed that, at the time of trial, Father received $1.8k a month in social security retirement benefits, $2.4k a month in retirement benefits, and $83 a

month in dividends from an investment account. Additionally, Father explained that he received about $925 in social security benefits for each child monthly that he deposited into his personal credit union account. At the conclusion of trial, Father requested that the trial court find that his current net resources were $3.8k per month and order him to pay $1k per month in child support. Thereafter, the court signed a SAPCR Order, denying Father's request to decrease his child support obligation, and ordered him to pay $2.3k per month for his two children. Father appealed and Mother cross-appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred in calculating his monthly net resources and finding that his monthly net resources exceeded $9.2k. Specifically, Father contends that he established that he was retired, unemployed, and did not have income-producing assets. Here, Father's gross earnings the year before trial were $9.8k per month. In addition to his salary, Father's monthly income included $1.8k in social security retirement benefits, $2.4k in retirement benefits, and $83 monthly dividends from an investment account. Still, Father asserts that the loss of his contract job six weeks before trial means that his earnings of $9.8k per month should not have been considered in determining his gross monthly resources. However, at trial, Father testified that he was one of only "eight people in the world" with expertise in aerospace glass applications, had worked closely with two NASA employees involved in aerospace glass projects, and actively sought employment. Thus, this testimony supports a reasonable inference that he was likely to obtain new contract work. Accordingly, the trial court did not err in considering his monthly earnings from his prior job in determining his net monthly resources. Next, Father received $1.9k per month as the representative payee for the children's social security benefits. Despite receiving this amount, Father asserts that he is entitled to deposit the children's social security benefits into his personal account and still subtract the amount of those benefits from his child support obligation. However, TFC 154.133 requires the trial court to subtract the amount of the children's social security benefits form the obligor's child support obligation "for a child who *receives* benefits as a result of the obligor's receipt of social security old age benefits." Conversely, if the children do not receive these benefits, the obligor may not subtract that amount from his child support obligation. Finally, Mother provided evidence that Father had not deposited all of the children's social security benefits that he had received into his personal account, and thus, evidence exists that Father used these funds for personal use. As such, the trial court properly considered the children's social security benefits as resources under Father's control that were available to him to pay his child support obligation. Therefore, the trial court did not err in calculating Father's child support obligation because his monthly net resources exceeded $9,200.

AFTER FILING HIS LAWSUIT, FATHER NEVER ATTEMPTED TO SERVE THE ATTORNEY GENERAL. THUS, THE TRIAL COURT DID NOT ERR IN DISMISSING FATHER'S SUITS FOR WANT OF PROSECUTION.

¶23-3-51. ***In re Aguilara*****,** ___ S.W.3d ___, No. 08-22-00083-CV, 2023 WL 2734371 (Tex. App.—El Paso 2023, no pet. h.) (03-31-23).

Facts: Father filed an Original Motion to Modify/Contest Child Support Payment/Seizure and a Motion to Vacate Lien Unauthorized by Law. Thereafter, Father failed to contact the clerk's office with any instructions to serve or cite the Attorney General, the named defendant. After failing to serve the Attorney General, the trial court held a final dismissing hearing and entered an order of dismissal for want of prosecution. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred by dismissing his case for want of prosecution. Here, the trial court signed its DWOP order six months after Father filed his motions. During this time, Father never attempted to serve or cite the Attorney General. While Father attempted to send a letter addressed

to the Attorney General, the correspondence did not constitute an attempt of service, nor did the substance of the letter notify the Attorney General of his pending lawsuit. Accordingly, Father failed to prosecute his case with diligence. Therefore, the trial court did not err in dismissing Father's suit.

UNDER TFC SECTION 154.182, A TRIAL COURT POSSESSES THE ABILITY TO ORDER A PARENT TO CONTRIBUTE TO A HEALTH SAVINGS ACCOUNT TO PAY FOR THE CHILD'S UNREIMBURSED MEDICAL EXPENSES BEFORE AN INSURER REFUSES TO REIMBURSE THE COST.

¶23-3-52. *In re S.B.*, No. 05-20-00338-CV, 2023 WL 2726830 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (03-31-23).

Facts: After the parties divorced, Mother filed a Motion for Enforcement and an Original Petition to Modify the Parent-Child Relationship. At trial, Mother testified that Father's treatment of the child had significantly worsened since the prior order. Additionally, Mother explained that doctors had diagnosed the child with Tourette Syndrome and A.D.H.D., and that the stress Father imposed on the child exacerbated her symptoms. Moreover, Mother testified that Father failed to consistently provide the child with her medications. During Father's summer visitation, Mother accused Father of interfering with the child's communications with her by disassembling the child's phone. Finally, Mother informed the trial court that Father failed to pay the child's unreimbursed medical expenses that she submitted to him. Therapist then testified that Father struggled with making good parenting decisions for the child and that his decisions often harmed the child. Following trial, the trial court signed a modification order that appointed the parties as JMCs and awarded Mother the exclusive right to designate the child's primary residence. Further, the trial court issued a step-up possession order which limited Father's possession to just one overnight on the first Saturday of each month. Moreover, the trial court found that Father violated the parties' prior order by failing to pay Mother $4.6k in unreimbursed medical expenses. Father appealed.

Holding: Affirmed as Modified.

Opinion: Father argues that the trial court erred by entering a vague step-up possession order. Specifically, Father asserts that the SAPCR Order's "good-behavior condition" lacks specificity because it requires, "[f]or a continuous period of six (6) months, [that] there [] not [be] a single altercation or incident initiated by [Father] including but not limited to [Father's] failure to comply with an Order of the Court." In response, Mother asserts that, "Father cannot [] claim to be unaware of his obligation under the trial court's order" and that "Father should know from this order exactly what is expected of him." Here, Father must guess what constitutes a prohibited "altercation or incident." Consequently, this provision of the SAPCR Order lacks specificity, and thus, the trial court erred by implementing this vague condition. Accordingly, this condition is removed from the SAPCR Order.

Next, Father argues that the trial court abused its discretion by ordering him to contribute $450 per month to a health savings account to pay for the child's unreimbursed medical expenses. Specifically, Father contends that TFC 154.182 does not authorize the trial court to allocate health-care costs to him unless an insurer first refuses to reimburse the cost. Here, the plain text of TFC 154.183(c)(1) does not limit itself to allocation of medical expenses only if an insurer refuses reimbursement for services rendered. Thus, TFC 154.183(c) authorized the trial court to enter the HSA provision that required Father to provide for the reasonable and necessary health expenses of the child. Therefore, the trial court did not err by ordering Father to make monthly contributions to an HSA account.

Editor's comment: *Requiring a recalcitrant obligor to make payments into an HSA is a nice addition to the family law toolkit. J.V.*

DESPITE POSSESSING THE ABILITY TO DO SO, FATHER FAILED TO PROVIDE MOTHER WITH FINANCIAL SUPPORT DURING THEIR DIVORCE; THUS, THE TRIAL COURT DID NOT ERR BY ORDERING FATHER TO PAY RETROACTIVE CHILD SUPPORT.

¶23-3-53. *Estrada v. Garrett-Estrada*, No. 03-22-00017-CV, 2023 WL 3132552 (Tex. App.—Austin 2023, no pet. h.) (mem. op.) (04-28-23).

Facts: Father filed for divorce. During the divorce, neither party paid child support to the other and Mother incurred substantial credit card debt. Prior to trial, the parties entered into a Rule 11 Agreement, which provided that they would submit the issue of retroactive child support and credit card debt to the trial court. Additionally, the parties agreed to limit retractive child support from September 2020 to the date of the final hearing. At trial, Mother testified that she struggled to pay rent, went to food pantries, could not support her three children (one of which emancipated during the suit), and had her vehicle repossessed. As a result, Mother started to sell her plasma to purchase food and medication for the children. Moreover, Mother cared for the parties' daughter 100% of the time and cared for their other child on a week-on/week-off basis. Concerning her credit card debt, Mother attributed 90% of it to the children's expenses. Following trial, the trial court entered a Final Decree that ordered Father to pay $486 per month in child support and $10.5k in retroactive child support. Additionally, the trial court ordered Father to pay approximately 60% of the parties' combined credit card debt. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court abused its discretion by ordering him to pay credit card debt in Mother's sole name. Here, there existed a disparity between the parties' earning capacities, and Father testified that he knew the credit card charges were for household expenses. Further, Mother testified that 90% of the credit card debt was spent on the children's needs and expenses that existed at the time of their separation. Therefore, the trial court did not abuse its discretion by ordering Father to pay 60% of the parties' credit card debt.

Next, Father argues that the trial court erred by ordering retroactive child support, which included support for the parties' son that solely lived with him during the duration of the divorce. Additionally, Father asserts that Mother did not provide financial or medical support to the son throughout the case. Here, the trial court is not bound to the parties' Rule 11 Agreement, which limited retroactive child support because it was not in the children's best interest. Moreover, Mother testified regarding the numerous expenses she paid for the children, the extensive care needed by the child in her sole possession, and Father's lack of financial support throughout the divorce proceeding. As a result of Father's lack of financial support, Mother had her car repossessed and had to sell her plasma for the children's food and medication. Finally, the evidence supports a finding that the amount of retroactive child support ordered would not impose an undue financial hardship upon Father. Therefore, the trial court did not err by ordering Father to pay retroactive child support.

TRIAL COURT ABUSED ITS DISCRETION BY CALCULATING THE CHILD SUPPORT OBLIGATION OF FATHER WITHOUT CONSIDERING FATHER'S CHILD OUTSIDE THE MARRIAGE.

¶23-3-54. *In re I.J.K.,* No. 08-22-00055-CV, 2023 WL 3153645 (Tex. App.—El Paso 2023, no pet. h.) (mem. op.) (04-28-23).

Facts: The OAG filed a Petition requesting that Father pay current and retroactive child support for his three children. Following a hearing, the trial court entered orders naming the parties JMCs and ordered Father to pay guideline child support for three children at 30% of his monthly net resources. Father then requested a de novo hearing solely on the issue of child support. After hearing Father's arguments, the district court ("trial court") determined that Father was not entitled to a credit in his child support obligation for a child he had outside the marriage with another woman. The trial court then entered its final SAPCR

order that confirmed the appointment of the parties as JMCs and ordered Father to pay Mother 30% of his monthly net resources. Father appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Father argues that the trial court erred by not providing him with a child support credit for his fourth child that lived in Africa. Here, TFC Chapter 154 explicitly provides that the trial court should consider any children of the marriage and any other children for which the obligor has a legal duty to support. In its ruling, the trial court claimed that its order was made pursuant to the child support guidelines; however, the trial court did not follow the guidelines by failing to consider Father's fourth child. Further, the trial court acknowledged Father's undisputed testimony that he had a daughter in Africa that he was legally required to support. Therefore, the trial court erred by not giving credit for child support to Father's daughter who he had outside of the marriage.

SAPCR
MODIFICATION

IT IS WITHIN TRIAL COURT'S DISCRETION TO IMPOSE A GEOGRAPHIC RESTRICTION ON THE CHILD'S RESIDENCE EVEN WHEN NEITHER PARTY PLEADS FOR THE RELIEF.

¶23-3-55. *In re I.J.N.*, No. 05-21-00738-CV, 2023 WL 2674079 (Tex. App.—Dallas 2023, no pet. h.) (mem. op.) (03-29-23).

Facts: The parties' SAPCR Order awarded Mother with the exclusive right to designate the child's primary residence without a geographic restriction. After receiving her bachelor's degree, Mother moved from Arlington to Houston with the child. Thereafter, Father filed a Petition to Modify the Parent-Child Relationship, requesting that he be appointed the conservator with the right to designate the child's primary residence. At trial, the child custody evaluator ("Evaluator") testified that the child "would benefit from seeing her father more…" and that the child expressed the child's desire to spend more time with Father. Additionally, Evaluator stated that it would benefit the child to visit her younger siblings more frequently. Following trial, the trial court restricted Mother's right to designate the child's primary residence to Dallas County and its contiguous counties. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court abused its discretion by imposing a geographic restriction on her right to designate the child's primary residence. Additionally, Mother asserts that neither party pleaded for a geographic restriction. As a general rule, a trial court is afforded wide latitude on its decisions regarding custody, control, possession, and visitation matters. Further, "[p]leadings are of little importance in child custody cases and the trial court's efforts to exercise broad, equitable powers in determining what will be best for the future welfare of a child should be unhampered by narrow technical rulings." Here, Mother does not justify why this Court should administer her proposed "narrow technical ruling" which is contrary to this Court's precedent. Further, after living in close proximity to Father for four years, Mother failed to provide Father with any notice of her move to Houston with the child. Therefore, the trial court did not abuse its discretion by imposing a geographic restriction.

