D.B.A. Family Law Section Case Law Update

January 14, 2015

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DIVORCE
TEMPORARY ORDERS

TRIAL COURT ERRED IN MODIFYING AGREED TEMPORARY ORDERS BECAUSE THE MODIFIED ORDER DID NOT ENHANCE THE CHILD'S SAFETY AND WELFARE; MODIFIED ORDER FAILED TO GIVE DUE REGARD TO THE STABILITY OF THE CHILD'S CURRENT LIVING SITUATION.

In re Casanova, No. 05-14-01166-CV, 2014 WL 6486127 (Tex. App.—Dallas 2014, orig. proceeding) (mem. op.)(11-20-14).

Facts: Mother and Father were married with one Child. The parents separated when the Child was 4 years old. At the time of the separation, Mother moved from Dallas to Tulsa to be with her family. Mother and Father agreed to let the Child finish out her school year in Dallas, and Mother would visit the Child in Dallas on the weekends. The parents further agreed that once that school year ended, they would share custody of the Child. The Child stayed with Mother Monday through Thursday and stayed with Father Thursday through Sunday. The parties agreed to temporary orders that appointed them JMCs and granted Mother the exclusive right to designate the Child's primary residence in either Dallas or Tulsa. The agreed orders gave both parents the right, subject to agreement with the other parent, to make decision concerning the Child's education. The temporary orders were to remain in effect until the Child turned 18 or was otherwise emancipated. Mother and Father entered a lottery to attempt to obtain a place for the Child to attend a Tulsa magnet school. When the Child was selected, Mother enrolled the Child in kindergarten at the magnet school to begin in the fall of 2014. Subsequently, Father moved to modify the temporary orders to limit the Child's primary residence to Dallas and to require her to attend school in Dallas. After an evidentiary hearing, the trial court entered an order requiring Mother to move the Child back to Dallas by January 1, 2015. If Mother returned with the Child as ordered, she would retain the exclusive right to designate the primary residence of the Child, and Father would be granted weekend visitation. However, if Mother failed to return with the Child, Father would be granted the exclusive right to designate the Child's primary residence, and Mother would be given weekend visitation. Mother appealed, arguing that the trial court erred in modifying the agreed temporary orders when there had been no material and substantial change in circumstances. Mother additionally argued that the trial court's ordered failed to give due consideration for the Child's safety and welfare and the current living conditions of the parties.
Holding: Writ of Mandamus Conditionally Granted

Opinion: Chapter 156 of the TFC is predicated on the doctrine of res judicata, and the policy concerns regarding finality of judgments and cessation of custody litigation are not implicated in the same was by modifications of temporary orders. Therefore, Chapter 156 does not apply to modifications of temporary orders.

However, per TFC 105.001(a), prior to modifying a temporary order, a court must consider whether the temporary orders are for "the safety and welfare" of the child. Because there was no evidence of a present threat to the Child's safety or welfare, the COA reviewed the trial court's order to determine whether the modified order enhanced the Child's safety or welfare. The trial court was required to measure each change the modified order imposed, particularly the geographic restriction on the Child's primary residence during the pendency of the divorce, against the yardstick of whether the change was necessary for the Child's safety and welfare.

While a trial court has broad discretion on custody, control, possession, and visitation matters, a trial court may not rely solely on its own ad hoc determinations. Rather, temporary orders must comport with legislatively pronounced public policy guidelines, including providing the child a safe, stable, and nonviolent environment; and encouraging parents to share the rights and duties of raising their child. Further, "[a] court abuses its discretion in imposing temporary orders without due regard for the current living conditions of the parties, *especially* the stability of the child's current living situation, and without regard for the financial or practical ability of the parties to comply with the court's orders."

The Child was happy and thriving under the current custodial situation. Mother sought to retain the status quo of the Child's residence. For over a year, the Child had a parent in both Tulsa and Dallas, with whom she spent about equal time. The Child had developed a life in Tulsa, was selected to attend a magnet school, participated in extracurricular activities, made local friends, and had frequent contact with extended family in Tulsa. The trial court's order forced disruption in the Child's schooling by requiring her to change schools mid-year; gave little or no weight to the positive benefit of the Child's frequent contact with her extended family; and placed a new burden on Mother by removing Tulsa as a permissible primary residence without showing that the burden was necessary for the safety and welfare of the Child. Mother had a job that contributed to her ability to provide a better standard of living for the child and allowed her to be personally with the Child after school, which should have been a significant consideration in determining whether to alter the agreed temporary orders.

The trial court failed to give weight to the parents' agreement that Tulsa was an appropriate residence for the child. The trial court abused its discretion in substituting its judgment for that of the parents.

WIFE'S COMMUNITY INTEREST IN HUSBAND'S MILITARY RETIREMENT DEFINED BY *BERRY* AND THE USFSPA; DIVORCE DECREE'S FAILURE TO SPECIFY DENOMINATOR IN DIVORCE DECREE DID NOT INDICATE AN INTENT NOT TO FOLLOW *BERRY*.

Douglas v. Douglas, __ S.W.3d ___, 2014 WL 6090420, 08-12-00259-CV (Tex. App.—El Paso 2014, no pet. h.)(11-14-14).

Facts: Husband and Wife divorced after about 15 years of marriage. At the time of the divorce, Husband was a Captain in the U.S. Air Force with 150 months of creditable service. The divorce decree awarded Wife her community interest in Husband's military retirement. The decree specifically provided that she was entitled to "one-half (1/2) times a fraction of which the numerator (150) is the number of months that the parties were married during which time [Husband] had credible time in the United States Air Force toward retirement, prior to the date of divorce (150 months), and the denominator of which is the number of months that [Husband] shall have of credible service toward his military retirement, times gross retirement benefits receivable, if [Husband] were eligible for retirement at the time of the divorce, at his present rank of Captain." After the divorce, Husband remained in the Air Force for another 177 months before retiring. After his retirement, Wife applied to the Defense Finance and Accounting Service (DFAS) for her share and included a certified copy of the decree. DFAS notified Wife that it could not approve her application because the language was faulty. It advised Wife that the deficiency could be remedied by a clarifying order that expressed her interest as a fixed sum or a percentage interest.

Wife moved to clarify the decree. After a hearing, the trial court issued a clarifying order providing that Wife was entitled to 4.096% of the disposable military retired pay. In addition, the trial court found that Husband was in arrears for almost $10,000. In its findings of facts and conclusions of law, the trial court did not clearly explain how it arrived at 4.096%. Wife appealed, and Husband cross-appealed. Both argued that the trial court used the wrong formula to calculate the percentage. Under Wife's formula, she urged that she was entitled to 1/2 of Husband's hypothetical gross retirement pay at the time of the divorce, or $1,404.03. Under Husband's formula, he argued that Wife was entitled to 1.7421% of his retired pay at the time of his retirement, or $134.48. Husband argued that by failing to specify the denominator in the decree, which was a known value at that time, the trial court had not intended to use the *Berry* formula to calculate Wife's percentage interest. Husband contested that Wife's interest was governed by the fraction formula established in *Taggert*, and the value of her interest was governed by *Berry*. Husband additionally argued that the trial court erred in finding him in arrears and in failing to award him attorney's fees.

Wife's formula:	50% x	150 months of service during marriage / 150 months of service credited toward marriage		x gross retirement benefits receivable
Husband's formula:	50% x	150 months of service during marriage / 372 months of service credited toward marriage	x 23.7500%	x $2808.60 (base pay of Captain at divorce)

$7,719.00 (total monthly amount received based on 372 months of service)

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

Opinion: Under the *Berry* formula, a non-member spouse's community interest in the member spouse's retirement plan is determined by dividing the number of months married (the numerator) by the number of months employed under the plan at the time of divorce (*Berry* denominator), and the value of the interest is determined as of the date of divorce, rather than at retirement. Contrarily, under the former *Taggert* formula, the community interest is determined by dividing the number of months married (the numerator) by the total number of months employed at retirement (*Taggert* denominator).

Here, the trial court failed to specify the value of the denominator; however, this failure did not mean that the trial court did not intend to use the *Berry* formula. Further, Husband produced no support for his contention that a hybrid formula should be used. Moreover, the formula proffered by Husband would have impermissibly diluted Wife's community interest in the retirement plan.

Under to Uniformed Services Former Spouses Protection Act (USFSPA), which was in effect at the time of the Parties' divorce, Husband's hypothetical gross pay was to be computed by multiplying his retired pay base at the time of divorce by the retired pay multiplier, which is 2.5% of his creditable service. The Parties agreed that Husband's retired pay base at the

time of divorce was $2,808.60. At the time of divorce, Husband had 150 months, or 12.5 years, of creditable service. Thus, Husband's retired pay multiplier was .3125 (2.5% x 12.5), and his monthly hypothetical gross pay was $877.50 (.3125 x $2,808.60).

The COA noted Husband's argument that his hypothetical gross retired pay should have been calculated under the provisions of the Temporary Early Retirement Authority (TERA) was without merit because TERA was neither in effect at the time of the Parties' divorce, nor would Husband have been entitled for early retirement under TERA had it been in effect.

To be enforceable under USFSPA, an award of an interest in military retirement must be expressed as either a fixed dollar amount or as a percentage of disposable retired pay. To convert Wife's award into a fraction, the COA multiplied her 50% community interest by the hypothetical gross pay ($877.50) divided by Husband's retired gross pay ($7,719.00). Therefore, Wife was entitled to 5.68078766679622 percent of Husband's disposable retired pay.

Further, because the trial court's clarifying order was not rendered until 41 months after Husband retired, Wife was entitled to arrearages for any payments not made by Husband during that time period. Finally, Husband was not entitled to attorney's fees because he was not the prevailing party.

TRIAL COURT IMPROPERLY DIVESTED HUSBAND OF HIS SEPARATE PROPERTY HOME BY AWARDING WIFE A ONE-HALF INTEREST IN THE HOME'S EQUITY.

Rivas v. Rivas, ___ S.W.3d ___, 2014 WL 6090415, 08-12-00228-CV (Tex. App.—El Paso 2014, no pet. h.) (11-14-14).

Facts: Husband inherited a home from his father. The home had been paid for in full prior to Husband's father's death. During their divorce proceedings, Wife testified that she had no legal interest in Husband's home. Wife sought reimbursement for, inter alia, improvements and waste of community assets, and she asked the trial court to impose an equitable lien on Husband's home to secure the reimbursement claims. The trial court denied these claims for reimbursement. However, despite finding that the home was Husband's separate estate, the trial court awarded Wife a one-half interest in the equity of the home and ordered Husband to pay Wife her share of the equity within ninety days. Husband appealed, arguing the trial court improperly divested him of his separate property.

Holding: Reversed and Remanded

Opinion: Husband's home was established as his separate property as a matter of law. He introduced evidence establishing that the home had no mortgage and was inherited from his father. Wife testified that she had no legal interest in the home. The trial court clearly erred when it divested Husband of his separate property and awarded Wife a one-half interest in the home's value.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

WIFE REBUTTED PRESUMPTION AGAINST SPOUSAL MAINTENANCE BY SHOWING THAT SHE EXERCISED DILIGENCE IN EARNING SUFFICIENT INCOME DURING MARRIAGE AND AFTER THE PARTIES SEPARATED; ELIGIBILITY FOR MAINTENANCE WAS BASED ON WIFE'S *CURRENT* ABILITY TO PROVIDE FOR HER MINIMUM REASONABLE NEEDS, NOT WHETHER SHE COULD DO SO WITH ADDITIONAL TRAINING OR EDUCATION.

Day v. Day, __ S.W.3d __, 2014 WL 6601655, 01-13-00839-CV (Tex. App.—Houston [1st Dist.] 2014, no pet. h.)(11-20-14)

Facts: Husband and Wife separated, and Wife acted as the primary caregiver for their only Child. After a five-year separation, Wife filed for divorce. During the proceedings, the Child graduated from high school. In her petition for divorce, Wife alleged that Husband had wasted community funds and asked the trial court to award her a reconstitution of the estate through court-ordered maintenance. After a trial, the trial court ordered Husband to pay spousal maintenance for 75 months. Husband appealed and argued that although Wife did not currently earn sufficient income to meet her minimum reasonable needs, she presented no evidence that she lacked the ability to earn more. In addition, Husband argued that Wife had not exercised diligence in earning sufficient income or in developing the necessary skills to provide for her minimum reasonable needs.

Holding: Affirmed

Opinion: Under Texas Family Code Section 8.051(2), a spouse may be entitled to spousal maintenance if she lacks the ability to earn sufficient income to meet her reasonable needs and the marriage lasted at least ten years. This section of the TFC focuses on whether the spouse *currently* meets her minimum reasonable needs, not whether she may be able to do so in the future. Texas Family Code Section 8.053 provides the statutory presumptions against granting spousal maintenance. Unlike Texas Family Code Section 8.053(a)(2), Texas Family Code Section 8.053(a)(1) is not limited to the time during the spouses' period of separation, thus efforts made during the marriage could be considered. Further, in 2011, the statute was amended to change the requirement from "diligence in seeking *suitable employment*" to "diligence in *earning sufficient income*." Therefore, any efforts to increase income and decrease expenses could be considered under this subsection.

Here, Wife was unable to meet her minimum reasonable needs because her income was about $1900 per month, and her expenses were about $3000 per month. Wife already worked full time plus some overtime. She had no assets from which she could earn rental income. While the parties were married, Wife was the primary caregiver for the Child and was frequently the only source of steady, regular income for the family. When the couple separated, Wife had been unemployed for a couple of months, but she was able to obtain and keep a job for over five years, and her annual pay increased from $30,000 to $34,000 during that time. She drastically limited her expenses, exhausted her savings, and sold separate property in order to care for the Child until the Child graduated from high school. To reduce expenses, Wife quit a substance abuse habit and negotiated reduced attorney's fees. In addition, she did not buy furniture for her home or replace or repair her seven-year-old car. Wife sold separate real property acquired before marriage, took out personal loans, and used inherited money from her parents to support herself and the Child.

SAPCR
STANDING AND PROCEDURE

AGREED ORDER ADJUDICATING PARENTAGE ENTERED IN TEXAS VOID BECAUSE MEXICO WAS THE CHILD'S HOME STATE; VOID ORDER WAS SUBJECT TO COLLATERAL ATTACK.

In re S.A.H., ___ S.W.3d ___, 2014 WL 6462580, 14-13-01063-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (11-18-14).

Facts: When the Child was 5-years-old, Mother filed an original petition in Houston to adjudicate parentage in Houston, Texas. Attached to her petition was an affidavit indicating that the Child had lived in Mexico since birth and that Father resided in, and could be served in, Houston. After genetic testing, the trial court entered an agreed order adjudicating Father as the Child's father and providing orders for conservatorship, possession and access, child support, and health care expenses. The orders included a finding that the trial court had "jurisdiction of this case and of all the parties" and that the parties had waived making a record. Additionally, the order indicated that the Child's county of residence was Mexico and included work and home addresses for each parent: Mother's in Mexico, and Father's in Houston. About 5 years later, Mother filed a SAPCR and a motion to enforce child support. Father answered and filed a petition to declare the original order void for lack of subject-matter jurisdiction. After an evidentiary hearing, the trial court entered an order declaring the original order void. Mother appealed.

Holding: Affirmed

Opinion: Subject-matter jurisdiction in child custody suits is governed by the UCCJEA. Texas has jurisdiction to make an initial child custody determination if Texas is the home state of the child, if no other state has jurisdiction, or if a court of the home state of the child has declined jurisdiction. Subject-matter jurisdiction cannot be conferred by consent, estoppel, or waiver. Here, although there was no indication in the record that the trial court considered evidence relating to subject matter jurisdiction at the original hearing, it was clear from Mother's petition and attached affidavit that the Child had only lived in Mexico since birth and had never lived in Texas. Therefore, Mexico was the Child's home state at—and for more than six months prior to—the commencement of the proceedings. Further, Mother alleged in her original petition that there was no case in which a Mexican court had declined to exercise jurisdiction.

SAPCR
POSSESSION AND ACCESS

RESTRICTION THAT MOTHER BE "OFF WORK" AND "PRESENT" DURING HER PERIODS OF EXTENDED SUMMER VISITATION WAS UNDULY BURDENSOME AND UNNECESSARILY RESTRICTIVE.

In re H.D.C., ___ S.W.3d ___, 2014 WL 6464331, 14-13-00976-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (11-18-14).

Facts: At the time of their divorce, Mother and Father had one teenage Daughter and one grade-school-aged Son. Mother and Father signed an agreed order that appointed both parents as JMC, with Mother having the exclusive right to designate the primary residence of the Children. Father had a standard possession order and was ordered to pay child support.

After the divorce, the Daughter began engaging in self-destructive behavior. About a year after the divorce, Father observed hygiene issues. A few months later, Father discovered that the Daughter had posted inappropriate photos of herself online. About a year after that, Father learned that the Daughter had begun cutting herself. Father discussed the problems with Mother, who did not think they needed to be addressed until after CPS recommended therapy. Both of the Children were struggling in school, and Mother's solution was to do the Children's homework for them. Mother was issued an arrest warrant as a result of the Children's truancy while in her care. Mother denied many of the problematic behaviors, including a claim that the Daughter had taken 12 Benadryl pills at once while in Mother's care.

Father filed a SAPCR. The trial court issued temporary orders giving Father the exclusive right to designate the Children's primary residence and ordering Mother to pay child support. A trial was held several months later, at which the Children's therapist testified about the Children's behavioral changes since residing primarily with Father. In its final order, the trial court granted Father the primary right to designate the Children's primary residence, ordered Mother to pay Child support, and imposed a restriction that Mother be "off work" and "present" during her extended summer possession of the Children. Mother appealed arguing that that restriction was ambiguous and broader than necessary to serve the Children's best interests.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: A possession order must be stated in clear and unambiguous language and must be specific enough to permit the court to enforce the judgment by contempt. Here, the requirement that Mother be "off work" and "present" during her extended period of possession was clear and unambiguous. Thus, the order was not vague. However, a restriction on possession should not exceed that which is required to protect the best interest of the child. Here, the trial court found that the Children had been left unsupervised many times while Mother was at work and that the Daughter engaged in self-destructive behavior while unsupervised. The evidence supported an order that the Children be supervised while in Mother's possession. In addition, Mother's brother had a marijuana conviction and abused prescription drugs. Mother's mother lost her daycare license because of Mother's brother's activities, indicating Mother's mother permitted those activities at the daycare while children were present. Therefore, evidence supported not allowing Mother's mother or brother to supervise the Children. However, requiring Mother to be "off work" and "present" during her month of extended summer visitation was unduly burdensome and unnecessarily restrictive. A restriction that Mother arrange for a suitable adult to supervise the Children in her absence would have been sufficient to protect the best interests of the Children.

SAPCR
CHANGE OF NAME—CHILD

EXISTENCE OF HALF-SIBLING WITH FATHER'S LAST NAME WAS INSUFFICIENT REASON TO CHANGE CHILD'S LAST NAME FROM MOTHER'S.

In re A.E.M., ___ S.W.3d ___, 2014 WL 7182562, 2014 WL 7183222, 01-14-00123-CV (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (12-16-14).

Facts: Mother and Father had a Child and met with the OAG to reach an agreement for a child support and custody order. The parents were able to agree on all issues except the name of the Child. Mother wanted the Child's last name to remain the same as hers, while Father wanted to change the Child's last name to his. Father testified that he had another child with his last name, and he wanted the two children to share a last name. Mother testified that her name was respected in the community because her father had run a business there for 33 years. The issue was presented to the trial court, which ordered the name

be changed to include Father's surname. Mother appealed, arguing that the evidence was legally and factually insufficient to change the Child's name.

Holding: Reversed and Rendered

Majority Opinion: (J. Higley, J. Sharp) Tex. Fam. Code Section 45.004 provides that a child's name may be changed if the change is in the child's best interest. Once a child is named, the name should only be changed when the substantial welfare of the child requires it. The interests of the parents are not relevant. The factors to consider include: (1) the name that would best avoid anxiety, embarrassment, inconvenience, confusion, or disruption for the child, which may include consideration of parental misconduct and the degree of community respect (or disrespect) associated with the name; (2) the name that would best help the child's associational identity within a family unit, which may include whether a change in name would positively or negatively affect the bond between the child and either parent or the parents' families; (3) assurances by the parent whose surname the child will bear that the parent will not change his or her surname at a later time; (4) the length of time the child has used one surname and the level of identity the child has with the surname; (5) the child's preference, along with the age and maturity of the child; and (6) whether either parent is motivated by concerns other than the child's best interest—for example, an attempt to alienate the child from the other parent.

Here, while most of the factors were neutral, in that, they did not favor Mother or Father, one factor weighed *slightly* in Father's favor. Father had another child who shared his last name. However, Father only had periodic visitation of both children, and no evidence was presented regarding how often either child visited Father or even whether those periods would overlap. Mother and Father did not live in the same town or in surrounding towns. Father presented no evidence as to where his other child lived or the age of the other child.

The dissent's criticism was misplaced because the majority did not place any reliance on Mother's testimony. Rather, it considered the evidentiary significance of Father's testimony. Father provided little or no information about the other sibling, and a name change should be granted reluctantly and only where the substantial welfare of the child requires it.

Dissenting Opinion: (J. Bland) The relative importance factors listed in the majority opinion depend on the unique facts and circumstances of each case. The number of factors favoring the trial court's ruling should not control, rather, the logical force of each should. All but one of the factors in this case were subjective in nature and thus, were uniquely within the trial court's purview. The one subjective piece of evidence was the Child's sibling relationship with Father's other child. Father testified that he wanted the children to get to know each other and develop a relationship. The majority rejected this testimony in favor of Mother's, where such a determination was within the trial court's discretion. Further, the majority dismissed the notion of the importance of a child's sibling relationship with another child.

MISCELLANEOUS

FATHER FAILED TO PRODUCE ANY EVIDENCE CONTROVERTING MOTHER'S TESTIMONY AND DOCUMENTARY EVIDENCE.

Reyes v. Reyes, ___ S.W.3d ___, 2014 WL 6982243, 08-13-00070-CV (Tex. App.—El Paso 2014, no pet. h.) (12-10-14).

Facts: Mother and Father were married with 3 Children. No discovery was conducted prior to trial, and neither party filed a sworn I&A. The trial court did not issue findings of facts and conclusions of law. Mother testified about family violence and the value of certain assets. She testified that although Father had not been involved in the Children's lives, more involvement would be in the Children's best interest. Father's counsel did not ask Mother any questions. After Mother's attorney rested, Father's attorney also rested without calling any witnesses. The trial court divided the community estate and appointed the parents JMC, with Mother being awarded the exclusive right to determine the Children's primary residence. Father was granted a standard possession schedule and was ordered to pay child support, medical support, and 50% of unreimbursed medical expenses. Father appealed, contesting the sufficiency of the evidence to support the conservatorship appointment, child support, the division of the marital estate, and "reimbursement" to Mother.

Holding: Affirmed

Opinion: There is a presumption that appointing parents as JMC of a child is in the child's best interest. If a party seeks SMC, that party must introduce evidence to rebut the JMC presumption. Although Father requested "full custody" on the stand, he did not plead for that relief. Further, he offered no evidence to rebut the JMC presumption. In fact, Father testified that because he worked two jobs, he was currently unable to care for the Children, and Father's future plans, if he were to be

awarded "full custody," were speculative at best. Moreover, the parties' divorce was granted on the grounds of Father's cruelty against Mother.

Mother entered a tax return that indicated the amount of Father's income, which Father did not controvert. The child support award was within the TFC guidelines based on that information.

An appellant who does not provide property values to the trial court cannot complain on appeal of the trial court's lack of complete information. Father presented no evidence to contradict Mother's values. Moreover, based on the values provided, the trial court divided the estate equally. Both parties testified that the parties' house could not be sold in its current condition. Thus, the trial court could have reasonably found the value of the house was $0 and did not err in awarding it to Mother.

Father complained that the trial court improperly "reimbursed" Mother for health insurance coverage and the parties' tax refund. However, the tax refund was community property, which the trial court divided equally. Further, the order requiring Father to pay health insurance was within the mandates of the TFC.

FATHER'S MOTIONS TO RECUSE TRIAL COURT JUDGE FAILED TO ESTABLISH THAT ANY BIAS, PREJUDICE, OR PARTIALITY AROSE FROM EVENTS OUTSIDE OF JUDICIAL PROCEEDINGS

Fox v. Alberto, ___ S.W.3d ___, 2014 WL 6998094, 14-13-00007-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (12-11-14).

Facts: Father, an attorney, filed a suit to establish his paternity and adjudicate his parental rights to his twin boys. Just before a scheduled hearing, the trial court Judge ordered the bailiff to take away Father's cellphone while he was in the courtroom. Father refused, and the Judge ordered the bailiff to place Father in a jail cell within the same building. While being dragged to the jail cell, Father shouted that he demanded his right as a licensed attorney to be released on his own recognizance and for a hearing before a different judge. The Judge denied Father's demand. Father remained in a jail cell for about twenty minutes, during which time, according to Father's allegations, opposing counsel stole motions from Father's file in the trial courtroom. When Father returned to the courtroom, he saw the motions in the opposing counsel's stack of papers and retrieved them. When the scheduled hearing began, Father demanded a court reporter, but the Judge denied the request because it was a temporary orders hearing. When Father was called to testify, he presented to the Judge a one-sentence, hand-written motion, which read, "Comes now, Petitioner, [Father], and makes this demand for the immediate recusation of [the Judge] from the above entitled and numbered cause." The Judge stopped the proceedings and referred the motion to the presiding administrative judge. Subsequently, Father filed a "supplemental" motion to recuse the trial court Judge. The administrative judge dismissed the first motion because it did not comply with TRCP 18a and held a hearing on the second motion. During the hearing, the administrative judge heard argument but did not allow Father to present evidence. Father's second motion was denied and the underlying case proceeded to jury trial. Mother and Father were appointed JMC, and Father was ordered to pay child support. Father appealed, arguing that the administrative judge erred in denying his motions to recuse the trial court Judge.

Holding: Dismissed in Part; Affirmed in Part

Opinion: When a party seeks a judge's recusal based on bias, prejudice, or partiality, the party must show either that (1) the bias, prejudice, or partiality arose from events outside of judicial proceedings; or (2) the judge has displayed a deep-seated favoritism or antagonism that would make fair judgment impossible. Events occurring outside of judicial proceedings must have an "extrajudicial source." Events occurring in a separate judicial proceeding are not "outside of judicial proceedings." Here, even if Father's allegations were true, Father described the events as taking place "in open court." All of the events in Father's motion occurred in the courtroom of the trial court, and the Judge was acting in her capacity as presiding judge of that court. Moreover, even if Father's allegations were true, they did not rise to the level of a "deep-seated favoritism or antagonism that would make fair judgment impossible." Father's remaining issues were dismissed for failure to preserve error or failure to adequately brief his issues for appellate review.

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February 6, 2015

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DIVORCE
COMMON-LAW MARRIAGE

BECAUSE HUSBAND FAILED TO ARGUE AT TRIAL THAT THE PARTIES NEVER RESIDED TOGETHER IN TEXAS, FATHER FAILED TO PRESERVE HIS COMPLAINT THAT NO COMMON-LAW MARRIAGE EXISTED.

Farrell v. Farrell, ___ S.W.3d ___, 2015 WL 364093, 08-13-00021-CV (Tex. App.—El Paso 2015, no pet. h.) (01-28-15).

Facts: Husband and Wife divorced in New Mexico. Later, Wife moved to Texas with the couple's children, where Husband visited them regularly. Eventually, the couple decided to "get back together," but they did not officially remarry. At that time, Husband was living in North Carolina, where he was participating in a four-month Border Patrol training program. When Wife's Texas lease expired, she moved back to New Mexico, where the couple began living together.

A few years later, the parties separated, and about six months after that, Wife filed for divorce in Texas, alleging a common law marriage. Husband filed a counter-petition disputing the date that the parties were married. The parties stipulated to dividing equally Husband's retirement benefits from the date of the common-law marriage through the date of the second divorce. The trial court determined the date of marriage and divided Husband's retirement benefits based on that date.

For the first time on appeal, Husband argued that there had been no common-law marriage because the parties had not lived together *in Texas* after agreeing to be married.

Holding: Affirmed

Opinion: Per Texas Family Code Section § 2.401, to prove the existence of an informal marriage, the couple must agree to be married, cohabitate in Texas after agreeing to be married, and represent to others that they are married. All three elements must be met at the same time. Here, the parties did not live in Texas after agreeing to be married. Further, although neither party introduced evidence of New Mexico law, New Mexico does not recognize common law marriages.

However, despite the trial court's erroneous ruling that a common-law marriage existed, Husband failed to preserve his error for appellate review. To preserve error, Husband was required to raise the complaint by making a timely request, objection, or motion stating the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. Here, the only context in which the common-law marriage was disputed was regarding the date of the marriage. Thus, the trial court was not put on notice of a complaint that the parties did not cohabitate in Texas.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

HUSBAND REQUIRED TO EXERCISE STOCK OPTIONS UPON WIFE'S DEMAND BECAUSE FINAL DECREE AWARDED HER "EQUITABLE OWNERSHIP" OF THE OPTIONS

Messier v. Messier, ___ S.W.3d ___, 2015 WL [Not available on WL yet], 14-13-00572-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (01-27-15).

Facts: When Husband and Wife divorced, the final decree awarded Wife a portion of the community's share of stock options earned by Husband through his employment during the marriage. After the divorce, Mother asked Husband to exercise her share of the options and deliver to her the proceeds as ordered in the decree. When Husband refused, Wife filed a suit for enforcement, damages for breach of fiduciary duty, contempt, an accounting, and a declaratory judgment setting forth Husband's obligations relating to the options. In the alternative, Wife sought clarification of the decree. Husband contested that he believed that he had a duty a constructive trustee to use his discretion in deciding when to exercise the options so as to maximize the benefit for Wife.

The trial court signed an order enforcing the final decree and clarifying the property division. The trial court held that Husband breached his fiduciary duty as constructive trustee by failing to exercise the options upon her request. In addition, the trial court awarded Wife attorney's fees and cost, expert witness fees, and unconditional appellate fees due the day after a notice of appeal was filed. Husband appealed, arguing the trial court erred in (1) finding that he was required to exercise the options at Wife's demand, (2) "clarifying" the decree by adding detailed orders for Husband's performance and consequences for failure to do so, (3) finding that he had breached his fiduciary duty, and (4) awarding Wife her attorney's fees.

Holding: Vacated in Part; Modified in Part; and Affirmed in Part

Opinion: The court cannot decide moot issues. During oral argument, Husband acknowledged that he had exercised all of the stock options subject to this action and delivered the proceeds to Wife. Thus, Husband's issues concerning the trial court's clarification order and its finding that Husband breached his fiduciary duty were both moot. However, the issue concerning the trial court's award of attorney's fees was still a live issue. Therefore, the underlying issue of which party had the right to determine when to exercise the stock options was also still a live issue.

