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

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DIVORCE
VALIDITY OF MARRIAGE

SUFFICIENT EVIDENCE SUPPORTED EXISTENCE OF VALID NIGERIAN "PROXY" MARRIAGE.

***Adeleye v. Driscal*, ___ S.W.3d ___, No. 14-14-00822-CV, 2016 WL 889162 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (03-08-16).**

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

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

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

Holding: Affirmed

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

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

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

DIVORCE
STANDING AND JURISDICTION

PLEA IN ABATEMENT MUST BE TIMELY: FATHER COULD NOT RAISE DOMINANT JURISDICTION ARGUMENT AFTER FINAL DEFAULT JUDGMENT.

Gutierrez v. Gutierrez, No. 05-14-00803-CV, 2016 WL 1242193 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-30-16).

Facts: Mother filed for a divorce with children in Dallas County. After the court rendered a default judgment against Father, he filed a motion for new trial asserting that the Dallas court lacked jurisdiction because he had

filed for divorce in Webb County before Mother filed her petition. He also filed a post-judgment motion to transfer and plea in abatement asserting Webb County had dominant jurisdiction. The trial court did not rule on Father's motions, and his motion for new trial was overruled by operation of law. Father appealed.

Holding: Affirmed

Opinion: Father did not dispute that Mother met the domiciliary requirements alleged in her petition, so Dallas was a proper venue for the divorce. Further, a dominant jurisdiction complaint must be timely asserted, and Father did not file a plea in abatement until after the Dallas County court rendered its final judgment. Additionally, Father failed to show that Webb County would have been a proper venue for the divorce.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

WIFE COULD NOT USE REPRESENTATIONS FROM MEDIATION TO UNDO EXISTING MSA.

Triesch v. Triesch, No. 03-15-00102-CV, 2016 WL 1039035 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (03-08-16).

Facts: During Husband and Wife's divorce, they disputed the character some real property. A portion of the property was purchased by Husband before marriage, and an adjacent tract was purchased during marriage. In a mediated settlement agreement, Husband was awarded all of the real property.

After the MSA was signed, but before a final decree was signed, Wife "discovered" documents showing that she had an interest in the real property and sought to set aside the MSA. During a hearing on Wife's motion to set aside the MSA, he trial court sustained Husband's objection when Wife attempted to offer statements made by Husband during mediation. The trial court denied Wife's request to set aside the MSA and entered a final decree consistent with the MSA. Wife appealed, alleging in part that the trial court erred in excluding the statements made during mediation.

Holding: Affirmed

Opinion: Wife failed to make an offer of proof, so she failed to preserve her complaint regarding the excluded statements. However, even if she preserved error, the communications related to the subject of any dispute made by a participant in mediation is confidential. Wife could not use representations from mediation to undo the existing settlement agreement.

DIVORCE
DIVISION OF PROPERTY

WIFE'S UNDISPUTED TESTIMONY SUFFICIENT TO ESTABLISH SEPARATE CHARACTER OF PROPERTY.

Lopez v. Lopez, No. 01-15-00618-CV, 2016 WL 1056701 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (mem. op.) (03-17-16).

Facts: During their marriage, Husband and Wife lived in a house owned by Wife's mother. When Wife received an interest in real property as inheritance from her father's estate, she allowed her brother and sister to buy out her interest. Wife invested the check from her brother, and she used the check from her sister to pay off the mortgage on the house in which she and Husband lived. Wife's mother then deeded the house to Wife individually. In the final decree, the trial court confirmed the house as Wife's separate property. Husband appealed.

Holding: Affirmed

Opinion: At trial there was testimony that Wife's mother owned the house in which Wife and Husband lived and that Wife subsequently paid off the house with money Wife inherited from her father. Wife's sister testified that she recognized the check as the one she wrote for Wife's share of the inheritance. Husband did not contradict any of these assertions. Here, court found that undisputed testimony is sufficient to establish separate character of the property.

REIMBURSEMENT AWARD AGAINST WIFE'S SEPARATE ESTATE INAPPROPRIATE WHEN HUSBAND DID NOT PLEAD FOR SUCH RELIEF.