Editor's comment: *This is a good one to point to in response to people who say, "better to ask for forgiveness than permission." Forgiveness is far from guaranteed. B.M.J.*

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TRIAL COURT ERRED IN GRANTING MOTHER'S NO-EVIDENCE MOTION FOR SUMMARY JUDGEMENT AS THERE WAS MORE THAN A SCITILLA OF PROBATIVE EVIDENCE THAT FATHER'S PETITION TO MODIFY WAS IN THE BEST INTERSTS OF THE CHILD.

¶23-3-56. *Ramirez v. Sanchez,* No. 01-21-00417-CV, 2023 WL (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (mem. op.) (04-13-23).

Facts: The parties' Final Decree appointed Mother and Father as JMCs, awarded Mother the exclusive right to designate the child's primary residence, and ordered Father to pay child support. Subsequently, Father filed a Petition to Modify the Parent-Child Relationship and requested to be appointed sole managing conservator. Father then filed a Motion for Enforcement alleging that Mother interfered with his periods of possession. In response, Mother filed a Counterpetition to Modify the Parent-Child Relationship which asserted that a material and substantial change in circumstances had occurred and requested additional child support. Thereafter, Mother moved for a no-evidence motion for summary judgement on Father's Petition to Modify the Parent-Child Relationship, which the trial court granted. Additionally, the trial court dismissed Father's Motion for Enforcement with prejudice. Following a bench trial, the trial court granted Mother's counterpetition and increased Father's child support obligation. Father appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Father argues that the trial court erred in granting Mother's no-evidence motion for summary judgement. Specifically, Father asserts that Mother's counterpetition to modify served as an admission that the circumstances of the child had changed. Here, both parties filed pleadings alleging material and substantial changes to the parties' circumstances. Therefore, the trial court erred by granting Mother's no-evidence MSJ because Mother's pleading was a judicial admission that a material change of circumstances had occurred.

Next, Father argues that the trial court erred in granting Mother's no-evidence motion for summary judgement because he offered evidence that his proposed modification was in the child's best interest. Here, in Mother's no-evidence MSJ, Mother herself attached evidence to her motion that created a question of fact as to the "best interest" factors. Because Mother's own evidence created a question of fact as to the "best interest" factors, the trial court should have considered Father's evidence in deciding the motion for summary judgement. Moreover, Father submitted a child custody evaluation in response to Mother's motion which indicated that Mother had anger management issues and currently lived with her boyfriend who kept weapons in the home. Accordingly, the evaluation constitutes more than a scintilla of probative evidence of the "best interest" factors bearing on Father's petition to modify. Therefore, the trial court erred in granting Mother's no-evidence motion for summary judgement.

Editor's comment: *Watch out what you plead for because you might get it even though that's not what you want. J.V.*

A MATERIAL AND SUBSTANTIAL CHANGE OF CIRCUMSTANCES WARRANTED IMPOSING A CHILD SUPPORT OBLIGATION UPON FATHER, DESPITE THE PARTIES PRIOR AGREEMENT THAT NO SUPPORT WOULD BE OWED.

¶23-3-57. *In re A.S.,* No. 02-22-00196-CV, 2023 WL 3017658 (Tex. App.—Fort Worth 2023, no pet. h.) (mem. op.) (04-20-23).

Facts: The parties' Agreed Final Decree of Divorce awarded Mother primary custody of their daughter and Father primary custody of their son. Due to their similar income levels, the parties agreed that neither party would be responsible for paying child support. After the parties' son emancipated, the OAG filed a Petition for Confirmation of Non-Agreed Child Support Review Order. Subsequently, Mother and OAG attended a negotiation conference without Father. Thereafter, the OAG filed a proposed Child Support

Review Order. Therein, the OAG and Mother agreed that Father should pay $1,095 in monthly child support. The order also stated that there had been a material and substantial change in circumstances of the child or parties. In response, Father filed a Motion to Dismiss and General Denial. Following a hearing in front of the AJ, the AJ found that the child's emancipation did not constitute a material and substantial change of circumstance and denied the child support modification. Afterwards, Mother filed a request for a de novo hearing and a petition to modify the parent-child relationship. After conducting the hearing, the District Court (the "trial court") found that there was a material and substantial change in circumstances and signed an order requiring Father to pay $770 in monthly child support. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred by ordering him to pay child support. Specifically, Father asserts that the child support obligation contained within the parties' Final Decree could not be modified because he and Mother contractually agreed to a variance from the child support guideline. Here, the State's interest in the continuing welfare of the children outweighs the parents' interest in having an established, permanent level of support payments. Accordingly, the trial court possesses the discretion to modify the agreement that the parties made in the original decree. Therefore, the trial court did not err by ordering Father to pay child support.

Next, Father argues that the trial court abused its discretion by finding that a material and substantial change in circumstances had occurred. Here, the child support provision contained within the Final Decree stated that the parties agreed that no child support was necessary due to the parties' similar monthly income. Further, until the son emancipated, both parties were the primary caretaker of one child, which is no longer the case. Moreover, Father's income nearly doubled since the signing of the Final Decree. Therefore, the trial court did not abuse its discretion by finding that a material and substantial change had occurred.

SAPCR
Enforcement

TRIAL COURT ABUSED ITS DISCRETION BY ORDERING HUSBAND TO INDEMINIFY WIFE FOR HER PAYMENT OF THE CHILDREN'S STUDENT LOANS BECAUSE NO LIABILITY ON WIFE'S BEHALF HAD ARISEN.

¶23-3-58. *Cucolo v. Cucolo,* No. 07-22-00218-CV, 2023 WL 2775173 (Tex. App.—Amarillo 2023, no pet. h.) (mem. op.) (04-04-23).

Facts: Within the parties' Final Decree, Husband agreed to indemnify Wife for any liability she incurred for non-payment of their children's student loans. When Husband's children all turned 30, he stopped making payments towards their student loan debt. Subsequently, Wife wired $75k to the children and sent a letter to Husband, demanding that he reimburse her for the student loan payment. Thereafter, Wife filed a Motion for Enforcement and requested that Husband pay her $75,000. Following trial, the trial court granted Wife's Motion for Enforcement and ordered Husband to pay Wife in full for failing to indemnify her payment of the student loans. Husband appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: As a preliminary matter, Husband argues that Wife lacked standing to seek indemnification and enforce a payment of a debt owed to a third party. Here, a review of the Wife's live pleading establishes that the Final Decree ordered Husband to pay the children's student loans and that he failed to do so.

As a result, Husband breached his contract to Wife. Therefore, Wife pleaded facts that are sufficient to establish standing.

Husband argues that the trial court erred in awarding Wife relief on her claim for indemnification. Specifically, Husband asserts that no liability had arisen, and thus, the payment by Wife to the children constituted a gift. Here, the Final Decree contained an agreement in which Husband agreed to indemnify Wife against any liability resulting from non-payment of the student loans. Further, Wife did not present any evidence that either the children or the creditor looked to Wife for payment of the student loans when Husband ceased his payments. Therefore, the trial court abused its discretion by ordering Husband to indemnify Wife for her payment towards the children's loans.

FATHER'S MISTAKEN BELIEF THAT THE TRIAL COURT TERMINATED HIS CHILD SUPPORT OBLIGATION DID NOT EXCUSE HIM FROM SATISFYING HIS CHILD SUPPORT ARREARAGE.

¶23-3-59. *In re G.L.G.*, No. 11-21-00285-CV, 2023 WL 3010912 (Tex. App.—Eastland 2023, no pet. h.) (mem. op.) (04-20-23).

Facts: The parties' New Mexico Final Decree ordered Father to pay $413 per month in child support. Thereafter, both parties moved to Texas and the OAG filed a suit to enforce and modify Father's child support order. At trial, Mother testified to the amounts that she paid for the child's health, dental, and vision care. In response, Father claimed that the New Mexico trial court terminated his parental rights, and thus, he no longer had a child support obligation. Moreover, Father testified that his New Mexico attorney informed him that he no longer had a child support obligation. Unbeknownst to Father, the New Mexico trial court denied Father's petition to terminate. Following trial, the trial court ordered Father to pay $200 per month until he satisfied his arrearage and increased his monthly child support obligation. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred by ordering him to satisfy the child support arrearage because he believed that his parental rights were terminated. Here, Father possesses a duty to further the child's welfare and best interests. Moreover, this duty is not negated by his New Mexico attorney advising him not to pay child support. While Mother severely limited Father's possession and access to the child, the TFC specifically prohibits trial courts from conditioning the payment of child support on whether one parent allows the other to have access to the child. Therefore, the trial court did not err by finding that Father's mistaken belief did not excuse him from satisfying his child support arrearage.

SAPCR
Removal of Child and
Termination of Parental Rights

BECAUSE MOTHER'S ATTORNEY DID NOT APPEAR AT TRIAL, MOTHER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

¶23-3-60. *In re J.C.H.,* ___ S.W.3d ___, No. 04-22-00560-CV, 2023 WL 2290302 (Tex. App.—San Antonio 2023, no pet. h.) (03-01-23).

Facts: DFPS received allegations that Mother exposed her child to ongoing episodes of domestic violence, substance abuse, and instability. Thereafter, DFPS filed a Petition Seeking Temporary Managing Conservatorship of the child and Termination of Mother's Parental Rights. At a bench trial, both Mother

and her attorney failed to appear. Subsequently, the trial court terminated Mother's parental rights on multiple grounds. Mother appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Mother argues that the trial court erred by terminating her parental rights because her retained counsel's absence is presumptively prejudicial to her. Specifically, Mother asserts that a "presumption of prejudice is warranted" because she failed to have representation at a crucial state in the litigation. In response, DFPS contends that a presumption of prejudice is not warranted because Mother voluntarily chose not to be present at trial. Here, there is nothing in the record indicating why Mother failed to appear at trial. Further, DFPS fails to provide authority that provides that a presumption of prejudice is not warranted if a parent is voluntarily absent from trial. Consequently, Mother's attorney's failure to appear at trial denied Mother effective assistance of counsel. Therefore, the trial court abused its discretion by terminating Mother's parental rights. Still, DFPS asserts that the portion of the trial court order appointing DFPS as permanent managing conservator should be affirmed regardless of whether Mother received ineffective assistance of counsel. Because Mother did not challenge DFPS's conservatorship appointment on appeal, the order appointing DFPS as permanent managing conservator is affirmed.

TRIAL COURT PROPERLY DETERMINED THAT TERMINATION OF THE PARTIE'S PARENTAL RIGHTS UNDER THE TEXAS FAMILY CODE WAS SUPPORTED BY THE EVIDENCE; HOWEVER, THE TRIAL COURT DID ERR IN FINDING THAT TERMINATION WAS IN THE BEST INTEREST OF THE CHILD ABSENT FACTUALLY SUFFICIENT EVIDENCE.

¶23-3-61. ***In re A.Y.C.,*** ___ S.W.3d ___, No. 14-22-00361-CV, 2023 WL 2415973 (Tex. App.—Houston [14th dist.] 2023, no pet. h.) (03-09-22).

Facts: Mother and Father agreed to allow Father's cousin ("Cousin") to smuggle their son into the United States from Honduras. After briefly living in the United States with Cousin and other caretakers, TDFPS received a referral for allegations of neglect and abuse of the child by Cousin. TDFPS filed its Original Petition for Protection of a Child for Conservatorship, and for termination in a SAPCR. On the same day, the trial court signed an Order for Protection of a Child in an Emergency, appointing TDFPS as emergency temporary sole managing conservator of the child. Thereafter, the child was placed in foster care and Mother and Father filed a Joint Counterpetition in SAPCSR and Request for Temporary Orders, pleading the return of the child to his parents. At a bench trial Mother and Father appeared via WhatsApp, and the court heard testimony from a caseworker, the foster mothers of the child, a cousin of the child, and Mother and Father. Subsequently, the trial court signed a Final Decree for Termination which found that the termination of Mother and Father's parental rights was in the best interest of the child and was justified under the TFC. The trial court appointed TDFPS as sole managing conservator. Mother and Father appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Majority Opinion: (Christopher, C.J; Wise J.) Father argues that the trial court lacked subject-matter jurisdiction to sign a decree terminating his parental rights, and asserts that the trial court should have allowed the federal authorities to hear this dispute as this case involved the parental rights of foreign nationals living in Honduras and an undocumented Honduran child living in the United States. Here, the parties appeared at the first hearing and did not challenge jurisdiction, and the evidence presented established that the child lived in the United States for over six months before TDFPS filed its original petition. Therefore, the trial court had jurisdiction in this case.