Although Husband argued that the decree did not expressly require him to exercise the options upon Wife's demand, the decree also did not expressly authorize Husband to use his own discretion. Husband acknowledged that Wife's options could be executed separate from his own. The trial court described Wife's ownership of the options as "equitable ownership," which is commonly defined as "the present right to compel legal title." Moreover, when imposing a constructive trust, the court may determine the scope and application of that trust. There was no language in the decree indicating that the trial court gave Husband, as constructive trustee, the discretion to determine when the options were to be exercised. The trial court clearly intended to give Wife the right to direct when the options would be exercised.

A trial court is permitted to award attorney's fees in an enforcement action. In its award of attorney's fees, the trial court did not state the basis for its decision, but it did state that the award was warranted in part for the delay caused by Husband's refusal to exercise the options upon Wife's request. Because Wife was required to file suit to enforce the final decree, the award of attorney's fees was within the trial court's discretion.

During trial, Husband stipulated to Wife's attorney's testimony regarding attorney's fees. Although it was unclear how broad that stipulation was, Husband did not cross-examine Wife's attorney, object to any evidence offered regarding's Wife's attorney's fees, or present any opposing evidence regarding fees. Moreover, the trial court found that Wife's attorney's fees were reasonable. In addition, Wife's attorney testified that the admitted billing statements for attorney's fees only included those fees for the enforcement action. Thus, Husband could not argue on appeal that Wife failed to segregate the recoverable fees incurred in the enforcement action from the non-recoverable fees related to Wife breach of fiduciary duty claim.

The fee of an expert witness constitutes an incidental expense in preparation for trial and is not recoverable as costs unless explicitly authorized by statute. The Texas Family Code Section governing enforcement actions only authorizes the award of attorney's fees and costs, not expenses. Thus Wife was not entitled to an award for her expert fees.

An award for appellate fees must be conditioned on the receiving party's success on appeal. Thus, Wife's unconditional award of appellate fees was improper. In addition, because an award for appellate fees must be conditioned on the outcome of the appeal, the fees should not have been due and interest should not have begun accruing until after the appellate court issued its judgment.

SAPCR
CHILD SUPPORT

CHILD SUPPORT OBLIGATION INCORRECTLY APPLIED TO FATHER'S GROSS MONTHLY INCOME INSTEAD OF HIS NET MONTHLY RESOURCES

Grotewold v. Meyer, ___ S.W.3d ___, 2015 WL 162075, 01-13-00875-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (01-13-15).

Facts: Mother and Father had one Child before they divorced. In the final decree, Father was ordered to pay child support. Subsequently, both parents filed motions to modify Father's child support obligation. After a hearing, the trial court entered an order modifying Father's child support obligation and identified one variance from the guidelines: Father's annual salary was based on a three-year average. The trial court set Father's child support obligation at 20% of his gross monthly income based on that average. Father appealed, arguing that the trial court miscalculated his child support obligation.

Holding: Reversed and Rendered in Part; Reversed and Remanded in Part

Opinion: When applying the child support guidelines to an obligor's income, certain deductions are made from the obligor's gross income, and the amount of monthly child support is based on the obligor's net monthly income. If the court deviates from the child support guidelines, the court must specific findings justifying the variance.

Here, the only variance from the guidelines acknowledged by the trial court was the method for calculating Father's gross annual income, which Father did not dispute on appeal. However, the trial court ordered Father to pay child support equal to 20% of *gross* monthly income. The trial court did not identify any justification for deviating from the child support guidelines. Thus, the COA reversed and rendered Father's child support obligation at 20% of his *net* monthly income (over a $300 monthly difference).

★★★TEXAS SUPREME COURT ★★★

TRIAL COURT LACKED AUTHORITY TO ORDER OAG TO REMOVE FAMILY VIOLENCE INDICATOR FROM FATHER'S FILE AND THE OAG'S SYSTEM.

In re OAG, ___ S.W.3d ___, 2015 WL [Not available on WL yet], 14-0038 (Tex. 2015) (01-30-15).

Facts: The OAG filed suit to establish Father's paternity and compel him to pay child support. After a hearing, the trial court adopted the associate judge's order establishing the parent-child relationship, ordering Father to pay child support, denying the OAG's request to prevent disclosure of certain identifying information of Father and the Child, and ordering the OAG to remove the family violence indicator from Father's file and the OAG system. The OAG filed a petition for writ of mandamus regarding the order to remove the family violence indicator.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Texas Family Code § 105.006(a) requires certain identifying information of the parties be included in a final order. However, under certain circumstances, a trial court may waive that requirement. Texas Family Code § 105.006(c) provides:

> (c) If a court finds after notice and hearing that requiring a party to provide the information required by this section to another party is likely to cause the child or a conservator harassment, abuse, serious harm, or injury, the court may:
>
> (1) order the information not to be disclosed to another party; or
>
> (2) render any other order the court considers necessary.

Under Part D of Title IV of the Social Security Act, states participating in the federal child support enforcement program must maintain a "family violence indicator" in the states' support enforcement systems. As Texas' designated Title IV-D agency, the OAG must collect, store, and maintain federally required information, including the family violence indicator.

A trial court may consider family violence when determining whether to disclose protected information, but the authority to assign a family violence indicator rests with the OAG. The Legislature chose to give the OAG discretion to designate the family violence indicator and has not chosen to allow the trial court to intervene, except to weigh the designation in considering a request for disclosure.

Further, the "any other order" language in Texas Family Code § 105.006(c)(2) is limited to that subsection and does not give the trial court carte blanche to do as it pleases.

SAPCR
ENFORCEMENT OF CHILD SUPPORT

LOUISIANA CHILD SUPPORT ORDER WAS REGISTERED WHEN FATHER FILED THE ORDER WITH THE COURT IN COMPLIANCE WITH TEXAS FAMILY CODE CHAPTER 159; NO MOTION WAS REQUIRED TO REQUEST REGISTRATION.

In re T.F., No. 09-14-00064-CV, 2015 WL 216396 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (01-15-15).

Facts: While Mother and Father lived in Louisiana, two separate orders were entered affecting custody and support of their Child. Mother had been ordered to pay child support and medical support for the Children. Father and the Children moved to Texas. Subsequently, Father filed a motion in Texas for enforcement and determination of support arrears. A week later, he filed an amended motion that also included a notice of filing of the Louisiana judgment. Father attached both of the Louisiana orders to the motion. Father also filed a "proof of mailing," in which he stated that he mailed copies of the judgments to Mother's last known mailing address.

Just over a month after Father filed the amended petition and five days before the hearing on Father's motion for enforcement, Mother filed her answer. Mother argued that the Louisiana order was incapable of enforcement because it was ambiguous and not clear and specific enough in its terms. Mother sought a hearing to contest the registration of the Louisiana order, and the trial court set Mother's hearing on the same date as Father's enforcement hearing. The parties subsequently agreed to reset the hearing for a later date.

Mother and her attorney appeared at the hearing, but Father and his attorney did not. At the hearing, Mother argued that Father failed to file a motion to have the foreign order registered and that the trial court lacked jurisdiction over the case. The trial court orally granted Mother's contest to the registration of the order and dismissed the case for lack of jurisdiction.

The order of dismissal stated "[t]he Court finds that there is no motion to register the order; therefore, the court has no jurisdiction over this matter." Father appealed, arguing that the orders had been properly registered with the court, that no evidence supported Mother's claim that the orders had not been registered, and that the trial court abused its discretion in dismissing the case.

Holding: Reversed and Remanded

Opinion: The Uniform Interstate Family Support Act is codified in Chapter 159 of the Texas Family Code and provides that a party may register an out-of-state support order or income-withholding order in Texas for enforcement. Tex. Fam. Code § 159.602 provides the procedure to register such an order. Nothing in the section requires the party to file a motion to have the out-of-state order registered, rather, per Tex. Fam. Code § 159.603(a), the order is "registered when the order is filed in the registering tribunal of this state." After the order is registered, the tribunal must notify the non-registering party and provide certain information, including the 20-day deadline for contesting the order. Per Tex. Fam. Code § 159.604, there are eight statutory defenses that can be raised to contest the validity or enforceability of the order.

Here, Father filed an amended pleading entitled "1st Amended Motion for Enforcement and to Determine Cumulative Child Support Arrears and *Notice of Filing of Foreign Judgment*." Father filed all the documents and information required by Tex. Fam. Code § 159.602. Although there was no evidence that the tribunal sent the required notice to Mother, she appeared, filed an answer, agreed to resetting the hearing, and appeared at the hearing. Mother claimed she was harmed because she did not receive the statutory notice; however, Mother failed to enumerate any particular complaints, other than alleging that Father failed to "actually ask for the order to be registered." The court of appeals noted that in one of her pleadings, Mother judicially admitted that the order had been registered.

TRIAL COURT ERRED IN REMOVING OAG'S LIEN ON FATHER'S ACCOUNTS WHEN FATHER'S ARREARAGES REMAINED DUE AND OWING; TRIAL COURT LACKED JURISDICTION TO ENJOIN OAG FROM PLACING FUTURE LIENS ON FATHER'S ACCOUNTS.

In re C.D.E., ___ S.W.3d ___, 2015 WL [Not on WL yet], 14-14-00086-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (01-27-15).

Facts: When Mother and Father divorced, Father was ordered to pay $400 a month in child support for their only Child. Almost ten years later, in 2011, the trial court signed an order that raised Father's child support obligation to $1000 and found Father in arrears for over $100,000. The trial court signed an agreed order requiring Father to pay the child support obligation plus $200 a month until his child support obligation ended and, thereafter, pay $1200 a month until his arrearages were paid off.

After the Child turned 19, Father filed a motion to terminate his child support obligation, which the trial court granted. Because Father's total arrearages still exceeded $100,000, the OAG issued a lien on several of Father's bank accounts. Father filed a petition for a declaratory judgment to set aside the lien. Father asked the trial court to declare that his arrearages no longer existed, or if they did exist, that the lien should be set aside because he had been making regular payments as defined in the 2011 order.

During the hearing, Father acknowledged that he owed arrears and asked that any funds removed from his accounts be credited towards his child support obligation. However, no evidence was admitted to show whether or when any funds had been removed, transferred to the OAG, or distributed to Mother. After the hearing, the trial court issued an order vacating and terminating the OAG's lien and enjoining the OAG from instituting any further child support liens unless Father fell behind on future payments. In addition, the trial court ordered the Child Support Disbursement Unit to apply any and all funds levied from Father's accounts to the child support account for the purpose of reducing interest owed by Father. The OAG appealed, arguing that the trial court erred in terminating the child support liens and that the trial court lacked jurisdiction to enjoin the OAG.

Holding: Reversed and Remanded

Opinion: The Texas Family Code authorizes the OAG to enforce child support orders and to collect and distribute support payments. The OAG is expressly authorized to file a statutorily prescribed lien to collect all amounts of child support due and owing. Texas Family Code § 157.322(c) provides certain actions a court may take in a proceeding to determine arrearages. The statute does not authorize the trial court to terminate or vacate a lien when arrearages are due and owing.

Here, the 2011 agreed order informed Father that the order did not preclude or limit the use of any other means to enforce the judgment, that the judgment was not an installment debt, that the entire judgment was "now due and owing," and

that the OAG was permitted to take whatever enforcement remedies deemed necessary even if Father made regular periodic payments. Thus, the trial court's order terminating the lien was contrary to the Texas Family Code and the OAG's authority.

Texas Government Code § 22.002(c) provides that only the Supreme Court of Texas may issue a writ of mandamus or injunction to a constitutionally designated executive officer, such as the Attorney General to compel performance of a discretionary act that the officer is authorized to perform. Because the OAG was entitled to enforce the child support obligation by issuing a lien until the child support arrearages were either paid or released, the trial court lacked jurisdiction to issue the injunctions.

The COA noted that Texas courts may issue a mandatory order to the OAG when the OAG is a party to litigation. For example, a court may set aside a default judgment if the obligor is not properly served with process. In addition, the court has limited discretion to determine the amount of arrearages, provided that sufficient evidence is before the court. Here, however, the trial court had little or no evidence before it to determine what, if any, funds had been levied from Father's account or whether any funds had been applied towards Father's arrearages.

MISCELLANEOUS

TRIAL COURT MAY UNCONDITIONALLY AWARD APPELLATE ATTORNEY'S FEES IF THE AWARD PROTECTS THE BEST INTEREST OF THE CHILD.

In re Jafarzadeh, No. 05-14-01576-CV, 2015 WL 72693 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (01-02-15).

Facts: After entering a final order in the parties' SAPCR, the trial court entered temporary orders pending appeal. Father was unconditionally ordered to pay Mother's appellate attorney's fees if Father appealed. Father filed a petition for writ of mandamus, arguing that the trial court erred in failing to condition the award upon Father's unsuccessful appeal.

Holding: Denied

Opinion: Ordinarily, in civil cases, an award for attorney's fees must be conditional upon an unsuccessful appeal. The premise for this condition is based on a punitive rationale that attorney's fees are part of the damages incurred by the prevailing party.

While acknowledging that at least three other COAs have reached a contrary conclusion, this COA held that in a SAPCR, deferring the fee award until resolution of an appeal is impractical because it fails to provide the resources necessary to the appellee to defend the appeal. Unlike other civil cases, an award of attorney's fees in a SAPCR is not based on a punitive or damages rationale, but rather on the rationale that the award is in the best interest of the child. Because both parents are responsible for providing for the child's needs, attorney's fees in a SAPCR may be imposed on either parent. Conditioning the award on an unsuccessful appeal may defeat the ability of the parent who prevailed in the trial court from defending an order that was in the best interest of the child.

Here, the record did not establish that the trial court's order was not in the best interest of the children. Additionally, the amount ordered did not "set a price" on an appeal to discourage Father's resort to appeal.

FATHER ENTITLED TO A STAY OF ASSOCIATE JUDGE'S TEMPORARY ORDER CHANGING THE DESIGNATION OF THE PERSON WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S PRIMARY RESIDENCE UNTIL AFTER A DE NOVO REVIEW.

In re E.M., No. 02-14-00403-CV, 2015 WL 128739 (Tex. App.—Fort Worth 2015, orig. proceeding) (mem. op.) (01-09-15).

Facts: Father had the exclusive right to designate the primary residence of the Child. Mother filed a suit to modify the parent-child relationship and sought to have the case transferred from the county in which the Child lived to Hidalgo County. The Associate Judge signed an order in connection with Mother's request to transfer that also had the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the Child from Father to Mother. Father filed a timely request for a de novo hearing, but the hearing was set for a date after the Associate Judge's order was to take effect. Father filed a petition for writ of mandamus to direct the Associate Judge to withdraw or stay the temporary order.

Holding: Writ of Mandamus Conditionally Granted

Opinion: In a modification suit, a court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence unless it is in the best interest of the child and cer-

tain circumstances are proved. Here, however, the Associate Judge's order did not contain the statutory findings required to support such an order.

Moreover, although Father timely filed a request for a de novo hearing, the Associate Judge's order took effect before the date the hearing was scheduled. Thus, Father had no adequate remedy at law and was entitled to a stay of the Associate Judge's temporary order until the conclusion of the de novo hearing.

FATHER WAIVED ERROR BY FAILING TO OBJECT TO FORM OF TRIAL COURT'S SANCTIONS ORDER

Grotewold v. Meyer, ___ S.W.3d ___, 2015 WL 162075, 01-13-00875-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (01-13-15).

Facts: Mother and Father had one Child before they divorced. In the final decree, Father was ordered to pay child support. Subsequently, both parents filed motions to modify Father's child support obligation. During the proceedings, Father filed a motion asking the trial court for sanctions against Mother for (1) failing to fully disclose her medical history and (2) failing to provide her tax returns. In the same motion, Father requested a continuance for more time to obtain Mother's medical history. The trial court granted Father's motion for sanctions but did not identify the ground(s) on which the sanction was based. The trial court denied Father's motion for continuance.

Father appealed, arguing that because the trial court granted his motion for sanctions, it erred in denying his motion for a continuance.

Holding: Reversed and Rendered in Part; Reversed and Remanded in Part

Opinion: A sanctions order must state the particulars of good cause supporting the sanctions. However, a failure to object to the form of a sanctions order waives any error. Here, Father's motion identified two grounds for sanctions but only identified one ground for a continuance. The trial court's order sanctioned Mother, but the order did not state the particulars of good cause supporting the sanctions. However, Father failed to object to the form of the order. Thus, there was no basis for Father's claim that the trial court sanctioned Mother for failing to fully disclose her medical history.

PERMANENT INJUNCTION DISSOLVED BECAUSE MOTHER FAILED TO PLEAD FOR SUCH RELIEF.

Finley v. Finley, No. 02-11-00045-CV, 2015 WL 294012 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (01-22-15).

Facts: Mother and Father had one Child during their marriage. After the parties separated, Husband broke into Mother's home by throwing a brick through a glass door. Husband tried to take the Child from Mother and punched Mother in the face. Soon after that incident, Mother filed a petition for divorce and an application for a protective order.

During the divorce proceedings, Father's attorney withdrew, so Father filed a motion to continue the final hearing. Although the trial court did not rule on Father's motion, he did not appear at the final hearing. Mother provided testimony, and the trial court granted the divorce and awarded Mother a protective order and a permanent injunction.

Father appealed, arguing, among other complaints, that the trial court abused its discretion by including a permanent injunction in the final decree when Mother did not plead for such relief.

Holding: Affirmed as Modified

Opinion: A permanent injunction cannot stand in the absence of (1) pleadings requesting such relief, (2) the granting of a trial amendment to add a request for a permanent injunction, or (3) trial of the issue by consent. Here, because none of these requirements were met, the trial court abused its discretion by including a permanent injunction in the final decree. Thus, the court of appeals dissolved the permanent injunction, modified the final decree to omit any reference to the permanent injunction and affirmed the remainder of the decree as modified.

D.B.A. Family Law Section Case Law Update

March 11, 2015

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DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TEX. FAM. CODE § 6.602 DOES NOT REQUIRE A TRIAL COURT TO ENTER A JUDGMENT ON AN OTHERWISE COMPLIANT MSA THAT WAS PROCURED BY FRAUD, DURESS, COERCION, OR OTHER DISHONEST MEANS; WIFE FAILED TO PROVE MSA WAS PROCURED BY FRAUD.

In re Hanson, No. 12-14-00015-CV, 2015 WL 898731 (Tex. App.—Tyler 2015, orig. proceeding) (mem. op.) (02-27-15).

Facts: Husband and Wife attended mediation during their divorce proceedings and entered into an MSA that satisfied the requirements of Tex. Fam. Code § 6.602. In their agreement, Husband was obligated to pay the first $5000 of the parties' taxes, and the parties were to be jointly responsible for any tax liability in excess of $5000. However, after the MSA was signed, property not disclosed during mediation was discovered, and the parties' tax liability was calculated to be greater than $100,000. Wife filed a motion to set aside the MSA for alleged willful non-disclosure, misrepresentation, and fraud. The trial court granted Wife's motion and set aside the MSA. Husband filed a petition for writ of mandamus. Husband argued that *In re Lee* required that any MSA satisfying the requirements of Tex. Fam. Code § 6.602 is binding, irrevocable, and enforceable immediately by judgment not withstanding Rule 11 of another rule of law, including common law fraud.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Tex. Fam. Code § 6.602 provides that a party is entitled to judgment on a compliant MSA notwithstanding Rule 11 or another rule of law. Some courts have held that this language precludes setting aside an MSA based on common law fraud, duress, coercion, or other dishonest means. This court of appeals noted that in *In re Lee*, the sole issue before the court was "whether a trial court presented with a request for entry of judgment on a validly executed MSA may deny a motion to enter judgment based on a best interest [of the child] inquiry." Further, in *In re Lee*, the Texas Supreme Court explicitly did not address the question of whether the Texas Family Code mandates entry of a complaint MSA under any and all circumstances, even where the agreement was procured by fraud, duress, coercion, or other dishonest means. Moreover, the concurrence in *In re Lee* commented, "[t]hough we have yet to decide the issue, our courts of appeals have observed that MSA's are contracts and courts may not enforce them if they are illegal."

Nevertheless, although this court of appeals held that an MSA could potentially be set aside on the basis of fraud, here, Wife failed to establish fraud. Wife showed that Husband made some material misrepresentations to the other about assets of the community estate. However, Wife failed to produce any evidence that she relied on those statements when entering into the MSA. In addition to evidence that Wife also failed to disclose material assets to Husband prior to the mediation, there was evidence that Wife had the ability to discover, through accounts and statement to which she had access, much of the information not disclosed by Husband.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

HUSBAND'S SPOUSAL MAINTENANCE OBLIGATION WAS NOT CHAPTER 8 COURT-ORDERED MAINTENANCE BECAUSE THE OBLIGATION DID NOT MEET ALL THE STATUTORY REQUIREMENTS OF CHAPTER 8, THUS THE OBLIGATION DID NOT TERMINATE UPON WIFE'S COHABITATION.

Lee v. Lee, No. 02-14-00064-CV, 2015 WL 601054 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (02-12-15).

Facts: In their divorce proceedings, Wife signed a waiver of service and did not appear at the final hearing. The trial court signed an Agreed Final Decree that was signed by both Husband and Wife, who each indicated that they agreed to the terms of the decree. No record was made by agreement of the parties. The agreed decree included a provision for spousal maintenance, which provided that "THE COURT ORDERS…" Husband to pay to Wife $2000 per month for 60 months and that "[t]he obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance."

Less than 15 months later, Husband filed a motion to terminate his maintenance obligation under Chapter 8 of the Texas Family Code because Wife was cohabitating with a man with whom she had a dating or romantic relationship. Wife filed a motion for summary judgment, arguing that the maintenance was not Chapter 8 court-ordered maintenance, but rather a contractual agreement to spousal maintenance. Thus, Wife argued, because the decree did not provide for termination on the basis of Wife's cohabitation with another man, she was entitled to summary judgment. The trial court agreed, and Husband appealed.

Holding: Affirmed

Opinion: Chapter 8 of the Texas Family Code provides certain prerequisites for and limitation on an award for spousal maintenance. Here, although the agreed maintenance had some common elements with Chapter 8 maintenance, there was no indication in the record that the trial court considered all of the statutory factors in determining maintenance. The record did not establish that Wife overcame the presumption against maintenance. The trial court did not indicate that the time limit placed on the maintenance was based on the statutory requirement to limit the duration to the shortest reasonable period. Finally, the fact that the award was part of the decree and not in an agreement incident to divorce was not relevant to the court of appeal's treatment of the decree as a binding contract.

The agreed decree provided only two ways to terminate the agreed spousal maintenance obligation: death and remarriage. There was no provision concerning Wife's cohabitation with another man.

SAPCR
ENFORCEMENT OF CHILD SUPPORT

TRIAL COURT PROPERLY CONSIDERED MOTHER'S 42-YEAR DELAY IN FILING WHEN IT DETERMINED FATHER'S TESTIMONY WAS MORE RELIABLE; AWARD OF INTEREST ON PRE-SEPTEMBER 1991 CHILD SUPPORT ARREARAGES WAS MANDATORY

Babbitt v. Below, No. 04-13-00759-CV, 2015 WL 505097 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (02-04-15).

Facts: Mother and Father divorced in 1971, and Father was ordered to pay child support directly to Mother. Over 40 years later, in 2013, Mother filed an application for judicial writ of withholding, alleging Father owed nearly $100,000 in child support arrearages, including interest. Father filed a timely motion to stay, contesting the amount of arrearages, and asserting equitable estoppel as an affirmative defense to the payment of interest. At the

subsequent hearing, Mother testified that Father had only paid $1000 of his child support obligation. Father, on the other hand, testified that he had paid all but $2,820 and that his last payment was made in November 1984 because Mother moved, changed her name, and did not provide Father with her new address.

The trial court noted that the case was a classic case of "he said, she said." The trial court determined that, based on the fact that Mother waited 42 years to make a child support claim, a reasonable person would infer that child support payments were being made during that time. Thus, the trial court found that Father's arrearages were $2,820 and concluded that interest began accruing in September 1991. Mother appealed, arguing the trial court improperly considered her 42-year delay in assessing arrearages and in not awarding her interest for the period between Father's last payment in November 1984 and September 1991.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: While the Texas Family Code's time-limitation provision regarding child support does not apply to an application for a writ of withholding, a trial court may consider a forty-year delay in filing when making a creditability determination. As fact-finder, when determining the credibility of the Parents' conflicting testimony, the trial court was free to consider the fact that Mother had waited over forty years to file her application.

In September 1991, the Texas Legislature mandated the award of interest on unpaid child support. Prior to September 1991, prejudgment interest accrued on unpaid child support. In addition, interest on unpaid child support cannot be reduced on the basis of equitable estoppel. Thus, because no legal basis was presented for reducing the interest on Father's unpaid child support, the trial court erred in awarding no interest on the unpaid child support prior to September 1991.

PROVISION OF AGREED DIVORCE DECREE OBLIGATING FATHER TO PAY CHILD SUPPORT AFTER THE CHILD GRADUATED FROM HIGH SCHOOL WAS NOT ENFORCEABLE BY CONTEMPT.

In re D.B.J., ___ S.W.3d ___, 2015 WL 781502, 14-14-00285-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (02-24-15).

Facts: In Mother's and Father's agreed divorce decree, Father was ordered to pay monthly child support that would continue for 4 years after their Child graduated from high school. About a year and half after the Child graduated from high school, Mother filed a motion for enforcement, alleging Father had stopped paying child support, and she sought enforcement by contempt. The trial court denied her motion stating that the provision was not enforceable by contempt because it accrued after the Child had turned 18 and graduated from high school. Mother appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 154.124 provides that "parties may enter into a written agreement containing provision for support of the child" and "[t]erms of the agreement pertaining to child support in the order may be enforced by all remedies available for enforcement of a judgment, including contempt." However, the Texas Constitution provides "[n]o person shall ever be imprisoned for a debt." The Texas Supreme Court has held that obligations *which the law imposes* on spouses to support one another or their children is not considered a "debt" but a legal duty. When spouses contract to support one another or their children, and that obligation *exceeds* one's legal duty, the obligation is a debt. Further, the Texas Supreme Court has addressed the analogous issue of an agreement to pay spousal maintenance and held that the obligation is only enforceable by contempt if the agreement meets the Texas Family Code's other requirements for spousal maintenance.

Tex. Fam. Code §§ 154.001 and 154.002 prohibit courts from ordering support for nondisabled children who are at least 18 years old and have graduated from high school. Thus, because the Parent's agreement did not meet the Texas Family Code's other requirements for child support, it was not enforceable by contempt.

D.B.A. Family Law Section Case Law Update

April 11, 2015

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DIVORCE
SPECIAL APPOINTMENTS

AMICUS ATTORNEY NOT ENTITLED TO ATTORNEY'S FEES AS SANCTIONS BECAUSE SHE PRESENTED NO EVIDENCE OF SANCTIONABLE CONDUCT; FATHER'S LACK OF AUTHORITY TO BRING A SUIT ON BEHALF OF HIS CHILD DID NOT PRECLUDE HIM FROM BRINGING THE SAME CLAIMS INDIVIDUALLY.

Tanner v. Black, ___ S.W.3d ___, 2015 WL 1122945, 01-13-01059-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (03-12-15).

Facts: Mother and Father had one Child. During their divorce proceedings, the trial court appointed the Amicus Attorney. After the divorce decree was rendered, Father sued the Amicus Attorney individually and on behalf of the Child as her next friend. The Amicus Attorney filed a general denial, pleaded the affirmative defense of immunity, counterclaimed for sanctions, and filed special exceptions. However, the Amicus Attorney did not request a hearing on her special exceptions, immunity defense, or sanctions motion. The Amicus Attorney also filed a Motion to Show Authority, in which she argued that Father lacked authority to act as next friend of the Child because the divorce decree required the joinder of Mother in legal proceedings brought on the Child's behalf. Father later conceded that he lacked authority to proceed on behalf of the Child. At the show authority hearing, the Amicus Attorney argued that Father's individual claims should also be dismissed because his claims were "derivative" of the claims brought on behalf of the Child. The Amicus Attorney then requested attorney's fees as sanctions. The trial court heard evidence of the amount and reasonableness of the Amicus Attorney's attorney's fees and struck all of Father's pleadings. Father appealed arguing that the trial court erred in striking all of his pleadings and in awarding attorney's fees as sanctions without a finding that his suit was groundless and brought in bad faith or for the purpose of harassment.

Holding: Reversed and Remanded

Opinion: Tex. R. Civ. P. 12 provides that if a party to a lawsuit believes that the suit is being prosecuted or defended without authority, the party may file a sworn motion questioning the attorney's authority to act. The primary purpose of this rule is to protect defendants by enabling them to determine who authorized the suit. A ruling on such a motion is merely a pretrial determination of an attorney's authority to represent a party. If the challenged attorney fails to show authority to act, the court shall strike the pleadings if no person who is authorized to prosecute or defend appears.

Here, Father conceded that he lacked authority to represent the Child without joinder of Mother. However, the Amicus Attorney had no pleading on file challenging Father's authority to bring the suit on his own behalf. Further, while the Amicus Attorney asserted in her answer the affirmative defense of immunity, she did not have a hearing set to hear that defense, and at the hearing she did not argue immunity. Moreover, Father's pleadings asserted that the Amicus Attorney acted in bad faith, which is an exception to immunity. Accordingly, there was no basis for striking Father's individual pleadings.

Rule 13 and Chapter 10 sanctions both require the order to state a reason for the sanctions. Here, although the order failed to state the particulars of good cause or the basis for the imposed sanctions, Father failed to object to the form of the sanctions order and waived his complaint on appeal. However, other than testimony regarding the amount and reasonableness of Amicus Attorney's attorney's fees, there was no evidence regarding sanctions or sanctionable conduct presented during the show authority hearing.

SAPCR
ENFORCEMENT OF CHILD SUPPORT

MOTHER'S PLEA TO JURISDICTION FAILED TO NEGATE THE TRIAL COURT'S JURISDICTION OVER FATHER'S REQUEST FOR REIMBURSEMENT TO OFFSET ARREARAGES.

In re C.D.B., ___ S.W.3d ___, 2015 WL 1405921, 14-13-00718-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (03-24-15).

Facts: In a prior agreed order, Father was required to pay child support semi-monthly until the Child turned 18 or graduated from high school, which ever occurred later. When the Child was a junior in high school, he began living with Father. The Child turned 18 shortly after graduating from high school. About six months later, Father filed a SAPCR, in which he requested: (1) reimbursement for support paid during the period that Mother allegedly relinquished custody of the Child to Father; (2) reimbursement of payments as a counterclaim to Mother's claim for arrearages or an offset of support provided by Father; and

(3) retroactive Child support from Mother. Mother moved to dismiss Father's petition on the grounds that the Child had become emancipated and that the trial court lacked jurisdiction to modify the prior order. The trial court agreed and dismissed the SAPCR. Father appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: In construing the substance of Father's petition, the court of appeals determined that Father requested three different forms of relief: (1) a request for direct reimbursement for the period during which Mother had relinquished custody to Father; (2) a request for reimbursement or offset relative to arrearages; and (3) a request for retroactive support for the period during which the Child was in his care.