Trevino v. Garza, No. 13-15-00241-CV, 2016 WL 1072627 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (03-17-16).

Facts: In his divorce pleading, Husband requested "reimbursement from the community estate for any monies wasted by [Wife] during the marriage." Husband made no other reference to reimbursement. In the final decree, the trial court confirmed Wife's separate property, which included two pieces of real property and a business, and awarded Husband a reimbursement award for his uncompensated time, toil, talent, and effort expended in enhancing the value of Wife's separate property. Wife appealed, arguing that the judgment did not conform to the pleadings.

Holding: Reversed and Rendered

Opinion: Husband made no claim for reimbursement for his time, toil, and effort expended in enhancing Wife's separate property. Husband asked to be reimbursed for waste of community resources by Wife. Waste is an issue a trial court considers in determining the just and right division of the community estate and is distinct from an order for reimbursement. Additionally, there was no evidence that the issue was tried by consent. Although some evidence offered during trial may have been construed as supporting a reimbursement claim, that evidence was also relevant to the pleaded issues before the court: the value of disputed assets.

DIVORCE
Retirement Benefits

WIFE'S INTEREST IN RETIREMENT BENEFITS INCLUDED ALL BENEFITS TRACEABLE TO COMMUNITY ASSETS EARNED DURING THE MARRIAGE.

***Howard v. Howard*, ___** S.W.3d ___, No. 01-14-00761-CV, 2016 WL 1267810 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (03-31-16).

Facts: During their marriage, Husband worked for the police department. The parties' agreed divorce decree awarded Wife "[o]ne-half of any and all sums related to any vested profit sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan or accrued unpaid bonuses, or other benefit programs existing by reason of [Husband]'s employment during the marriage."

At the time of divorce, Husband's interest in the employee retirement plan had not yet vested. If Husband was terminated from his employment at that time, he would have been entitled only to a reimbursement of his payroll contributions to the plan. After the marriage, a new benefit was added to which Husband was entitled because of his employment with the department during the marriage.

After Husband retired, the trial court entered a QDRO interpreting the decree and awarding benefits. The trial court determined that because, at the time of divorce, Husband was only entitled to reimbursement for his contributions to the plan, Wife only had a 50% interest in that reimbursement. Wife appealed.

Holding: Reversed and Remanded

Opinion: Husband and the trial court's interpretation of the retirement award ignored the decree's use of the terms "all sums related to" and benefits "existing by reason of" employment during the marriage, which was broader than sums that were "then-existing." Additionally, if the intent was to only award Wife a half portion of

Husband's payroll contributions at the time of the divorce, that value was readily ascertainable at the time of the divorce. Further, the limiting provisions in the decree were forward-looking and contemplated a future-contingent interest in all retirement benefits that Husband became entitled to as a result of his employment during the marriage. Moreover, the agreement provided for an interest in a retirement benefit, not in a right to a refund of an employee's contribution on termination of employment.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT ABUSED DISCRETION BY ENTERING POSSESSION ORDER THAT SUBSTANTIALLY ALTERED THE TERMS OF THE PARTIES' MSA.

In re H.W.G., No. 05-15-00114-CV, 2016 WL 1179495 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-25-16).

Facts: In a SAPCR, Mother and Father entered an MSA that gave Mother visitation in four incremental stages subject to certain drug testing requirements. Per the MSA, to move from Step 1 to Step 2, Mother had to exercise supervised visitation for 10 consecutive weeks and submit to random standard 10 panel monthly drug tests. Five weeks after the final order was entered, Mother filed a motion for enforcement of possession under Step 2. Mother asserted that she had been sober for six months and had several negative drug tests in that time. However, she had not undergone any drug tests as described in the final order. Father argued that Mother was still in Step 1 because she had not submitted to the random drug testing. At the hearing's conclusion, the trial court denied the motion for enforcement and held that Mother was in Step 4 of the possession order because she had satisfied the requisites of the order. Father appealed arguing that the trial court abused its discretion in awarding Mother additional visitation because no party requested it, and the evidence did not support the order.