The parties also argue that there is legally and factually insufficient evidence to support the trial court's findings that termination of their parental rights is in the child's best interest. Here, though the child is malnourished, with learning disabilities and a genetic disorder, TDFPS presented no evidence

that the care the child needs is unavailable in Honduras with his parents. Further, at the time of trial TDFPS presented no evidence as to the condition, safety, or stability of the parents' home, and the evidence shows that Mother and Father took steps to return the son to them and to communicate with him whenever possible. Accordingly, though there is legally sufficient evidence to support the trial court's findings that the termination of the parties' parental rights was in the best interest of the child, the evidence was factually insufficient to support this finding. Therefore, the trial court abused its discretion by finding that termination of the parties' parental rights was in the best interests of the child.

Dissenting Opinion: (J. Hassan) TDFPS initiated the proceedings against Mother and Father, therefore it had the burden of establishing the trial court's subject-matter jurisdiction. Jurisdiction is only conferred when the state is the home state of the child on the date of the commencement of the proceeding. TFC defines home state as the state in which a child lived with a parent or person acting as a parent for at least six months immediately before the commencement of a child custody proceeding. Because Mother and Father did not live in Texas during the required time, TDFPS was required to show that a person acting as parent met this statutory requirement as the home state of the child. Therefore, the trial court lacks subject-matter jurisdiction to hear this termination.

MOTHER'S FAILURE TO COMPLETE DFPS'S FAMILY SERVICE PLAN AND HER DRUG USE SUPPORTED THE TRIAL COURT'S FINDING THAT TERMINATION OF HER PARENTAL RIGHTS WAS IN THE CHILD'S BEST INTEREST.

¶23-3-62. ***In re Z.R.M.*****,** ___ S.W.3d ___, No. 04-22-00787-CV, 2023 WL 2506430 (Tex. App.—San Antonio 2023, no pet. h.) (03-15-23).

Facts: After the child's birth, both Mother and the child tested positive for drugs. Thereafter, DFPS removed the child from Mother's care and filed a Petition to Terminate Mother's parental rights. Subsequently, DFPS created a family service plan for Mother and placed the child with relatives. At trial, Mother only appeared on the first day and failed to testify. Further, DFPS testified that Mother failed to complete her service plan and had tested positive for methamphetamine during the case. Following trial, the trial court terminated Mother's parental rights. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court abused its discretion by finding that termination was in the child's best interest. Here, Mother failed to comply with her family service plan by not attending parenting and domestic violence classes. Because Mother failed to challenge the trial court's termination finding under Subsection (b), this Court must accept its validity. As a result, the standard of review requires this Court to hold that the evidence is legally and factually sufficient to have permitted the trial court to find that the child's best interest would have been served if Mother had completed the required classes. Moreover, Mother tested positive for methamphetamine after she completed her family service plan and refused to submit a subsequent test; thus, Mother's drug use supports the best interest finding. Therefore, the trial court did not abuse its discretion by terminating Mother's parental rights.

IT WAS IN THE CHILD'S BEST INTEREST TO TERMINATE MOTHER'S PARENTAL RIGHTS BECAUSE SHE FAILED TO COMPLY WITH HER FAMILY SERVICE PLAN, TESTED POSITIVE FOR METHAMPHETAMINES DURING THE SUIT, AND VISITED THE CHILD 5 TIMES DURING THE DURATION OF THE SUIT.

¶23-3-63. ***In re A.J.D.-J.*****,** ___ S.W.3d ___, No. 01-22-00724-CV, 2023 WL 2655736 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (03-28-23).

Facts: After the birth of the child, Mother and the child tested positive for marijuana. Thereafter, DFPS filed a Petition to Terminate Father's and Mother's Parental Rights. At trial, DFPS testified that Mother failed to comply with her court-ordered family service plan. Specifically, Mother never: (1) took a substance-abuse assessment; (2) submitted to a psychiatric evaluation, (3) completed a program on domestic violence; (4) provided proof of income or housing; and (5) attended all court hearings, including trial. Moreover, DFPS informed the trial court that Mother missed nearly all of the random drug tests scheduled by the department. As a result, Wife's results were automatically considered positive. Further, the lone drug test Mother submitted tested positive for marijuana, methamphetamine, and hydrocodone. During the proceeding itself, DFPS testified that Mother had only visited the child five times and never stayed the entire time allotted to her. Additionally, DFPS explained that the child had flourished in Foster Parent's care and had started to call the Foster Mother, "mom." Child Advocate then reaffirmed the DFPS caseworker's testimony, opining that it was in the child's best interest for the child to remain with Foster Mother. Following trial, the trial court terminated Mother's parental rights under Subsection O. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court abused its discretion by finding that it was in the child's best interest for her parental rights to be terminated. Here, the record contains significant evidence of parental indifference. Specifically, Mother tested positive for marijuana after the child's birth, infrequently visited the child during the proceeding, and made no efforts to complete her court-ordered family service plan. As is the case here, when a parent does not try to abide by a service plan, the factfinder may reasonably infer the parent is indifferent to the goal of family reunification. Despite DFPS requesting that Mother submit multiple drug tests, she only complied once. In the lone test Mother submitted, Mother tested positive for marijuana, methamphetamine, and hydrocodone. As a result, the factfinder could have reasonably found that Mother's continued use of illegal drugs exemplified her parental indifference. By continuing to use illegal drugs, Mother repeated the very poor behavior that resulted in the child's removal from her care. Further, Mother's continued drug use indicates an inability or unwillingness to prioritize the burdens and responsibilities of parenthood ahead of the desire for intoxication. Mother's use of hard drugs such as methamphetamine detrimentally impacts her parental fitness. Finally, Mother's failure to attend trial and other hearings is an additional circumstance that demonstrates that she is indifferent to her parental rights and responsibilities. At trial, Mother's attorney attributed her failure to appear at trial due to a car wreck; however, her attorney could not provide written documentation corroborating the car accident and Mother made no attempts to appear via alternative means. Therefore, the trial court did not err in terminating Mother's parental rights because the record contains both legally and factually sufficient evidence to support its best interest finding.

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FATHER, WHO LIVED IN EL SALVADOR, FAILED TO REGISTER HIMSELF IN THE PATERNITY REGISTRY, CARE FOR THE CHILDREN, AND ASSAULTED BOTH THE CHILDREN AND MOTHER; THUS, MOTHER IS ENTITLED TO PROCEED TO TERMINATE FATHER'S PARENTAL RIGHTS UNDER TFC 161.002(b)(2) AND (c-1) WITHOUT PERSONALLY SERVING HIM.

¶23-3-64. ***In re L.N.A.H.*****,** ___ S.W.3d ___, No. 14-21-00594-CV, 2023 WL 2799436 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (04-06-23).

Facts: After fleeing from Father, Mother and the children moved to Texas. Thereafter, Mother filed a Petition to Terminate Father's parental rights; however, Mother failed to effectuate service upon Father, who lived in El Salvador, because she did not know his location. In Mother's petition, she alleged that Father sexually assaulted her, never supported the children, failed to register himself in the paternity registry, and was not listed on the children's birth certificates. Additionally, Mother argued that service upon alleged Father was not necessary under TFC 161.002(b)(2)(B) and (c-1). Subsequently, the trial court issued a notice of intent to dismiss the case for want of prosecution. Following a hearing, the trial court dismissed Mother's petition for want of prosecution and found that it did not possess personal jurisdiction over alleged Father. Mother appealed.

Holding: Reversed and Remanded.

Opinion: Mother argues that the trial court abused its discretion by dismissing her case for want of prosecution. Specifically, Mother contends that the trial court only needed subject-matter jurisdiction and in rem jurisdiction over the parent-child relationship. Here, Mother invoked TFC 152.201(a)(1) by alleging in her petition that both her and the children resided in Harris County, Texas. Thus, Mother established that the trial court possessed subject-matter jurisdiction over the case. Further, TFC 152.105(a) states the following: "A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this subchapter and Subchapter C." Moreover, TFC 152.105(a) provides that it may be applied "for the purpose of applying this subchapter," "this subchapter" being Subchapter B of TFC Chapter 152. The application of the plain meaning of TFC 152.105(a) is that it applies to "child custody proceedings" as that term is defined and to terminate parental rights. Accordingly, TFC 152.105(a) applies through application of TFC 152.104 to parental termination proceedings. In this case, Father is an "alleged" father who failed to register with the paternity registry under TFC Chapter 160. The USSC stated in *Lehr v. Robertson* that, "[t]he Constitution does not require either a trial judge or litigant to give special notice to [alleged fathers] who are presumptively capable of asserting and protecting their own rights." As a result, the Constitution allows, and Texas law provides, that no personal service is required if the alleged father has not registered in the paternity registry or otherwise demonstrated a father-child relationship. Finally, Mother pleaded that Father did not register as a father in the paternity registry, did not care for the children since their birth, and assaulted both her and the children. Therefore, the trial court erred because Mother pleaded sufficient facts to allow her to proceed to adjudicate alleged Father's parental rights under TFC 161.002(b)(2) and (c-1) without personal service upon him.

AFTER THE TRIAL COURT LEARNED THAT THE CHILDREN POSSESSED INDIAN HERITAGE, IT FAILED TO APPLY THE ICWA'S HEIGHTENED BURDEN OF PROOF AND ENSURE THAT NOTIFICATION PROCEDURES WERE COMPLIED WITH.

¶23-3-65. ***M.Y. v. TDFPS*****,** ___ S.W.3d ___, No. 03-22-00720-CV, 2023 WL 3033415 (Tex. App.—Austin 2023, no pet. h.) (04-21-23).

Facts: DFPS filed a suit to terminate Father and Mother's parental rights. At trial, Mother testified that she had Indian heritage through two tribal nations: Cherokee and Blackfoot. Although Mother nor the children had registered with either tribe, her Grandmother was a registered member of the Cherokee

tribe. Following trial, the trial court terminated Father and Mother's parental rights. Father and Mother appealed.

Holding: Reversed and Remanded.

Opinion: Mother argues that the trial court abused its discretion by terminating her parental rights without first providing notice to the tribal nations. The ICWA is a federal law that applies in state court termination cases when a trial court knows or has reason to know that an Indian child is involved in a child custody proceeding. Here, Mother testified regarding her heritage and that Grandmother had registered with the Cherokee tribe. As a result, Mother's testimony triggered the presumption that the ICWA and its procedures apply to the termination proceedings. Due to this presumption, the ICWA required DFPS to notify relevant tribal authorities when it sought to terminate parental rights of Mother since it was known or suspected that the children possessed Indian heritage. In this case, the record demonstrates that DFPS failed to provide such notification to the relevant tribal authorities. Further, due to the application of the ICWA, the act required the trial court to apply its heightened beyond-a-reasonable-doubt burden of proof, which it failed to do. Therefore, the trial court abused its discretion by failing to abide by the ICWA's rules and procedures.

IN A PRIVATE TERMINATION PROCEEDING BROUGHT BY MOTHER, THE TRIAL COURT ERRED BY FAILING TO APPOINT FATHER COUNSEL DUE TO HIS DESIRE TO CONTEST THE CASE AND THE COMPLEXITIES ASSOCIATED WITH DOING SO.

¶23-3-66. ***In re I.M.S.,*** ___ S.W.3d ___, No. 01-22-00094-CV, 2023 WL 3103298 (Tex. App.—Houston [1st Dist.] 2023, no pet. h.) (04-27-23).