Father's ongoing child support obligation ended when the Child turned 18 shortly after graduating from high school. Thus, the order was no longer subject to modification. Because the Child had become emancipated, the trial court lacked jurisdiction to grant father relief for his first request.

However, under Tex. Fam. Code § 157.005, the court retains jurisdiction to confirm arrearages and render a cumulative money judgment for past due child-support if a motion for enforcement is filed before the 10th anniversary of the child's emancipation or the termination of the child support order. Additionally, pursuant to Tex. Fam. Code § 157.008, an obligor may plead as an affirmative defense that the obligee voluntarily relinquished actual possession and control of the subject child.

Unless the pleadings "affirmatively negate the existence of jurisdiction," a plea to the jurisdiction should not be granted without allowing the plaintiff an opportunity to amend his pleadings. Mother only argued that the trial court lacked jurisdiction to modify the prior order because the Child had turned 18 and had graduated from high school. Mother failed to differentiate between the several forms of relief requested by Father. Mother did not dispute Father's allegation that there was a claim for arrearages, thus the court of appeals accepted Father's allegation as true. The court of appeals interpreted Father's reference to a "claim" for arrearages as sufficient to mean there was a motion to enforce. Thus, Father's request for reimbursement or offset against arrearages was construed as an affirmative defense or counterclaim, over which the trial court retained jurisdiction.

Dissenting Opinion: (C.J. Frost) In reviewing whether a court has jurisdiction, the court is not limited by the grounds asserted in a plea to the jurisdiction. Tex. Fam. Code § 157.008(d) only permits an obligor to request reimbursement as a counterclaim or offset *against the claim of the obligee*. Father's petition referenced the prior child support order but made no reference to any petition filed by Mother. Father was the petitioner in the underlying lawsuit, while Mother was the Respondent. Because the record reflected that Mother had not filed a motion for enforcement, Father's pleading could not be construed as an affirmative defense. Further, even if Father was entitled to seek confirmation of his arrearages, his assertion of such a claim would not give the trial court jurisdiction to decrease the amount of Father's child-support obligation after the Child had turned 18 and graduated from high school.

SAPCR
MODIFICATION

STEP-GRANDPARENTS HAD SUFFICIENT INTEREST TO INTERVENE IN SAPCR BECAUSE MODIFICATION COULD AFFECT THEIR RIGHTS TO TELEPHONE VISITATION GRANTED TO THEM IN PRIOR AGREED ORDER

In re Shifflet, ___ S.W.3d ___, 2015 WL 967556, 01-14-00929-CV (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (03-03-15).

Facts: Five years after their divorce, the parents signed an agreed order in a SAPCR naming them joint managing conservators with Father having the exclusive right to designate the Children's primary residence. Also in that order, Step-Grandparents were given telephone visitation with the Children at least three days a week and were permitted to enforce the order in their own names.

About five years later, Father filed a petition for a writ of habeas corpus with respect to the Children, alleging that Mother had been illegally keeping them away from him. Mother filed an answer and asserted that she had been in possession of the Children to protect their safety because Father had been convicted of domestic violence against his girlfriend. Father did not appear at the subsequent hearing. Step-Grandparents had not been noticed and also did not appear. The trial court signed an order denying Father's habeas petition and issued findings that the Children had been in Mother's possession for over six months before the filing of the habeas petition. The trial court entered temporary orders appointing Mother sole managing conservator and denying Father access or possession until further order of the court.

That same day, Mother filed a SAPCR seeking permanent sole managing and possessory conservatorship of the Children. Subsequently, Step-Grandparents filed a petition in intervention seeking sole managing conservatorship of the younger Child. Step-Grandparents alleged that they had sole managing conservatorship of the Child for at least six months, that Father had voluntarily relinquished care to them, that the Child had lived with them with the permission of both parents, and that Mother also lived with them and the Children for a period of time.

Mother filed a motion to dismiss and argued that the prior factual findings negated Step-Grandparents' claim of actual care, custody, and control of the Child. Mother argued that the factual findings made Step-Grandparents supporting affidavit insufficient as a matter of law. At a hearing on Step-Grandparents' standing to intervene, Mother asked the trial court to take judicial notice of the factual findings, which it did. No other evidence was presented. The trial court orally granted Mother's motion to dismiss.

Step-Grandparents filed a petition for writ of mandamus arguing that they should have been allowed to rebut Mother's motion to dismiss and that they had had sufficient standing to intervene under Tex. Fam. Code § 102.003(a)(9) or, in the alternative, under Tex. Fam. Code § 156.002(a).

Holding: Writ of Mandamus Conditionally Granted

Opinion: A trial court may take judicial notice of its own records in a cause involving the same subject matter *between the same, or practically the same, parties.* Further, a trial court may take notice *that* a pleading has been filed in a case or *that* it has signed an order, but it may not take notice of the *truth* of allegations in its records.

Here, when Mother answered and filed an affidavit controverting Father's habeas corpus petition, Step-Grandparents were not parties. Therefore, the orders from the habeas proceeding were not the proper subject of judicial notice. Moreover, if the trial court relied on the factual findings in the prior orders, that was also an abuse of discretion.

A person who satisfies the standing requirements to file an original suit may also intervene. Tex. Fam. Code § 102.003(a)(9) grants standing to file an original suit to a person other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition. This section does not require the care, custody, and control to be exclusive. A petitioner filing a petition under this section need only allege that she meets the requirements of this section. If a party challenges the standing of the petitioner, the petitioner must submit evidence raising a fact issue on the challenged elements to avoid dismissal. If there is a question of fact, the trial court may not dismiss for lack of standing.

Step-Grandparents' alleged they had actual care, control, and possession of the Children for at least six months ending not more than 90 days preceding the date of the filing of the petition. Because Tex. Fam. Code § 102.003(a)(9) does not require the care, control, and possession be exclusive, the fact that Mother also lived with Step-Grandparents was insufficient to establish as a matter of law that they lacked standing.

Further, Tex. Fam. Code § 156.002(a) provides that a party affected by an order may file a suit for modification. Because the prior agreed order had granted Step-Grandparents telephone visitation with the Children at least three days a week and permitted them to enforce the order in their own names, Grandparents had sufficient interest to intervene under Tex. Fam. Code § 156.002(a).

Finally, Mother's argument that the parental presumption should have been applied was without merit because Chapter 153's parental presumption does not apply in a Chapter 156 modification.

MISCELLANEOUS

MOTHER FAILED TO PRESERVE HER COMPLAINT THAT RULE 11 AGREEMENT WAS BASED ON MUTUAL MISTAKE BY FAILING TO RAISE ISSUE WITH TRIAL COURT; MOTHER'S APPELLATE COMPLAINT THAT DECREE DID NOT COMPLY WITH RULE 11 AGREEMENT WOULD HAVE BEEN PROPERLY RAISED IN A MOTION TO MODIFY OR CORRECT JUDGMENT.

In re A.B., ___ S.W.3d ___, 2015 WL 967727 (Tex. App.—Dallas 2015, no pet. h.) (03-03-15).

Facts: While Mother was incarcerated, her two Children were under her friend's care. TDFPS received a referral alleging neglectful supervision and filed a petition to terminate Mother's and Father's parental rights. The trial court appointed attorneys to represent Mother and Father in addition to appointing a guardian ad litem attorney to represent the Children. The day before trial, the guardian ad litem, the attorneys for Mother and Father, and TDFPS signed a Rule 11 agreement in which the parents agreed to have their rights terminated pursuant to Tex. Fam. Code § 161.001(1)(O) (failure to comply with a court order). The agreement provided that TDFPS would send cards, pictures, and letters sent to the parents twice a year until the Children were adopted. TDFPS further agreed to try to find adoptive parents who would agree to continue sending cards, pictures, and letters. At trial, Mother's counsel requested a continuance because Mother had a criminal hearing the next day and

might be placed on probation through a mental health program. Mother believed that with the aid of the mental health program, she would be in a better position to complete the court-ordered services and provide a stable environment for her Children. The trial court denied the motion. The only evidence presented at trial was the testimony of a TDFPS caseworker, who testified that the parties had entered into a Rule 11 agreement. The trial court terminated Mother's parental rights based on the agreement. Mother appealed, arguing the Rule 11 agreement was void because it was based on a mutual mistake, in that there was no order with which she had failed to comply.

Holding: Affirmed as Modified

Opinion: The appellate record did not contain specific orders "establishing the actions necessary for the [Mother] to obtain the return of the child[ren]…." However, Mother did not argue on appeal that the evidence was insufficient to support a finding that she committed the ground described in Tex. Fam. Code § 161.001(1)(O). Rather, she argued the Rule 11 agreement was void because of mutual mistake. However, Mother did not raise her mutual mistake argument at trial, in a motion for new trial, or in another post-judgment motion. Thus, she waived the issue for appeal.

Mother also pointed to errors in the decree that were inconsistent with the Rule 11 agreement, including the attorneys' names, the gender of one of the Children, and terms of the Rule 11 agreement. The court of appeals modified the decree to reflect the correct attorneys' names and Child's gender. However, the court of appeals lacked information necessary to make substantive changes to the judgment concerning the Rule 11 agreement. Such errors would be properly brought to the trial court's attention through a motion to modify or correct the judgment.

THE DISMISSAL FOR WANT OF PROSECUTION OF FATHER'S FIRST BILL OF REVIEW DID NOT SERVE AS A BASIS FOR RES JUDICATA BARRING A SECOND BILL OF REVIEW.

Barnes v. Deadrick, ___ S.W.3d ___, 2015 WL 1247004, 01-14-00271-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (03-17-15).

Facts: When the Child was about ten-years old, his mother died, and his older Sister filed a SAPCR, seeking conservatorship of the Child. Father was served by substituted service but did not appear. The trial court granted Sister a default judgment, appointed Sister as sole managing conservator and Father as possessory conservator. Father was given supervised visitation and ordered to pay monthly child support. About a year and a half later, Father filed a bill of review, alleging that he had never been served. In the bill of review proceeding, a docket entry noted that neither Father nor his counsel appeared at a scheduled hearing. The docket sheet further stated "Bill of Review denied." Despite this notation indicating a denial, the trial court subsequently signed an "Order for Dismissal for Want of Prosecution."

About two years later, Father filed a second bill of review that asserted that Father "was served via substitute service at an incorrect address and thus never received notice of the pending action." Sister filed an answer and asserted the affirmative defense of res judicata in addition to filing special exceptions. She alleged that Father's second bill of review was barred by res judicata because there was a prior final judgment in the first bill of review and that the second bill of review was based on the same claims as the first bill of review or on claims that could have been raised in the first action. At the hearing, the trial court overruled Sister's special exceptions and, without prompting by the parties, stated that the affirmative defense of res judicata "may have some merit." After dialogue with counsel, the trial court agreed that the second bill of review was barred by res judicata and signed an order denying the second bill of review. Father filed a motion for new trial. Sister asserted that Father's motion for new trial was improper and sought sanctions. The trial court agreed and awarded Sister attorney's fees as sanctions. Father appealed the order denying his second bill of review and the award of sanctions.

Holding: Reversed and Remanded

Majority Opinion: If a bill-of-review plaintiff can establish that he was not properly served, he is not required to show either that he had a meritorious defense or that fraud, accident, wrongful act, or official mistake prevented the plaintiff from presenting such a defense. The only issue to determine is whether he was served. A bill of review must be filed within four years after the entry of the order that it is challenging.

Unless otherwise stated in the order, a dismissal for want of prosecution is presumed to be without prejudice. A dismissal without prejudice places the parties in a position as if the suit had never been brought and does not serve as a final judgment on the merits for purposes of res judicata.

Here, Father's inattentiveness in the SAPCR or the first bill of review was not at issue. Father was not obligated to show anything except that he was not properly served in the underlying SAPCR. Moreover, Father's conduct during the first bill of review proceeding was irrelevant to whether he was properly served in the underlying SAPCR. Father's second bill of review

was properly filed within the four-year limitation of the challenged judgment. The court of appeals remanded the case to provide Father with the opportunity to establish whether he had received service of the underlying SAPCR.

Dissenting Opinion: (J. Keyes) A party who fails to timely avail himself of available legal remedies is not entitled to relief by bill of review. If a motion to reinstate, motion for new trial, or direct appeal is available, a failure to pursue one of those available forms of relief is likely negligence that would preclude subsequent relief through a bill of review.

Following a dismissal for want of prosecution, Tex. R. Civ. P. 165a provides the exclusive mechanism for reinstating a case by requiring a party to set forth grounds for reinstatement within thirty days. Here, Father failed to appear at his first bill of review hearing, which justified the trial court's dismissal of the first bill of review for want of prosecution under Rule 165a. After the dismissal, Father filed no motion to reinstate his first bill of review, nor did he appeal the trial court's dismissal. Thus, the order dismissing his first bill of review became a final, unappealable judgment.

The majority's holding permitted Father to bring the exact same bill of review on exactly the same grounds despite Rule 165a providing the exclusive mechanism for reinstating a case. Moreover, the record clearly established Father's conscious indifference throughout all of the proceedings. Father's first bill of review was not filed until a year and a half after the final order, and he did not attach any evidence to his petition to disprove the recital in the order that he had been "duly and properly cited" with service. Father failed to appear at his own bill of review hearing. Father did not timely file a motion to reinstate his bill of review, nor did he appeal the trial court's order dismissing the first bill of review. When Father filed his second bill of review, he again failed to attach any evidence to show that he had not been served with notice of the underlying SAPCR.

D.B.A. Family Law Section Case Law Update

May 13, 2015

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DIVORCE
GROUNDS

HUSBAND FAILED TO ESTABLISH INSUPPORTABILITY AS A GROUND FOR DIVORCE.

Alvarez v. Alvarez, No. 04-13-00787-CV, 2015 WL 876863 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (04-29-15).

Facts: Husband filed for divorce on the sole ground of insupportability. Wife filed a general denial. The final trial date was reset by agreement of the parties; however, Wife failed to appear at the reset final hearing. Husband testified that he and Wife were presently married, that they were no longer living together, and that they were seeking a divorce. The divorce was granted on the ground of insupportability. Wife appealed arguing that the judgment of divorce was unsupported by the evidence.

Holding: Reversed and Remanded

Opinion: A party who pleads insupportability as a ground for divorce must establish the statutory elements: (1) that the marriage has become insupportable because of discord or conflict; (2) that discord or conflict destroys the legitimate ends of the marriage; and (3) that there is no reasonable expectation of reconciliation. It is sufficient for a spouse to provide one word yes-or-no answers to his or her attorney's questions as to whether the elements are present. Here, however, Husband merely testified that he and Wife were married but not living together. Because spouses may have reasons for living apart other than discord or conflict, Husband's testimony alone was insufficient to establish the ground of insupportability.

DIVORCE
STANDING AND PROCEDURE

WIFE'S DIVORCE PLEADING DISMISSED BECAUSE HUSBAND HAD ALREADY OBTAINED A VALID DIVORCE UNDER PAKISTANI LAW.

Ashfaq v. Ashfaq, ___ S.W.3d ___, 2015 WL 1925832, 01-14-00329-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (04-28-15).

Facts: Husband and Wife married in Pakistan and lived there for a few months before Husband returned home to Fort Worth. Wife remained in Pakistan for almost two years before she was granted a U.S. visa and was able to join Husband in the U.S. Less than one unhappy year later, the couple returned to Pakistan for a wedding, and Husband had Wife's parents take her to their home. Husband announced to Wife his intention to divorce her and returned to Fort Worth. After the Pakistani divorce was final, Wife moved to Houston. Husband subsequently returned to Pakistan to marry another woman who returned to Fort Worth with Husband. About a month after Husband's second marriage, Wife filed for divorce in Houston.

At trial, Husband introduced evidence of Pakistani divorce laws through an expert witness licensed to practice in Pakistan. After hearing the evidence, the trial court determined the Pakistani divorce was valid, dismissed the divorce for want of jurisdiction, and treated the remainder of Wife's pleading as a post-divorce petition for division of assets, upon which it entered a judgment.

Wife appealed, arguing that Texas had sole jurisdiction over the parties' divorce because the parties lived in Texas, that the Pakistani divorce should not have been recognized, and that Husband failed to comply with Pakistani law in procuring the divorce. Wife further argued that Pakistani divorce law denied her due process, was fundamentally unfair, and violated public policy. Wife did not contest the trial court's division of assets.

Holding: Affirmed

Opinion: Foreign law is a fact issue. If the parties' divorce was valid under Pakistani law, then whether Texas would have had jurisdiction to hear the divorce was not a relevant question.

Husband's expert witness testified that under Pakistani divorce law, a resident may obtain a Pakistani divorce. A resident is anyone who retains Pakistani citizenship regardless of where the resident currently lives. It was undisputed that Wife was a Pakistani citizen and Husband had dual U.S. and Pakistani citizenship. To obtain a divorce, the husband must pronounce "talaq" ("I divorce you") three times and then provide notice to his wife and the Chairman of the Union Council. This provides the wife an opportunity to seek reconciliation through an Arbitration Council. If, after 90 days, the parties have not

reconciled, they are divorced. Additionally, if the husband offers and the wife accepts return of her dowry, the wife has indicated her acceptance of the divorce and cannot later deny its validity. The expert testified that Husband followed the requirements laid out by Pakistani law to obtain a divorce. Wife admitted to receiving a copy of the divorce papers before the divorce was finalized. Wife's family accepted the return of her dowry before the divorce was finalized.

The court of appeals noted that the U.S. federal government recognizes the above described procedure for divorce as valid proof of marital status for immigration purposes. Moreover, the federal government presumably must have found this Pakistani divorce valid because it issued Husband's new wife a visa.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

CONTEMPT ORDER VOID FOR UNCONSTITUTIONALLY IMPRISONING WIFE FOR HER FAILURE TO PAY A DEBT.

In re McLaurin, ___ S.W.3d ___, 2015 WL 1967536, 01-14-00920-CV (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (04-30-15).

Facts: About a year after Husband's and Wife's divorce, Wife filed a post-judgment action to enforce certain terms of the divorce decree. Wife alleged that Husband failed to execute certain documents or to surrender certain personal property to her. Husband filed a response requesting sanctions on the basis that Wife's motion was frivolous and was filed in bad faith without reasonable inquiry. The trial court issued a final judgment denying Wife's requested relief and granting Husband reimbursement for attorney's fees as sanctions. Wife appealed that judgment. When the due date for Wife's sanctions passed without her payment of them, Husband filed a petition for enforcement asking the trial court to hold Wife in contempt. The trial court entered an interim order requiring Wife to pay the judgment by a new date certain. After that date had passed, the trial court issued a contempt order that found Wife failed to pay the ordered sanctions despite her ability to do so, held Wife in both civil and criminal contempt, and sentenced her to confinement in county jail for 180 days as punishment and thereafter until she purged herself of contempt by paying the sanctions. Wife filed a petition for writ of habeas corpus, arguing the contempt order was void because it unconstitutionally imprisoned her for failing to pay a debt.

Holding: Writ of Habeas Corpus Granted

Opinion: Section 18 of Article I of the Texas Constitution prohibits imprisonment for a debt. A judgment for attorney's fees in a case other than enforcement of child support is a debt. Although a court may issue sanctions for failure to comply with a court order, those sanctions cannot include imprisonment for failure to pay a debt.

SAPCR
ENFORCEMENT OF CHILD SUPPORT

PROVISION IN AGREED DECREE REQUIRING FATHER TO PAY FOR CHILD'S COLLEGE TUITION AND EXPENSES WAS NOT CHILD SUPPORT AND WAS ENFORCEABLE ONLY AS A CONTRACT.

Bartlett v. Bartlett, ___ S.W.3d ___, 2015 WL 1966860, 14-14-00058-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (04-30-15).

Facts: Mother and Father had two Children. In their agreed final decree of divorce, they included a provision that required Father to pay 100% of the Children's college tuition and related expenses, provided that the Children maintained an above-C GPA. However, when the oldest Child began college, Father refused to pay the Child's college expenses. Mother paid for the expenses and sued Father for breach of contract. After the Child's third semester, his GPA fell below a C average, but after taking summer school, he brought his GPA back above a C. The trial court signed a judgment in Mother's favor awarding her damages for the amounts paid for the Child's tuition and related expenses. The trial court also issued findings of fact and conclusions of law, in which it found that the college-expenses provision in the parties' agreed decree was not a provision for child support and that the parties had intended the provision to be enforceable as a contract.

Father appealed, arguing that the college-expense provision was void, was not enforceable as a contract, and was precluded by statute. Father further argued that the Child's failure to maintain a C GPA constituted a material breach and excused Father from future performance.

Holding: Affirmed

Majority Opinion: (J. McCally, J. Boyce)

The "Education Beyond High School" provision was not included in the child support section of the agreed final decree. Rather, it was a subsection of the "Division of Marital Estate." Further, in the child support section, the decree provided that Father would pay $1800 a month with a step-down provision of $1500. Thus, it could not be argued that the Education Beyond High School was a provision in lieu of child support. Therefore, the provision was not "child support," so provisions of the Texas Family Code applicable to child support were not applicable to this provision, which was enforceable as a contract.

In addition, although the Child's GPA fell below a C average, the Material-Breach doctrine required a court to consider:

(1) the likelihood that the Child would cure his failure to perform;
(2) the extent to which the Child's behavior comported with standards of good faith and fair dealing;
(3) the extent to which the Child would suffer forfeiture;
(4) the extent to which Father would be deprived of a reasonably expected benefit;
(5) the extent to which Father could be adequately compensated for that expected benefit;
(6) the extent to which Father would be prevented from or delayed in making reasonable suitable arrangements; and
(7) the extent to which the agreement provided for performance without delay.

The Child's GPA admittedly fell below a C average for one semester, during which time he had knee surgery, but the Child cured his failure by taking summer school to bring his GPA back above a C average. Father was not deprived a benefit because the Son remained a full-time student with an above-C GPA at the time of trial. Further, the agreement did not require performance on a semester-by-semester basis, nor did it call for forfeiture of obligations previously owed for a breach in a later semester.

Concurring Opinion: (C.J. Frost)

The majority mischaracterized the contractual provision and applied a breach of contract analysis when the provision was actually a condition precedent. The "Education Beyond High School" provision required Husband to pay for the Child's incurred college expenses, "***provided that***" the Child maintained a C average. "Provided" is unmistakable language of condition. The ordinary meaning of maintain is "to prevent a decline, lapse or cessation from [an] existing state or condition." When the Child incurred expenses for his first two semesters, his GPA had not fallen below a C, and the condition precedent was satisfied. However, the Child's GPA fell below C before he incurred expenses for his third semester. Thus, the condition precedent had lapsed at the time expenses for the third semester were incurred. Therefore, Father was only obligated under the contract to pay for the Child's first two semesters but not for future semesters.

Moreover, even if it were appropriate to apply the Material-Breach Doctrine to this case, the Child's failure to maintain a C average was a material breach because the C-average requirement was the *sine qua non* of the agreement. By failing to maintain a C average, the Child potentially delayed his graduation date, thereby increasing the expense of his education.

However, because Father failed to raise an affirmative defense at trial that the condition precedent had not been satisfied, Mother was not required to prove that it had been satisfied. Therefore, there was no reversible error.

SAPCR
MODIFICATION

DALLAS COUNTY COURT WITHOUT JURISDICTION TO SET ASIDE BRAZOS COUNTY COURT'S ORDER BECAUSE BRAZOS COUNTY ORDER NOT VOID; TEXAS COURT NOT REQUIRED UNDER UCCJEA TO COMMUNICATE WITH OKLAHOMA COURT BECAUSE ONLY PENDING ISSUE IN TEXAS WAS CHILD SUPPORT.

In re S.J.G., No. 05-13-01351-CV, 2015 WL 1611833 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (04-09-15).

Facts: Father and Mother divorced nearly ten years ago in Brazos County. Pursuant to the final decree, they were named joint managing conservators, with Mother being granted the exclusive right to determine their Children's primary residence, and Father being ordered to pay child support. Soon after the divorce, Mother remarried and moved to Oklahoma with the Children. A few years later, Father moved to Dallas County.

Father filed an original SAPCR in Brazos County, along with a motion to transfer the case to Dallas County. Mother responded with a motion asking the Texas court to decline jurisdiction because she and the Children lived in Oklahoma. After a hearing, the Brazos court signed a transfer order to transfer the issue of child support to Dallas County and stay the custody issues on the condition that the parties filed a custody suit in Oklahoma. Mother subsequently filed the divorce decree in Oklahoma along with a motion to modify. Father thereafter filed a motion in the Dallas County court to set aside the Brazos

County transfer order. The Dallas County court denied Father's motion and, after hearing evidence, entered an order modifying child support. In addition, the Dallas County court awarded Mother attorney's fees.

Father appealed, arguing the Dallas County court erred in failing to set aside the Brazos County court's transfer order. Father contended that the Brazos County court lacked subject matter jurisdiction to retain the custody issues and make a forum determination because it had a ministerial duty to transfer the entire case to Dallas County. Additionally, Father argued the Dallas County court erred in awarding Mother attorney's fees because he claimed the only statute authorizing an award of attorney's fees is Tex. Fam. Code § 156.005, which only allows such an award if a suit was filed frivolously or was designed to harass. Finally, Father argued the Dallas County court abused its discretion by failing to communicate with the Oklahoma court as required by the UCCJEA.

Holding: Affirmed

Opinion: A court may not set aside a judgment of a court of equal jurisdiction unless that order is void. Here, the Brazos County court obtained continuing, exclusive jurisdiction when it entered the parties' final decree of divorce, and the Brazos County court maintained its continuing, exclusive jurisdiction on the day it entered the transfer order. Thus, the order was not void and not subject to collateral attack.

Tex. Fam. Code § 156.005 permits a court to tax attorney's fees as costs if a modification suit is filed frivolously or designed to harass a party. Tex. Fam. Code § 106.002 allows a court to render a judgment for reasonable attorney's fees to be paid directly to an attorney in any SAPCR proceeding. Here, the trial court did not assess attorney's fees as costs, but rather found good cause to award attorney's fees to Mother based on Father's actions. Father did not argue why an award under Tex. Fam. Code 106.002 would constitute error.

Tex. Fam. Code § 152.110(d) (UCCJEA) requires that if proceedings involving the same parties are ongoing in Texas and another state, the Texas court must inform the other state's court of the ongoing proceedings. The UCCJEA applies to child-custody proceedings, not child-support proceedings. Here, the only issue addressed in the Dallas County court was a modification of child support, so the requirement of Tex. Fam. Code § 152.110.(d) did not apply.

MISCELLANEOUS

HUSBAND FAILED TO ESTABLISH PRIMA FACIE PROOF HE WAS ENTITLED TO BILL OF REVIEW.

Morris v. O'Neal, ___ S.W.3d ___, 2015 WL 1622184, 14-14-00252-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (04-07-15).

Facts: Mother and Father entered a mediated settlement agreement ("MSA") in their SAPCR proceeding. The trial court subsequently signed a final order in the SAPCR incorporating the MSA. About three months later, Mother filed a motion for judgment nunc pro tunc on the basis that the final order omitted terms provided for in the MSA. The trial court entered a judgment nunc pro tunc that included the omitted terms and omitted certain other terms that had been included in the original final order.

One year later, Father filed a petition for bill of review, alleging the judgment nunc pro tunc improperly corrected a judicial error after the expiration of the court's plenary power. Father further argued that he did not find out about the judgment nunc pro tunc until after the time for appeal. Father attached a copy of the judgment nunc pro tunc to his petition. Both parties filed bench briefs regarding whether the judgment nunc pro tunc was void. The trial court issued a letter ruling denying Father's petition for bill of review and a few weeks later, signed an order denying the bill of review. Father appealed, arguing the trial court erred in denying his bill of review and in denying him a hearing or an opportunity to amend his pleadings.

Holding: Affirmed

Opinion: A bill of review is brought as a separate suit that seeks to set aside a prior judgment that can no longer be challenged by a motion for new trial or direct appeal. To be entitled to relief on a bill of review, a petitioner must show that (1) he has a meritorious defense to the underlying action, (2) he was prevented from making that defense by fraud, accident, or wrongful act of the opposing party, or due to official mistake, and (3) those actions were unmixed with any fault or negligence of his own. When the petitioner has participated in the underlying suit, he must show a meritorious ground for appeal, rather than a meritorious defense. To succeed on a bill of review, the petitioner mush present prima facie proof to support his defense or ground for appeal.

Because there was no reporter's record, there was no record of any oral objections by Father. Additionally, the clerk's record contained no written motion filed by Father. Thus, Father failed to preserve any error regarding the trial court's denial of an evidentiary hearing.

A trial court may correct a *clerical* error in the record of a judgment and render judgment nunc pro tunc at any time, even after its plenary power has expired. However, once the court's plenary power has expired, it may not render a judgment to correct a *judicial* error; such an order would be void. The only evidence Father presented was a certified copy of the judgment nunc pro tunc. He did not present a copy of the trial court's original final order. Father did not ask the trial court to take judicial notice of the original order, which, because a bill of review is a separate proceedings, was a part of the record of a different case. Because there was no proof before the court regarding the original order, there was no prima facie evidence that the judgment nunc pro tunc improperly corrected a judicial error. In addition, even if the court of appeals considered the original order as evidence, nothing in that order indicated that the trial court did not make any oral renditions preceding the original final order. Thus, there is no way to determine whether the judgment nunc pro tunc merely incorporated a prior oral rendition that should have been incorporated into the original final order.

ALTHOUGH WIFE WAS IDENTIFIED AS HUSBAND'S SPOUSE ON THEIR JOINT CAR INSURANCE AND HUSBAND'S LIFE INSURANCE POLICIES, NO INFORMAL MARRIAGE. FINANCIAL RECORDS OBTAINED FROM HUSBAND'S BANK WERE LIKELY ADMISSIBLE AS HUSBAND'S BUSINESS RECORDS.

Castillon v. Morgan, No. 05-13-00872-CV, 2015 WL 1650782 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (04-14-15).

Facts: Husband and Wife were unmarried, but they lived together in a jointly owned house with their one Child. The couple eventually married formally, but Wife alleged that they had entered into an informal marriage more than a year before their formal ceremony. During their divorce proceedings, Husband and Wife reached an agreement regarding most of the property division; however, they could not reach an agreement regarding the characterization or division of the house or certain financial accounts in Husband's name. During trial, Husband offered account statements prepared by his financial institutions. However, the trial court sustained Wife's hearsay objection and excluded the statements. After trial, the court divided the property and found that the couple had entered into an informal marriage about a year before their formal marriage. Husband appealed, arguing that the evidence was legally and factually insufficient to sustain the finding that the parties were informally married and that the court erred in excluding the financial account statements.

Holding: Affirmed as Modified.