Holding: Reversed and Remanded

Opinion: Despite the trial court's recitation, the undisputed evidence did not support a finding that Mother satisfied the prerequisites to advance to Step 4 visitation. One perquisite for Mother to advance beyond Step 1 was that she submit to random drug tests. That had not occurred. Although a trial court may provide clarification necessary to implement an MSA, a court may not substantially alter an MSA's terms.

SAPCR
CHILD SUPPORT

TRIAL COURT NOT REQUIRED TO USE FEDERAL TAX REGULATIONS IN CALCULATING NET MONTHLY RESOURCES FOR SELF-EMPLOYED FATHER.

In re B.Q.T., No. 05-14-00480-CV, 2016 WL 861633 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-07-16).

Facts: Mother and Father were unmarried, but they purchased a house together and had one Child. When Father moved out, he and Mother agreed that in lieu of child support, Father would give Mother his interest in the house (about $8500). Less than a year later, the OAG filed a SAPCR, seeking appointment of conservators and an order for current and retroactive child support and medical support. Father introduced evidence of his self-employment income, and the trial court ordered him to pay $903 per month for child support and $200 per month for medical support. Additionally, the trial court ordered retroactive child support in the amount of $6,534. On appeal, Father argued the evidence was insufficient to support the trial court's finding regarding his net resources, and that the trial court erred in failing to consider the parties' prior agreement when calculating retroactive child support.

Holding: Affirmed

Opinion: Father's gross income was $131,000 in 2011, a loss of $311 in 2012, and $129,000 in 2013. Father testified that he was injured in 2012 and could not work; however, bank statements showed deposits of $19,000 in the first six months of 2012. His tax returns showed that after expenses, Father's income was $7000 in 2011, -$311 in 2012, and $13,000 in 2013. The federal income tax regulations are distinct from the rules for computing net resources under the Family Code. The trial court's finding of monthly gross resources of $6,598.11 was somewhat less than Father's average gross income for the three available years of tax information. Further, while the trial court *may* exclude certain expenses from self-employment income, it is not required to do so, and Father presented no evidence that would have allowed the trial court to do so in this case.

The agreement concerning support between the parties would not reduce or terminate the retroactive support that the OAG could request unless the OAG was party to the agreement.

OBLIGEE FATHER BORE BURDEN TO SHOW HE TIMELY DELIVERED RECEIPTS OF UNINSURED MEDICAL EXPENSES BEFORE OBLIGOR MOTHER'S OBLIGATION TO REIMBURSE WAS TRIGGERED; UCCJEA DOES NOT APPLY TO TRAVEL EXPENSES ASSOCIATED WITH VISITATION OF A CHILD.

In re M.S.C., No. 05-14-01581-CV, 2016 WL 929218 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-11-16).

Facts: Mother and Father's divorce decree appointed them joint managing conservators of their four Children and granted Mother the exclusive right to designate the Children's primary residence. Subsequently, Mother and the Children moved to California.

A few years later, the Texas trial court determined that although it retained jurisdiction over the Children (because Father continued to live in Texas), California was a more convenient forum for addressing custody issues. The Texas trial court retained jurisdiction over child support issues.

A California court determined that due to the costs associated with the youngest Child's physical disabilities, Father could better care for that Child. The California court granted Father sole legal custody of the youngest Child and ruled that Mother could visit the youngest Child in Texas one weekend a month with adequate notice to Father. Additionally, the California court ordered Father to pay for transportation and accommodations for Mother for three of her visits with the Child each year.

Father filed a SAPCR in Texas, asking the Texas trial court to order Mother to pay child support for the youngest Child, to reimburse him for 50% of the youngest Child's uninsured medical expenses pursuant to the divorce decree (which amounted to $125,697.25), and to order that she visit the youngest Child at her own expense. The Texas trial court awarded Father a judgment for the unreimbursed medical expenses, ordered Mother to pay child support for the disabled Child, and ordered that Mother pay the expenses associated with her visitation with the youngest child.

Mother appealed, arguing that the evidence was insufficient to support the judgment for unreimbursed medical expenses and that the Texas trial court lacked jurisdiction to modify the California court's "visitation" order pursuant to the UCCJEA.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: The final decree required Father to send proof of medical expenses to Mother within ten days of incurring the expense. Father failed to prove he timely sent the documents to Mother. Thus, Father failed to establish that Mother's obligation to reimburse was ever triggered. Whether the documents were timely sent was an element of Father's burden of proving an arrearage and was not an affirmative defense that Mother was required to assert at trial.