Facts: The trial modified the parties Final Decree and named Mother as SMC after Father started using drugs during his possession. Despite the trial court's Order, Father failed to register with the center responsible for supervising his visitation. After three years had transpired without Father exercising possession of the children, Mother and Stepfather sought to terminate Father's parental rights under Subsection C, F, and Q. In response, Father filed a pro se answer and an unsworn declaration of inability to pay costs. Therein, Father stated that he could not afford to hire an attorney and informed the trial court that he was currently incarcerated. Despite Father's request, the trial court did not appoint him an attorney. At trial, Mother testified regarding Father's failure to pay child support payments and exercise possession. Further, Mother testified regarding Father's incarceration after the State convicted him of possession of marijuana, robbery, and kidnapping. Following trial, the trial court terminated Father's parental rights under Subsection F and Q. Father appealed.

Holding: Reversed and Remanded.

Majority Opinion: (J.J., Farris, Goodman) Father argues that the trial court abused its discretion by failing to appoint him counsel. As a result, Father asserts that his due process rights were violated. Here, Mother bore the burden to establish, by clear and convincing evidence, that Father had the ability to support the children for each of the twelve consecutive months from February 2019 to August 2020. During trial, Mother did not ask Father any questions about his assets, nor did she ask any questions about any funds Father may have received or had access to during this time period. While Father received proceeds from a foreclosure sale of his residence, the record is not clear when the sale occurred, whether Father had access to the proceeds, or whether he even knew about the proceeds during the time period relevant to Subsection F. Accordingly, Mother failed to meet her burden in establishing that Father possessed her ability to pay her. Thus, it cannot be said that appointed counsel would not have "made a determinative difference" at trial." Further, under Subsection Q, Father had the burden of providing evidence that he arranged alternative childcare for the children during his incarceration; however, Father failed to do so. As a result, this case presented "troublesome points of law," and appointed counsel for

Father could have "made a determinative difference." Therefore, the trial court erred by failing to appoint counsel for Father given the importance of the issue at stake, his desire to contest termination, and the challenges that accompany a termination suit under Subsections F and Q.

Dissenting Opinion: (Countiss, J.) This is a private termination suit, and thus, there is no statutory or constitutional right to appointed counsel. Here, no expert witnesses were involved in the court proceedings and there were no expert witnesses for father to cross-examine without the assistance of counsel. Next, there are no troublesome points of law to address, and there are no indications in the records that the absence of counsel amounted to fundamental unfairness. Finally, despite Father's desire to contest the proceeding, this alone does not "tip the scales of due process" to entitle Father to appointed counsel in a private termination suit. Therefore, the trial court did not err by denying Father appointed counsel.

AFTER COMPLETING A MAJORITY OF THEIR FAMILY SERVICE PLAN, FATHER AND MOTHER PHYSICALLY AND VERBALLY ABUSED THE CHILD DURING A MONITORED RETURN; THUS, THE TRIAL COURT DID NOT ERR BY TERMINATING THEIR PARENTAL RIGHTS.

¶23-3-67. ***In re L.C.C.*****,** ___ S.W.3d ___, No. 11-22-00301-CV, 2023 WL 3101794 (Tex. App.—Eastland 2023, no pet. h.) (04-27-23).

Facts: After the birth of the child, DFPS removed the child from Mother and Father's care. After the parties completed their family service plan, the trial court ordered that the child be returned to Father and Mother's care subject to certain provisions. Subsequently, Father abused the child and Mother had a physical altercation with another child living in their home. When DFPS removed the child from the home, the child had bruises on multiple parts of his body which required an evaluation by a pediatrician. At trial, multiple witnesses testified regarding the parties' abusive behavior and that it would not be in the child's best interest for him to be returned to Father or Mother. Further, Foster Parent testified that the child had night terrors and flinched when exposed to any sudden movements. Following trial, the trial court terminated Father and Mother's parental rights under Subsections D and E. Mother and Father appealed.

Holding: Affirmed.

Opinion: Mother and Father argue that the trial court erred by finding that it was in the child's best interest for their parental rights to be terminated. Here, DFPS presented extensive testimony regarding the child's fear of Mother and Father, the physically and verbally aggressive behavior of Father towards the child, and Mother's abusiveness towards another child living in their home. Further, the child's attorney and guardian ad litem, who had previously advocated for the monitored return, believed that the parties abused and "broke" the child. Therefore, the trial court did not abuse its discretion by finding that termination of the parties' parental rights was in the child's best interest.

FATHER FAILED TO PRESERVE HIS FACTUAL AND LEGAL SUFFICIENCY CHALLENGE TO THE JURY'S VERDICT BY FAILING TO FILE ANY POST-VERDICT MOTIONS OR OBJECTIONS.

¶23-3-68. ***In re J.W.*****,** ___ S.W.3d ___, No. 07-22-00360-CV, 2023 WL 3645867 (Tex. App.—Amarillo 2023, no pet. h.) (05-25-23).

Facts: DFPS filed a Petition to Terminate Father's Parental Rights. Following a jury trial, the trial court terminated Father's parental rights under Subsection D, E, and O. Following the jury's verdict, Father failed to file any post-verdict motions or objections. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court abused its discretion by terminating his parental rights. Here, to preserve error on a legal sufficiency challenge after the jury's verdict, Father needed to file: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury's answer to a vital fact issue; or (5) a motion for new trial. Further, to preserve error on Father's factual-sufficiency challenge, Father needed to file a Motion for New Trial. However, Father failed to file a Motion for New Trial or any of the other post-verdict motions or objections listed hereinabove. Therefore, Father failed to preserve his error for appeal.

MOTHER FAILED TO MEET HER IN BURDEN IN PROVING THAT DRUG TESTING RECORDS ACCOMPANIED BY A BUSINESS RECORDS AFFIDAVIT WERE UNTRUSTWORTHY.

¶23-3-69. ***In re K.R.K.-L.H.,*** ___ S.W.3d ___, No. 09-22-00392-CV, 2023 WL 3633469 (Tex. App.—Beaumont 2023, no pet. h.) (05-25-23).

Facts: After the birth of the child, DFPS took custody of the child when an investigator could not locate Mother. Subsequently, DFPS located Mother in a rehab facility where she admitted that she had used meth since the age of 18 and had taken opiates during her pregnancy. Mother then tested posited for meth and DFPS filed a Petition to Terminate Father and Mother's parental rights. At trial, DFPS informed the trial court that Mother had failed to complete multiple drug-treatment programs and comply with drug testing requirements during the case. Additionally, Mother's neighbor testified that Mother had frequently allowed a registered sex offender to be in the child's presence. Following trial, an Associate Judge terminated Father and Mother's parental rights. In response, Mother filed a request for a de novo hearing. During the de novo hearing, Mother questioned the employee who worked for the Texas Alcohol and Drug Testing Service (TADTS) as its custodian of records. Specifically, the TADTS Employee testified that she signed the affidavit attached to the records containing Mother's drug test results (the "Exhibit"). Moreover, TADTS Employee agreed that she could not testify to the exact chain of custody for the drug test results because an outside lab conducted the testing. In closing argument, Mother argued that the Exhibit was inadmissible because the results in the records were not reliable. Nine months later, the trial court overruled Mother's objection to the Exhibit and terminated Father and Mother's parental rights. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court abused its discretion in admitting the Exhibit because it contains "drug test results without anyone to testify" about the "qualification[s] of the tester, the equipment used, and the testing procedures…" Here, the lab that conducted the testing is a Department of Health and Human Services certified laboratory. Consequently, the DHHS Certified Lab is subject to the Department of Health and Human Services' certification program. The evidence that the lab results came from a DHHS Certified Lab is circumstantial evidence that shows the lab that tested Mother's drug samples possessed the certification to test for five classes of drugs. Moreover, a certified medical review officer (Certified "MRO") signed the reports, indicating that the reports contained their interpretation of Mother's results. Even though the term Certified MRO is not defined in the report, it can be presumed that the trial court knew that federal law required an MRO to be a licensed physician and to have training collection procedures for urine samples. Once DFPS established the authenticity of the records through its business records affidavit, Mother failed to prove that the source of the information, the method the records were prepared, or the circumstances behind them indicated a lack of trustworthiness. Particularly, Mother does not point to any issues in the records themselves and failed to elicit any testimony from witnesses that casted doubt upon the record's trustworthiness. Accordingly, Mother failed to meet her burden of introducing evidence rebutting the prima facie evidence presented by DFPS which established that the records were authentic and created and maintained in the regular course of business. Therefore, the trial court did not err by admitting the Exhibit into evidence.

THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT THE TERMINATION OF FATHER'S PARENTAL RIGHTS GIVEN HIS ABUSE OF MOTHER DURING HER PENDENCY AND EXTENSIVE CRIMINAL RECORD.

¶23-3-70. ***In re E.J.M.,*** ___ S.W.3d ___, No. 04-22-00264-CV, 2023 WL 3729540 (Tex. App.—San Antonio 2023, no pet. h.) (05-31-23).

Facts: Father had been arrested for multiple felonies and served time in prison, and both Mother and Father were known to be affiliated with a gang. Upon giving birth, it was discovered that Mother and Daughter both tested positive for narcotics. Shortly after Daughter's birth, TDFPS started an investigation against Mother and after conducting a removal hearing, Daughter was placed in the care of a foster mother and foster father (collectively "Foster Parents") and TFPS was named a possessory managing conservator. Throughout the pendency of the case, Foster Parents took care of Daughter and considered Daughter to be their own child. Daughter had medical problems that required substantial care and Foster Parents were responsible for taking her to appointments, therapy, and daycare programs. Father was awarded weekly visitation with Daughter at his Mother's residence and took many courses with TDFPS to monitor his rehabilitation, drug-use, and mental health. Various TDFPS workers oversaw Father's compliance with probation, and they monitored his progress. The case was set for a jury trial with TDFPS workers testifying as to Father's progress, and Foster Parents testifying as to Father's inability to provide for Daughter's mental, physical, and emotional well-being. Subsequently, the trial court signed a Final Order in SAPCR and Order of Termination appointing Foster Parents as JMCs and terminating Father's parental rights to Daughter. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the evidence is legally and factually insufficient to support termination of his parent rights under section 161.001(b)(1)(E) because he has taken steps to change his life in a positive manner since Daughter's birth and was compliant in all the conditions of his probation. Here, Father took narcotics with Mother while he knew that she was pregnant with Daughter. Father was aware of the danger that this would have on Daughter but failed to take any steps to prevent the danger from occurring throughout Mother's pregnancy. There was also significant evidence of crimes and felonies committed by Father before the child's birth, including Father's assault on Mother while she was pregnant with Daughter. The jury also heard evidence of two of Father's violations of his community supervision that resulted in his incarceration on both accounts. Accordingly, the jury could have reasonably inferred an endangering course of conduct from Father's history of felonies and violations of the terms of his community supervision. Therefore, the evidence is legally and factually sufficient to support the termination of Father's parental rights.

Next, Father argues that the evidence is legally and factually insufficient to support the jury's finding that the termination of his parental rights was in the best interest of Daughter. Here, there is extensive evidence that Foster Parents are able to meet the child's emotional and physical needs, as Foster Parents also provide for Daughter's half siblings, and have successfully raised multiple foster children. Moreover, though Father has taken rehabilitative steps, he has not displayed an ability to care for Daughter's unique medical needs, and he could not even identify any of Daughter's healthcare providers, specific daycare centers, schools, doctors, or therapists. Therefore, the evidence is legally and factually sufficient to support the jury's finding that termination of Father's parental rights is in the child's best interest.

FAMILY VIOLENCE/PROTECTIVE ORDERS

TRIAL COURT'S ORDER THAT GRANTED A NEW TRIAL SUA SPONTE DID NOT INVOKE FATHER'S ABILITY TO REQUEST A DE NOVO HEARING.

¶23-3-71. *Guerrero v. A.C.G.*, No. 08-22-00042-CV, 2023 WL 2589697 (Tex. App.—El Paso 2023, no pet. h.) (mem. op.) (03-21-23).