Opinion: The element of holding themselves out to be married requires more than occasional references to each other as "wife" and "husband." Although Wife was identified as Husband's spouse on their joint car insurance and Husband's life insurance policies, there was no indication that anyone in the community saw those documents. Wife testified that they represented themselves as married but did not state to whom or how frequently they made that representation. Wife used her maiden name until the couple was formally married. Wife did not receive an engagement ring until ten months after they supposedly entered an informal marriage and did not wear a wedding ring until after they were formally married. Moreover, Wife filed taxes as a single person in the years the couple were allegedly informally married. Trial court's judgment modified to delete finding of informal marriage.

Pursuant to Tex. R. Evid. 803(6), records of regularly conducted activity are hearsay, but they are admissible in evidence if a qualified witness testifies:

(1) the documents were made and kept in the course of a regularly conducted business activity;
(2) it was the regular practice of the business activity to make the documents;
(3) the documents were made at or near the time of the event that it recorded; and
(4) the documents were made by a person with knowledge who was acting in the regular course of business.

The witness laying the predicate need not be the creator of the evidence or have knowledge of the records' contents. The witness must have personal knowledge of the manner in which the records were prepared. Generally, documents received from another entity are not admissible under Rule 803(6); however, such documents may be admissible business records upon proof by the party that:

(1) the records are incorporated and kept in the course of the party's business;
(2) the party typically relies upon the accuracy of the records' contents; and
(3) the circumstances otherwise indicate the documents' trustworthiness.

Here, even if the trial court erred by denying admission of Husband's exhibits, Husband failed to establish that their exclusion probably caused the rendition of an improper judgment because Husband failed to fully trace the separate-property portions of the accounts and to isolate them from community property commingled in the accounts.

BOYFRIEND'S TEXT MESSAGES AUTHENTICATED WHEN GIRLFRIEND TESTIFIED THAT BOYFRIEND CALLED HER IN BETWEEN MESSAGES FROM THE SAME NUMBER.

¶15-3-__. ***Butler v. Texas,*** ___ S.W.3d ___, 2015 WL 1816933, PD-0456-14 (Tex. Crim. App. 2015) (04-22-15).

Facts: Boyfriend and Girlfriend lived together. When Girlfriend went on a road trip with her family to visit her dying grandmother, Boyfriend began harassing her over the phone, accusing her of using the trip as an opportunity to have an affair. While Girlfriend was gone, Boyfriend took Girlfriend's car and sent her a text saying she could find the car on the side of the highway. Girlfriend found her car and took it to her mother's house. Boyfriend apologized and convinced Girlfriend to return home with him. Once they arrived at their home, Boyfriend began accusing Girlfriend again of infidelity and spent the evening and night beating her. The next afternoon Girlfriend's mother found her and called an ambulance to take Girlfriend to the hospital, where a police report was filed. Boyfriend was arrested and charged with aggravated kidnapping.

In the week before trial, Boyfriend and Girlfriend exchanged text messages in which Boyfriend harassed Girlfriend and threatened "to come and hurt [her] or [her] family" if she testified against him. At trial, the State offered photographs of Girlfriend's Blackberry displaying the messages. The State laid the predicate for the text messages with the following testimony:

Q. What is [Boyfriend's] phone number?
A. ###-###-####
Q. Does that number appear on all the pages of the exhibit?
A. Yes.
Q. How do you know that that is [Boyfriend's] telephone number?
A. Because that's where he called me from and that's what's on the same exhibit in front of me.
Q. You've read the text messages in the exhibit?
A. Yes.
Q. Who sen[t] you those text messages?
A. He did.
Q. How do you know that it was him?
A. Because he was the one texting me back and forth and he had even called in between the conversations talking mess.

The jury found Boyfriend guilty, and he was sentenced to fifty years' confinement and a fine of $10,000. Boyfriend appealed, and the court of appeals reversed the verdict, finding that the State's predicate was insufficient to establish that Boyfriend was the author of the text messages. The court of appeals held that the State should have further developed Girlfriend's testimony to include other circumstantial evidence linking the text messages or the phone number to Boyfriend, such as how Boyfriend identified himself, how she knew it was Boyfriend calling her, or how she recognized his voice when he called.

The State appealed to the Court of Criminal Appeals.

Holding: Reversed

Opinion: To satisfy Tex. R. Evid. 901(a), a party wishing to authenticate text messages as evidence must produce evidence sufficient to support a finding that the matter is what the proponent claims, which can be achieved through testimony of a witness with knowledge or through evidence showing distinctive characteristics. Knowledge may be obtained because the witness is the author of the text message, he observed the author actually type or send the message, or he knows the text message came from a phone number known to be associated with the purported sender. The association of a cell-phone number with a particular individual can be quite strong evidence; however, that evidence by itself might be too tenuous. Because "cell phones can be purloined," additional evidence, whether direct or circumstantial, is necessary. Such evidence might be the message's "appearance, contents, substance, internal patterns, or other distinctive characteristics," or such "circumstances in which it is reasonable to believe that only the purported sender would have access to the…cell phone." Additionally, the purported sender may respond in such a way as to indicate his authorship of the message, or the content or context of the message may create an inference supporting the conclusion that the purported author sent them.

Here, Girlfriend recognized Boyfriend's cell phone number as the number from which the messages were sent. Girlfriend testified that Boyfriend called her in between text messages from the same number. Further, the content of the text messages themselves created a reasonable inference that they were from Boyfriend. The sender called Girlfriend a snitch for going to the police, for "f***[ing] him over" by "run[ning] to the cops." In the week before Boyfriend's trial, the sender threatened Girlfriend and her family if she testified against him in the upcoming trial. The record failed to suggest anyone else who would have a similar motive to threaten Girlfriend at that particular time. While the State could have taken extra steps to remove any ambiguities, there was sufficient evidence to support a jury finding that the text messages were what the State purported them to be.

D.B.A. Family Law Section Case Law Update

May 10, 2015

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DIVORCE
DIVISION OF PROPERTY

HUSBAND'S CONSTRUCTIVE FRAUD SUPPORTED JUST AND RIGHT DIVISION BASED ON VALUE OF RECONSTITUTED ESTATE.

Slicker v. Slicker, ___ S.W.3d ___, 2015 WL 2407814, 05-13-01762-CV (Tex. App.—Dallas 2015, no pet. h.) (05-21-15).

Facts: Husband and Wife separated after nearly 40 years of marriage. Wife filed a petition for divorce seeking a disproportionate share of the marital estate because Husband had committed fraud on the community. Wife also alleged Husband used community assets in violation of the trial court's standing order. In addition, Wife sought spousal maintenance. During the trial, much of the evidence related to a trust created during the marriage by Husband's parents as grantors. By the time of the divorce, the property contributed to the trust by Husband's parents was no longer owned by the trust, and the trust held 5 new assets. In the years leading up to the parties' separation, Husband made large withdrawals without Wife's knowledge from the trust. During the proceedings, Husband sought reimbursement for a distribution from the trust on the basis that the trust was allegedly separate property and the distribution had been allegedly used to pay community debts. However, Husband provided no evidence of how the large withdrawals were spent, and he provided no evidence of tracing to support his claim that the distributions were his separate property.

After the parties separated, Husband withdrew funds from an entity created by Husband and Wife during the marriage to pay a "salary" to himself and the parties' adult son. Although he claimed that funds were used to support the parties' lavish lifestyle and to pay for trips and entertaining guests, Husband introduced no evidence of trips taken by the parties or any entertainment expenses of the parties. Evidence showed that the trust held assets that would normally be held by a community estate. For example, the trust sold a home during the pendency of the divorce and purchased a condominium for Husband. Additionally, an entity that owned a vacation home was sold to another family trust at less than fair market value, and emails indicated that the "goal" of the transaction was "to give [Husband] the opportunity to buy his…share back in the future at the same price."

At the conclusion of trial, the court found the value of the reconstituted estate included the large distributions made by Husband, awarded Wife a money judgment based on Husband's waste and/or constructive fraud, ordered that Husband pay Wife for the improper spending during the pendency of the divorce, and awarded Wife spousal maintenance. Husband appealed, arguing that the evidence was insufficient to support the trial court's judgment and that the court made no specific finding that he had committed constructive waste or fraud.

Holding: Affirmed

Opinion: Although there was no explicit finding that Husband committed waste or constructive fraud, the trial court did find that the "value of the community property lost to waste and/or constructive fraud committed by [Husband] should be considered as part of the total value of property awarded to [Husband]" and that "[Wife] should be given a judgment of $275,000 for [Husband's] waste and/or constructive fraud committed against [Wife]." Additionally, although Husband argued that there was no fraud because Wife was fully aware the parties' financial situation, Husband offered no evidence to support this conclusory statement. Further, Husband made no attempt to show that the large withdrawals he made from the trusts were used for community purposes or that Wife was aware of the withdrawals. Moreover, Wife and her psychologist each testified that Husband controlled the relationship and the finances. Finally, Husband offered no evidence to support his contention that the distributions received from the trust were his separate property. Thus, despite Husband's contention that the estate had a negative value at the time of the divorce, the trial court was entitled to divide the reconstituted community estate at the value as if Husband's fraud had not occurred.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

DEED CONVEYING PROPERTY VOID BECAUSE IT LACKED REQUISITE INTENT; WIFE SIGNED SIGNATURE PAGE OF DEED WITH INTENT TO CONVEY PROPERTY TO HUSBAND, BUT DEED RECORDED BY HUSBAND PURPORTED TO CONVEY PROPERTY TO HUSBAND'S FATHER.

In re Merrikh, No. 14-14-00024-CV, 2015 WL 1247064 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (mem. op.) (on reh'g) (05-19-15).

Facts: The day after Husband and Wife were married, Husband's parents conveyed certain real property to Husband. About six weeks later, Husband conveyed the property to Wife. About a month later, Wife conveyed the property to Husband's father. At trial, Wife contested the validity of this deed and alleged that it was procured by fraud. The property was conveyed twice more after the contested deed: once to Husband and Wife's four year old daughter, and later from the daughter back to Husband's father. Husband purportedly executed the deed on his daughter's behalf.

After a bench trial, the trial court found that the deed conveying the property from Wife to Husband's father was procured by fraud and that it, and all subsequent transfers were void. The court further found that the property was Wife's separate property by gift and that Husband's parents had no interest in the property. Husband's parents (who were co-Respondents at trial) appealed the judgment and argued that there was insufficient evidence to establish fraud. In the alternative, they argued that Wife's claim was barred by the statute of limitations.

Holding: Affirmed

Opinion: While a deed procured by fraud is *voidable* and subject to a four-year statute of limitations, an invalid deed is *void*. Delivery is an essential element to a valid deed. Delivery consists of two elements: (1) the deed must be delivered into the grantee's control; and (2) the grantor must intend for a deed to become operative as a conveyance to the grantee. If the intent element is lacking, the deed is void, and subsequent grantees cannot not acquire title to the property the deed purports to convey. The grantor's intent is determined by examining all of the facts and circumstances preceding, attending, and following the execution of the instrument.

If a deed has been recorded, there is a presumption that it was delivered with the requisite intent. However, the presumption can be overcome if the party challenging the validity shows one of the following: (1) that the deed was delivered or recorded for a different purpose; (2) fraud, accident, or mistake accompanied the delivery or records; or (3) the grantor had no intention of divesting herself of title.

Here, Wife testified that Husband presented her with a blank signature page and told her that by signing the page, she would be transferring the property to Husband. Wife believed Husband and signed the page. Although the page was notarized, Wife testified that she did not sign in the presence of a notary. The deed was recorded over two months later and actually transferred the property to Husband's father. Based on this evidence, the trial court could have reasonably determined that Wife intended to convey the property to Husband, yet the deed was recorded for a different purpose. Although the trial court's findings of fact did not include such a finding, an omitted finding, supported by the evidence, may be supplied by a presumption that it supports the judgment.

SAPCR
CHILD SUPPORT

BECAUSE FATHER'S COMPANY WAS FOUND TO BE A "SHAM CORPORATION," FATHER WAS FOUND TO BE INTENTIONALLY UNDEREMPLOYED, AND TRIAL COURT COULD REVIEW THE COMPANY'S TAX RETURNS AS EVIDENCE TO DETERMINE FATHER'S POTENTIAL INCOME.

In re Merrikh, No. 14-14-00024-CV, 2015 WL 1247064 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (mem. op.) (on reh'g) (05-19-15).

Facts: Mother and Father were informally married and had two Children during the marriage. After a bench trial, the trial court found that Father was intentionally underemployed and that Father's net monthly resources were $3000. The trial court ordered Father to pay $750 per month in child support. Father appealed, arguing that Mother failed to meet her burden to show that he was intentionally underemployed.

Holding: Affirmed

Opinion: On appeal, Father challenged the trial court's finding of fact that he was intentionally underemployed. However, the trial court also found that Father's business was a "sham corporation," and Father did not challenge that finding on appeal. Thus, Father and Father's business were treated as one and the same. Further, on two business account applications, Father stated that his company's gross sales were $500,000 and $1 million, respectively. Based on those applications, Father's average gross monthly income was between $41,000 and $83,000 per month. Thus, there was sufficient evidence before the court for it to determine that Father's potential net monthly was $3000.

MISCELLANEOUS

CHILD'S PETITION FOR ENFORCEMENT OF AGREED DIVORCE DECREE'S COLLEGE TUITION PROVISION TIMELY FILED WITHIN TEN-YEAR DORMANCY STATUTE APPLICABLE TO CONSENT JUDGMENTS.

Abrams v. Salinas, ___ S.W.3d ___, 2015 WL 2124786, 04-14-00104-CV (Tex. App.—San Antonio 2015, no pet. h.) (05-06-15).

Facts: Mother and Father divorced in 1988, when their only Child was 4-years old. The agreed decree provided that each parent would pay one-half of the Child's college tuition and related expenses until she turned 30, provided that the Child was in school full-time to obtain a bachelor's degree, maintained a C average, and provided her grades to her parents within 10 days of receiving them. The Father stopped seeing the Child when she was 5- or 6-years old; however, he saw her once more when she was 12, at which time he told her that she was dead to him. When the Child was 16, Father was held in contempt for failing to provide the OAG with his current contact information. Although the OAG subsequently received Father's new address, it would not provide the address to Mother, as the information was protected under the Sailors and Soldiers Release Act.

The Child, who was homeschooled, obtained a GED in 2004 and enrolled as a full-time college student. When the Child graduated from college she began gathering documents necessary to pursue a master's degree. At that time, she discovered the 1988 divorce decree with the college expense tuition that provided that she could enforce the provision in her name. Within 10 days of discovering the provision, the Child sent Father a certified letter requesting reimbursement with a copy of the decree, her itemized school expenses, and proof she had main-

tained a C average. Father acknowledged receiving the letter, but rather than following up with the Child, he contacted the college to request information regarding the Child. The college refused to provide any information without a release from the Child. Father took no further action.

Unaware that Father had received her first letter, the Child sent Father two more certified letters with the same information, the last of which was returned not deliverable. The Child and Mother filed a petition to enforce the college tuition provision of the divorce decree. Father filed an original answer with a general denial. Subsequently, Father filed an amended answer, contending the claim was barred by the four-year statute of limitations applicable to a breach of contract claim. The trial court awarded the Child and Mother one-half of the Child's college expenses. Father appealed, arguing again that the claim was barred by the four-year statute of limitations and that the Child's failed to satisfy the condition precedent of the agreement by failing to timely provide him with her grades. The Child and Mother responded that Father's prolonged absence from the Child's life affirmatively and consciously relinquished his right to complain about the Child's failure to fulfill the conditions precedent in the decree.

Holding: Affirmed

Opinion: When a court approves an agreement made by divorcing parties and incorporates that agreement in full or by reference in the final decree, the agreement becomes a part of the judgment and is no longer merely a contract between private individuals. While a four-year statute of limitations applies to an action for breach of a written divorce agreement, a ten-year limitation applies to enforcement of a consent judgment. Further, when a judgment orders payments predicated on future conditions, the limitations period does not begin to run on the date the judgment becomes final, but rather when payment becomes due.

Here, the consent judgment did not specify when Father was required to make payments. The only reference to timing required the Child to complete her bachelor's degree before she turned 30. The Child went to college from about age 20 to age 24, and she filed her enforcement action when she was 28. The court of appeals further reasoned that because the consent judgment required Father to pay one-half of the Child's tuition provided that she maintain a C average, then the earliest date Father would have been required to make a payment would have been when the Child received her first semester report card with a GPA of C or greater, which was within 10 years of the date the Child filed her petition. Therefore, the Child's suit was not barred by a statute of limitations.

Father failed to raise his claim regarding the conditions precedent in any of his trial court pleadings. Father only filed a general denial and alleged the affirmative defense that the claim was barred by the statute of limitations. Father never specially excepted to the Child's claim in her petition that all conditions precedent had been met.

★★★TEXAS SUPREME COURT★★★

ACCRUAL OF PRE-/POSTJUDGMENT INTEREST DETERMINED BY DATE TRIAL COURT COULD HAVE ENTERED RENDERED FINAL JUDGMENT; POST-JUDGMENT INTEREST ON CONDITIONAL APPELLATE ATTORNEY'S FEES ACCRUES ON DATE APPEAL RESOLVED IN PARTY'S FAVOR.

¶15-3-38. ***Ventling v. Johnson,*** ___ S.W.3d ___, 2015 WL 2148056, 14-0095 (Tex. 2015) (05-08-15).

Facts: In 1995, Husband initiated a divorce proceeding to end his common-law marriage to Wife. Within a few months, the parties agreed to a property division that required Husband to pay Wife a lump sum upon divorce plus monthly contractual alimony payments for 7 years. The trial court signed a final decree of divorce incorporating the parties' agreement. In 1997, Husband took the position that he and Wife were never common-law married and stopped making the alimony payments. Thus, Wife filed a motion to enforce the payments as ordered in the final decree.

In 1998, the trial court denied Wife's enforcement motion without prejudice but granted her motion for attorney's fees and ordered the parties to mediation. Wife did not appeal this judgment. Mediation was unsuccessful.

In 2001, the trial court signed an order denying all relief sought by Wife, including her enforcement motion, and granted a motion by Husband to nonsuit the divorce based on his claim that the parties were never married. Wife appealed this judgment. The court of appeals determined the final divorce decree was a valid final judgment, and the trial court's plenary power had expired 30 days after it was signed. Thus, Husband's attempt to challenge the validity of the underlying marriage was an impermissible collateral attack on the decree, and the trial court had no authority to modify the property division. Therefore, the 2001 order was void.

Wife subsequently obtained a judgment from an Iowa court, where Husband was living at the time, for the lump sum owed her under the final divorce decree. The Iowa court ruled that the monthly payment payments were not enforceable in Iowa and granted Husband a stay as to those amounts.

After receiving the Iowa judgment, the Wife renewed her enforcement motion in Texas to recover the monthly payments due to her, as well as postjudgment interest, damages for adverse tax consequences, and attorney's fees. In 2009, the trial court rendered a judgment denying all relief requested by Wife. Wife appealed. The court of appeals reversed the trial court's judgment, finding that the contractual alimony payments were binding on the parties. The court of appeals remanded the case and instructed the trial court to grant Wife's enforcement motion and award her the unpaid contractual alimony, appropriate prejudgment interest, and reasonable attorney's fees and court costs.

Upon remand, the issue of attorney's fees and pre- and postjudgment interest was tried to the trial court. The trial court granted Wife prejudgment interest from the date she filed her initial enforcement motion through the date the trial court held its initial hearing on her motion, and postjudgment interest on Wife's entire award (including both the alimony and attorney's fees) beginning on the date of its contemporaneous 2012 judgment. The trial court awarded Wife past-due attorney's fees but did not award Wife any appellate attorney's fees. Wife appealed a third time.

The court of appeals held that because the trial court should have rendered judgment for the unpaid alimony in 1998, postjudgment interest began to accrue as of that judgment. Further, because no judgment for attorney's fees was rendered until 2012, the postjudgment interest on the fees award began to accrue as of that judgment. Finally, the court of appeals reversed the denial of Wife's request for conditional attorney's fees and ordered that interest would begin to accrue on that award on the date Wife's appeal was perfected.

Husband filed a petition for review with the Texas Supreme Court arguing that postjudgment interest could not begin to accrue prior to 2012 because no final judgment was rendered until that date. Additionally, Husband argued that Wife was not entitled to conditional appellate attorney's fees because such an award is only available upon the prevailing party's successful *defense* of a judgment.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Prejudgment interest accrues from the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed and runs until the day before judgment. Postjudgment interest begins accruing on the date judgment is rendered. When an appellate court's remand results in multiple trial court judgments, there must be a determination of which judgment controls for the purpose of pre- and postjudgment-interest accrual.

If the appellate court renders, or could have rendered, judgment, then the postjudgment interest accrues from the date of the trial court's original, erroneous judgment. However, if on remand, the trial court determines that it must reopen the record, postjudgment interest will begin to accrue on the date the subsequent judgment is rendered. A claimant is entitled to postjudgment interest from the judgment date once the trial court possesses a sufficient record to render an accurate judgment. A party may affect the accrual of postjudgment interest through severance, offers of proof, and bills of exception.

Here, the 1998 judgment was interlocutory, not a final judgment. Wife did not appeal the judgment, but rather, the parties continued to litigate the enforcement motion. Moreover, Wife conceded the judgment was interlocutory. Additionally, the 2001 judgment was declared void by the appellate court, and thus, it could not under any circumstances be a final judgment. However, the 2009 judgment disposed of all claims of the parties, with the exception of attorney's fees. Upon remand, the trial court's only task with respect to the claim for alimony was the ministerial act of entering the judgment as instructed. While the court of appeals did not use the term "sever," for all practical purposes, in its disposition, it did sever the claims for attorney's fees from Wife's alimony claim. Thus, postjudgment interest on Wife's alimony award began accruing from the date of the erroneous 2009 judg-

ment, while the postjudgment interest on Wife's award of past-due attorney's fees began accruing on the date of the subsequent judgment in 2012 following the presentation of additional evidence on that issue.

Further, because the 2009 judgment was the final judgment with respect to Wife's claims for alimony, she was entitled to prejudgment interest on her alimony claim until the day before that judgment was rendered.

Next, Tex. Civ. Prac. & Rem. Code § 38.001 provides that a prevailing party may recover attorney's fees on a breach-of-contract claim as additional damages. Under this section, the trial court has no discretion to deny attorney's fees, including conditional appellate attorney's fees, when presented with evidence of same. Although the more common scenario involves a prevailing party seeking attorney's fees for successfully defending an appeal, no precedent supported a conclusion that Wife should be precluded from recovering attorney's fees for pursuing this appeal. Because the trial court erred in denying Wife prejudgment interest for 14 years and in denying Wife in postjudgment interest for 3 years, Wife at least partially prevailed on her appeal. Thus, while the trial court had discretion as to the amount of reasonable and necessary appellate attorney's fees, it had no discretion not to award Wife appellate attorney's fees.

However, contrary to the court of appeal's holding in this case, because Wife's appellate attorney's fees were conditional upon her prevailing on appeal, postjudgment interest on those fees would not begin to accrue until after the appeal was resolved in her favor. Here, Wife's postjudgment interest on appellate fees associated with the appeal to the district court of appeals began accruing when it issued its judgment in 2013, and her postjudgment interest on appellate fees associated with the appeal to the Texas Supreme Court began accruing when it issued its judgment in 2015.

WIFE ENTITLED TO RESTRICTED APPEAL BECAUSE INCONSISTENCIES ON RETURN OF SERVICE COULD NOT ESTABLISH WIFE WAS PROPERLY SERVED.

In re R.E.C., No. 05-14-01003-CV, 2015 WL 2205654 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (05-12-15).

Facts: After the parties' divorce, Husband filed a petition to enforce the property division. After the process server attempted to serve Wife ten times, the trial court granted a motion for alternate service. A return of service was filed, and the trial court granted Husband's requested relief and ordered Wife to pay Husband's attorney's fees. A little over 5 months later, Wife filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: Because the parties agreed that Wife established the other 3 requirements for a restricted appeal, the only question was whether error was apparent on the face of the record. In a direct attack on a default judgment, there is no presumption in favor of proper service. Further, service of process must be performed in strict compliance with the appropriate statutory provision to support a default judgment. Any deviation will be sufficient to set aside a default judgment in a restricted appeal.

Here, because the trial court ordered substituted service, the only authority for the service was the order itself, which provided that service would be effected by mailing one true copy of the citation with a copy of the petition to Wife's address and posting a second of each on the front door of the home at Wife's address. The return of service stated that citation was delivered to Wife "in person" with a true and correct copy "of the document attached hereto" and further indicated that a "true and correct copy" was posted on the front door of and mailed to Wife's address. However, the paragraph indicating that copies were mailed and posted did not indicate whether the "cop[ies]" were of the petition and citation, the order for substituted service, or some other document. Further, the return of service was inconsistent with itself by stating in one paragraph that service was made on Wife "in person" and in another by mail and posting on her front door. Thus, it was impossible to determine from the return of service whether Wife was properly served.

TRIAL COURT RETAINED PLENARY POWER TO GRANT MOTION FOR NEW TRIAL 30 DAYS AFTER MOTHER'S MOTION FOR NEW TRIAL HAD BEEN DENIED BY OPERATION OF LAW.

Jones v. Jones, No. 03-14-00110-CV, 2015 WL 2375970 (Tex. App.—Austin 2015, no pet. h.) (mem. op.) (05-13-15).

Facts: Mother filed a petition for divorce, and Father filed a counterpetition for divorce. After obtaining temporary orders appointing Mother the sole managing conservator of the parties' Children, Mother's attorney filed a motion to withdraw, in which she provided Mother's current Georgia address to the court. Subsequently, Father set the divorce for trial. The trial court sent Mother a notice of trial by certified mail to the Georgia address, but it was returned unsigned. Sometime before trial, Mother returned to Texas with the Children to live with her mother. Mother did not appear at trial. Father testified that he had spoken to Mother's mother about the trial, but he had not spoken to Mother. He also stated that he was aware Mother had moved in with her mother. The trial court signed a final decree, reciting that Mother had made a general appearance and had been notified of final trial but failed to appear and defaulted. The final decree appointed Father the sole managing conservator. Father promptly took a copy of the final decree to Mother's mother's house and took possession of the Children.

Mother, representing herself, filed timely motions to set aside the default judgment and for new trial. Mother asserted she had not received notice and was not aware of the trial setting. She attached an affidavit to her motion, in which she averred that she did not know that the proceedings would continue before she had obtained new counsel, which she was in the process of doing. After a hearing on Mother's motions, the trial court agreed Mother was entitled to notice yet had not received proper notice. The trial court orally granted Mother's motion for new trial, but did not sign an order granting a new trial before the motion was overruled by operation of law after 75 days. One week later, Mother presented the trial court with a proposed order reflecting the ruling granting her motion for new trial. However, the trial court refused to sign it, stating that the time to enter an order on a motion for new trial had expired. Mother appealed.

Holding: Reversed and Remanded

Opinion: Per Tex. R. Civ. P. 329b(e), when a motion for new trial is timely filed, the trial court's plenary power does not expire until 30 days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first. Thus, even though Mother's motion for new trial was overruled by operation of law because the trial court did not reduce its ruling to a written order within 75 days after signing the final decree, the trial still had jurisdiction to grant a new trial when it refused to do so. Therefore, because Mother established she was entitled to a new trial based on her lack of notice, the trial court abused its discretion in refusing to grant her motion for new trial.

WIFE NOT ENTITLED TO SUMMARY JUDGMENT DISPOSING OF ALL OF HUSBAND'S CLAIMS BECAUSE SHE DID NOT ADDRESS ALL OF THE CLAIMS IN HER MOTION FOR SUMMARY JUDGMENT.

Philips v. McNease, ___ S.W.3d ___, 2015 WL 2452525, 14-14-00161-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (05-21-15).

Facts: In their 1998 divorce, Husband and Wife reached a settlement agreement that included a provision for contractual alimony for the remainder of Wife's life. The trial court incorporated the parties' agreement into a final decree.

A few years later, Husband filed a petition to modify the contractual alimony, describing it as "maintenance and support." Husband asked the court to modify the payments due to a material and substantial change of circumstances. Husband additionally asked the trial court to terminate the contractual alimony on the basis of lack of consideration and unconscionability. The trial court denied Husband's request to terminate the payments but

found a material and substantial change and reduced Husband's obligation. (The court of appeals did not "comment on whether the trial court acted properly or improperly.")

Nearly ten years later, Husband filed a second petition to modify, again alleging modification was available under Chapter 8 of the Tex. Fam. Code (the "family law claim"). He additionally asked the trial court to set aside his obligation on the bases of frustration of purpose, lack of consideration, unconscionability, undue influence, duress, extrinsic fraud, and mistake of fact (the "contract law claims"). In response, Wife filed a plea to the jurisdiction alleging the trial court had no authority to act under the Family Code because the payments were not subject to Chapter 8. Wife also filed a no evidence motion for summary judgment alleging no evidence supported any of Husband's contract claims. Additionally, in a traditional motion for summary judgment, Wife contended that each of Husband's contract claims, with the exception of frustration of purpose, were barred by res judicata. In the alternative, she argued that each theory, including frustration of purpose, failed as a matter of law. Wife did not seek summary judgment on the family law claim. Subsequently, the trial court granted Wife's motions for summary judgment and signed a final judgment dismissing the entirety of Husband's petition to modify. Although the judgment included a Mother Hubbard clause, the trial court did not expressly address Wife's plea to the jurisdiction.

Husband appealed, arguing the trial court erred in dismissing the family law claim because Wife had not sought such relief. Husband further argued that the "perpetual" contractual alimony obligation was against public policy.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Because Wife's motion for summary judgment only addressed the contract claims, the trial court had no basis on which to dispose of the family law claim. Further, Husband's failure to object to the scope of the trial court's judgment did not waive his issue for appeal, because no objection is necessary if the grounds for summary judgment are insufficient as a matter of law. Even if the trial court ultimately could not modify contractual alimony based on contract law, the trial court still had jurisdiction to consider the merits of Husband's family law claim. Thus, to the extent that the trial court granted summary judgment on the family law claim, such judgment was improper.

To establish "frustration of purpose," Husband was required to show supervening circumstances made his performance impossible. However, at best, Husband showed that performance had become more difficult. Husband's performance could not be excused merely because it had become burdensome.

Further, in Husband's first modification proceeding, Husband raised the claims of lack of consideration and unconscionability. In his second modification, in addition to claims of lack of consideration and unconscionability, husband also alleged undue influence, duress, extrinsic fraud, and mistake of fact. Because each of the additional claims could have been raised in the first modification proceedings, all six of these claims were barred by res judicata. Moreover, because Husband raised no fact issues as to any of these claims, Wife was entitled to summary judgment as a matter of law.

Finally, with respect to Husband's public policy argument, he was free to negotiate different terms during the pendency of the divorce, but he did not. Thus, the contractual alimony was not void for being against public policy.

D.B.A. Family Law Section Case Law Update

July 8, 2015

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DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT MAINTAINED INHERENT POWER TO AWARD ATTORNEY'S FEES AS A SANCTION DESPITE MSA PROVISION THAT EACH PARTY WOULD BE RESPONSIBLE FOR HIS OR HER OWN FEES.