The UCCJEA does not apply to orders relating to child support or another monetary obligation of an individual. Because the Texas trial court retained jurisdiction to determine custody issues, the California trial court lacked jurisdiction to order Father to pay for Mother's travel expenses to visit the Child. Additionally, because the California court lacked subject-matter jurisdiction to enter the order regarding travel expenses, the doctrines of comity, disfavoring collateral attacks on foreign judgments, and the Full Faith and Credit Clause of the U.S. Constitution did not apply.

SAPCR
MODIFICATION

TRIAL COURT ENTITLED TO DETERMINE AWARD FOR CHILD SUPPORT BECAUSE NOT ADDRESSED IN MSA.

In re Marriage of Wolfe, No. 05-14-01279-CV, 2016 WL 772640 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-29-16).

Facts: Mother and Father, both pro se, entered a mediated settlement agreement that addressed conservatorship, access, and possession of their Child, but not child support. The associate judge entered temporary orders that addressed conservatorship, access, and possession, and child support. Before the final bench trial, both parents asked the trial court to "modify" conservatorship, access, and possession, and child support. While the MSA provided that Mother would have the exclusive right to designate the Child's primary residence, the final decree granted that right to Father. Mother was ordered to pay child support. Mother appealed, arguing that she was entitled to a judgment that complied with the MSA.

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

Opinion: Without a finding of family violence, the trial court lacked discretion to modify the MSA based on the Child's best interest. Further, Mother stated no ground on which the MSA could be set aside. However, because the MSA did not address the issue of child support, the trial court had the authority to include an order for child support in the final decree. Because the appellate court reversed and rendered the ruling on conservatorship, access, and possession, it also reversed and remanded the case for further determination on the issue of child support.

EVIDENCE SUPPORTED CHANGING PARENT WITH RIGHT TO DESIGNATE CHILDREN'S PRIMARY RESIDENCE.

In re A.J.M., No. 10-14-00284-CV, 2016 WL 936869 (Tex. App.—Waco 2016, no pet. h.) (mem. op.) (03-10-16).

Facts: A prior order appointed Mother and Father joint managing conservators of their two Children and granted Mother the exclusive right to designate the primary residence of the Children within Ellis County and contiguous counties. Mother married a man who was in the military, and without notice to Father, Mother and the Children moved with Mother's new husband to Georgia. Father filed a motion for enforcement, and the trial court granted Father the temporary right to designate the Children's primary residence and ordered Mother to pay $50 a month in child support. [Note: Mother did not contest this order.] Mother moved back to Ellis County and alleged that her new husband had been transferred to Fort Hood and that they planned to find a house in Waxahachie so her new husband could commute to work. Mother failed to pay child support for two months and then paid three months at once. She was one month behind on child support at the final hearing. Although she was qualified to be a nurse, she was working part-time at a convenience store because she said she did not want to get a full-time job until the trial was over. After the final hearing, the trial court granted Father the exclusive right to designate the Children's primary residence. Mother appealed, arguing that the evidence was insufficient to support the judgment. Mother also argued that there was insufficient evidence to establish a material and substantial change in circumstances. She contended that her remarriage and third child did not constitute a material and substantial change because Father had also remarried, and his new wife was pregnant.

Holding: Affirmed

Opinion: Both parties had remarried and had or were expecting another child, which was sufficient to constitute a material and substantial change. Additionally, Mother twice violated court orders: once in moving without notice, and again in failing to pay the nominal award for temporary child support. Contrarily, Father had a stable home, and the Children did well in his care.

SAPCR
ADOPTION

AUNT'S PETITION FOR ADOPTION UNTIMELY BECAUSE NOT WITHIN 90 DAYS OF TERMINATION OF PARENT-CHILD RELATIONSHIP.

In re E.G., No. 14-14-00967-CV, 2016 WL 1128137 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (mem. op.) (03-22-16).