Facts: Mother filed an Application for Protective Order against Father. In December 2021, the associate judge held a hearing on Mother's Application and initially denied same because "Respondent had not been identified." On its own motion, the associate judge reconsidered the denial of Mother's application and ordered a new trial ("December Order"). In response, Father filed an objection to the associate judge's "sua sponte new trial" and requested a hearing de novo hearing in front of the district court. Thereafter, the associate judge held a trial on Mother's application, and Father appeared through his attorney. Following the trial, the associate judge issued a protective order ("January Order") against Father and advised the parties of their right to seek a de novo appeal before the district court. Father did not seek a de novo hearing before the district court of the January Order. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred when it granted a new trial sua sponte. Here, TRCP 320 enables a trial court to grant a new trial on its own motion while it retains plenary power. On the same day on which the associate judge initially denied Mother's application, the associate judge ordered a new trial; thus, the trial court still retained its plenary power. Therefore, the trial court did not abuse its discretion by granting a new trial.

Next, Father argues that the trial court erred by failing to hold a de novo hearing. Specifically, Father asserts that he timely requested a de novo hearing in response to the December Order when he filed an objection to the granting of a new trial and requested that the matter be referred to the district court. Here, the December Order vacated the original judgment and returned the case to the trial court's docket "as though there had been no previous trial or hearing." The December Order did not provide the parties with notice of: (1) the substance of the AJ's report; or (2) the rendering of a temporary order. Accordingly, Father could not request a de novo hearing to review the December Order and failed to request a de novo hearing of the January Order. Therefore, the trial court did not err by failing to hold a de novo hearing on the January Order.

EVIDENCE SUFFICIENT TO SUPPORT A FINAL PROTECTIVE ORDER AGAINST MOTHER.

¶23-3-72. *In re A.H.,* No. 02-22-00241-CV, 2023 WL 2805479 (Tex. App.—Forth Worth 2023, no pet. h.) (mem. op.) (04-06-23).

Facts: Father filed an Application for a Protective Order against Mother and requested the trial court to issue a Temporary Ex Parte Protective Order. In his application Father attached an affidavit claiming that Mother and Boyfriend assaulted, threatened, and harassed him on multiple occasions. Subsequently, the trial court granted the Temporary Ex Parte Protective Order. Following trial, the trial court granted a final protective order against Mother for a period of five years. Further, the trial court ordered that Mother's periods of possession be supervised. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court erred by issuing a Final Protective Order because the evidence was insufficient to support a finding of past family violence. Here, Father testified that Mother and Boyfriend, while masked, assaulted him. Further, Father identified Mother and Boyfriend based upon their voices and informed the trial court that they left after he told them that the children were not with him. Moreover, Father testified that Boyfriend brandished a gun in front of the children during Mother's supervised visitation. Therefore, the trial court did not err in finding that there was a history of family violence.

Next, Mother argues that the trial court abused its discretion by granting a Final Protective Order because the evidence was insufficient to support a finding that family violence was likely to occur in the future. Here, given the extent of Father's injuries from the assault, the trial court could have inferred that Mother would have continued to act the same manner in the future. Additionally, the trial court could have reasonably believed Father's testimony that he possessed concerns for the children's future safety based upon Mother's threats to remove them from the country. Therefore, the trial court did not err by finding that family violence was likely to occur in the future.

MOTHER DID NOT REQUEST TO BE NAMED A PROTECTED PERSON IN HER APPLICATION FOR A PROTECTIVE ORDER; THUS, TRIAL COURT ERRED IN ISSUING A PROTECTIVE ORDER THAT PROVIDED HER PROTECTION.

¶23-3-73. ***Fontenot v. Fontenot*****,** ___ S.W.3d ___, No. 14-21-00451-CV, 2023 WL 3102676 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (04-27-23).

Facts: Mother filed an Application for a Protective Order, alleging that Father had engaged in conduct that constituted family violence against the child. Further, Mother pleaded that Father committed an act constituting a felony offense involving family violence against her and the child, which resulted in serious bodily injury. Based upon her allegations, Mother requested that the protective order exceed a two-year term. However, in her pleading that sought the protective order, Mother only defined the "protective person" as the child. At trial, Mother testified regarding instances in where Father physically assaulted both her and the child. Following trial, the trial court entered a protective order protecting both the child and Mother and found that Father had committed an offense constituting a felony offense involving family violence against Mother. Father appealed.

Holding: Affirmed in Part; Reversed in Part.

Opinion: Father argues that the trial court erred in granting a protective order because Mother's live pleadings did not request that she be a protected person under the order. In response, Mother contends that her pleading requested this relief and, in the alternative, that Father tried the issue by consent. Here, Mother's application stated that "[t]his Application for a Protective Order is brought for the protection of [the child]…" and "[t]he child… for whom a protective order is sought is not subject to the continuing jurisdiction of any court." Applying the fair-notice pleading standard, Mother's pleading only requested a protective order for the child and did not request a protective order for herself. Further, Father did not try the issue by consent because Father complained of Mother's pleading deficiency to the trial court. Father is entitled to rely upon Mother's pleading, and without reference to Mother seeking an order as a protected person, Father had no reason to specially except to it. Finally, the record does not demonstrate that the issue was tried by consent because neither party understood that it was an issue in the case. Therefore, the trial court erred in granting its protective order because it granted Mother relief for which she did not plead and that Father did not try by consent.

TRIAL COURT ERRED BY DISMISSING PARALEGAL'S LAWSUIT AGAINST CLIENT FOR UNPAID LEGAL FEES BECAUSE THE TRIAL COURT HAD THE AUTHORITY AND JURISDICTION TO CONSIDER THE FOREIGN PROTECTIVE ORDER UNDER CHAPTER 88 OF THE TEXAS FAMILY CODE.

¶23-3-74. ***Anderson v. Wynne***, ___ S.W.3d ___, No. 14-22-00037-CV, 2023 WL 3236677 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (05-04-23).

Facts: A woman ("Client") from Oregon hired an attorney ("Attorney") based in Texas for assistance with a probate dispute. Attorney was assisted by his paralegal ("Paralegal"), and after Client allegedly refused to pay either of them, they filed a suit for breach of contract and served Client in Harris County Court at Law No. 3 ("the trial court"). Attorney non-suited his claims, then Client filed a Special Appearance and Motion to Quash for Paralegal's alleged improper service in Texas. Prior to a status conference over Zoom, Client filed a Notice of Oregon Proceedings for Status Conference, which attached a copy certified copy of the Oregon County Circuit Court "Final Stalking Protective Order and Judgment" ("the Oregon Protective Order") that Client obtained against Paralegal. The Oregon Protective Order compelled Paralegal to avoid all contact, with contact broadly defined as "visual or physical presence," and communication with Client. At the status conference, the trial court examined the Oregon Protective Order and whether the hearing itself, with Paralegal present, was a violation of the Oregon Protective Order. Client also notified the trial court that she agreed to dismiss a criminal trespass charge against Paralegal in Oregon. Subsequently, the trial court dismissed the case on the grounds that "criminal matters" and Oregon Protective Order deprived the trial court of jurisdiction. Paralegal filed a Motion for New Trial, which the trial court denied. Paralegal appealed.

Holding: Reversed and Remanded.

Opinion: Paralegal argues that the trial court erred in concluding that the Oregon Protective Order and the Oregon "criminal matters" deprived the court of jurisdiction to adjudicate Paralegal's claims. Here, if the requirements under the Uniform Interstate Enforcement of Protective Orders Act, or TFC Chapter 88, are met, the trial court has a mandatory duty to enforce a foreign protective order. Accordingly, under TFC, the trial court had authority and jurisdiction to consider the Oregon Protective Order, and to evaluate its effect on the pending claims by Paralegal and impose any appropriate remedy based on its findings. Therefore, the Oregon Protective Order did not deprive the trial court of jurisdiction and the trial court erred by dismissing Paralegal's lawsuit.

MISCELLANEOUS

TRIAL COURT ERRED IN GRANTING PLAINTIFF'S TRADITIONAL MOTION FOR SUMMARY JUDGMENT REGARDING CHARACTERIZATION OF MARITAL PROPERTY BECAUSE A MOVANT IN A SUMMARY JUDGEMENT CANNOT USE A PRESUMPTION TO CHANGE THE BURDEN OF PROOF IN A SUMMARY JUDGEMENT.

¶23-3-75. *UpCurve Energy Partners, LLC, v. Muench,* ___S.W.3d___, No. 08-21-00156-CV, 2023 WL 2143614 (Tex. App.—El Paso 2023, no pet. h.) (02-21-23).

Facts: Mother conveyed a piece of land ("the property") to her three children, Geraldine Fox, Shirley Muench, and Richard Werner (collectively "the Plaintiffs") in a deed in 1981 ("the 1981 deed"). In 2019, the Plaintiffs filed an original petition for trespass to try title against UpCurve Energy Partners, LLC and other parties with claims of interest in the property (collectively "the Defendants"). The Plaintiffs claimed that the Defendants were wrongfully withholding certain undivided mineral interests on the property. Additionally, the Plaintiffs asserted that they owned a larger percentage of the property. In response,

UpCurve argued that William Robinson, an heir to Richard Werner (one of the three original grantees), conveyed to them an interest in the property. Both Plaintiffs and Defendants (collectively "the parties") filed a joint stipulation whereby they agreed that Mother was the common source of title to the property, that grantees of the deed were the children of Mother, and that she conveyed an interest in the 1981 deed to her three children, the Plaintiffs. Additionally, the parties stipulated that the main issues were whether: (1) the Plaintiffs received the property from Mother as separate property via gift or as community property; and (2) they inherited the property with rights of survivorship. If the Plaintiffs inherited the property as separate property, the parties stipulated that UpCurve would have 3.333% interest in the property. Conversely, if it was community property, the parties agreed that UpCurve would possess a 23% interest therein. Subsequently, the Plaintiffs filed a traditional motion for summary judgement on the claim that the property was a gift as a matter of law because of the presumption of a gift from parent to child. Thereafter, UpCurve filed a cross motion for summary judgment, contending that that the property should be characterized as community property because of the presumption of community property in a conveyance to a married couple. Following a hearing, the trial court granted the Plaintiffs' summary judgement motion, and denied UpCurve's cross motion for summary judgement. Specifically, the trial court held that the property was a separate property gift, and that the Defendants did not meet their burden of overcoming the presumption. Further, the trial court granted UpCurve's summary judgement motion and held that there was no right of survivorship in the original conveyance as a matter of law. UpCurve appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: UpCurve argues that the trial court erred in granting the Plaintiffs' motion for summary judgment and in finding that the Plaintiffs owned the property as their separate property due to Mother's original conveyance. A traditional motion for summary judgement creates a burden on movant to establish their claim as a matter of law. Here, the trial court accepted the Plaintiffs' application of the presumption of separate property via a gift from parent to a child; however, the Texas Supreme Court in *Draughon v. Johnson* recently held that presumptions and burdens of proof for an ordinary or conventional trial are immaterial to the burden that a movant of summary judgment must bear. Accordingly, a movant cannot use the presumption of separate property to win on summary judgement by placing the burden to rebut on the non-movant because doing so defeats the purpose of the heightened standard of the traditional summary judgement motion. As a result, the Plaintiffs movants were required to establish that the property was a separate property gift as a matter of law, which they failed to do due to the lack of evidence they submitted. Therefore, the trail court erred by granting Plaintiff's Motion for Summary Judgment because they did not meet their burden in proving that they received the property as their own separate property as a matter of law.

★★★FIFTH CIRCUIT ★★★

18 U.S.C. § 922(g)(8), A FEDERAL STATUTE THAT PROHIBITS THE USE OF FIREARMS BY SOMEONE SUBJECT TO A DOMESTIC VIOLENCE RESTRAINING ORDER, IS UNCONSTITUTIONAL BECAUSE IT RUNS AFOUL TO THIS NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.

¶23-3-76. ***United States v. Rahimi***, ___ F.4th ___, 2023 WL 2317796, No. 21-11001 (5th Cir. 2023) (03-02-23).

Facts: In two months, Father involved himself in five separate shootings. Thereafter, police obtained a warrant and searched Father's home. When doing so, Father admitted that he possessed firearms and that he was subject to an agreed civil protective order entered by a Texas state court after Father assaulted his ex-girlfriend. Specifically, the protective order expressly prohibited Father from possessing a firearm. Subsequently, the Police removed the firearms from Father's possession, and a federal grand jury indicted Father for possessing a firearm while under a domestic violence restraining order in violation

of 18 U.S.C. § 922(g)(8). Father then moved to dismiss the indictment, contending that § 922(g)(8) was unconstitutional. The District Court denied Father's Motion and he pleaded guilty. Father appealed.