Clements v. Clements, No. 13-13-00560-CV, 2015 WL 3523028 (Tex. App.—Corpus Christi 2015, no pet. h.) (mem. op.) (06-04-15).

Facts: Husband and Wife reached an MSA in their divorce proceedings that addressed all the legal issues between them. Additionally, the MSA provided that each party would be responsible for his or her own attorney's fees. After a hearing, the trial court orally rendered judgment granting the divorce and incorporating the MSA. Wife requested attorney's fees pursuant to Husband's delay in proceedings of an already settled case. The trial court denied Wife's request, noting the MSA prohibited such an award. The trial court instructed Wife's counsel to present the court with a separate final decree of divorce incorporating the MSA. About two months later, Wife presented the trial court with a final decree and a request for attorney's fees incident to the motion for entry of judgment. Wife's attorney testified as to attorney's fees caused by Husband's delay in signing the final decree. The trial court signed the final decree and granted Wife's request for attorney's fees related to her pursuit of entry of final judgment. Husband appealed.

Holding: Affirmed

Opinion: Because the MSA provided that each party would be responsible for his or her own attorney's fees, the trial court was prohibited from granting attorney's fees as it related to the divorce. However, an award of attorney's fees as a sanction is within the trial court's inherent powers. Here, after the trial court orally rendered judgment granting the divorce, Husband's actions delayed getting the written judgment entered, caused Wife delay in finalizing the sale of a house, and caused Wife to incur further legal fees. Further, the award was not excessive because Wife's counsel testified as to the amount of fees that specifically correlated to the work in getting the divorce decree signed.

DIVORCE
DIVISION OF PROPERTY

DIVISION OF MARITAL ESTATE MANIFESTLY UNJUST BECAUSE TRIAL COURT ERRONEOUSLY INCLUDED THE SAME MORTGAGE TWICE.

Zarnesky v. Zarnesky, No. 03-13-00692-CV, 2015 WL 3918513 (Tex. App.—Austin 2015, no pet. h.) (mem. op.) (06-24-15).

Facts: After the final contested hearing in the divorce proceedings, the court directed Husband and Wife to prepare a list of agreed community assets and debts. The parties were able to reach an agreement on most of the estate and submitted an exhibit to the court evidencing their agreement. The trial court entered a decree that incorporated the agreement and divided the remaining disputed assets. However, upon discovering an error in the parties' exhibit, Husband moved for a new trial, which the trial court denied. The error was a duplication of the mortgage on a home awarded to Wife. In the debts section of the exhibit, the mortgage was listed correctly. However, in the assets section, rather than listing the market value of the home, the exhibit listed its net value. Husband argued that by listing the net value, the mortgage was included twice, which caused the trial court to underestimate the proportion of the estate it had awarded to Wife. Thus, Husband argued, the trial court abused its discretion in ordering a division that was so erroneously disproportionate as to be manifestly unjust.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: While a trial court has discretion to make an unequal division of the marital estate, there must be a reasonable basis for an unequal division. Here, neither party sought an unequal award, and Wife's only asserted ground for divorce was insupportability. After accounting for the error in the exhibit, Wife received a significantly greater share of the marital estate, which was not supported by the evidence of a reasonable basis.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

DESPITE HAVING A MEDICAL DEGREE, WIFE ESTABLISHED THAT SHE LACKED RESOURCES TO PROVIDE FOR HER MINIMUM REASONABLE NEEDS AND THAT SHE HAD BEEN DILIGENT IN IS SEEKING SUITABLE EMPLOYMENT; DISABLED HUSBAND ORDERED TO PAY SPOUSAL SUPPORT.

In re Marriage of Boyd, No. 07-14-00211-CV, 2015 WL 3941614 (Tex. App.—Amarillo 2015, no pet. h.) (mem. op.) (06-24-15).

Facts: Husband and Wife had been married about 21 years. When they married, Husband was an anesthesiologist, and Wife was in med school. After completing, med school, Wife took the board certification exam 11 times but was unable to pass. Thus, she never obtained a license to practice medicine. During the marriage, Father developed significant health issues related to weight gain. He applied for disability under multiple policies and at the time of divorce, he was unemployed but receiving non-taxable $28,689 per month plus social security disability payments. As Husband's disabilities worsened throughout the marriage, Wife spent most of her time tending to Husband's basic necessities and basic life functions. Wife only held three jobs during the marriage, the first of which was phased out, the second was discontinued, and the third was a contract position after which she was not rehired. When the divorce process began, Wife made efforts to find work in California, where she planned to live.

After a trial, the court entered a decree that provided for spousal maintenance payments to Wife of $3200 per month. Husband appealed arguing that the evidence was insufficient to support findings that Wife was unable to earn sufficient income to provide for her needs, that the property awarded to her in the decree was inadequate to provide for her needs, or the amount of her reasonable financial needs.

Holding: Affirmed

Opinion: Although Wife had a medical degree, she was never able to pass the licensure examination and had never been able to practice medicine. Additionally, she was 51-years old, only had sporadic employment outside the home during the 21-year marriage, and she had fallen behind on basic computer skills. Wife spent much of the marriage caring for Husband, which caused her to become functionally unemployable.

Wife had contacted a former employer about future opportunities, checked internet job-posting boards daily, and had spoken with headhunters. Wife had purchased two self-help books to improve her basic computer skills. Wife testified that if she took her social security early, her total monthly income would be $900 per month. She further testified that her monthly expenses were well over $10,000 a month, not including the mortgage. Husband did not controvert this evidence; in fact, he estimated her minimum reasonable needs to be $15,000 per month. Finally, although Wife was awarded significant property in the divorce, most of that property was non-liquid and would require time before cash value could be realized or would carry significant tax consequences if accessed. Additionally, although the marital home had been on the market throughout the divorce proceedings, it had received no offers.

SAPCR
STANDING AND PROCEDURE

MATERNAL GREAT-AUNT NOT REQUIRED TO ENTER PLEADINGS OR PRESENT EVIDENCE PRIOR TO TRIAL COURT APPOINTING HER SOLE MANAGING CONSERVATOR.

In re R.A., No. 10-14-00352-CV, 2015 WL 3646528 (Tex. App.—Waco 2015, no pet. h.) (mem. op.) (06-11-15).

Facts: After the Child was severely burned, his Mother and her boyfriend failed to seek medical treatment for almost a day. The Child was removed and placed with his four siblings, who were residing with the Child's Maternal Great-Aunt. By the time the case got to trial, TDFPS concluded that termination of Father's parental rights was not in the Child's best interest, but that the Maternal Great-Aunt should be appointed the Child's managing conservator. The Maternal Great-Aunt was not made a party to the proceedings, but she was present at the final hearing. The trial court entered an order following TDFPS's recommendations. Father appealed, arguing the trial court erred in appointing the Maternal Great-Aunt as sole managing conservator because she had no affirmative pleadings on file and did not present any evidence.

Holding: Affirmed

Opinion: The Family Code provides that the Department can recommend a relative be named managing conservator in its permanency plan. Father presented no authority supporting his claim that a relative who had been recommended for placement by TDFPS would be required to file her own pleadings or present evidence. Rather, TDFPS as petitioner, bore the burden to establish that Father should not have been named managing conservator and that the Maternal Great-Aunt should have been. TDFPS's pleadings and evidence was sufficient to support the trial court's appointment.

SAPCR
PATERNITY

DISCOVERY RULE DID NOT TOLL FOUR-YEAR STATUTE OF LIMITATION TO CHALLENGE PATERNITY; MISREPRESENTATION EXCEPTION OF TEX. FAM. CODE § 160.607(b) DOES NOT APPLY RETROACTIVELY.

In re S.T., ___ S.W.3d ___, 2015 WL 3646990, 02-15-00014-CV (Tex. App.—Fort Worth 2015, no pet. h.) (06-12-15).

Facts: During Husband and Wife's marriage, one Child was born. Husband, and Texas law, presumed he was the father of the Child. Wife never gave Husband any reason to think otherwise. However, as the Child grew older, Husband began to suspect that the Child's father was not his. Husband filed for divorce and denied his paternity of the Child. Husband sought genetic testing and named an unknown father as a respondent to the suit. Wife countersued and asserted that Husband's denial of paternity was barred by the statute of limitations. Husband filed a third-party petition against Wife's lover seeking money damages in an amount equivalent to unpaid child support. Husband and Wife entered a Rule 11 agreement, in which they agreed that Husband would not be adjudicated to be the father of the Child in the final decree, and he would have no duties with respect to the Child, including the duty of child support. The agreement also provided that if Wife ever received child support from the Child's father, Husband would be entitled to one-third of the funds received. Wife's lover filed an objection to the Rule 11 agreement, arguing that adjudicating Husband not to be the Child's father violated public policy. Wife's lover also filed a counterclaim for a declaratory judgment that Husband's attempt to challenge his paternity was barred by a four-year statute of limitations. After a hearing, the trial court entered an agreed Order for Stipulation of Facts that incorporated Husband and Wife's Rule 11 agreement. Wife's lover filed a petition for writ of mandamus. Husband filed a response asserting that the discovery rule applied and that Wife's deception prevented him from asserting a claim within the four-year statute of limitations. Husband argued that Tex. Fam. Code § 160.607(b), which had been amended more than four-years after the Child was born to include just such an exception, was merely a codification of the existing common law.

Holding: Writ of Mandamus Conditionally Granted

Opinion: When the Child was born, Tex. Fam. Code § 160.607(b) did not include an exception providing for inaction due to deception. The legislative addition of such an exception was not added until after the Child was four years old. Thus, the statutory exception was unavailable to toll the statute of limitations.

The discovery rule has never been applied in a situation involving a presumed father and the conception of a child during the marriage. Thus, there was no common law discovery rule that could have tolled the four-year statute of limitation.

Because the legislature had not yet endorsed the misrepresentation exception, Wife's lover had a vested right to rely on the four-year statute of limitations. Public policy favors preserving an established family unit where there has been a long-term relationship between a child and a presumed father.

Even though the Order for Stipulations of Facts did not directly purport to impose liability on Wife's lover or adjudicate him to be the father of the Child, the stipulation was contrary to the court of appeals' holding that the limitations period had run. Thus, Husband and Wife could not bind Wife's lover—a third party to the proceeding—by stipulation.

Moreover, under the statutory scheme of Texas Family Code Chapter 160 Subchapter G contemplated that a child would not be left without a means of support, either by a presumed father or an adjudicated father. Husband and Wife's stipulation attempted to contravene that statutory scheme.

SAPCR
CONSERVATORSHIP

FINDING OF FAMILY VIOLENCE PRECLUDED APPOINTMENT OF PARENTS AS JOINT MANAGING CONSERVATORS; MOTHER'S FAILURE TO DISCLOSE HER METHODS FOR CALCULATING ECONOMIC DAMAGES DID NOT WARRANT STRIKING HER CLAIMS SEEKING NON-ECONOMIC DAMAGES.

Baker v. Baker, ___ S.W.3d ___, 2015 WL 3917922, 14-14-00083-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (06-25-15).

Facts: Mother and Father had two Children. At trial, Mother testified about a history of domestic violence against her by Father, including his pushing her, throwing a chair at her, spitting on her, and calling her derogatory names in front of the Children. She had ultimately filed for divorce because Father had punched her in the face, breaking at least two bones in her skull. Mother had to undergo surgery to save her eye. In addition to the requesting a divorce, Mother asserted several tort claims against Father, including assault, battery, terroristic threats, and IIED.

During discovery, Mother responded to Father's request for disclosure and included the medical bills associated with the punching incident. However, she did not disclose the amount or method for calculating her requested economic damages, including lost earnings and lost earning capacity. Father filed a motion to exclude Mother's tort claims, which the trial court granted. At the conclusion of the trial, the trial court awarded Mother a disproportionate share of the marital estate and appointed the parents joint managing conservators ("JMC"). In its subsequent findings of fact and conclusions of law, the court found "[f]amily violence has occurred in the past but the court declines to find that it is likely to occur in the future." The court further found that the appointment of the parents as JMC was in the children's best interest.

Mother appealed arguing that the trial court erred in appointing the parents JMC despite its family violence finding, in striking her tort claims as sanctions, and in granting the divorce on the ground of insupportability as opposed to cruelty.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Conservatorship: Tex. Fam. Code § 153.004 prohibits the appointment of the parents as JMC when there is a "history or pattern of past or present neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child." The court of appeals held that a finding of "family violence," although not explicitly included in the language of § 153.004, precludes such an appointment under that section.

Although Father argued that the trial court's finding of family violence could have been based on the punching event alone, Mother introduced evidence of other acts of abuse, and a single act can amount to history of physical abuse. Moreover, § 153.004 does not require evidence that Father *intended* to harm Mother. Thus there was sufficient evidence to establish a history of violence.

Additionally, although Mother never sought a protective order, that is not a perquisite to a finding of physical abuse. Unlike the requirements for obtaining a protective order, § 153.004 does not require a finding that violence is likely to occur in the future.

Because the family violence finding precluded an appointment of the parents as JMC, the court of appeals remanded the case to the trial court for a determination as to which parent should be appointed the sole managing conservator of the children.

Discovery Sanctions: Although Mother did not disclose the amount or any method of calculating economic damages, Mother also sought non-economic damages. Therefore, striking all of her tort claims was an excessive discovery sanction. Because the court of appeals remanded the case for a consideration of Mother's tort claims, the court was also obligated to remand the divorce decree's property division to avoid awarding Mother a double recovery.

Ground for Divorce: The trial court made a finding of fact that the marriage had become insupportable. Mother did not challenge that finding, and the evidence supported the finding. Thus, the court did not abuse its discretion in not finding that the marriage should have been dissolved based on cruelty.

MISCELLANOUS

★★★TEXAS SUPREME COURT ★★★

STATE LACKED STANDING TO INTERVENE OR SEEK APPELLATE RELIEF BECAUSE IT FAILED TO INTERVENE BEFORE THE TRIAL COURT'S JUDGMENT, THE JUDGMENT WAS NOT SET ASIDE, AND THE STATE DID NOT SATISFY THE DOCTRINE OF VIRTUAL REPRESENTATION.

¶15-4-__. ***State v. Naylor,*** ___ S.W.3d ___, 2015 WL 3852284, Nos. 11-0114, 11-0222 (Tex. 2015) (06-19-15).

Facts: Two Texas women were married in Massachusetts and sought a divorce in Travis County. They were raising a child and operating a business together, and the Petitioner sought a judgment addressing their respective rights, some of which had been previously settled in a SAPCR. Initially, the Respondent challenged the divorce, arguing that Texas lacked jurisdiction to recognize their marriage. However, the parties reached an agreement that was read into the record. The trial court then granted an ostensible divorce pursuant to the agreement, stipulating that the judgment "is intended to be a substitute for…a valid and subsisting divorce," and "is intended to dispose of all economic issues and liabilities as between the parties whether they [are] divorced or not."

The next day, the State, which had been present during the hearing and the announcement of the judgment, filed a petition in intervention to defend the constitutionality of Texas laws limiting divorce actions to opposite-sex couples. The State had not previously attempted to intervene or otherwise make its interests known. The trial court denied the petition in intervention. The State appealed, but the court of appeals held that the State lacked appellate standing. The State sought both appellate and mandamus relief from the Texas Supreme Court.

Holding: Trial Court and COA Affirmed; Mandamus Denied.

Majority Opinion: (J. Brown, C.J. Hecht, J. Green, J. Johnson, J. Boyd) (J. Lehrmann did not participate)

The State did not timely intervene and was not a party of record. Once a judgment is rendered, intervention may only be allowed if the trial court sets aside its judgment.

An appellant may be "deemed to be a party" under the Doctrine of Virtual Representation if the appellant establishes (1) it is bound by the judgment, (2) its privity of estate, title, or interest appears from the record; and (3) there is an identity of interest between the appellant and a party to the judgment. None of these elements were satisfied. Further, the State identified no equitable doctrine that might allow it to seek appellate review. While equity is a factor in determining whether a party may intervene, such equity is applied in a determination of whether intervention will prejudice the existing parties, not the intervenor. The courts lack authority to expand the scope of their respective jurisdictions, which are determined by the Texas constitution and legislature.

While a party may seek mandamus from the Texas Supreme Court without first seeking it from the courts of appeals, the relator must present a compelling reason for such action. Here, the State argued that it did not file a mandamus because it thought it would have standing to appeal. Additionally, the State contended that the effort would have been futile because the lower court had "already made clear its skepticism of the State's argument." Neither a misunderstanding of the law, nor an argument of futility constituted a "compelling reason" for not seeking mandamus from the court of appeals.

Concurring Opinion: (J. Boyd)

Only those with a justiciable interest in a trial court's judgment have standing to appeal. A post-judgment intervention is only permissible if the trial court sets aside its judgment. The trial court was not asked to, and did not, set aside its judgment, and the virtual representation doctrine did not apply.

Contrary to J. Willet's dissent, the Court has never allowed a non-party to appeal if it did not meet the requirements of virtual representation. If equity is applied to an intervenor it is used to deny an intervention. If a party does not have standing to pursue its appeal, "no amount of equity can overcome that barrier."

Dissenting Opinion: (J. Willett, J. Guzman, J. Devine)

Because the question before the trial court was Constitutional in nature, the State should have received notice while the case was pending. Further, because intervention is an equitable doctrine, the State should have been permitted to intervene even if its petition was filed after the judgment.

Here, the parties had no interest in including the State in their dispute, but the State had an interest in the proceedings because they questioned the constitutionality of a Texas law, which the State had a duty to defend. The parties should not have been permitted to subvert the State's right to defend the law through a "legally baseless agreed judgment." A court

should seek arguments from the attorney general on alleged bars to jurisdiction when the nature of the proceedings removes any expectation that the parties themselves will address the issue.

Moreover, because the decree was void, it could be collaterally attacked for as long as the parties were alive. As that left the State and the parties in a place of uncertainty, they all deserved a "definitive, once-and-for-all ruling."

Dissenting Opinion: (J. Devine)

Although the question was not before the court, J. Devine fully addressed whether a same-sex divorce should be permitted in Texas and answered the question in the negative.

Under Texas law, because Texas did not recognize same-sex marriage, the parties' only option was to have their marriage declared void through an in rem proceeding. Texas' prohibition on same-sex marriage did not violate the Due Process or Equal Protection Clauses because same-sex marriage has never been considered a fundamental right, and homosexuals are not a suspect class. Therefore, the classification was only subject to rational review, as opposed to strict scrutiny. Texas had a rational interest in defining marriage based on history and tradition and in a manner that promoted family stability and the well-being of children.

Because *Windsor* did not overturn the portion of DOMA that explicitly provided states with no duty to recognize same-sex marriages performed in other states, and because such marriages violated Texas' public policy, Texas was not required to give Full Faith and Credit to the parties' out-of-state marriage. Finally, there was no allegation that Texas' ban on same-sex marriage deterred the parties; right to travel.

★★★UNITED STATES SUPREME COURT ★★★

SAME-SEX COUPLES MAY EXERCISE THE FUNDAMENTAL RIGHT TO MARRY IN ALL STATES; THERE IS NO LAWFUL BASIS FOR A STATE TO REFUSE TO RECOGNIZE A LAWFUL SAME-SEX MARRIAGE PERFORMED IN ANOTHER STATE ON THE GROUND OF ITS SAME-SEX CHARACTER.

¶15-4-__. ***Obergefell v. Hodges,*** 576 U.S. ___, 2015 WL 2473451, Nos. 14-556, 14-562, 14-571, and 14-574 (06-26-15).

Facts: Petitioners were fourteen same-sex couples and two men whose same-sex partners were deceased. Respondents were state officials responsible for enforcing the challenged laws. The petitioners claimed that the respondents violated the Fourteenth Amendment by denying them the right to marry or to recognize their lawfully performed out-of-state marriages. In each case, the trial courts ruled in the petitioners' favor. The respondents appealed to the Sixth Circuit, which consolidated the cases and reversed the lower courts' rulings. The petitioners appealed to the US Supreme Court.

In its Opinion, the Supreme Court provided the facts for three of the petitioners:

Obergefell was in a long-term relationship with a man named John Arthur, who was diagnosed with ALS. The couple wanted to get married before Arthur died. Because same-sex marriage was not allowed in Ohio, they flew to Maryland to get married. However, due to Arthur's condition, they wed inside the medical transport plane on the tarmac in Baltimore. After Arthur passed away, Ohio refused to list Obergefell as the surviving spouse on Arthur's death certificate.

Two women in Michigan lived as a family and had each individually adopted one child. Michigan would not permit the two women to adopt both children together, so they lived in fear that if an emergency arose, schools and hospitals would treat the children as if they only had one parent. Further, if either mother died, the surviving mother would have no legal rights to protect the child she was unable to adopt.

A soldier and his partner were legally married in New York. After the soldier returned from a tour of duty in Afghanistan, the couple moved to Tennessee, where same-sex marriage was not recognized. Despite the soldier having served this Nation to preserve our Constitutional freedoms, his lawful marriage was stripped from him when he crossed state lines.

Holding: Judgment of the Sixth Circuit is Reversed.

Majority Opinion: (J. Kennedy, J. Ginsburg, J. Breyer, J. Sotomayor, J. Kagan)

Marriage has evolved over time. Once, it was viewed as an arrangement by a couple's parents, but later it was understood to be a voluntary contract. The law of coverture has been abandoned. The "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."

Until the mid-20th century, same-sex intimacy had been condemned as immoral. However, in more recent years, psychiatrists and others have recognized that sexual orientation is both a normal expression of human sexuality and immutable. Same-sex couples have started to lead more open and public lives and to establish families. Although some states have concluded that same-sex couples must be allowed to marry, the States were divided.

The Due Process Clause of the Fourteenth Amendment requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them respect. We must respect and learn from our history without allowing the past alone to rule the present. "When new insight reveals discord between the Constitution's central protections and a received legal structure, a claim to liberty must be addressed."

The reasons marriage is fundamental under the Constitution apply with equal force to same sex marriage. The Court provided four premises of relevant precedent to extend the fundamental right to marry to same-sex couples:

(1) The right to personal choice regarding marriage is inherent in the concept of individual autonomy. Through the bond of marriage, two persons together can find other freedoms, such as expression, intimacy, and spirituality.
(2) The right to marry support a two-person union unlike any other in its importance to committed individuals. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association.
(3) The right to marry safeguards children and families and allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. While procreation is not a prerequisite to marriage, the laws banning same-sex marriage harm and humiliate the children of same-sex parents.
(4) Marriage is a keystone of our social order. Exclusion from marriage has the effect of teaching that gays and lesbians are unequal in important respects.

Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right. The "right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty." "The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights." Further, "individuals need not await legislative action before asserting a fundamental right." "Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."

This ruling does not prevent religious organizations from continuing to teach the principals central to its practitioners' lives and faith.

Dissenting Opinion: (C.J. Roberts, J. Scalia, J. Thomas)

Fundamental rights implied under the Due Process Clause must be so rooted in the traditions and conscience of the American people as to be ranked as fundamental. While there have been cases holding that the right to marry was fundamental, none of those cases purported to change the core definition of marriage. Further, the other cases relied on by the majority correspond to a right of privacy or a right to be let alone. The bans on same-sex marriage did not impose any government intrusion on the petitioners. Moreover, the majority offered no reason as to why its reasoning could not be applied to polygamous relationships. Additionally, the majority overlooked the history and tradition of marriage. Furthermore, despite the majority's conclusory assertion that the Equal Protection Clause requires states to license and recognize same-sex marriages, it did not seriously engage with the claim.

Despite the evolution of certain characteristics of marriage, its core structure has endured. The same-sex marriage decision should have been left to public debate. People denied a voice are less likely to accept a ruling on an issue that does not seem to be the sort of thing courts usually decide. It is beyond the Court's power to address concerns not before the court or to anticipate problems that may arise from the exercise of a new right. Further, the majority's decision cast "Americans who did nothing more than follow the understanding of marriage that has existed for our entire history" as bigoted.

Dissenting Opinion: (J. Scalia, J. Thomas)

Scalia began by noting that the substance of the majority's decision was not "of immense personal importance to [him]." While he joined in the other three dissents, he wrote separately to opine that the make-up of the Supreme Court Justices is hardly a reflective cross-section of Americans as a whole. Thus, it was inappropriate for the nine Justices to make such a sweeping decision and stop the public debate of the subject. There should be "no social transformation without representation."

Additionally, there was no basis for striking down a practice that was not expressly prohibited by the Fourteenth Amendment's text. Rather, the majority "discovered" a fundamental right "overlooked" by every person alive at the time of the Fourteenth Amendment's ratification and in the time since. Further, the opinion was couched in a style that was pretentious and egotistical. The language used, while appropriate in a concurrence or dissent, was out of place in an Opinion of the Court. Moreover, "the opinion's showy profundities [were] often profoundly incoherent." Scalia noted in a footnote that "If…I ever joined an opinion that began [with the first sentence of the majority opinion], I would hide my head in a bag."

Finally, under the majority's reasoning, the Due Process Clause stands for nothing except those freedoms and entitlements that the US Supreme Court prefers. "With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court—we move one step closer to being reminded of our impotence."

Dissenting Opinion: (J. Thomas, J. Scalia)

"Due Process" guarantees whatever "process" is "due" before a person is deprived of life, liberty, or property. "Liberty" refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." Even assuming "liberty" encompasses more than freedom from physical restraint, liberty has long been understood as individual freedom from government action, not a right to a particular government entitlement.

The petitioners here cannot claim to have been physically restrained or that the States restricted their ability to go about their daily lives. Rather, the plaintiffs seek privileges and benefits that exist solely because of the government. Further, the precedents relied on by the majority all involved absolute prohibitions on private actions associated with marriage. Here, nothing prohibited the petitioners from getting married in a state that recognizes same-sex marriage or through a private religious ceremony. Additionally, the majority disregarded the political process and threatened religious liberty. It is inevitable that individuals and churches will be confronted to demands to participate in ceremonies that violate their religious faith. The majority's discussion of advancing the dignity of same-sex couples was flawed. The government cannot bestow dignity, and it cannot take it away. One's liberty and dignity is something to be shielded from, not provided by the State.

Dissenting Opinion: (J. Alito, J. Scalia, J. Thomas)

The Constitution says nothing about a right to same-sex marriage. Every person in our nation has the unalienable right to liberty, but liberty means different things to different people. The US Supreme Court has previously held that "liberty" under the Due Process Clause includes only those rights that are "deeply rooted in this Nation's history and tradition." Same-sex marriage is not among those rights.

States have reasonable secular grounds for restricting marriage to same-sex couples, including the traditional tie between marriage and procreation. Although this tie has been fraying in recent years, that does not mean the States should not be concerned about contributing further to traditional marriage's decay.

Further, the language of the majority opinion could be used to vilify Americans who are unwilling to assent to the new orthodoxy. By comparing traditional marriage laws to laws that denied equal treatment for African-Americans and women, those who oppose same-sex marriage risk being labeled as bigots if they express their views in public.

★★★TEXAS SUPREME COURT ★★★

WIFE'S ATTORNEYS PROTECTED BY LITIGATION IMMUNITY FROM CIVIL LIABILITY TO THIRD PARTIES BECAUSE CONDUCT, ALTHOUGH WRONGFUL AND FRAUDULENT, WAS CONDUCT IN WHICH AN ATTORNEY ENGAGES TO DISCHARGE HIS DUTIES TO HIS CLIENT.

¶15-4-__. ***Cantley Hanger v. Byrd,*** ___ S.W.3d ___, 2015 WL 3976267, No. 13-0861 (Tex. 2015) (06-26-15).

Facts: In their divorce decree, Wife was awarded an airplane that had been owned by Husband's company. Additionally, Wife was awarded all tax liabilities and debts associated with the airplane. The decree provided that Wife's attorney would prepare the documents to effectuate the transfer within ten-days. No documents were executed within that time-frame. About a year later, Husband discovered that Wife's attorneys had aided her in executing a bill of sale to sell the airplane to a third party. The bill of sale listed Wife on the bill of sale as a manager of Husband's company, when she had never had any role in the company, and used her married name, although her maiden name had been long-since restored. As a result of the sale, Husband's company became responsible for the tax liability associated with the airplane. Husband sued Wife's attorneys for fraud, aiding and abetting, and conspiracy. At trial, Wife's attorney's moved for summary judgment on attorney-immunity grounds. The trial court granted the summary judgment and dismissed Husband's claims with prejudice. The court of appeals reversed, holding that the attorneys' fraudulent conduct had nothing to do with the divorce decree and was outside the scope of representation of a client. Wife's attorneys petitioned the Texas Supreme Court for relief.

Holding: Court of Appeals' Judgment Reversed; Trial Court Judgment Reinstated

Majority Opinion: (J. Lehrman, J. Guzman, J. Boyd, J. Devine, J. Brown)

Attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation, even if wrongful or fraudulent. Attorneys are not protected from liability to non-clients when the actions do not qualify as the kind of conduct in which an attorney engages when discharging his duties to his client. An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that his conduct was part of the discharge of his duties to his client.

Here, because the divorce decree awarded the aircraft to Wife and provided that Wife's attorney would draft the necessary documents, the preparation of the bill of sale was "conduct in which an attorney engages to discharge his duties to his client" and was not "foreign to the duties of an attorney."

Any claims of fraud should be against Wife and not her attorneys.

Dissenting Opinion: (J. Green, C.J. Hecht, J. Johnson, J. Willett)

There are two theories of attorney immunity: (1) litigation immunity, which requires the conduct to have occurred in the litigation context; and (2) judicial proceedings privilege, which applies to statements made in the course of or in serious contemplation of a judicial or quasi-judicial proceeding. Here, there was no evidence that the judicial proceedings privilege applied.

Without the litigation immunity, an attorney's zealous advocacy at trial would be diluted. The dissent agreed that there is no exception for wrongful or fraudulent conduct. However, rather than an analysis of whether the conduct occurred in the litigation context, the majority instead asked whether the conduct occurred in the scope of representation. Under a scope-of-representation test, almost anything an attorney does would be protected from civil liability.

Further, the summary judgment evidence did not conclusively establish that the conduct occurred in the litigation context. The bill of sale was signed over a year after the divorce decree was signed. The airplane was sold to a third party. The fact that the sale had tax implications was inconsequential because the litigation had ended, and the decree did not address subsequent sales to third parties.

Moreover, the holding created a judicial dichotomy, in that the undisturbed court of appeals holding—that the fraud claims were not claims for enforcement of the decree—was contrary to the majority's holding that the attorneys' conduct was within the scope of representation in the divorce proceeding. The conflict created a question of jurisdiction as to whether the fraud claims against Wife are within the divorce courts' continuing, exclusive jurisdiction.

★★★TEXAS SUPREME COURT ★★★

NO LEGAL REQUIREMENT FOR ATTORNEYS TO EXPLAIN TO PROSPECTIVE CLIENTS ARBITRATION PROVISIONS IN ATTORNEY-CLIENT EMPLOYMENT CONTRACTS; HUSBAND FAILED TO PROVE A DEFENSE TO ARBITRATION.