Holding: Reversed; Conviction Vacated.

Majority Opinion: (C.J. Jones, Ho, Wilson) Father argues that the District Court erred by finding him guilty because § 922(g)(8) is unconstitutional because the Second Amendment guarantees an individual's right to keep and bear arms. In response, the Government argues that *Heller* and *Bruen* restrict the Second Amendment's applicability to only "law-abiding, responsible citizens," and "ordinary, law-abiding citizens." Because Father is neither responsible nor law-abiding, the Government asserts that he falls outside the scope of the Second Amendment. Here, *Heller* provided that there is a "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans…" Accordingly, *Heller's* definition of "the people" indicates that Father is included in "the people" and thus falls within the Second Amendment's scope. Further, *Heller's* reference to "law-abiding, responsible" citizens meant to exclude groups that have historically been stripped of their Second Amendment Right, including citizens who were felons or mentally ill. In this case, Father does not fall within such group at the time the State charged him for violating § 922(g)(8). Thus, the "strong presumption" that Father remained among "the people" protected by the second amendment holds, and Father's civil charge alone does not remove him from the political community within the amendment's scope. The State did not convict Father for a felony or otherwise subject him to another "longstanding prohibition[] on the possession of firearms" that would have excluded him. Despite not being a model citizen, Father is a part of the political community entitled to the Second Amendment's guarantees. Under the first step in *Bruen*, the court must determine whether "the Second Amendment's plain text covers an individual's conduct." In this case, the Second Amendment grants Father the right "to keep" firearms. Additionally, it is undisputed that the types of firearms that Father possessed are "in common use," such that they fall within the scope of the Second Amendment. Consequently, the first step of *Bruen* is met, and the Second Amendment presumptively protects Father's right to keep the weapons Police discovered in his residence. Since the first step of *Bruen* is satisfied, the "Constitution presumptively protects the conduct," and the Government "must justify its regulation by demonstrating that it is consistent with the Nation's historical traditional of firearm regulation." As such, the question turns on whether § 922(g)(8) falls within that historical tradition, or outside of it. This statute operates to deprive an individual of his right to keep and bear arms once a court finds (after notice and a hearing) that the individual poses a "credible threat" to an intimate partner or their child, and thereafter enters a restraining order based on same. Despite referencing the English Militia Act of 1662, "dangerousness" laws established by the colonies, "going armed" laws, surety laws, and proposals offered at various ratification conventions for the Constitution, the Government fails to demonstrate that § 922(g)(8)'s restrictions of the Second Amendment fits within this Nation's historical tradition of firearm regulation. In particular, the Government's proffered analogues falter under one or both of the metrics set forth in *Bruen* for measuring "relatively similar" analogues; "how and why the regulations burden a law-abiding citizen's right to armed self-defense." For example, the United States disarmed "disloyal" or "unacceptable" groups for the preservation of political and social order, and not for the protection of an identified person from the threat of "domestic gun abuse," posed by another individual. Likewise, the United States disarmed individuals to dissuade terroristic and riotous behavior, which consequently protected society generally as opposed to just identified individuals. As a result, § 922(g)(8) falls outside the class of firearm regulations allowed by the Second Amendment; thus, § 922(g)(8)'s ban on possession of firearms is an "outlier[] that [this Nation's] ancestors would never have accepted. Therefore, the District Court erred by upholding Father's conviction because § 922(g)(8) is unconstitutional.

Concurring Opinion: (Ho, C.J.) The USSC responded to lower court disfavoring the Second Amendment by setting forth a new legal framework in *Bruen*. Particularly, *Bruen* requires courts to examine this Nation's history and traditions to determine the meaning and scope of the Second Amendment. As stated in the majority opinion, there is no analogous historical tradition sufficient to support § 922(g)(8) under *Bruen*.

Editor's comment: *This case abrogates the holding in United States v. Emerson, 270 F.3d 203 (5th Cir. 2001). G.L.S.*

Editor's comment: *The recent SCOTUS decision in New York State Rifle & Pistol Assn, Inc. v. Bruen, 142 S. CT. 2111 (2022), referenced in this opinion, marks a fundamental change in Second Amendment analysis. The Court rejected the consensus "two-step" analysis adopted by the federal Courts of Appeals, describing the second step as "one step too many." Before, a Court inquired whether the Second Amendment protected the right to keep and bear arms, and if it did, whether a restriction on that right was "substantially related to the achievement of an important governmental interest." Now, the courts are to make a single inquiry, whether a firearms restriction "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." The 5th Circuit therefore reversed the defendant's conviction because the statute prohibiting possession of firearms by a person subject to a domestic violence restraining order "is an outlier that our ancestors would never have accepted." J.V.*

MOTHER'S DISMISSAL OF HER APPEAL ON THE TRIAL COURT'S ORDER PRECLUDES HER FROM FILING A PETITION FOR WRIT OF MANDAMUS ON THE SAME JUDGMENT.

¶23-3-77. *In re Vara*, No. 08-23-00064-CV, 2023 WL 2327465 (Tex. App.—El Paso 2023, original proceeding) (mem. op.) (03-02-23).

Facts: Mother filed a Petition for Writ of Mandamus, which requested the trial court to modify Father's child support obligation and order Father to pay all child and medical support to the Texas State Disbursement Unit. Additionally, Mother's Petition requested that the trial court issue an order of income withholding against Father. Thereafter, the trial court denied Mother's petition and Mother appealed. Before this Court heard Mother's appeal, Mother dismissed her appeal and filed another Petition for Writ of Mandamus that requested the same relief as the first.

Holding: Petition for Writ of Mandamus Denied.

Opinion: In Mother's Second Petition for Writ of Mandamus, she admits that she voluntarily dismissed her appeal of the order from which she now seeks relief. Here, Mother voluntarily dismissed her original appeal, and consequently waived her right for a review of the Order. As a result, Mother cannot seek mandamus relief. Therefore, Mother failed to demonstrate that she is entitled to mandamus relief, and her Petition for Writ of Mandamus is denied.

TRIAL COURT DID NOT ERR IN GRANTING HUSBAND'S ATTORNEY'S MOTION FOR WITHDRAWAL AND DENYING HUSBAND'S MOTION FOR NEW TRIAL BECAUSE HUSBAND CONSENTED TO HIS ATTORNEY'S WITHDRAWAL AND DID NOT TAKE STEPS TO HIRE A NEW ATTORNEY.

¶23-3-78. *Fard v. Hajizadeh,* No. 14-21-00537-CV, 2023 WL 2423628 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (mem. op.) (03-09-23).

Facts: In divorce proceeding, Husband's attorney ("Attorney") filed a motion for withdrawal of counsel, asserting that he could not effectively communicate with Husband. Attorney then filed an amended motion for withdrawal and attached an affidavit from Husband that included Husband's consent to the withdrawal. Thereafter, the trial court granted Attorney's withdrawal and the parties proceeded to a bench trial. Following trial, the trial court signed a Final Decree and awarded Wife a money judgement against Husband and attorney's fees. Husband then filed a motion for new trial that asserted that the withdrawal of his trial counsel placed him in legal peril because he could not find capable counsel willing to take on his case.

As a result, Husband argued this resulted in an unjust and inequitable division of the parties' marital estate. The trial denied the motion for new trial, and Husband appealed.

Holding: Affirmed.

Majority Opinion: (JJ. Hassan, M. Zimmerer, Spain) Husband argues that the trial court erred by granting Attorney's motion to withdraw. Here, Attorney's amended motion complied with the TRCP and there existed good cause for the withdrawal. Further, the amended motion states that Husband consented to his attorney's withdrawal, which is further reflected in Husband's attached affidavit. Therefore, the trial court did not err by granting Attorney's amended motion to withdraw as counsel.

Next, Husband argues that the trial court erred by not granting his motion for new trial. Here, Husband testified that he did not take steps to hire a new attorney. Moreover, after failing to retain counsel, Husband failed to contact the trial court to inform them of same. Therefore, the trial court did not abuse its discretion by denying Husband's motion for new trial.

Concurring Opinion: (Spain, J.) Husband did not timely preserve his complaint for appellate review because Husband signed Attorney's amended motion to withdraw, which indicated that he "agreed and approved" of the motion. Further, Husband's motion for new trial does not argue that his signature on the amended motion was not consensual. Thus, Husband waived this issue.

TRIAL COURT DID NOT ERR IN DENYING GRANDMOTHER'S HEIRS MOTION FOR SUMMARY JUDGEMENT BECAUSE THE COMMUNITY PROPERTY PRESUMPTION DOES NOT APPLY TO A MOVANT ON SUMMARY JUDGEMENT.

¶23-3-79. ***Stillwell v. Stevenson,*** ___ S.W.3d ___, No. 08-21-00131-CV, 2023 WL 2447470 (Tex. App.—El Paso 2022, no pet. h.) (03-10-22).

Facts: During the marriage of Grandfather and Grandmother, Grandfather acquired a one-eighth divided mineral interest in a property located in Reeves County ("the Property"). Grandfather and Grandmother divorced in 1933 and executed a separation agreement that was binding on their heirs. Grandfather and Grandmother both remarried and had multiple children. Upon the death of Grandfather and Grandmother, the heirs of Grandfather ("Grandfather's Heirs") and the heirs of Grandmother ("Grandmother's Heirs") had competing claims to the Property. As a result, Grandmother's Heirs sued Grandfather's Heirs to trespass to try title. Subsequently, both parties filed competing motions for summary judgement. Specifically, Grandfather's motion for summary judgement sought summary judgment upon Grandfather's Heir's separate property claim. Conversely, Grandmother's Heirs claimed that that they possessed superior title to the Property. Additionally, Grandmother's Heirs asserted that they should prevail on summary judgement because Grandfather's Heirs could not meet the burden of overcoming the community property presumption. Following a hearing, the trial court denied Grandmother's Heirs motion for summary judgement and granted Grandfather's Heirs motion for summary judgement. Grandmother's Heirs appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Grandmother's Heirs argue that the trial court erred in granting Grandfather's Heirs motion for summary judgement. Here, Grandfather's Heirs failed to present to the trial court in their motion for summary judgement any cause of action upon which their motion could be granted. Instead of identifying each cause of action within their MSJ, Grandfather's Heirs motion states that the cause of action is "obvious" from the face of the motion. Therefore, the trial court abused its discretion because Grandfather's Heirs motion for summary judgement did not state the specific grounds upon which judgement was sought as required by TRCP 166(a)(c).

Next, Grandmother's Heirs argue that the trial court erred by denying their MSJ because Grandmother owned a one-sixteenth interest in the Property. Further, Grandmother's Heirs assert that Grandmother acquired her interest during her marriage to Grandfather. As a result, Grandmother's Heirs claim that the interest is presumptively community property and Grandfather's Heirs did not meet their burden to rebut this presumption. Here, Texas courts have not applied this community property presumption when the spouse who acquired the property never resided in Texas or another community property state. Moreover, the Supreme Court of Texas recently held that the presumptions at trial that operate to establish a fact until rebutted do not apply to a movant on summary judgment. Accordingly, Grandmother's Heirs, as movant, must establish that Grandmother Borden acquired the property as community property as a matter of law, and the burden does not shift to Grandfather's Heirs to prove it was not community property. Therefore, the trial court did not err in denying Grandmother Heir's MSJ because Grandmother's Heirs did not submit evidence to show that Grandmother acquired a community property interest in the property as a matter of law.

A TRIAL COURT IS WITHOUT DISCRETION TO DENY A PROPERLY REQUESTED MOTION FOR LEGISLATIVE CONTINUANCE WHEN A LAWYER-LEGISLATOR SATISFIES THE REQUIREMENTS SET FORTH IN TCPRC 30.003.

¶23-3-80. *In re Jones*, No. 05-23-00070-CV, 2023 WL 2445763 (Tex. App.—Dallas 2023, orig. proceeding) (mem. op.) (03-10-23).