¶15-4-__. ***Royston, Razor, Vickery, & Williams, LLP v. Lopez,*** ___ S.W.3d ___, 2015 WL 3976101, No 14-0109 (Tex. 2015) (06-26-15).

Facts: Husband hired a law firm to represent him in his divorce from his common-law wife who had won $11 million in the lottery. The attorney-client employment contract included an arbitration provision which stated that the parties agreed to resolve any disputes between them in binding arbitration, except claims made by the firm for the recovery of its fees and expenses. Husband signed the agreement, and the firm represented him throughout the divorce proceedings. After a settlement agreement was reached between Husband and Wife, Husband sued his law firm claiming the attorneys induced him to accept an inadequate settlement. The firm moved to compel arbitration.

In the trial court, Husband had raised affirmative defenses to arbitration, including that the arbitration provision was substantively unconscionable, the arbitration provision violated public policy, the law firm failed to explain the effects of arbitration to Husband as a prospective client, and the provision was illusory because it allowed the firm to avoid arbitration as to its fee disputes while requiring Husband to arbitrate all his disputes. At the hearing on the motion to compel arbitration, Husband introduced no evidence of his own, but rather, relied solely on the language of the attorney-client employment contract.

The trial court denied the firm's motion, so the law firm filed an interlocutory appeal and a petition for writ of mandamus. The court of appeals affirmed the trial court's refusal and denied mandamus relief. The law firm then sought relief from the Texas Supreme Court, asking the court to hold all of Husband's defenses to arbitration invalid, reverse the court of appeals' judgment, and remand the case to the trial court with instruction to order the parties to arbitration.

Holding: Court of Appeals Reversed; Remanded to Trial Court; Mandamus Denied

Majority Opinion: (J. Johnson, joined by all)

Texas law protects a broad freedom of contract. Substantive unconscionability refers to the fairness of the arbitration provision, and procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration provision. Arbitration clauses in agreements are enforceable absent proof of a defense, and a person who signs a contract with an arbitration clause is deemed to know and understand its contacts and is bound by its terms. An arbitration agreement is unenforceable if it is procedurally unconscionable, substantively unconscionable, or both.

Although Husband challenged certain terms of the contract as being "one-sided," his complaints were not directed specifically to the arbitration provision. Moreover, excepting certain claims from arbitration does not make an arbitration agreement so one-sided as to be unconscionable. The provision equally bound both parties to arbitrate claims within its scope and ensured that the same rules applied to both parties.

There are two competing policies to be considered with respect to an attorney-client arbitration agreement: (1) the policy of holding attorneys to the highest level of ethical conduct; and (2) the policy of encouraging and enforcing arbitration agreements. While an ethics opinion provided that Disciplinary Rule 1.03(b) advised that the rule applied to prospective clients, ethics opinions are advisory only. Further, even if Rule 1.03(b) did apply to prospective clients, the burden would be on Husband to establish that explanations required by the Rule were not made, which he did not do.

Finally, the fact that the scope of an arbitration provision binds parties to arbitrate only certain disagreements does not make it illusory.

Concurring Opinion: (J. Guzman, J. Lehrmann, J. Devine)

The ethical rules need more specificity delineating the means and methods by which attorneys can discharge their ethical responsibilities in the context of attorney-client contracts and arbitration provisions. Vulnerable or unsophisticated clients are less likely to fully appreciate the implications of an arbitration agreement, understand the process and its procedures, or seek independent counsel regarding the costs and benefits of arbitration. An attorney has an ethical responsibility to the client, but the Disciplinary Rules lack clear guidance.

D.B.A. Family Law Section Case Law Update

September 9, 2015

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DIVORCE
COLLABORATIVE LAW

WIFE ESTABLISHED FACT ISSUE AS TO WHETHER HUSBAND BREACHED COLLABORATIVE LAW AGREEMENT BY FAILING TO DISCLOSE DEVELOPMENTS AFFECTING HIS INCOME.

Rawls v. Rawls, No. 01-13-00568-CV, 2015 WL 5076283 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (08-27-15).

Facts: During their divorce, Husband and Wife entered a collaborative law agreement and reached a settlement agreement. In the settlement agreement, Wife was entitled to portions of Husband's bonuses over the next few years. However, Wife later discovered that before the settlement agreement was signed, Husband received a job offer and resigned from his job. Although a non-compete period prevented him from immediately taking the job offer, he was able to accept the job after a 90-day period elapsed. Wife alleged that, during negotiations, Husband suggested modifications to the settlement agreement that appeared innocuous to Wife at the time but were designed to deprive Wife of any of Husband's future bonuses.

Wife filed a bill of review attacking the decree and a petition for enforcement. The trial court granted a Husband's partial motion for summary judgment. During a bench trial, the parties disputed whether the summary judgment disposed of all of Wife's claims. The trial court signed a final judgment stating that the summary judgment disposed of the majority of Wife's claims and denied the remainder. Wife appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The disclosure provision in the parties' collaborative law agreement required Husband to disclose "all developments affecting…[his] income." However, Husband failed to disclose that prior to signing the settlement agreement, he received a job offer, resigned from his current job, and was told that he could inquire about the offer again after his 90-day non-compete period elapsed. Thus, there was a genuine issue of material fact regarding whether Husband breached the collaborative law agreement.

Additionally, Husband owed a duty to Wife that arose from the collaborative law agreement. While represented parties in a divorce generally do not owe a fiduciary duty to one another, Wife presented fact issues as to whether Husband breached his fiduciary duty pursuant to the collaborative law agreement and committed fraud by non-disclosure.

A summary judgment cannot dispose of claims not addressed in a motion for summary judgment. Because Husband did not address Wife's bill of review, petition for post-divorce division, and enforcement claims based on non-disclosure, the trial court erred in granting summary judgment on those claims.

To successfully challenge a summary judgment on appeal, an appellant must address each argument that could support the summary judgment. Here, however, Wife only addressed one of Husband's many urged grounds. Therefore, to the extent summary judgment was granted on claims addressed in Husband's motion for summary judgment, Wife waived her claims.

Finally, when the trial court excluded evidence regarding the applicable tax rate of the 2009 bonus, Wife made an offer of proof. The court of appeals held that the excluded evidence was necessary to show whether Wife's contention was correct, and if so, to calculate her award. Thus, the trial court erred in excluding the evidence.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

WIFE PRESENTED FACT ISSUE AS TO WHETHER HUSBAND'S POST-MSA BONUS WAS COMMUNITY PROPERTY SUBJECT TO DIVISION OR WAS "FUTURE EARNINGS" PARTITIONED BY MSA.

Loya v. Loya, ___ S.W.3d ___, 2015 WL 4546398, 14-14-00208-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (07-28-15).

Facts: Husband and Wife were married for almost thirty years. During the marriage, Husband worked for a company that provided discretionary annual bonuses. A few months after receiving a bonus, the parties signed an MSA, which served as "an immediate partition" of all future earnings of the parties. Shortly thereafter, Wife moved to set aside the MSA, asserting there was no meeting of the minds because the parties had not reached an agreement as to the division of Husband's next bonus, a portion of which pertained to services rendered prior to the signing of the MSA. The trial court denied Wife's motion and signed a final decree incorporating the terms of the MSA. Wife did not appeal the decree.

Less than a year later, Husband received his $4.5 million bonus, and Wife filed an original petition for post-divorce division of property. Husband moved for a partial summary judgment on the ground that the bonus had been partitioned by the MSA. Wife responded that a genuine issue of fact existed as to whether the bonus was subject to division. The trial court granted Husband's partial summary judgment, heard evidence on attorney's fees, and then signed a final judgment. Wife appealed.

Holding: Reversed and Remanded

Majority Opinion: (J. McCally, J. Boyce)

The parties' MSA expressly partitioned only "future earnings" and had no impact on the characterization of earnings prior to the execution of the MSA. Additionally, because there is no bright line rule for bonuses, Wife presented a fact issue as to whether some portion of Husband's bonus was community property undivided by the MSA.

Dissenting Opinion: (C.J. Frost)

The parties' MSA provided that "All future earnings…are partitioned to the person providing the services giving rise to the earnings." When drafting the divorce decree, the parties disagreed about this provision, and after arbitration, the following language was used in the decree: "All future income and earnings are partitioned as of June 13, 2010…" The arbitrator's provision also included an exception for the purpose of calculating tax liability for the year of the parties' divorce. The plain meaning of "income" and "earnings" as defined by Black's Law Dictionary and the Texas Family Code encompassed Husband's post-MSA bonus. Even if a portion of the bonus could be characterized as community property, the parties partitioned that community property in their MSA.

WHETHER OR NOT MSA WAS AMBIGUOUS, TRIAL COURT LACKED DISCRETION TO SET ASIDE STATUTORILY COMPLIANT MSA.

In re Lauriette, No. 05-15-00518-CV, 2015 WL 4967233 (Tex. App.—Dallas 2015, orig. proceeding [Mandamus pending in Texas Supreme Court]) (mem. op.) (08-20-15).

Facts: Father and Mother had one Child during their marriage. During their divorce proceedings they attended mediation and signed a binding MSA. The MSA provided that Father would pay to Mother monthly post-divorce maintenance payments for 72 months. The MSA further provided that if Father became the sole managing conservator because Mother moved outside of a specified geographical area, the monthly "alimony" payments would be terminated. The "alimony" would not terminate upon death of Father, cohabitation of Mother, or marriage of Mother. The final decree was to be prepared consistently with the Texas Family Law Practice Manual ("TFLPM"). There was no arbitration provision, but the MSA provided that they would return to mediation if they disagreed about the drafting of the final decree.

Mother and Father could not reach an agreement regarding the tax treatment of the alimony. Mother argued that the payments would terminate "only if" Father became sole managing conservator under the conditions described above. Father argued that because the decree was to be prepared consistently with the TFLPM, and because the MSA did not explicitly provide otherwise, the payments terminated upon Mother's death.

At a hearing on the parties' motions—Mother's motion to enter her version of a decree and Father's motion to set aside the MSA—Father presented evidence that a prior version of the MSA included a provision that the payments would not terminate upon Mother's death, but that provision was deleted from the final, signed MSA. The trial court determined there was an ambiguity as a matter of law and that it could not assess the parties' intent regarding tax treatment. Thus, the trial court granted Father's motion to set aside the MSA.

Mother filed a petition for writ of mandamus complaining that the trial court abused its discretion by setting aside a statutorily compliant MSA. Father argued that because the parties had already re-attempted mediation—as provided in the MSA—and failed to resolve the issue, and because the trial court could not determine the parties' intent, the only remaining solution was to set aside the MSA.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Relying on *Milner v. Milner*, 361 S.W.3d 615, 619 (Tex. 2012), the court of appeals determined that because the MSA Texas Family Code's statutory requirements, the trial court lacked the authority to set it aside. Unlike *Milner*, the parties here had not agreed to binding arbitration in the event of a dispute regarding the terms of the MSA. Therefore, the trial court was still the trial of fact and had a duty to resolve any remaining fact questions before entering a final decree.

The court of appeals offered no guidance as to whether the MSA was ambiguous, or if it was not, which parties' interpretation was correct.

The court of appeals noted in a footnote that—although not at issue in this case—mediated settlement agreements are not enforceable when they are illegal in nature or procured by fraud, duress, coercion, or other dishonest means.

DIVORCE
DIVISION OF PROPERTY

PASTOR-HUSBAND'S NET INCOME INCLUDED "GIFTS" RECEIVED FROM HIS CHURCH; PARTIES' HOUSE NOT PART OF COMMUNITY AND NOT SUBJECT TO DIVISION BECAUSE HUSBAND'S ONE-SPOUSE DEED OF HOUSE TO CHURCH BECAME OPERATIVE ONCE WIFE'S HOMESTEAD INTEREST WAS DIVESTED BY FINAL DECREE.

West v. West, No. 01-14-00350-CV, 2015 WL 4251159 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (07-14-15).

Facts: Husband was a pastor of a church. During the marriage, the church wanted to give Husband a house, but it could not obtain financing. Instead, Husband purchased a house, and the church provided him with an annual $50,000 housing allowance. After purchasing the house, Husband and Wife deeded the house to the church. Subsequently, when interest rates dropped, the church wanted to refinance the mortgage on the house, but it was still unable to obtain financing. Thus, the church deeded the house back to Husband and Wife, who refinanced the mortgage. Subsequently, Husband deeded the house back to the church, but Wife did not sign that deed.

In its final decree of divorce, the trial court divided the assets relatively equally, with Husband receiving the house and Wife receiving a number of bank accounts. Husband appealed, arguing that the trial court erred in including the house in the property division.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Whether a homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse except as otherwise provided by law. A one-spouse homestead transaction is not void but is inoperative while the property remains the non-signing spouse's homestead. On the termination of a homestead, title passes to the grantee.

Here, Husband's conveyance of his interest in the house was not void, but it was inoperative against Wife's homestead claim to the house. However, once the trial court, in its final decree, divested Wife of her interest in the property, Husband's deed to the church became operative. Thus, the house was not part of the community estate subject to division. Further, the house was the party's largest asset in the trial court's property division. Thus, the entire division had to be remanded to the trial court for a new just and right division.

HOUSE WAS ONLY VALUED ASSET, SO NET VALUE OF COMMUNITY ESTATE CORRESPONDED TO EQUITY IN HOUSE; AWARD OF HOUSE TO WIFE WAS AWARD OF 100% OF THE COMMUNITY ESTATE, BUT NO REASONABLE BASIS EXISTED FOR DOING SO.

Kaftousian v. Rezaeipanah, ___ S.W.3d ___, 2015 WL 4389581, 08-14-00019-CV (Tex. App.—El Paso 2015, no pet. h.) (07-17-15).

Facts: During their divorce proceedings, Husband and Wife each testified as to the composition of the marital estate. The evidence established that the parties had significant debt, that each was living paycheck-to-paycheck, and that their house was encumbered by two mortgages. Wife wanted to live in the house for eight years—until their Child was grown—after which time, she intended to sell the house and give Husband his share of the proceeds. Husband wanted to sell the house immediately in order to pay the Parties' debts. After the bench trial, the court awarded Wife the marital residence and mortgages and divided the remaining assets and debts equally. Husband appealed, arguing that the trial court's division was manifestly unjust because it awarded a disproportionate share to Wife without a reasonable basis for doing so.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Based on the evidence presented at trial, the community estate consisted of the home, the two cars, two mortgages, and two car notes. The only evidence regarding value was related to the house. Therefore, the entire basis of the trial court's value of the community estate was the net value of the home, which was awarded 100% to Wife. The trial court granted the divorce on the ground of insupportability, and there was no evidence justifying a disproportionate award to Wife.

BECAUSE PARTIES' AGREEMENT TO USE CERTAIN VALUATION EXPERT DID NOT PROVIDE THAT THE EXPERT'S VALUE WOULD BE FINAL AND BINDING, HUSBAND WAS ENTITLED TO RETAIN HIS OWN ADDITIONAL VALUATION EXPERT TO TESTIFY.

Stearns v. Martens, ___ S.W.3d ___, 2015 WL 5092497, 14-13-00094-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (08-27-15).

Facts: Husband had a pool business before marriage. During the marriage, the business was incorporated and shares were issued separately to Husband and Wife. Husband actively served in the army, and before one of his deployments, Husband and Wife executed a stock transfer agreement in which Wife purchased Husband's stock for $10. The agreement did not contain the term "gift," "partition," "separate property," "separate use," or "separate estate." During their divorce, Husband and Wife disputed both the character and the value of the stocks.

The issue of character was tried to a jury. After Wife presented her case-in-chief and rested, she moved for a directed verdict, which the trial court granted in part—finding that 49% of the stocks were Wife's separate property. The jury found the other shares were community property.

The remaining issues, including the value of the stocks, were tried to the bench. The parties had agreed to use an appraiser who valued the stocks at slightly under $500k. However, Husband additionally retained another appraiser who valued the stocks at $1.6 million. Wife objected to the testimony of Husband's expert because the parties had agreed to use a single expert. The trial court sustained her objection and excluded Husband's expert's testimony.

Additionally, Wife requested monetary sanctions for Husband's failure to attend court-ordered mediation. Wife complained that every time the case required Husband's direct participation, he claimed he could not participate because he was serving in the military.

In its final decree, the trial court found that 49% of the stocks were Wife's separate and 51% were community property; used the agreed expert's value for the stocks; and ordered Husband to pay sanctions for his failure to attend mediation.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A trial court should not render a verdict against a party before that party has had a full opportunity to present his case and has rested, except under certain exceptions not present here. Thus, the trial court erred in granting a directed verdict against Husband before he had an opportunity to present his case-in-chief. Moreover, because the stock transfer agreement contained no recital stating anything about gift or separate property, Husband was entitled to use parol evidence regarding the parties' intent behind the stock transfer agreement.

The trial court granted a motion to give the parties 30 days to agree on an appraiser of Husband's business, which they did. However, neither the trial court nor the parties stated that the appraiser's valuation would be final and binding on the parties. Moreover, the trial court signed a docket control order providing for a deadline for the designation of experts. Husband timely designated a second expert and timely provided an expert report from that expert. Thus, the trial court erred in excluding the testimony of Husband's expert.

While the Servicemembers Civil Relief Act should be construed liberally to accomplish its purpose, it should not be used as a device to delay the proper and expeditious determination of legal proceedings. Section 521 of that Act allows a defendant to seek a stay when he has not made an appearance. Here, Husband had filed an answer and counterpetition. In seeking a stay under Section 522, the movant must provide a letter from his commanding officer stating the duties preventing appearance. Here, Husband provided two letters, but neither was from his commanding officer. Thus, the trial court did not err in denying Husband a stay and in finding his failure to attend the court-ordered mediation was sanctionable.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

TRIAL COURT RETAINED AUTHORITY TO ENFORCE JUDGMENT AFTER PLENARY POWER EXPIRED, BUT TRIAL COURT COULD NOT ENTER ENFORCEMENT ORDER INCONSISTENT WITH JUDGMENT.

Bhardwaj v. Pathak, No. 05-14-01030-CV, 2015 WL 4882522 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-17-15).

Facts: Husband and Wife divorced in California. The decree ordered that a property in Texas was to be sold and the proceeds divided equally between the parties. Wife domesticated the California judgment in Texas. Subsequently, Wife obtained a California order to aid in enforcing the California judgment, which she filed in Texas. In response to Wife's request, the Texas trial court entered an enforcement order appointing a receiver to sell the property and deliver the proceeds to Wife. Husband appealed the Texas enforcement order and raised a number of issues related to the Uniform Enforcement of Foreign Judg-

ments Act, whether Texas had personal jurisdiction over him, whether California had jurisdiction over the Texas property, and whether the Texas Court properly applied the Full Faith and Credit Clause.

Holding: Affirmed as Modified

Opinion: Filing the enforcement order only enforced the already domesticated Texas judgment and did not affect the appellate timetable. Thus, by the time the enforcement order was entered, Husband had already missed the deadline to appeal the underlying judgment. Additionally, his notice of appeal was to the enforcement order. Thus, the court of appeals could not address the majority of Husband's complaints.

A trial court retains authority to enforce its judgment after its plenary power expires. However, once its plenary power has expired, the trial court cannot make orders inconsistent with its final judgment. The underlying judgment ordered that proceeds be divided equally between Husband and Wife. Thus, while the trial court could enter orders enforcing the sale of the house pursuant to the underlying judgment, it could not order the proceeds be delivered solely to Wife.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

WIFE'S CHILD SUPPORT OBLIGATION BASED ON MINIMUM WAGE WAS INCONSISTENT WITH CONCLUSION THAT WIFE'S DISABILITY WARRANTED AN AWARD OF SPOUSAL MAINTENANCE.

K.T. v. M.T., No. 02-14-00044-CV, 2015 WL 4910097 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (08-13-15).

Facts: Husband and Wife had two children. Wife alleged that she was unable work due to physical pain for which she took medication. There was evidence that Wife was addicted to pain medication, doctor shopped, and filled her prescriptions more often that recommended. While in Wife's possession, one of the Children once texted Husband to tell him that Wife was passed out but not dead. Ultimately, Wife was awarded only limited supervised possession of the Children.

The community estate was comprised mostly of debt. One of the only valuable assets was Husband's deferred compensation account. Husband testified that the account was set up for the purpose of paying for the Children's college education and was a gift to the Children. The trial court found that the account was a gift and did not include it in the division of the estate. The trial court awarded Husband control of the account to be used solely for the Children's educations.

Wife testified that her monthly expenses exceeded $14,000 not including monthly rent. Husband testified that Wife lived beyond her means and that he had paid over $200,000 in temporary spousal support while the divorce was pending. The trial court awarded Wife spousal maintenance of $1,250 per month for one year. Additionally, Wife was ordered to pay child support based on minimum wage.

Wife appealed raising a number of issues, including the failure to include the deferred compensation account in the division of the community estate, the award of spousal maintenance, and her child support obligation.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: (C.J. Livingston, J. Dauphinot) Although Husband testified that the deferred compensation account was set up for the purpose of paying for the Children's college educations, the account was still in his name, and future distributions were to be made to Husband. Additionally, there was no evidence of a divestiture of ownership indicating a gift. While the evidence supported a disproportionate division in Husband's favor, it did not support giving Wife 86%–76% of the community debt while giving Husband the only liquid asset that could potentially be used to pay off debt.

There is no requirement that an award of spousal maintenance eliminate a shortfall between monthly income and expenses. However, by determining that Wife was entitled to spousal maintenance—presumably due to her inability to be employed as a result of her drug addiction—the award of spousal maintenance was incongruous with the award of child support. That the trial court implicitly found that Wife was unable to support herself and that child support should be set based on Wife earning minimum wage was inconsistent.

Concurring and Dissenting Opinion: (J. Gabriel) When reversible error materially affects the just and right division of the community estate, the appellate court must remand the case for a new division. Because the majority held that the trial court erred in finding that the deferred compensation account was a gift to the children and that the failure to include it resulted in an inequitable division of the community estate, the majority should not have addressed Wife's remaining property-related issues.

Further, the majority reached its determination regarding spousal support based on speculative inferences derived from the trial court's actual findings.

SAPCR
PATERNITY

CHILDREN'S FATHER COULD NOT RELY ON COURT ORDER CHANGING HIS GENDER IDENTITY TO MALE TO CONFER STANDING TO ADJUDICATE PARENTAGE.

In re Sandoval, ___ S.W.3d ___, 2015 WL 4759972, 04-15-00244-CV (Tex. App.—San Antonio 2015, orig. proceeding) (08-12-15).

Facts: Some of the facts below come from the first case involving these parties: *In re N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (03-11-15).

Father was born female but self-identified as male and had been raised as a boy. When Father and Mother met, Mother knew that Father had been born female. The two began a romantic relationship, and during the relationship, Mother adopted two Children as newborns, the second adoption occurring when the first Child was two-years old. The Children referred to Father as their father, and Father was known as the Children's father to family, friends, school officials, and church officials. When the Children were six- and four-years old, Father quit his job to be a stay at home parent. Three years later, Mother and Father separated, and Father moved out of the family home. He continued to care for the Children after school, in the mornings, and on weekends. Nearly three years later, Mother refused to allow any contact between Father and the Children. About a week later, Father obtained an order to legally change his female birth name to the masculine name he had gone by since he was a Child. A few weeks later, Father filed a SAPCR seeking joint managing conservatorship and equal periods of possession and access. Father subsequently filed a voluntary statement of paternity. Father then obtained an order changing his identity from female to male. Mother filed a motion to dismiss Father's petition for lack of standing, which the trial court granted. Father appealed, asserting standing under Tex. Fam. Code § 160.602(a)(3), § 102.003(a)(8) and (9), and under the common law doctrines of *in loco parentis*, unconsionability, estoppel, and psychological parent.

The court of appeals determined that because Father was not a "man" at the time that he filed his SAPCR, he lacked standing under both Tex. Fam. Code § 160.602(a)(3) and Tex. Fam. Code § 102.003(a)(8). Additionally, Father lacked standing under Tex. Fam. Code § 102.003(a)(9) because, after their separation, which occurred almost three years before he filed suit, Father was not as involved with the actual care, control, and possession of the Children.

Moreover, Father failed to show that he had standing under the asserted common law doctrines. *In loco parentis* has never been applied when the actual parent has maintained custody of the child. Further, Father cited no authority that unconscionability or estoppel were independent grounds for standing. Finally, Father pointed to no Texas law recognizing the concept of psychological parent.

Five days after losing that appeal, Father filed a second suit to adjudicate parentage, asserting standing under Tex. Fam. Code § 102.003(a)(8). Father asserted he was "a man alleging himself to be the father of minor children." Mother again filed a plea to the jurisdiction, which the trial court denied. The trial court entered temporary orders allowing Father possession of the Children, appointing an amicus attorney, and enjoining the parties from initiating any adoption proceedings. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: In 2009, the Tex. Fam. Code § 2.005(b)(8) was added to allow a court order relating to an individual's sex change to be an acceptable form of identification to establish a person's identity and age for the purpose of obtaining a marriage license. The San Antonio Court of Appeals refused to extend the applicability of this section to confer standing to maintain a suit to adjudicate parentage under Tex. Fam. Code § 160.602(a)(3).

SAPCR
CONSERVATORSHIP

ALTHOUGH THERE WAS SOME EVIDENCE OF MOTHER'S PHYSICAL VIOLENCE, FATHER COULD NOT COMPLAIN ON APPEAL OF APPOINTMENT OF MOTHER AS JMC BECAUSE HE INVITED THE ERROR BY REQUESTING THAT RELIEF IN HIS LIVE PLEADING.

Kimbell v. Kimbell, No. 02-14-00202-CV, 2015 WL 4663396 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (08-06-15).

Facts: Mother and Father dated for a few years but broke up when Mother was accepted into nursing school. Subsequently, Mother married another man. However, the marriage ended a few weeks later after Mother discovered that her husband had a wife and child in Mexico. When she discovered the deceit, Mother threw a coat hanger at her husband, which led to her being arrested. The charge was later dismissed for lack of evidence.

A few years later, Mother and Father began dating again, got married, and had two Children. During their subsequent divorce proceedings, Father testified that Mother had bloodied his lip and left scratches on his neck. He did not seek medical attention after the incident, but he did filed a police report. As a result, Mother was convicted of a Class C Assault. The appeal of that conviction was pending at the time of the divorce proceedings.

In the final decree, the trial court ordered Mother to take an anger management class, appointed the parents joint managing conservators, and granted Mother the exclusive right to determine the primary residence of the Children. Father appealed, arguing the trial court erred in appointing Mother a joint managing conservator when there was credible evidence of violence by her against Father as well as against her first husband.

Holding: Affirmed

Opinion: The invited error doctrine prevents a party from asking for relief from the trial court and later complaining on appeal that the trial court gave it. Here, Father asked in his live petition for the trial court to appoint the parents joint managing conservators. Thus, whether there was a history or pattern of past or present physical abuse, Father waived his complaint.

MOTHER AWARDED SOLE MANAGING CONSERVATORSHIP OF FATHER'S NIECE, WHO HAD BEEN LIVING WITH THE COUPLE FOR YEARS, BECAUSE CREDIBLE EVIDENCE THAT FATHER COMMITTED FAMILY VIOLENCE.

In re K.A.K., No. 05-14-000628-CV, 2015 WL 4736566 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-11-15).

Facts: Mother and Father moved to the United States from Sudan with two Children of their own and Father's cousin's child ("Niece"). After moving, the couple had two more Children. During their divorce proceedings, all five Children were subject to the suit. The Niece's father was not made a party to the suit. A protective order had been entered against Father before the suit was filed. Relying in part on the family violence finding in that order, the trial court appointed Mother the sole managing conservator of all five Children and entered a supervised possession order for Father. Among other complaints on appeal, Father argued that it was error to appoint Mother the sole managing conservator of his Niece when the Niece's father had recently expressed a different preference for custody.

Holding: Affirmed

Opinion: Because there was credible evidence that Father had committed family violence, he could not be appointed a joint managing conservator of any of the Children the subject of the suit. Nothing in the Family Code gives a biological relative greater rights than another person with standing under Tex. Fam. Code § 102.003(a)(9). Further, the trial court could not appoint another individual as a managing conservator because there was no pleading, evidence, or finding that such an appointment would be in the Niece's best interest.

FATHER GRANTED EXCLUSIVE RIGHT TO DESIGNATE CHILDREN'S PRIMARY RESIDENCE BECAUSE TRIAL COURT DOUBTED WHETHER MOTHER—IF GIVEN THE SAME RIGHT—WOULD EVER ALLOW THE CHILDREN TO HAVE A GOOD RELATIONSHIP WITH FATHER.

Allen v. Allen, ___ S.W.3d ___, 2015 WL 5025844, 14-14-00426-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (08-25-15).

Facts: Mother and Father had two Children of the marriage. When they separated, they agreed that Mother would be the primary conservator and that Father would not be required to pay child support. However, Father subsequently revoked his consent to the agreement. After the divorce was filed, the trial court entered agreed temporary orders appointing Mother the joint conservator with the exclusive right to designate the Children's primary residence and requiring Father to pay child support. At trial, Father sought to be named sole managing conservator or, in the alternative, the conservator with the exclusive right to designate the Children's primary residence.

Father testified about multiple allegations by Mother to CPS that Father had abused or neglected the Children. Each allegation was ruled out or deemed inconclusive. Additionally, Father testified about multiple occasions on which Mother denied Father access to the Children. Once when Father arrived to pick up the Children, Mother called the police to accuse Father of trespass. Additionally, Mother informed the Children's school that Father and his family were not allowed to have contact with the Children.

The guardian ad litem testified that both parents were capable of taking care of the Children. However, she expressed concerns that Mother created a wedge between Father and the Children, and Mother seemed intent on continuing her feud with Father.

The trial court appointed the parents joint managing conservator and granted Father the exclusive right to designate the Children's primary residence. Mother appealed, arguing the trial court erred in granting Father that right.

Holding: Affirmed

Opinion: The trial court could have reasonably determined that Mother's actions were aimed at preventing Father access rather than preventing abuse of the Children. Persistent alienation of the other parent can be a guiding consideration in making possession and access determinations.

SAPCR
CHILD SUPPORT

PASTOR-HUSBAND'S NET INCOME INCLUDED "GIFTS" RECEIVED FROM HIS CHURCH; PARTIES' HOUSE NOT PART OF COMMUNITY AND NOT SUBJECT TO DIVISION BECAUSE HUSBAND'S ONE-SPOUSE DEED OF HOUSE TO CHURCH BECAME OPERATIVE ONCE WIFE'S HOMESTEAD INTEREST WAS DIVESTED BY FINAL DECREE.

West v. West, No. 01-14-00350-CV, 2015 WL 4251159 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (07-14-15).