Facts: Mother filed a Petition to Establish the Parent-Child Relationship. During the proceeding, a State Senator participated in the preparation and presentation of Father's defense, including appearing on Father's behalf at every hearing held by the trial court. Mother then filed a Motion for Genetic Testing, which State Senator opposed. Following a hearing, the trial court granted Mother's Motion, and State Senator requested a de novo hearing. Due to the upcoming 88th Texas Legislative Session, State Senator filed an Application and Motion for Legislative Continuance pursuant to TCPRC Section 30.003. In an attached affidavit, State Senator explained that he: (1) would attend the upcoming legislative session; (2) intended to actively participate in the preparation and presentation of Father's case once the session adjourned; and (3) did not undertake Father's representation for the purpose of obtaining a legislative continuance. Subsequently, the trial court added the following text at the top of Father's proposed order: "DISAPPROVED. CONFERENCE SET FOR JANUARY 24, 2023." Additionally, the trial court entered into its docket entry: "Proposed Order Denied." State Senator filed a Petition for Writ of Mandamus.

Holding: Petition for Writ of Mandamus Granted.

Opinion: State Senator argues that the trial court erred by proceeding with the de novo hearing without first ruling on his motion. Here, the trial court inscribed "DISAPPROVED" at the top of State Senator's proposed order. Further, the trial court entered "Proposed Order Denied" in its docket entry and set a de novo hearing after the beginning of the legislative session. Thus, the trial court implicitly denied State Senator's Motion. Still, when a lawyer-legislator is retained more than 30 days before the date a civil case is set for trial, a trial court lacks discretion to deny a properly requested motion for legislative continuance. In this case, Father retained State Senator as counsel more than 30 days before the date of his trial. Additionally, State Senator supported his motion by an affidavit within 30 days of the start of the legislative session. Accordingly, State Senator met the requirements of TCPRC 30.003. Therefore, the trial court abused its discretion by denying Father's Application and Motion for Legislative Continuance.

MOTHER FAILED TO ESTABLISH THAT THE TRIAL COURT'S DECISION TO SEAL THE TRANSCRIPTS OF THE JUDGE'S INTERVIEW WITH THE CHILLDREN WAS ARBITRARY AND UNREASONABLE.

¶23-3-81. *In re Cole,* No. 07-23-00002-CV, 2023 WL 177686 (Tex. App.— Amarillo 2023, orig. proceeding) (mem. op.) (03-21-23).

Facts: In a SAPCR proceeding, Mother filed a Motion for Judge to Confer with the Children and requested for the interview's record to be sealed. Subsequently, the trial court interviewed the children in-chambers. After the trial court entered Interim Temporary Orders, Mother filed a motion seeking to release the transcripts of the interviews, which the trial court judge, denied. Mother filed a Petition for Writ of Mandamus

Holding: Petition for Writ of Mandamus Denied.

Opinion: Mother argues that the trial court abused its discretion by denying her motion to release the transcripts of the trial court's interview with the children because Mother intended to use the transcripts in a separate petition for mandamus. Additionally, Mother claims that her substantial rights were prejudiced "because, when a record is incomplete, it must be presumed that the missing portion of the record supports the trial court's judgment." Here, the trial court ordered that the transcript of the interviews be forwarded to this Court under seal. If Mother petitions this Court for a writ of mandamus regarding the temporary orders and requests that the sealed transcript be provided to this Court, under the order of the trial court, the sealed transcript will be part of the appellate record. Further, Mother failed to establish that the trial court's decision to deny her access to the sealed transcript was so arbitrary and unreasonable as to constitute an abuse of discretion. Therefore, the trial court did not err by denying her motion to release the transcripts.

TRIAL COURT DID NOT ERR IN DENYING WIFE'S MOTION TO DISMISS HUSBAND'S ATTORNEYS DEFAMATION CLAIMS IN PART BECAUSE ATTORNEY ESTABLISHED A PRIMA FACIE CASE FOR DEFAMATION.

¶23-3-82. ***Terrell v. Mazaheri,*** ___ S.W.3d ___, No. 04-22-00060-CV, 2023 WL 2588568 (Tex. App.— San Antonio 2023, no pet. h.) (03-22-23).

Facts: In a divorce proceeding, Wife made disparaging remarks regarding Husband's attorney ("Attorney") on social media. Specifically, Wife posted that Attorney helped Husband hide the children from Wife, that Attorney "fool[ed] around" with Husband, and that Attorney set hearings with the trial court without informing Wife. After making these remarks, Wife then filed a pro se motion to disqualify Attorney as Husbands counsel. Thereafter, Attorney filed a defamation petition in the underlying cause, claiming that Wife's three statements were made with actual malice and to cause injury to Attorney. Wife then filed a motion to dismiss the defamation claims under the TCPA. In response, Attorney filed a motion to permit discovery on the TCPA claims. Following the hearing, the trial court denied Wife's motion to dismiss. Wife appealed.

Holding: Affirmed in Part; Reversed and Remanded.

Opinion: Wife argues that the trial court erred by denying her Motion to Dismiss. Specifically, Wife's asserts that her statement that Husband "fool[ed] around" with Attorney, was based on or in her right to free speech. In response, Attorney argues that the insinuation of a relationship between Husband and herself is a purely private matter, and as such, the TCPA does not apply. Here, the Wife's statement is vague and does not relate to any specific unethical conduct by attorney. Accordingly, the statement is not a matter of public concern for which the TCPA would apply. Therefore, the trial court did not err in denying Wife's motion to dismiss with regard to this allegation.

Next, Wife argues that the trial court erred by denying her Motion to Dismiss because allegation she made that Attorney assisted Husband in hiding the child is a matter of public concern and protected under the TCPA. Alternatively, Wife asserts that Attorney failed to establish a prima facie case of defamation. Here, while the TCPA applies to this allegation, Attorney presented clear and specific evidence that she did not act as an accomplice to Husband in kidnapping the children. Consequently, Attorney presented evidence that Wife's statement is false. Still, Wife argues that as a limited purpose public figure, Attorney failed to show that Wife made the statements with actual malice. In this case, the record demonstrates that Attorney is a local lawyer, representing a party in a divorce proceeding. As such, Attorney is not a limited public figure with respect to the alleged defamatory statements. As a private individual, Attorney need only show that Wife acted negligently in making the statements. To support her contention that Wife acted negligently in publishing her statements, Attorney testified that at the time of both alleged kidnapping incidents, Wife knew that no court order regarding possession of the child existed and there was no pending divorce. Accordingly, Attorney established that Wife acted negligently when she made the kidnapping allegations. Therefore, the trial court did not err because the TCPA does not apply, and Attorney established a prima facie case for defamation.

Finally, Wife argues that the trial court erred by denying her Motion to Dismiss because her allegation that Attorney set hearings without informing her or her counsel is protected under the TCPA. Here, this specific allegation is not defamatory. Therefore, the trial court erred by denying Wife's Motion to Dismiss as to this allegation.

FOLLOWING A DWOP, IT NECESSARY TO FILE A MOTION TO REINSTATE TO PRESERVE ERROR ON APPEAL.

¶23-3-83. *In re B.S.C.*, No. 14-22-00451-CV, 2023 WL 2711348 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (mem. op.) (03-30-23).

Facts: Father filed an Original Petition to Modify the Parent-Child Relationship. Following trial, the trial court requested that Father submit a final order by a date certain. Thereafter, the trial court extended Father's deadline; however, Father never submitted a final order. Subsequently, the trial court signed an order dismissing the case for want of prosecution. The trial court then sent correspondence to the parties regarding the DWOP. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred in failing to provide him notice and an opportunity to be heard before dismissing the case for want of prosecution. Here, Father failed to file a motion to reinstate. Consequently, Father waived any due process violation caused by a lack of notice. Further, Father filed an appeal within 30 days of the trial court signing the dismissal date, which indicates that Father received notice of the dismissal and possessed the ability to file a motion to reinstate. Therefore, the trial court did not err in signing the DWOP and Father failed to preserve his error for appeal.

MOTHER FAILED TO MAKE A PRIMA FACIE CASE FOR HER MULTIPLE CLAIMS AGAINST FATHER, THUS, THE TRIAL COURT PROPERLY DISMISSED HER CLAIMS UNDER THE TCPA.

¶23-3-84. *Landa v. Rogers*, No. 03-21-00097-CV, 2023 WL 2697880 (Tex. App.—Austin 2023, no pet. h.) (mem. op.) (03-30-23).

Facts: After the birth of the child, Mother and the child moved from Austin to Houston to live with Father. According to Mother, the parties entered into an oral contract and agreed that Mother would live with Father for one year on that condition that he would not oppose any attempt by her to return to Austin with their child. Thereafter, the parties' relationship deteriorated and Mother informed Father that she would

be separating from him. Mother then filed a Suit Affecting the Parent-Child Relationship in Harris County, requesting that the child's residence be restricted to Travis County, Harris County, and their contiguous counties. In response, Father filed a Counterpetition, requesting that the child's residence be restricted to Harris County and its contiguous counties. Following mediation, the trial court signed an Agreed SAPCR Order that restricted Mother's right to designate the child's primary residence to Harris County, Fort Bend County, and/or Montgomery County. Subsequently, Mother filed a lawsuit against Father, alleging that he breached their oral contract by opposing the inclusion of Travis County as a part of their final agreement. Mother later amended her lawsuit to include claims for fraud, fraudulent inducement, civil conspiracy, breach of duty of good faith and fair dealing, false imprisonment, and intentional infliction of emotional distress. Following a hearing on Father's Motion to Dismiss, the trial court dismissed Mother's claims with prejudice under the TCPA and awarded Father attorney's fees. Mother appealed.

Holding: Affirmed.

Opinion: Mother argues that the trial court abused its discretion when it dismissed her claims under the TCPA. Specifically, Mother contends that Father failed to demonstrate that the TCPA applies to her causes of action. In response, Father asserts that the TCPA applies because all of Mother's causes of action are based on or are in response to his exercise of his right to petition. Here, each of Mother's causes of action are inextricably tied to, and are based on and in response to, the filings and statements made by Father in the previous SAPCR proceeding. Although Mother alleges that Father's initial promise occurred one year before the SAPCR commenced, Mother's claims are not based solely on this single allegation. Instead, each of Mother's causes of action rely upon, and are intertwined with allegations and evidence that pertain to the SAPCR proceedings. Thus, Father satisfied his initial burden of demonstrating that Mother's causes of action are "based on" or "in response to" his exercise of his right to petition in the previous lawsuit. As a result, the burden shifted to Mother to establish by "clear and specific evidence a prima facie case for each essential element" of her causes of action. In this case, Mother failed to make a prima facie case for her claims for breach of contract, fraud, civil conspiracy, breach of duty of good faith and fair dealing, false imprisonment, and intentional infliction of emotional distress. Therefore, the trial court did not err by dismissing Mother's claims under the TCPA.

★★★TEXAS SUPREME COURT ★★★

EMPLOYEE ESTABLISHED THAT HE LIVED IN DALLAS COUNTY FOR THREE MONTHS AND THAT HE INTENDED TO LIVE IN THE COUNTY INDEFINITELY; THUS, THE MERE FACT THAT HE RESIDED IN A HOTEL IS IMMATERIAL.

¶23-3-85. ***Fortenberry v. Great Divide Insurance Co.***, ___ S.W.3d ___, No. 21-1047, 2023 WL 2719475 (Tex. 2023) (03-31-23).

Facts: Employee signed a three-year contract to play for the Dallas Cowboys, and in May 2015, began living in a hotel located in Dallas County. Due to an injury sustained in June, Employee traveled to Louisiana to receive treatment; however, he returned to Dallas in July before the start of training camp. On August 2, Employee injured himself and later sought a worker's compensation claim. After the insurance company ("Insurer") denied his claim, Employee sought judicial review of the final administrative decision in Dallas County. Employee alleged that venue was mandatory in Dallas County under Labor Code Section 410.252 because he resided in Dallas County at the time of the injury. Specifically, Employee claimed that he resided at the Dallas Marriott Residence Inn. Subsequently, a jury found in his favor and Insurer appealed, challenging venue among other things. The Court of Appeals concluded that the Dallas County hotel at which Employee averred he "lived and resided" at the time of his injury could not constitute his residence under Texas Labor Code Section 410.325(b). Due to its finding, the Court of Appeals reversed and remanded the case with instructions to conduct further venue proceedings, adding that the law-of-

the-case doctrine operated to exclude Dallas County as a proper venue in any subsequent proceedings. Employee petitioned for review.

Holding: Reverse and Remanded.