Facts: Husband was a pastor of a church, and he received an annual salary of just over $30,000 in addition to periodic gifts and allowances from the church and congregation averaging just under $40,000 per year. In its final decree of divorce, the trial court found that Husband was intentionally underemployed and ordered him to pay $1,906 per month in child support for the parties' three Children. Husband appealed, arguing that the trial court erred in finding him intentionally underemployed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Although Husband referred to certain monies received from the church as "gifts," when a religious institution is intrinsically involved in facilitating the collection of funds from congregants for its pastor under a regularly conducted program, and the pastor receives little other compensation, the contributions constitute income. Additionally, all the gifts and allowances from the church were non-taxable. Thus when including his salary, gifts, and housing allowance, the evidence supported a finding that Husband's net monthly income exceeded $7,500, and Husband was actually ordered to pay less than the statutory guidelines.

TEXAS FAMILY CODE CHILD SUPPORT GUIDELINES SHOULD HAVE BEEN APPLIED WHEN CALCULATING AMOUNT OF SUPPORT FOR ADULT DISABLED CHILD.

In re J.M.W., ___ S.W.3d ___, 2015 WL 10123434, 14-14-00135-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (07-23-15).

Facts: When Mother and Father divorced, Father was ordered to pay child support. Subsequently, the Child was diagnosed with bipolar disorder and ADHD. A court-appointed psychiatrist testified that the Child was unable to support himself, and if not for Mother's care, the Child would need full-time, structured residential placement. Per the divorce decree, Father exercised his visitation and paid child support until the Child was 18, after which time, Father stopped paying child support and reduced his visitation with the Child to twice a year for a few hours each time.

Mother filed a SAPCR seeking support for the adult disabled Child. During the trial court proceedings, Mother argued that under Tex. Fam. Code § 154.306, the court was able to consider Father's new wife's resources for the purpose of setting support, which the trial court did. The trial court signed a final order ordering Father to pay child support indefinitely, plus retroactive support going back to when Father had stopped paying. Father requested findings of fact and conclusions of law pursuant to Tex. Fam. Code § 154.130; however, other than finding the guidelines were unjust and inappropriate in this case, the trial court failed to include the findings required by that section. Subsequently, Father requested additional findings twice, but the trial court denied his requests.

Father appealed and, among other complaints, argued that the trial court erred in disregarding the guidelines and in including his wife's income in its calculation.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Despite Mother's argument to the contrary, Tex. Fam. Code § 154.306, which provides factors to be given "special consideration" when determining the amount of child support after a child's 18th birthday, cannot be read in isolation. The factors in this section are not the sole or exclusive factors to consider when setting child support for an adult disabled child. Further, interpreting this section to trump consideration or application of the child-support guidelines does not accord with common sense.

Additionally, pursuant to Tex. Fam. Code § 154.069, even though a spouse's income is community property, that income cannot be included when calculating a child support obligor's net resources.

TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION UNDER UIFSA TO HEAR GUATEMALAN MOTHER'S SUIT TO ESTABLISH CHILD SUPPORT BECAUSE GUATEMALA IS NOT A "STATE" AS DEFINED BY UIFSA.

In re M.I.M., No. 05-14-00662-CV, 2015 WL 4472741 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (07-22-15).

Facts: The OAG filed a suit on Mother's behalf to establish child support for her Child under UIFSA. Mother and the Child were residents of Guatemala. Father filed a motion to dismiss, arguing that because Guatemala is not a "State" as defined by UIFSA, the trial court lacked of subject-matter jurisdiction. The trial court agreed and dismissed the case with prejudice. The OAG appealed.

Holding: Affirmed as Modified

Opinion: Pursuant to Tex. Fam. Code § 159.102(21)(B), which is a UIFSA provision, a "State" includes a foreign country or political subdivision that meets one of three defined criteria--(i) been declared to be a foreign reciprocating country or political subdivision under federal law; (ii) established a reciprocal arrangement for child support with this state as provided by Section 159.308; or (iii) enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this chapter. Nothing in the record revealed that Guatemala met any of those criteria. Thus, Guatemala is not a "State" under UIFSA, and Mother could not be a petitioner to an action under that Act. Further, because the OAG only has authority to initiate a proceeding on behalf of a "petitioner," it lacked authority to file a suit on Mother's behalf. However, because a dismissal for jurisdiction does not reach the merits of a dispute, the dismissal "with prejudice" was improper.

TRIAL COURT ERRED IN ORDERING FATHER TO PAY MORE THAN 100% OF THE PROVEN NEEDS OF THE CHILD.

Carter v. Carter, No. 09-13-00461-CV, 2015 WL 4571315 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (07-30-15).

Facts: Mother and Father had one Child. During trial, evidence established that Father's net monthly income exceeded $7,500, which was the cap at the time. In the final decree, the trial court ordered Father to pay $2000 per month in Child support, plus one-half of the costs associated with the Child attending private school. The trial court issued findings of fact that provided the net resources of both parents and that the applied percentage was 20%. (The court of appeals noted that 20% of $7,500 is $1,500, not $2000.) Father appealed and asserted, among other complaints, that the trial court erred in ordering him to pay child support over and above the presumptive award.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A trial court may order an obligor to pay more than the presumptive award established by the Texas Family Code child support guidelines. However, the court must calculate the extra amount by subtracting the presumptive award from the proven needs of the child. Additionally, the obligor cannot be required to pay for greater than the higher of the presumptive amount or 100% of the proven needs of the child.

Here, the only evidence of the Child's "needs" was his monthly tuition for attending private school. Even if the private school tuition was a proven need of the Child, Father was ordered to pay 50% of the tuition in addition to an amount that was $500 greater than the presumptive child support award. The court of appeals further noted in a footnote that a child support order should specify the exact amount an obligor is required to pay and that a requirement to pay unspecified costs of private school was too vague to be enforceable.

SAPCR
Enforcement of Child Support

TRIAL COURT'S JUDICIAL NOTICE OF OAG PRINTOUT OF CHILD SUPPORT PAYMENTS DID NOT CONSTITUTE EVIDENCE TO SUPPORT ARREARAGE JUDGMENT.

In re T.S.P., No. 04-14-00547-CV, 2015 WL 5037123 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (08-26-15).

Facts: Mother and Father divorced more than a decade ago, and Father was ordered to pay child support. In 2013, the trial court signed an order of enforcement by contempt, in which it found Father in contempt and assessed a fine, payable to Mother. Subsequently, Mother filed an amended motion for enforcement asserting Father failed to pay child support and the contempt fine. Mother attached to her motion a printout from the office of the attorney general reflecting payments made by Father since the divorce. During the hearing, Mother's counsel asked the trial court to take judicial notice of the prior orders in the file, the attorney general printout, and an updated payment record. The trial court agreed to take judicial notice. The trial court entered an order holding Father in contempt and assessing arrearages. The trial court additionally ordered Father to pay the fine based on the prior order. Father appealed.

Holding: Reversed and Remanded in Part; Vacated in Part

Opinion: Tex. Fam. Code § 157.162(c) provides that a payment record attached to a motion for enforcement of child support is admissible to prove facts related to nonpayment. However, the fact that a record is admissible does not render it admitted. Additionally, a trial court may not take judicial notice of the truth of the allegations within a document.

Here, other than the attorney general's payment record, no evidence supported any finding regarding the amount of arrearages. Because the printout was not admitted into evidence—the trial court only took judicial notice of it—it could not support the trial court's judgment.

Additionally, the portion of the order that a civil contempt fine be paid to Mother, a private party, was improper and was vacated.

WIFE RESTRAINED ILLEGALLY BECAUSE CONTEMPT ORDER FAILED TO DIRECT OFFICER TO TAKE WIFE INTO CUSTODY.

In re S.W., No. 02-15-00232-CV, 2015 WL [not on WL yet] (Tex. App.—Fort Worth 2015, orig. proceeding) (mem. op.) (08-28-15).

Facts: Wife was found in contempt for failing to comply with terms of a modified divorce decree. She was ordered to be confined in the county jail for 180 days. Wife filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: An order that lacks a directive to the sheriff to take a person into custody cannot constitute a commitment order. Here, although the trial court titled its order as being both a "contempt" and "commitment" order, the order did not direct the sheriff or other ministerial officer to take Wife into custody.

SAPCR
MODIFICATION

EVIDENCE INSUFFICIENT TO SUPPORT CHILD SUPPORT MODIFICATION BECAUSE NO EVIDENCE OF FINANCIAL CIRCUMSTANCES AT TIME OF PRIOR ORDER.

In re Todd, Nos. 14-15-00412-CV, 14-15-00413-CV, 2015 WL 4249799 (Tex. App.—Fort Worth 2015, orig. proceeding) (mem. op.) (07-14-15).

Facts: A 2013 Georgia court order found Father in child support arrears and ordered him to make payments of $400 per month. Almost a year later, after the Children had moved to Texas, Father filed a petition in Texas to modify the Georgia order. Mother filed a counter-petition also seeking modification. A temporary orders hearing was set, and although Father was properly noticed, he did not appear. At the hearing's conclusion, the trial court increased Father's child support obligation to $1000 per month. Subsequently, because Father had failed to pay child support or attorney's fees as ordered, Mother filed a motion for enforcement and to modify the temporary orders. The day before the hearing on Mother's motions, Father filed petitions for writ of prohibition and for writ of mandamus. Father argued that the trial court erred in increasing his child support obligation.

Holding: Writ of Mandamus Conditionally Granted in Part and Denied in Part

Opinion: Although Mother testified as to Father's profession and his current earning ability, she failed to demonstrate that the circumstances of the children or an affected party had materially and substantially changed since the prior child support order. Mother presented no evidence of the financial circumstances at the time the prior order was rendered.

SUPPORTING AFFIDAVIT NOT REQUIRED WITH SAPCR FILED TWENTY DAYS AFTER AGREED CHILD SUPPORT ORDER BECAUSE THE PRIOR ORDER ADDRESSED ONLY CHILD SUPPORT, NOT CONSERVATORSHIP.

In re J.A., ___ S.W.3d ___, 2015 WL 4985914, 08-13-00253-CV (Tex. App.—El Paso 2015, no pet. h.) (08-21-15).

Facts: An order was entered appointing the parents joint managing conservators of their Child and granted Mother the exclusive right to designate the Child's primary residence. Two years later, the Office of the Attorney General initiated a child support review. An agreed order was entered increasing Father's child support obligation. Twenty days later, Father filed a SAPCR seeking the exclusive right to designate the Child's primary residence. Mother filed an answer and motion for Rule 13 sanctions. Although neither Father nor his attorney appeared at a sanctions hearing, a sanctions order was entered dismissing Father's modification and ordering Father to pay $2500 in attorney's fees to Mother's attorney. The order did not state the particulars of the court's reasoning for granting sanctions. Father did not request findings of fact and conclusions of law, and he did not object to the failure to articulate the reasons for sanctions. Father appealed. He did not file a reporter's record, and Mother did not file a responsive brief.

Holding: Affirmed

Opinion: Tex. Fam. Code § 156.102 requires an attached supporting affidavit when a party seeks to modify the exclusive right to designate the Child's primary residence within one year of a prior order. Here, although there was a prior child support order within one year of Father's petition, that order did not change or reiterate the custodial designations, and it did not incorporate any prior order by reference. Thus, Father was not required to attach an affidavit to his petition for modification.

Additionally, while a moving party cannot be defaulted for failure to appear, a trial court may, under Rule 13, impose appropriate sanctions if a pleading, motion, or other paper is signed in violation of that rule. Here, Father's suit was not dismissed on the merits by default; it was dismissed for violating Rule 13.

Rule 13 requires that the particulars of the cause for sanctions be included in a sanction order or in its findings of fact and conclusions of law. However, a party who fails to raise an objection to an insufficient sanctions order waives that complaint for appellate review. Father made no timely objection and did not request findings of fact and conclusions of law.

MISCELLANOUS

ANY TEXAS LAW DENYING SAME SEX COUPLES THE RIGHT TO MARRY OR REFUSING TO RECOGNIZE SAME-SEX MARRIAGES PERFORMED IN OTHER STATES VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES AND CANNOT BE ENFORCED.

De Leon v. Abott, ___ F.3d ___, SA-13-CA-00982-OLG, 2015 WL 4032161 (5th Cir. 2015) (07-01-15).

Facts: Plaintiffs were two same-sex couple who sought to marry in Texas or have their out-of-state marriage recognized in Texas. They sought a declaration that Texas's law denying same-sex marriage violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. Additionally, they sought a permanent injunction enjoining Texas from enforcing laws prohibiting same-sex couples from marrying or prohibiting the recognition of same-sex marriages performed in other states. The federal district court granted a preliminary injunction, which the State appealed. Upon appeal, the injunction was stayed.

Holding: Preliminary Injunction Affirmed and Remanded for Judgment for Plaintiffs

Opinion: While the appeal was pending, the United States Supreme Court decided *Obergefell v. Hodges*, __ U.S. __, 2015 WL 2473451 (2015). In light of that decision:

1) Any Texas law denying same-sex couples the right to marry, including Article I, § 32 of the Texas Constitution, any related provisions of the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983;
2) Defendants [Texas Governor, et al.] are permanently enjoined from enforcing Texas's laws prohibiting same-sex marriage; and
3) Any taxable costs in this case are assessed against the Defendants.

BECAUSE A DIVORCE INVOLVING CHILDREN IS NOT SUBJECT TO TEX. R. CIV. P. 76a, TRIAL COURT ABUSED DISCRETION BY UNSEALING THE FILE PURSUANT TO THAT RULE.

In re S.M.B., No. 05-14-00745-CV, 2015 WL 3988034 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (07-01-15).

Facts: During their divorce proceedings, Mother and Father entered into an Agreed Confidentiality Order to seal their case file. About three years after the divorce, Mother filed a motion to unseal the record, stating that the circumstances of the parties and children had substantially changed; that due to electronic filing, Mother and her attorney could not review the online docket or verify filings or court settings; that Mother's attorney could not adequately represent Mother because the case was sealed; and that the parties' youngest Child was about to graduate from high school and confidentiality was no longer necessary. The only cited authority in Mother's motion to unseal was Tex. R. Civ. P. 76a. The trial court granted the motion to unseal. Father appealed, arguing that the records in this case were not subjection to Rule 76a.

Holding: Reversed

Opinion: Under Tex. R. Civ. P. 76a, court records are presumed to be open to the general public, and the Rule sets forth limited circumstances and procedures for overcoming the presumption. While the Rule's definition of court records is broadly written to include "all documents of any nature filed in connection with any matter before any civil court," Tex. R. Civ. P.

76a(2)(a), the Rule specifically excludes "documents filed in an action originally arising under the Family Code." Tex. R. Civ. P. 76a(2)(a)(3).

FATHER NOT REQUIRED TO ATTACH SUPPORTING AFFIDAVIT TO SAPCR BECAUSE HIS PETITION WAS FILED MORE THAN A YEAR AFTER THE COURT ORALLY RENDERED JUDGMENT IN THE PRIOR SAPCR.

In re K.R.Z., 04-14-00876-CV, 2015 WL 4478123 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (07-22-15).

Facts: A final order granted Mother the exclusive right to designate their Child's primary residence. Subsequently, Father filed a SAPCR and sought the exclusive right to designate the Child's primary residence. Mother filed a motion to dismiss, alleging that Father's motion had been filed less than a year after the prior order was signed, and Father failed to attach a supporting affidavit as required by Tex. Fam. Code § 156.102. The trial court dismissed Father's motion without prejudice and granted Mother's request for attorney's fees. Father appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 156.102 requires the filing of a supporting affidavit if a SAPCR seeks to change the designation of the person having the exclusive right to designate the primary residence within one year of the date of the rendition of the prior order. A rendition can be oral or in writing. Here, the order recited that it was pronounced on July 26, 2013 and signed September 11, 2013. Mother did not contest this recital. Thus, one year after the rendition of this order was July 26, 2014. Father's petition was filed until August 11, 2014 and thus, was not required by Tex. Fam. Code § 156.102 to include a supporting affidavit.

WIFE ENTITLED TO RESTRICTED APPEAL BECAUSE, DESPITE RECITATION IN ORDER, THERE WAS NO EVIDENCE SHE WAS PROPERLY SERVED.

Schamp v. Mitchell, 04-14-00741-CV, 2015 WL 4478150 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (07-22-15).

Facts: In their divorce decree, Wife was obligated to refinance a promissory note in her name and pay the remaining balance. Almost 9 years later, Husband filed a petition for enforcement, claiming Wife had failed to comply with the divorce decree. Although the docket sheet indicated that Husband requested the clerk issue citation, there was no entry indicating service was accomplished. Additionally, the docket sheet included a note that Husband requested a non-jury trial setting, but there was no order for a setting. Further, the docket sheet did not include an entry showing a trial took place. Nevertheless, the final order on enforcement contained recitals that each party appeared in person and announced ready for trial. Less than six months later, Wife filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: Despite the recitation in the final order, nothing else in the record or docket indicated Wife was served with notice of the suit or the trial, that she waived notice, or that she appeared. Thus, because the record did not affirmatively show proper service, there was error apparent on the face of the record.

EVIDENCE SUPPORTED DISMISSAL OF JURORS BECAUSE ONE WAS STATUTORILY DISQUALIFIED AND OTHER WAS CONSTITUTIONALLY DISABLED FROM SERVING.

In re M.G.N., ___ S.W.3d ___, 04-12-00108-CV, 2015 WL 4554525 (Tex. App.—San Antonio 2015, no pet. h.) (07-29-15).

Facts: The Parents had been appointed joint managing conservators of their two Children. A few years later, Father filed a SAPCR, and Mother filed a counter-petition, with each parent seeking sole managing conservatorship.

During the cross-examination of a witness, Mother's attorney suggested that the witness had been responsible for running a certain business to the ground. Subsequently, a juror related to the court that he was in the same business as the one in question and knew the individuals in question. Further, the juror stated that he knew that the business struggles were due to the economy and not due to anything the witness had done. The trial court dismissed that juror, noting that there was an alternate juror to take the dismissed juror's place.

Subsequently, on the morning of the last day of trial, a juror contacted the court to report that he had been up sick the entire night before and that he did not know when he would be well enough to return to court. The trial court proceeded without the sick juror, and a verdict was returned by the remaining eleven jurors.

After a final judgment was signed, Father appealed arguing that the trial court abused its discretion by dismissing the jurors, excluding certain evidence during the trial, and ordering him to pay 75% of the Children's dental care when Mother's pleadings had not sought such relief.

Holding: Affirmed

Opinion: A juror is statutorily disqualified if the juror admits bias or prejudice. Here, the first dismissed juror stated that it would be difficult for him not to convey his understanding of the "true" source of the business's economic problems to the other jurors. Further, the trial judge is in the best position to evaluate the sincerity and attitude of a juror.

A jury of less than twelve people if, during trial, no more than three juror die or become disabled from sitting. A juror can be dismissed if he suffers from a constitutional disability that is in the nature of physical or mental incapacity. The second dismissed juror was physically incapable of sitting for the last day of trial and could not determine when he would be well enough to return.

After determining there was no error in allowing a panel of eleven jurors to return a verdict, the court of appeals addressed the merits of Father's appeal. However, Father waived the majority of his complaints because he rested his case-in-chief without obtaining rulings on his objections to the trial court's exclusions of his proffered evidence. Although Father made offers of proof after resting, his late offers of proof failed to preserve his complaints for appeal.

Additionally, although Father argued that Mother's pleadings did not support the court's order regarding payment for the Child's dental care, that issue was tried by consent because it was addressed at length during trial.

UNMARRIED COUPLE FOUND TO HAVE BEEN IN A CONFIDENTIAL RELATIONSHIP, AND BOYFRIEND ENTITLED TO REIMBURSEMENT FOR GIRLFRIEND'S CONSTRUCTIVE FRAUD.

Rubio v. Klein, 11-13-00189-CV, 2015 WL 4720792 (Tex. App.—Eastland 2015, no pet. h.) (mem. op.) (07-30-15).

Facts: Girlfriend and Boyfriend dated for ten years and lived together for nine. They exchanged rings and opened a joint back account, but they never formally married. During the relationship, they lived in Girlfriend's house. When they moved in together, Girlfriend was unemployed and had a mortgage on the house. Throughout the relationship, Boyfriend paid the mortgage and property taxes. Girlfriend alleged that she made some of these payments but provided no documentary evidence or specific testimony to support this claim. Boyfriend testified that he understood that he would get his money back if the house were ever sold. Girlfriend denied ever having any such conversation. Girlfriend's ex-husband testified that Boyfriend had intended the payments to be a gift to Girlfriend, but Boyfriend denied ever discussing the payments with Girlfriend's ex-husband. Additionally, Boyfriend provided Girlfriend with money to open and run a hair salon. At the time of the couple's break-up, Girlfriend owned and ran two salons.

After a bench trial, the court found that there had been no common law marriage. However, the trial court found that there had been a confidential relationship and that Girlfriend had breached her fiduciary duty to Boyfriend. The court awarded Boyfriend a reimbursement award. Girlfriend appealed, arguing the court erred in finding she had committed constructive fraud.

Holding: Affirmed

Opinion: A confidential relationship that gives rise to an informal fiduciary relationship exists where one person trusts in and relies upon another. One party is justified in expecting another to act in its best interest when the parties have dealt with each other for a sufficient time and have become accustomed to being guided by the judgment or advice of the other. However, subjective trust alone is insufficient to create such a relationship.

Although there was conflicting evidence, because the trial court is the sole factfinder, the trial court did not err in finding that a confidential relationship existed and that Girlfriend breached her fiduciary duty.

UNCONTROVERTED EVIDENCE OF TOTAL FEES INCURRED WITH TESTIMONY THAT THE FEES WERE "FAIR AND REASONABLE FOR THE COMPLEXITY OF THIS CASE" WAS SUFFICIENT TO SUPPORT ATTORNEY FEE AWARD.

In re J.R., III, 05-14-00338-CV, 2015 WL 4639625 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-05-15).

Facts: Mother and Father were not married, but they lived together and had one Child. Mother filed a petition for divorce alleging an informal marriage and sought to be named the Child's sole managing conservator. Father denied that the couple was ever informally married and also sought sole managing conservatorship. Subsequently, Mother nonsuited her divorce, and the property-related claims were vacated. Although the parties initially agreed to let Mother live in Father's home with the Child during the pending SAPCR, Mother later moved out, and Father saw her take many of his personal possessions during the process. Father called the police, but they did not assist. Thus, Father amended his petition to include claims for theft and conversion. Per the scheduling order, the parties attending mediation, which was unsuccessful. During the proceedings, Mother had two different attorneys, who each withdrew. After a final trial, the trial court signed a final order appointing the parents joint managing conservators, awarded Father a $24,428.82 judgment for conversion, awarded Father $779.64 for utilities Mother failed to pay while in the home, and awarded Father $5,000 in attorney's fees. Among other complaints, Mother appealed the award of attorney's fees.

Holding: Affirmed

Opinion: In *In re Marriage of Pyrtle*, 433 S.W.3d 152, 167 (Tex.App.–Dallas 2014, pet. denied), the court stated that under the "lodestar" method, a party desiring to prove-up attorney's fees must establish (1) the number of hours reasonably spent on the case, (2) the fee application and record must include proof documenting the performance of specific tasks, (3) the time required for those tasks, (4) the person who performed the work, and (5) his or her specific rate. However, *Pyrtle* did not involve a statute that required attorney's fees to be determined under the lodestar method. Nevertheless, because the record did not include testimony, contradicted or uncontradicted, respecting the hourly rate or reasonableness of the fees, the award of attorney's fees could not be upheld.

Here, the parties did not dispute that attorney's fees in a SAPCR must be calculated according to the lodestar method. However, a trial court has broad discretion to award reasonable attorney's fees in a SAPCR, and a trial court does not abuse its discretion when there is some evidence to support the award.

Father's attorney did not testify about the specific number of hours he worked, but he did state the total fees incurred and that they were "fair and reasonable for the complexity of this case." This evidence was uncontroverted. Further, the trial court was authorized to consider the entire record and its own common knowledge in determining whether the fees were reasonable.

NO EVIDENCE SUPPORTED TRIAL COURT'S BAD-FAITH FINDING IN ORDER FOR SANCTIONS; CONTENTS OF AFFIDAVIT NOT IN EVIDENCE BECAUSE ATTACHED TO SANCTIONS MOTION BUT NOT INTRODUCED DURING SANCTIONS HEARING.

O'Donnell v. Vargo, 05-14-00404-CV, 2015 WL 4722459 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-10-15).

Facts: Husband was Wife's second husband. After an 11-year marriage, Wife filed for divorce in Collin County from Husband. Husband responded by filing a petition to have the marriage declared void because he alleged Wife's prior divorce decree was void. In Wife's prior divorce proceeding in Dallas County, the case was dismissed for want of prosecution, and then the divorce decree was signed without an order reinstating the case. The Collin County trial court denied Husband's request without stating a reason. Subsequently the case was transferred to a different Collin County court. Husband filed an amended petition to have his marriage to Wife declared void. The second Collin County trial court denied Husband's request, stating that the declaratory judgments act did not authorize it to declare a different court's judgment void.

Husband then filed a petition for declaratory judgment in the Dallas County court that had signed Wife's prior divorce decree. Wife filed a response and motion for sanctions. Each party filed a motion for summary judgment. The trial court granted Wife's, denied Husband's, and awarded Wife sanctions. In its findings of fact, the trial court found that Husband's filings were groundless because the statute of limitations for his cause of action expired 20 years before he filed. Additionally, the trial court held that the case was brought in bad faith. Husband appealed only the sanctions award.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: "Bad faith" under Tex. R. Civ. P. 13 is not simply bad judgment or negligence, but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. There is a rebuttable presumption of good faith.

Here, the only evidence supporting sanctions included Husband's amended petition for declaratory judgment, Wife's response and plea to the jurisdiction, and Wife's attorney's fee statements. The Dallas County trial court also took judicial notice of the Collin County court orders and pleadings attached to the summary judgment motions. However, one Collin County judge did not state the reason for denying Husband's relief, and the other Collin County judge stated that it lacked authority to declare void a final judgment of another court. Neither ruling held that Husband could not seek relief from the Dallas County district court that rendered Wife's prior divorce.

Wife attached an affidavit to her sanctions motion, but the affidavit was not admitted into evidence during the hearing on her motion. Further, while the trial court could take judicial notice that the affidavit had been filed, it could not take judicial notice of the contents of the affidavit. Thus, the affidavit's contents could not support the bad-faith finding.

Based on the trial court's findings of fact, its Chapter 10 sanctions appeared to be a sanction under Tex. Civ. Prac. & Rem. Code § 10.001(1), which requires a finding that pleadings no be presented for an improper purpose. Here, the only "improper purpose" found by the trial court was "bad faith," which was not supported by the record.

MOTHER FAILED TO ESTABLISH APPELLATE ATTORNEYS FEES WERE NECESSARY TO PROTECT THE SAFETY AND WELFARE OF THE CHILDREN.

In re Wiese, 03-15-00062-CV, 2015 WL 4907030 (Tex. App.—Austin 2015, orig. proceeding) (mem. op.) (on reh'g) (08-12-15).

Facts: In Mother and Father's divorce decree, they were appointed joint managing conservators of the Children, and Father was granted the exclusive right to designate the Children's primary residence. The decree further provided that neither parent could travel internationally with the Children without written consent of the other party. About ten years later, Mother initiated a SAPCR, and the trial court modified the decree to allow the parties to travel internationally with the Children. Father appealed. Mother filed a motion, and received an order, for appellate attorney's fees under Tex. Fam. Code § 109.001. Father filed a petition for writ of mandamus arguing the trial court abused its discretion in determining that an award of appellate attorney's fees was "necessary to preserve and protect the safety and welfare of the child[ren] during the pendency of the appeal."

Holding: Writ of Mandamus Conditionally Granted

Opinion: A party seeking a temporary order for appellate attorney fees under Tex. Fam. Code § 109.001 must demonstrate that the fees are necessary to preserve and protect the safety and welfare of the children. Here, Mother testified that Father had more financial resources, that an appeal would divert her resources away from the Children, and that without additional funds from Father, the Children would be unable to travel internationally. However, Mother presented no evidence that the disparity of the parties' incomes would negatively affect the Children during the pendency of the appeal. Rather, Mother asked the trial court to take judicial notice of the prior proceedings, which it did. Under Tex. Fam. Code § 109.001, the operative standard is the "safety and welfare" of the Children, not "best interests." Although Mother argued that international travel would be in the Children's best interest, she presented no evidence as to how international travel affected the Children's safety and welfare.

SEVERANCE OF DIVORCE AND SAPCR APPROPRIATE BECAUSE IN CHILD'S BEST INTEREST.

In re B.T.G., 05-13-00305-CV, 2015 WL 4911856 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-18-15).

Facts: Husband and Wife were married for one year and had one Child of the marriage. Wife also had a teenage son from a previous marriage. During the marriage, the parties accumulated no community property or debt other than personal belongings.

Both Husband and Wife filed for divorce and SAPCR in Dallas County, so there were simultaneous proceedings in two district courts. After the cases were consolidated and unconsolidated many times, the 302nd assumed jurisdiction over all the proceedings with the judge of the 330th presiding.

The trial court entered temporary orders in the SAPCR, found that Husband had committed family violence, appointed Wife temporary sole managing conservator of their Child, and granted Wife temporary exclusive possession of the parties' residence. Subsequently, because Husband refused to move out of the residence, Wife obtained financing to buy a HUD home. She moved to sever the divorce from the SAPCR because if the divorce was not finalized "soon enough" she would lose out on the opportunity to buy a home at price she could afford.

The trial court severed the divorce from the SAPCR and proceeded with a bench trial on the divorce. A divorce was granted on the ground of insupportability and provided that the child-related issues would be addressed in the pending SAPCR. The severance order and the divorce decree stated that severance was in the best interest of the Child.

Husband appealed arguing that the trial court erred in severing the divorce from the SAPCR.

Holding: Affirmed

Opinion: Tex. Fam. Code § 6.406 requires the joinder of petitions for divorce and SAPCRs related to the parties' minor children. However, there is no authority that prohibits a subsequent severance of the divorce and SAPCR.

Here, the trial court had the opportunity to acquaint itself with the issues. The trial court determined that severance was in the best interest of the Child because it would allow Wife to purchase a house for her and her children. Further, due to the limited community property, which amounted only to personal belongings, the issues in the divorce and SAPCR were not so interwoven that they could not be severed.

TRIAL COURT HAD NO JURISDICTION TO CONSIDER NEW MODIFICATION PROCEEDING DURING PENDENCY OF APPEAL OF PRIOR SAPCR ORDER.

In re E.W.N., ___ S.W.3d ___, 08-13-00345-CV , 2015 WL 5047612 (Tex. App.—El Paso 2015, no pet. h.) (08-26-15).

Facts: The trial court appointed Mother and Father joint managing conservators and ordered Father to pay child support. Father appealed. While his appeal was pending, he filed in the trial court a petition to reduce his child support obligation, and the trial court entered temporary orders. On Mother's motion, the trial court dismissed Father's modification without prejudice because the appellate court had the exclusive "power" of the cause. Father appealed arguing that because the trial court had continuing, exclusive jurisdiction, it had jurisdiction over the parent-child relationship regardless of whether an appeal was pending.

Holding: Affirmed

Opinion: Tex. Fam. Code § 109.001 authorizes a trial court to enter temporary orders during the pendency of an appeal under certain circumstances. If the continuing, exclusive jurisdiction of a trial court to enter orders affecting a child was automatically retained during the pendency of an appeal, Section 109.001 would be unnecessary.

The court of appeals noted that there are available remedies to petitioners who need emergency relief to protect a child during the pendency of an appeal. For example, Tex. Fam. Code § 109.002 provides that an appellate court may, on a proper showing, permit the trial court's order to be suspended. Additionally, pursuant to Tex. R. App. P. 10, a litigant may file a motion with the court of appeals explaining the circumstances that require abatement of the appeal to permit the trial court to set an emergency hearing to protect the child.

Here, after the appeal was perfected, and the trial court's plenary power expired, the trial court had no authority to consider Father's subsequent petition to modify.

TRIAL COURTS CANNOT TAKE JUDICIAL NOTICE OF THE TRUTH OF FACTUAL STATEMENTS AND ALLEGATIONS CONTAINED IN PLEADINGS, AFFIDAVITS, OR OTHER DOCUMENTS

Perez v. Williams, ___ S.W.3d ___, 01-14-000504-CV, 2015 WL ####### (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (08-27-15).

Facts: When Mother and Father began living together, Mother was still married to another man. Mother and Father's only Child was born less than a month before Mother's divorce was finalized. Mother and her other children had violent tendencies. Father told Mother to leave their residence a few times, but she kept coming back until Father changed the locks. Father filed a SAPCR, and Mother responded by filing a counter-petition alleging an informal marriage. Father filed partial motions for summary judgment to adjudicate his parentage of the Child and to determine that no informal marriage existed. After a hearing, the trial court granted Father summary judgment on both issues. The trial court dismissed the issues of marriage and division of property, and the remaining issues were tried to the bench. The trial court appointed the parents joint managing conservators, granted Father the exclusive right to determine the Child's primary residence, and awarded Mother a step-up possession schedule. Mother appealed, raising a number of complaints.

Holding: Affirmed

Opinion: Mother failed to file a motion to substitute new lead counsel mid-trial. Because the trial court and other parties had no notice of this request, the trial court did not err in denying Mother's oral request to substitute counsel.

Because Mother did not offer certified copies of certain motions and a Rule 11 agreement from Father's divorce from his ex-wife, the motions and agreement were not documents of which the trial court could take judicial notice. Moreover, even if the trial court had taken judicial notice of the documents, it could not have taken judicial notice of the contents of the motions or Rule 11 agreement.

ATTORNEY'S AFFIDAVIT INSUFFICIENT TO SUPPORT AWARD OF ATTORNEY'S FEES BECAUSE IT DID NOT INCLUDE ANY PROOF AS TO HOW MUCH TIME WAS SPENT PERFORMING DIFFERENT CATEGORIES OF WORK.

Auz v. Cisneros, ___ S.W.3d ___, 14-13-00989-CV, 2015 WL [not on WL yet] (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (08-27-15).

Facts: Plaintiff filed a motion for summary judgment on a breach of contract claim and a request for necessary attorney's fees, which the trial court granted. Plaintiff then filed a motion for judgment seeking judgment as a matter of law that Defendant take noting on his counterclaims. The trial court granted the motion and rendered a final judgment.

Defendant appealed, arguing that the trial court erred in awarding attorney's fees because Plaintiff's supporting affidavit was insufficient to support the award.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: (C.J. Frost, J. McCally) The lodestar method is used in awarding attorney's fees under Tex. Civ. Prac. & Rem. Code § 38.001. Under this method, the court must first determine the reasonable hours spent by counsel and reasonable hourly rate for such work. The court then multiplies the number of hours by the applicable rate to assess the base fee or lodestar. The base lodestar may be adjusted up or down if relevant factors indicate such adjustment is necessary. Basic facts underlying the lodestar include: (1) the nature of the work; (2) who performed the services and their rate; (3) approximately when the services were performed; and (4) the number of hours worked.

Here, in his affidavit, Plaintiff's attorney provided the total amount of his fees, the number of hours worked, and his hourly rate. He also stated that each of these amounts were reasonable. Additionally, Plaintiff's attorney asserted generally as to eight different categories of work performed. However, he did not present any proof as to how much time was devoted to each of these eight categories. He did not submit any time records or other documentary records that would have provided this information.

Concurring Opinion: (J. Boyce, J. McCally) The Texas Supreme Court has allowed some flexibility in requiring documentation for the simplest cases, and such flexibility should have been applied here. This is a simple case involving a simple commercial dispute requiring a modest expenditure of 30 attorney hours. A reversal was an unduly formalistic result for a failure to allocate not very many hours to not very many specific tasks.

D.B.A. Family Law Section Case Law Update

October 14, 2015

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SAPCR
CONSERVATORSHIP

IV-D COURT LACKED AUTHORITY TO MODIFY CONSERVATORSHIP AND ERRED IN DENYING INCARCERATED FATHER'S REQUEST TO PARTICIPATE IN HEARING BY ALTERNATE MEANS.

In re T.J.H., No. 12-15-00062-CV, 2015 WL 5439746 (Tex. App.—Tyler 2015, no pet. h.) (mem. op.) (09-16-15).

Facts: Mother was named the sole managing conservator of her and Father's three Children. About a year later, the Children's maternal grandparents filed a SAPCR. Subsequently, the Office of the Attorney General ("OAG") sought a modification of the child support order. The case was then transferred to an associate judge of a IV-D court. Father filed an answer asking for an attorney and a bench warrant. Alternatively, he asked to participate by telephone, video conference, or other means. The associate judge of the IV-D court explicitly denied Father's request for a bench warrant, implicitly denied his request to participate by alternate means, appointed Mother and the maternal grandparents joint managing conservators, and appointed Father possessory conservator.

Father appealed, arguing that the SAPCR was improperly referred to the IV-D court and that the trial court abused its discretion in failing to allow Father to participate in the hearing.

Holding: Reversed and Remanded

Opinion: Referral of Title IV-D cases to an associate judge as ordered by the presiding judge of an administrative judicial region is mandatory under Tex. Fam. Code § 201.101(d). However, the authority of the associate judge is limited by Tex. Fam. Code § 201.104(e) and does not include the authority to grant orders for conservatorship. Thus, it was not error to refer the child support case to the Title IV-D associate judge upon the OAG's initiation of the Title IV-D case. However, it was an abuse of discretion for that associate judge to modify conservatorship.

Litigants cannot be denied access to the courts simply because they are inmates. While an inmate does not have an automatic right to appear personally, he should be allowed to proceed by affidavit, deposition, telephone, or other means. Here, the record reflected that Father was not present during the hearing, and the transcript made no reference to Father's affidavits filed with his answers.

MISCELLANOUS

FATHER HAD NO CLAIM FOR DAMAGES AFTER MOTHER STOLE HIS SPERM TO IMPREGNATE HERSELF WITH TWINS.

Pressil v. Gibson, ___ S.W.3d ___, 14-14-00731-CV, 2015 WL 5297689 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (09-10-15).

Facts: Mother and Father engaged in a consensual sexual relationship. They used condoms for birth control. Without Father's knowledge, Mother collected Father's sperm, took it to a fertility clinic, and told the clinic that she was married to Father and that the couple needed help getting pregnant. The clinic took Mother at her word and successfully inseminated Mother with twin boys. Subsequently, Father sued the clinic for negligence, conversion, violations of the Texas Theft Liability Act, and conspiracy. Father sought damages for mental anguish, loss of opportunity, loss of enjoyment of life, child support, the cost of raising two children, lost earnings, and lost earning capacity. Pursuant to a motion filed by the clinic, the trial court dismissed Father's claims with prejudice on the ground that the claims were health care liability claims under Tex. Civ. Prac. & Rem. Code ch. 74, which requires a timely filed expert report.

Holding: Affirmed

Opinion: A wrongful pregnancy action is a lawsuit brought by the parents of a healthy, but unexpected, unplanned, or unwanted child against a medical provider for negligence leading to conception or pregnancy. Such a claim usually arises after a negligently performed sterilization procedure; the failure to properly diagnose a pregnancy or perform an abortion; negligence

in the insertion or removal of an IUD or in dispensing contraception prescriptions; or in the failure of a contraceptive pill or condom.

In Texas, a plaintiff cannot recover damages related to the support and maintenance of a healthy child born as a result of the medical provider's negligence because the intangible benefits of parenthood far outweigh the monetary burdens involved. The damages available to a plaintiff in a wrongful pregnancy case are limited to the medical expenses associated with the failed procedure. Here, not only was no procedure performed on Father, but the procedure was a rousing success that resulted in the birth of healthy twin boys.

Additionally, because damages in this case were unavailable as a matter of law, any expert testimony on whether the law would afford Father a remedy would have been inadmissible.

WIFE'S BILL OF REVIEW DENIED BECAUSE SHE FAILED TO SHOW THAT A NEW PROPERTY DIVISION WOULD BE MORE FAVORABLE TO HER OR THAT HER FAILURE TO PRESENT A DEFENSE IN THE DEFAULT DIVORCE WAS DUE TO HUSBAND'S FRAUD.

In re Estate of Curtis, No. 09-14-00242-CV, 2015 WL 5604772 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (09-24-15).

Facts: Wife and Husband were married for 44 years. Husband filed for divorce. However, Wife alleged that Husband subsequently told her that he changed his mind and was no longer seeking a divorce. Husband never moved out of the house but was "in and out of" a trailer on the couple's property until he moved into an assisted living facility. Before moving to the assisted living facility, Husband controlled the only key to the couple's locked mailbox, so Wife only received her mail after Husband collected it and passed it on to her. Husband obtained a default divorce, but Wife alleged that she had no notice that there had been a divorce. About a year later, Husband died.

A will contest ensued between Wife and Husband's illegitimate son. In a separate proceeding that was consolidated with the will contest, Wife filed a petition for bill of review to set aside the default divorce decree, asserting the decree was grossly unequal, that the divorce was obtained secretly, and that her failure to present a defense was not due to any intentional act of fault or result of negligence. The trial court denied her bill of review, and Wife appealed.

Holding: Affirmed

Opinion: To succeed on a bill of review when the petitioner was properly served in the underlying proceeding, a petitioner must present a meritorious defense. Here, however, Wife presented no evidence as to the values of assets received by Husband in the divorce. Thus, the trial court was unable to assess whether Wife would receive a more favorable property division even if her allegations were true.

Additionally, a bill of review petitioner must establish that her failure to present her alleged meritorious defense was a result of the extrinsic fraud, accident, or wrongful conduct of the opposing party. Because Wife presented no evidence besides her own testimony to corroborate alleged statements made to her by Husband, the evidence was properly excluded by Tex. R. Evid. 601 ("'Dead Man's Rule' in Civil Actions"). Wife presented no evidence other than her own self-serving statements to support her allegations of fraud.

AWARD OF NO ATTORNEY'S FEES IMPROPER IN CHILD SUPPORT ENFORCEMENT, BUT MOTHER REQUIRED TO PRESENT EVIDENCE OF AMOUNT AND REASONABLENESS OF FEES.

Russell v. Russell, ___ S.W.3d ___, 14-13-01100-CV, 2015 WL 5723109 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (09-29-15).

Facts: Mother and Father divorced after having one Child. Father was ordered to pay child support, and Mother was awarded control of the Child's bank account. Subsequently, Mother filed a petition to enforce payment of child support and to enforce a provision of the decree that required Father to deposit funds into the Child's bank account. Although the trial court entered a judgment for arrearages and ordered Father to comply with the final decree, the trial court refused to find Father in contempt and refused to award Mother her attorney's fees. She appealed. The court of appeals reversed and remanded the case on the issue of attorney's fees.

In its prior order, the court of appeals held that the trial court abused its discretion in failing to award Mother her attorney's fees without stating good cause. On remand the trial court again did not award Mother her attorney's fees, stating "I

do not think the law is that I must award attorney's fees in a child support issue…when I do not find Father in contempt." Mother appealed again.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Because contempt finding is not necessary for an award of reasonable attorney's fees under Tex. Fam. Code § 157.167, the trial court again abused its discretion in failing to award Mother her attorney's fees *without stating good cause*.

Because the award to Mother of the Child's bank account was contained in the "Division of the Marital Estate" section of the final decree, it was not an award for child support. Thus, Mother was not entitled under the Texas Family Code to attorney's fees incurred while enforcing that provision of the decree. However, the final decree included a fee-shifting provision that allowed for the recovery of attorney's fees to a successful party in a suit to enforce the final decree. Thus, the trial court should have determined whether Mother was a "successful party" entitled to an award of attorney's fees incurred in enforcing the provision related to the Child's bank account.

Because Mother presented some evidence to support an award of attorney's fees, an award of no fees was improper. However, Mother failed to offer evidence that her attorney's fees were reasonable. Additionally, because the requirements to recover fees under the final decree and under the Texas Family Code differed, Mother was required to segregate her fees related to the recovery of child support from her fees related to enforcing the final decree.

Finally, the trial court did not abuse its discretion in not awarding Mother her appellate attorney's fees or fees associated with the remand because she failed to present any evidence of those fees to the trial court. However, she could seek such fees on this subsequent remand and introduce evidence at that time.

MOTHER PROVIDED SUFFICIENT, UNCONTRADICTED EVIDENCE TO ESTABLISH ATTORNEY'S FEES UNDER TRADITIONAL METHOD.

In re E.B., No. 05-14-03980-CV, 2015 WL [not on WL yet] (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (09-29-15).

Facts: Mother and Father filed cross petitions to modify the parent-child relationship with respect to their only Child. At the conclusion of the trial, the trial court awarded Mother her attorney's fees and costs. Father appealed, arguing the evidence was insufficient to support the award of attorney's fees under the lodestar method.

Holding: Affirmed

Opinion: When a party opts to use the traditional method to prove up the reasonableness of his or her attorney's fee, requirements of the lodestar method are inapplicable. When determining an award of attorney's fees under the traditional method a court looks to:

(1) the time, labor, and skill required to properly perform the legal service;
(2) the novelty and difficulty of the questions involved;
(3) the customary fees charged in the local legal community for similar services;
(4) the amount involved and the results obtained;
(5) the nature and length of the professional relationship with the client; and
(6) the experience reputation and ability of the lawyer performing the services.

Here, Mother's attorney testified that he was licensed in Texas and had been practicing for over twenty years. He testified as to his hourly rate, the number of hearings in the case, and various costs incurred throughout the litigation. He additionally testified that redacted invoices had been provided to everyone in the case, although those invoices were not admitted into evidence. Father's attorney did not object to any of the evidence, did not cross-examine Mother's attorney, and did not offer any evidence or witness to contradict Mother's attorney.

D.B.A. Family Law Section Case Law Update

November 11, 2015

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SAPCR
CHILD SUPPORT

IN CALCULATING CHILD SUPPORT AWARD, TRIAL COURT COULD CONSIDER MONEY RECEIVED BY FATHER FROM HIS EXTENDED FAMILY IN ADDITIONAL TO HIS INCOME POTENTIAL, DESPITE HIS EXPIRED NON-IMMIGRANT WORK VISA.

R.J. v. K.J., No. 02-14-00266-CV, 2015 WL 5778775 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (10-01-15).

Facts: Mother and Wife moved with one Child from Pakistan to the U.S., where they had a second Child. Father was admitted to the U.S. under a non-immigrant visa, and Mother was admitted as a non-immigrant dependent. Father left his employment, and his visa expired. At the time of the parties' divorce, Mother had obtained her own employer-sponsored temporary-work visa. During the parties' divorce proceedings, Father testified that his family in Pakistan had been supporting him through his unemployment and that they had given him more than $300,000. Father testified that the money was given as loans and should not be considered income. He testified that he earned rental income, but that his monthly expenses far exceeded that income. The trial court found that Father was intentionally under- or unemployed, that he had the ability to earn $50,000 a year, and that his net monthly resources were $4,000. Thus, the trial court ordered Father to pay $1,000 a month in child support. Father appealed, arguing the evidence was insufficient to support the child support award.

Holding: Affirmed

Opinion: A court may take into consideration a parent's earning potential from whatever sources available to that parent. Whether or not Father could legally work in the U.S., he could not evade his child support obligation by voluntarily remaining unemployed. Nothing in Tex. Fam. Code § 154.006 requires further proof of the motive or purpose behind the unemployment or underemployment.

FATHER REQUIRED TO PROVIDE SUPPORT FOR CHILDREN REGARDLESS OF STATUS AS ILLEGAL IMMIGRANT

In re R.R., No. 05-14-00773-CV, 2015 WL 5813391 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (10-06-15).

Facts: Mother and Father lived together and had two Children. Mother testified that during the relationship, Father was emotionally and physically abusive. Mother filed a SAPCR and sought sole managing conservatorship. The trial court ordered supervised visitation, but attempts to exercise that visitation were unsuccessful because the Children were so fearful of Father. Father testified that he was never abusive and that Mother had poisoned the Children against him because Mother was jealous after he married another woman. At the final hearing, a social worker and the Children's counselor also testified regarding the Children's fear of Father.

Father had been working in the U.S. illegally for about 20 years. He alleged that he was presently unemployed because he was attempting to gain legal status and no longer wanted to work under a false name. He had a trucking company, which he claimed to have sold—although the trucks remained on his property. He claimed to help his wife run her trucking business in return for no pay by doing maintenance on the trucks when they broke down. Later in his testimony, he claimed that he only put air in the tires and water in the reservoirs.

The trial court found that there had been no family violence in the prior two years but appointing Mother as the sole managing conservator would be in the Children's best interest. The trial court awarded Father supervised possession and provided for reunification therapy. Additionally, the court found that Father was intentionally unemployed and awarded child support based on the average wage of a diesel mechanic. Father appealed, arguing the trial court abused its discretion in appointing Mother sole managing conservator when there had been no family violence finding. Additionally, he argued that there was no evidence to support the court's finding that he could have been employed as a diesel mechanic because he had never been trained as one.

Holding: Affirmed

Opinion: While there was evidence of family violence, there was no evidence of family violence within the past two years. Nevertheless, when determining whether appointing parents joint managing conservators, the trial court should consider the enumerated factors of Tex. Fam. Code 153.134(a). Here, the Children feared Father, and their physical, psychological, and emotion needs and development would not benefit from appointing the parents joint managing conservators. There was evidence that the parents could not reach shared decisions in the

best interest of the Children. Additionally, Mother had always been the Children's primary caregiver.

Regardless of Father's legal status, he had a duty to support his Children. Father's testimony regarding his current unemployment was inconsistent, and the trial court could have reasonably determined he was employable as a diesel mechanic.

SAPCR
CHILD'S NAME CHANGE

TRIAL COURT DID NOT ABUSE DISCRETION IN CHANGING CHILD'S LAST NAME WHEN BEST INTEREST EVIDENCE WAS "MIXED."

Anderson v. Dainard, ___ S.W.3d ___, 01-15-00081-CV, 2015 WL 5829645 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (10-06-15).

Facts: Mother and Father never married. After they broke up, Mother told Father she was pregnant with his Child. He asked Mother to take a paternity test, but she refused. The Child was given Mother's last name. Some months later, the Attorney General initiated a parentage and child support action. The trial court ordered a paternity test, and Father was established as the Child's father. After the entry of temporary orders appointing the parents joint managing conservators, Father filed a SAPCR seeking to change the Child's last name to his own. The trial court granted Father's request. Mother appealed, arguing the evidence was insufficient to support a finding that the name change was in the Child's best interest.

Holding: Affirmed

Opinion: Neither parent's name would cause the Child embarrassment nor was there any evidence either name was accorded particular respect in the community. There was no evidence of parental misconduct or neglect. The Child had no full- or half-siblings. The Father testified that because the Child spent a significant time with Mother, having his last name would help create a familial bond between himself and the Child. The Mother testified that although the Child was young, the Child knew her last name and was known by that name to her daycare, doctors, and others. The Mother planned to keep her maiden name if she were to subsequently marry.

The appellate court noted that the evidence before the trial court was mixed and that the trial court's decision "was a difficult one to be sure."

MISCELLANOUS

NO EXCEPTION APPLIED TO PERMIT TRIAL COURT TO DECLARE DIVORCE DECREE VOID AFTER ITS PLENARY POWER EXPIRED.

In re Martinez, ___ S.W.3d ___, 14-15-00429-CV, 2015 WL 5770829 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (10-01-15).

Facts: Husband and Wife were from Honduras and did not speak English. Husband filed a petition for divorce, but the case was dismissed for want of prosecution. Husband filed a motion to reinstate, and without reinstating the case, the trial court held a final hearing. Twenty-nine days after the dismissal order was signed, the trial court signed an agreed final decree and an order reinstating the case.

About nine months later, Husband filed a petition to set aside the divorce decree or to modify or reform the decree to award the house to him instead of to Wife. Wife filed a motion to enforce the decree alleging that Husband refused to vacate the home and had obstructed her efforts to take ownership of it. After a hearing, the trial court found that:

- neither party understood the agreed decree at the time of the prove-up;
- neither party was capable of providing any evidence through testimony to support a just and right division because there was no interpreter;
- under the circumstances, there could not have been a legal prove-up; and
- the decree was void on its face.

The trial court signed an order declaring the divorce decree void. Mother filed a petition for writ of mandamus to set aside that order.

Holding: Writ of Mandamus Conditionally Granted

Opinion: After a trial court's plenary power has expired, a court may sign an order in that case under limited circumstances:

(1) judgment nunc pro tunc to correct a clerical error;
(2) order declaring prior judgment void because:
(a) prior order was signed after expiration of plenary power;
(b) court lacked subject matter jurisdiction to render judgment;
(c) complete failure or lack of service violated due process; or
(d) any ground allowing a collateral attack of the judgment.

The court of appeals assumed *arguendo* that the trial court here declared the order void because:

- the parties did not understand the decree and could not prove it up;
- the trial court had not reinstated the case prior to signing the decree;
- the decree failed to divide all the marital property; and
- the decree omitted orders for Wife's children born during the marriage.

Even assuming all of the above were true, those facts do not fall under the limited circumstances under which a trial court may sign an order after its plenary power has expired.

BECAUSE AWARD OF ATTORNEY'S FEES UNDER TEX. FAM CODE § 106.002 ARE NOT "COSTS," TEX. R. CIV. P. 143 DID NOT APPLY TO AWARD OR TO FATHER'S FAILURE TO PAY AWARD.

In re M.A.M., No. 05-14-00040-CV, 2015 WL 5863833 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (10-08-15).

Facts: Father filed a petition to recover excess child support. Mother filed a counterpetition to modify the parent-child relationship. Father failed to appear at a hearing on three motions filed by Mother. The trial court granted Mother's motions and awarded Mother attorney's fees under Tex. R. Civ. P. 143. When Father failed to pay the attorney's fees as ordered, Mother filed a motion to dismiss his pleadings as required by Tex. R. Civ. P. 143. The trial court granted Mother's motion and dismissed all of Father's claims for affirmative relief without prejudice. Father appealed.

Holding: Affirmed in Part; Reversed in Part

Opinion: Tex. R. Civ. P. 143 provides that a party seeking affirmative relief may be required to give security for costs at any time prior to a final judgment and that a failure to comply results in the claim for affirmative relief being dismissed. There are two statutory provisions authorizing attorney's fees in modification suits: Tex. Fam. Code §§ 106.002 and 156.005. Mother did not plead for attorney's fees under Section 156.005. In 2003, the legislature removed "as costs" from Section 106.002. Thus, because attorney's fees under Section 106.002 are not costs, Tex. R. Civ. P. 143 does not apply, and the trial court abused its discretion in striking Father's pleadings pursuant to that rule.

WIFE WAS ESTOPPED FROM APPEALING PROPERTY DIVISION BECAUSE SHE ACCEPTED THE BENEFITS OF THE JUDGMENT AND DID NOT SHOW THAT ANY EXCEPTION APPLIED.

White v. White, No. 14-14-00593-CV, 2015 WL 5893225 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (mem. op.) (10-08-15).

Facts: Husband and Wife married after Husband had been working for the fire department for 27 years. He continued working for the fire department for an additional 13 years. Four years after he retired, Wife filed for divorce. The trial court determined that the vast majority of Husband's retirement benefits were his separate property and divided the community portion equally between the parties. Wife appealed the division of the retirement benefits. Wife additionally complained of the trial court's refusal to change her name back to her maiden name. Husband filed a motion to dismiss her appeal in its entirety because Wife accepted the benefits of the judgment.

Holding: Affirmed in Part; Reversed in Part

Opinion: To support her claim that the economic necessity exception applied, Wife filed a supporting affidavit identifying her monthly expenses, but she provided no documentary evidence to substantiate those expenses. Additionally, although Wife claimed that certain motorcycles awarded to her were left at her home by Husband without her consent, Wife provided no explanation for her acceptance of a Buick awarded to her in the decree. Moreover, Wife did not contend that she lacked the ability to borrow money or obtain money through a request for temporary orders pending appeal.

Wife claimed the entitlement exception applied because the award of her share of Husband's retirement was supported by Husband's

sworn affidavit and his expert witness. However, nothing would prevent the trial court from changing that award on remand and awarding her less than she had previously received.

Wife finally argued that the cash benefits exception applied because she only accepted cash. However, the cash benefits exception generally applies only when the cash accepted is relatively small in comparison with the total value of the community property. Wife took control of essentially the entire cash amount awarded her, which represented half the community estate. Further, Wife did not deny that she accepted non-cash benefits, including the Buick.

Because Wife accepted the benefits of the judgment that she appealed, she could not complain of that judgment's property division. However, her complaint regarding her name change was severable from the property division. The trial court abused its discretion in denying Wife her request to change her name without stating a reason for the denial.

BOYFRIEND NOT ENTITLED TO JURY TRIAL IN FAMILY-VIOLENCE PROTECTIVE-ORDER PROCEEDING.

Roper v. Jolliffe, ___ S.W.3d ___, 05-14-00500-CV, 2015 WL 5946680 (Tex. App.—Dallas 2015, no pet. h.) (10-09-15).

Facts: Boyfriend and Girlfriend lived in an apartment together. He was physically abusive to her. After an attack, Girlfriend called the police who took her statement and photographs. Subsequently, the district attorney's office filed an application for a protective order against Boyfriend, and a final hearing was set. Boyfriend perfected his request for a jury trial about six weeks before the final hearing. However, the trial court denied the jury request and proceeded with the trial. The trial court found that family violence had occurred and was likely to occur in the future and granted a two-year protective order. Boyfriend appealed, raising a number of issues, including a complaint that the trial court abused its discretion in denying his request for a jury trial.

Holding: Affirmed

Majority Opinion: (J. Stoddart, J. Brown) The portion of the family code pertaining to Protective Orders and Family Violence was originally passed in 1979. The statutory language provides that the court will act as the "sole fact finder." By using the word "court" and omitting "jury," the legislature made clear that the courts, not juries, have the responsibility to make the necessary findings prior to issuing a family-violence protective order.

Although the Texas Constitution provides the right to a trial by jury, civil law did not address domestic violence at the time of the constitution's adoption. Where no common law action or government scheme existed in 1876, no jury trial is required. Additionally, no other state has found the right to a jury in a proceeding for a domestic violence protective order.

Ordinary permanent injunctions are distinct from family-violence protective orders. A permanent injunction is an equitable remedy for some other cause of action requiring a liability finding after a hearing on the merits. In contrast, a family violence protective order is obtained through an independent statutory proceeding with no underlying cause of action.

Further, a family-violence protective-order proceeding is not a "cause" as defined by Tex. Const., art. V, § 10. It does not seek to remedy past wrongs or punish criminal acts, but rather to protect the applicant and prevent future violence. Moreover, the delay and expense inherent in jury trials make them unsuitable for protective orders because of the serious need for an expedited and efficient procedure to prevent family violence.

Dissenting Opinion: (J. Evans) Family-violence protective orders are appealable, permanent injunctions. Whether the restraint continues for six months or six years has no bearing on the question of "permanency." Before granting a permanent injunction, a trial court must make both factual and equitable determinations. Because the right to a trial by jury is inviolate, Boyfriend should not have been denied his request to have a jury determine the questions of fact.

Further, because parties to a hearing on a permanent injunction have been entitled to a jury since before the adoption of the 1876 constitution, Boyfriend had a right to a jury despite the fact that family-violence protective orders did not exist at that time. The right to a jury trial in permanent injunction hearings existed before the 1876 constitution and cannot be abrogated by statute.

Additionally, the legislature's use of the "the Court" did not distinguish the role of trial judge from the jury. When a jury is sworn in, its members become officials of the court. The Family Code frequently explicitly provides whether an issue may be decided with or without a jury, and if this fact question were to be decided without a jury, the legislature could have easily stated precisely that.

WIFE DENIED DUE PROCESS IN CONTEMPT PROCEEDING WHEN TRIAL COURT ENTERED DIRECTED VERDICT AGAINST HER WITHOUT ALLOWING HER TO FULLY PRESENT HER DEFENSE.

In re Harrison, No. 14-15-00370-CV, 2015 WL 5935816 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (mem. op.) (10-13-15).

Facts: Husband filed a motion for enforcement asking that Wife be held in contempt for violations of a final decree of divorce, even though that decree had been reversed by the court of appeals. Husband also asked the trial court to hold Wife in contempt for violations of the parties' MSA and an agreed interim order entered after the reversal of the final decree. At the hearing on Husband's motion, while Wife was testifying to her defense, Husband's counsel interrupted and objected that Wife had not filed an answer or pleaded any affirmative defenses and moved for a directed verdict. The trial court granted a directed verdict and denied Wife's request to continue her testimony.

Subsequently, a contempt order was signed confining Wife to jail for violations of the decree, the MSA, and the agreed interim order. Several other orders were entered over the next few months on the basis of that order. Wife filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: "To deny an accused the right to inform the court why he had not complied with an order is, in effect, to deny him trial. That is not due process." There is no requirement that a respondent file a written pleading to avoid admitting the truth of the movant's allegations. The trial court abused its discretion in granting a directed verdict without giving Wife an opportunity to present her defense.

Additionally, a party may not be held in contempt for violating an agreement unless the court has signed an order commanding the parties to comply. Incorporating an MSA by reference is not sufficient. Thus, the contempt order was void to the extent that it punished Wife for violations of the MSA.

The Final Decree of Divorce was reversed by the court of appeals. Wife could not be held in contempt for violating a reversed judgment.

If a contempt order lists each failure separately and assesses punishment separately for each failure, only the invalid portion is void, and the remainder can be severed and enforced. Here, the trial court did not assess separate punishments for each of Wife's alleged violations. Moreover, the subsequent contempt orders were each based on the original void contempt order. Therefore, each of the subsequent contempt orders were also void.