Opinion: Employee argues that the Court of Appeals erred by finding that he did not reside in Dallas County at the time of the injury. As a result, Employee asserts that the Court of Appeals failed to establish venue under Section 410.252(b). Here, the Court of Appeals concluded that a hotel cannot constitute a residence for venue purposes. However, there is no categorical prohibition against a hotel serving as one's residence. Further, Employee's affidavit provided that he "lived and resided" in Dallas County at the time of his injury. This testimony is sufficiently specific and factual, and the Court of Appeals should have considered and not disregarded it. Moreover, the following evidence establishes Employee's intent to remain in Dallas County for an indefinite time: (1) Employee agreed in his NFL player contract that he would attend Dallas Cowboy games, practices, and events for 2015 through 2017; (2) Before Employee's injury, he trained and received treatment by doctors and trainers for two months in Dallas County; and (3) Employee returned to Dallas in July and participated with the team before leaving to training camp in California later that month. Finally, during the administrative process, Insurer, Employee, and the administrative law judge stipulated that Employee resided within 75 miles of Insurer's Dallas Field Office at the time of injury. In sum, the record contains sufficient probative evidence that Employee resided in Dallas County for three months at the time of the injury; thus, venue in Dallas County was mandatory under Section 410.252(B) and the Court of Appeals erred finding otherwise.

A MOTION FOR SANCTIONS IS NOT A LEGAL ACTION FOR PURPOSES OF THE TCPA.

¶23-3-86. ***Thuesen v. Scott,*** ___ S.W.3d ___, No. 09-22-00254-CV, 2023 WL 2796501 (Tex. App.—Beaumont 2023, no pet. h.) (04-06-23).

Facts: Father filed an Original Petition for Interference with a Possessory Interest in Child against Boyfriend, alleging that he and Mother kept the child from Father in violation of the parties Agreed Modification of Conservators, Possession and Access Order ("Possession Order"). Thereafter, Boyfriend filed an Answer and moved for sanctions pursuant to TRCP 13 and TCPR chapter 10, claiming that Father's suit was harassing, groundless, and that the Petition was frivolous. Father then filed a TCPA Motion to Dismiss Boyfriend's claim for sanctions. Therein, Father supported his motion with an affidavit and certified copies from the Montgomery County Court Law Number 3 ("CCL"). Boyfriend failed to respond. Following a hearing, the trial court dismissed Father's Motion to Dismiss, finding that Boyfriends Motion for Sanctions did not constitute a "legal action" under the statute and that the TCPA did not apply. Father appealed.

Holding: Affirmed.

Opinion: Father argues that the trial court erred by dismissing TCPA Motion to Dismiss. Specifically, Father asserts that the Motion for Sanctions is a "legal action" for purposes of the TCPA. The TCPA defines "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that request legal, declaratory, or equitable relief." The Legislature recently amended this definition to exclude, among others, procedural actions or motions made in an action that do not amend or add a claim for legal, equitable, or declaratory relief. Here, under the amended definition, a Motion for Sanctions falls within the exceptions for the definition of a "legal action." First, a Motion for Sanctions is clearly procedural, as it is a motion made in an underlying action. Second, because a Motion for Sanctions does not assert an existing right and it is not a right to receive payment or an equitable remedy, it does not amend or add a claim. Moreover, the trial court alone possesses the right to make sanctions under TRCP 13 and TRCP Chapter 10. Since a Motion for Sanctions does not implicate a legal right that a party asserts or enforces, the motion does not add a claim for relief when a

party requests the trial court to impose sanctions. Even though some courts in Texas have arrived at the opposite opinion, this court adopts the view that a party seeking sanctions is not seeking vindication of a substantive legal right outside of the litigation context. Therefore, the trial court did not err by dismissing Father's Motion because a Motion for Sanctions does not constitute a "legal action" for purposes of the TCPA.

TRIAL COURT DID NOT ERR BY REFUSING TO REOPEN THE EVIDENCE AFTER A FINAL HEARING FOR HUSBAND'S ATTORNEY'S INTERVENTION CLAIM BECAUSE THE ATTORNEY FAILED TO PRESENT EVIDENCE AT THE FINAL HEARING.

¶23-3-87. *IMOMO Hale,* No. 06-22-00066-CV, 2023 WL 2979026 (Tex. App.—Texarkana 2023, no pet. h.) (mem. op.) (04-18-23).

Facts: Husband filed an Original Petition for Divorce, and a year into the proceeding, Husband's attorney ("Attorney") filed a Motion to Withdraw. Additionally, Attorney filed a Petition in Intervention, claiming that Husband owed $40,000 in attorney's fees for a prior criminal matter, $5,000 in attorney's fees for the pending divorce, and $340 in court costs. In his intervention, Attorney alleged that Husband and Wife violated the Texas Uniform Fraudulent Transfers Act (TUFTA) by conspiring to avoid the debt owed to Attorney through their agreed division of property. At the hearing on Attorney's motion, Husband and Wife testified that they owed Attorney $40,000. Despite this testimony, Attorney failed to introduce evidence to support his claim that the spouses violated the TUFTA and did not contend that they owed him anything more than $40,000. Thereafter, Attorney filed a Motion for Rehearing. At the rehearing, the trial court refused to allow Attorney to present new evidence. Subsequently, the trial court entered a final judgement in the divorce suit that divided the $40,000 evenly between Husband and Wife and characterized such as a community debt. The trial court did not award Attorney his attorney's fees or court costs for the divorce proceeding. Attorney appealed.

Holding: Affirmed.

Opinion: Attorney argues that the trial court erred by violating his due process rights. Specifically, Attorney contends that the trial court violated the Open Courts Provision. Moreover, Attorney asserts that the trial court did not properly consider his legal cause of action against both Husband and Wife that made them jointly and severally liable for damages under TUFTA. Here, the record exemplifies that the trial court afforded Attorney the opportunity to present his TUFTA claims at a final hearing. However, Attorney failed to offer any evidence to support his claim prior to resting. Therefore, the trial court did not violate the Open Courts Provision because Attorney was provided the chance to prove his claims at trial.

Next, Attorney argues that the trial court abused its discretion by failing to reopen evidence. Here, in deciding whether to permit additional evidence, the trial court could have determined that Attorney had the opportunity to obtain evidence and prove his claims before the final hearing. However, Attorney did not exercise due diligence by waiting until after the trial had concluded to obtain and present evidence. Further, the trial court could have also determined that reopening the evidence over a year after the hearing in the divorce proceeding could have caused undue delay. Therefore, the trial court did not abuse its discretion by refusing to reopen the evidence a year after the hearing.

EVEN IF A JUDGE DOES NOT PRESIDE OVER THE ENTIRE TRIAL, TRCP 18 AUTHORIZES THE SUCCESSOR JUDGE TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

¶23-3-88. *IMOMO Clark*, No. 10-21-00087-CV, 2023 WL 3009824 (Tex. App.—Waco 2023, no pet. h.) (mem. op.) (04-19-23).

Facts: Judge 1 presided over the first day of the parties' divorce trial; however, after being elected to the court of appeals, Judge 1 resigned from the trial court. Thereafter, Judge 2 presided over the rest of the parties' trial, and without objection, reviewed the trial's transcript. Following trial, the trial court granted the divorce, divided the parties' estate, and entered orders pertaining to the children. Per Husband's request, Judge 2 issued Findings of Fact and Conclusions of Law. Husband appealed.

Holding: Affirmed.

Opinion: Husband argues that the trial court erred by issuing Findings of Fact and Conclusions of Law. Specifically, Husband asserts that the Findings of Fact and Conclusions of Law were void because Judge 2 did not preside over the entire trial. Here, Judge 2 heard most of the evidence presented in the case prior to ruling and issuing Findings of Fact and Conclusions of Law. Moreover, TRCP 18 authorizes a successor judge to issue findings of fact if the presiding judge "dies, resigns, or becomes unable to hold court during the session of court duly convened for the term." Therefore, Judge 2's Findings of Fact and Conclusions of Law are not void.

WHEN "DISCRETE LEGAL SERVICES" THAT ADVANCE BOTH A RECOVERABLE AND UNRECOVERABLE CLAIM ARE INTERTWINED, THEY NEED NOT BE SEGREGATED IN ORDER FOR A PARTY TO RECOVER ATTORNEY'S FEES.

¶23-3-89. *In re L.A.N.*, No. 14-22-00719-CV, 2023 WL 3115741 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (mem. op.) (04-27-23).

Facts: The parties' Final Decree required Father to pay the children's health insurance premiums, unreimbursed medical expenses, and child support. Mother filed a Motion for Enforcement of the child support, alleging that Father failed to comply with his child support obligations. Following the enforcement hearing, the trial court granted Mother's motion in part, including 31 counts of criminal contempt for failing to pay child support, and a money judgment for unpaid health-care expenses. However, the trial court declined to award Mother attorney's fees because Mother's attorney failed segregate the fees incurred between recoverable and non-recoverable claims. Mother appealed.

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

Opinion: Mother argues that the trial court abused its discretion by denying her request for attorney's fees. Here, Mother's attorney testified and admitted documents that detailed the dates, hours spent, hourly rate, and a brief narrative description of legal service performed and the person who performed the service. Further, when "discrete legal services" that advance both a recoverable and unrecoverable claim are intertwined, they need not be segregated. Moreover, when segregation is required, an attorney's opinion that a certain percentage of the total time was spent on the claim for which fees are recoverable will suffice. In this case, the trial court found that Father failed to make child support payments and reimburse Mother for health-care expenses; thus, attorney's fees were mandatory for these claims. While Mother did not segregate her claims, this does not preclude her ability to recover attorney's fees. Accordingly, the case is remanded to determine the segregated fee amount due. Therefore, the trial court erred by denying Mother's request for attorney's fees.

Next, Mother argues that the trial court erred by failing to award her prejudgment interest on specific unreimbursed medical expenses. Here, under the TFC, awarding interest on child support arrearages is

mandatory, and the trial court possesses no discretion to not award the full amount of interest due. Although Father contends Mother is not entitled to prejudgment interest because she presented no evidence to support her request, this circumstance does not deprive Mother of her right to interest. Therefore, the trial court erred in failing to award prejudgment interest on the child support arrearage.

Editor's comment: *The court held that mom was entitled to pre-judgment interest on the unpaid medical. Great. But how exactly does that work? It would be based on the date the obligation was past-due. So, would the court have to do a bunch of math for each separate unpaid expense? I guess? B.M.J.*

TRIAL COURT ERRED BY FAILING TO SEGREGATE ATTORNEY'S FEES RECOVERABLE FOR A MODIFICATION LAWSUIT FROM FEES THAT MIGHT LATER BE RECOVERABLE IN CONNECTION WITH MOTIONS FOR ENFORCEMENT.

¶23-3-90. ***Donnelly v. Speck*****,** ___ S.W.3d ___, No. 14-21-00414-CV, 2023 WL 3102675 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) (04-27-23).

Facts: Mother filed an Original Petition to Modify Parent-Child Relationship. During the proceeding, the child informed the trial court of Father's mismanagement of her diabetes, interference with her treatment, and that she wished to continue to live with Mother. At trial, Mother testified regarding Father's interference with the child's medical treatment. Further, Mother's attorney testified regarding attorney's fees and admitted her billing statements. Following trial, the trial court issued a SAPCR Order, which awarded Mother the exclusive rights to medical and psychiatric decisions for the child. Additionally, the trial court awarded Mother $25.7k in attorney's fees. Father appealed.

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

Opinion: Father argues that the trial court abused its discretion by awarding Mother attorney's fees because the evidence is insufficient to support the award. Additionally, Father contends that the trial court erred in failing to require segregation of the fees. In response, Mother claims that Father first objected to Mother's failure to segregate fees in his post-trial motion for new trial Here, this Court will follow the decision made in *Clearview Props., L.P. v. Prop. Tex. SC One Corp.*, which concluded that a post-judgment motion challenging segregation of fees is timely when following a bench trial. Here, the record at trial and in post-judgment hearings affirmatively shows that the award of attorney's fees was based upon enforcement motions that were unrelated to Mother's modification suit. In its findings of fact, the trial court only references work performed in connection with the modification action and does not recite facts segregating that work from the enforcement matters. Because fees on the enforcement motions were not recoverable at the time of the trial court's fee award, the trial court should have segregated the attorney's fees spent on the enforcement action, which it failed to do. Therefore, the trial court abused its discretion by failing to segregate Mother's attorney's fees.