Facts: The trial court terminated Father's parental rights and appointed TDFPS as the Child's managing conservator. Subsequently, Aunt (Father's sister) filed a petition for adoption, asserting that no court had continuing exclusive jurisdiction. Aunt's suit was randomly assigned to a district court and then transferred to the court that ordered the termination. TDFPS filed a motion to dismiss Aunt's petition, and the amicus filed special exceptions asserting that Aunt lacked standing under the Texas Family Code. The trial court granted TDFPS's motion to dismiss and the amicus's motion to strike and dismissed Aunt's petition. Aunt appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 102.006 limits standing by providing that a biological aunt may file a suit requesting managing conservatorship not later than the 90th day after the date of termination of the parent-child relationship. The date of termination occurred when the judge orally rendered his judgment. The signing and entry of the judgment were ministerial acts. Here, Aunt filed her petition for adoption more than 90 days from the date of oral rendition.

MISCELLANOUS

WIFE ESTABLISHED PROBABLE RIGHT TO RECOVERY UNDER ICA AND HACA BECAUSE, WITHOUT WIFE'S KNOWLEDGE OR CONSENT, HUSBAND RECORDED CONVERSATIONS BETWEEN HIMSELF AND WIFE AND PHOTOGRAPHED TEXT MESSAGES BETWEEN WIFE AND ANOTHER PERSON.

Miller v. Talley Dunn Gallery, LLC, No. 05-15-00444-CV, 2016 WL 836775 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-03-16).

Facts: Husband and Wife began dating when they were teenagers. Before they married, Wife opened an art gallery. Husband occasionally worked for the art gallery.

Husband suspected Wife of cheating on him with an artist and accessed her cell phone while she was sleeping to take photographs of text messages between her and the artist.
Additionally, Husband put a digital recording device in Wife's car and also started recording conversations between the two of them. Husband kept a log of the recordings and of Wife's daily activities. When Wife discovered the log, it was 150 pages. Wife filed for divorce.

During the divorce proceedings, Wife produced a general ledger from the gallery for use during mediation and to allow Husband to value the business. A confidentiality order was in place during the proceedings but was later vacated.

After the divorce was final, Husband began "wag[ing] a public campaign to disparage" Wife and the art gallery and to interfere with the gallery's business. Wife and the art gallery filed claims against Husband based on violations of the Texas Uniform Trade Secrets Act, the Interception of Communications Act ("ICA"), the Texas Theft Liability Act, and the Harmful Access by Computer Act ("HACA"); tortious interference, defamation, invasion of privacy, and intentional infliction of emotional distress. The trial court granted Wife and the gallery a temporary injunction. Husband appealed the injunction, arguing it included an unconstitutional prior restraint against disparaging the art gallery and that Wife and the gallery failed to show they were entitled to a temporary injunction, including establishing a probable right to recovery under the ICA and the HACA.

Holding: Affirmed as Modified
Opinion: The remedy for defamation is an award of damages, not the prevention of the right to speak freely. Injunctive relief in defamation or business disparagement actions may be permissible only when essential to

the avoidance of an impending danger, and when it is the least restrictive means. Here, there was no evidence that Husband's speech presented any impending danger.

To obtain temporary injunctive relief, Wife and the gallery were required to show a probable right to recover; they were not required to establish that they would prevail at final trial.

Husband argued that he did not violate the ICA because he—a party to the communication—consented to the recordings between himself and Wife. A common law right to privacy exists under Texas law, and no authority suggests that this right is limited to unmarried individuals. A spouse's actions, whether personally or through an agent, in making a surreptitious recording of the other spouse, who believes she is in a state of complete privacy, could be an invasion of privacy. Further, nothing in the ICA precludes a common law claim for invasion of privacy for communications not covered by the ICA.

Husband asserted that taking photographs of Wife's phone did not qualify as "access" under the HACA, and that even if it did, he had effective consent because the phone was community property. "Access" includes making use of any resource of a computer. Neither party disputed that the phone qualified as a "computer." Husband "accessed" the data on the phone by retrieving the text messages for the purpose of photographing them. Further, the HACA does not incorporate community property for the purpose of establishing ownership. Rather, it defines an "owner" as a person with a greater right of possession and the right to restrict access to the property. Wife had a superior right of possession to the phone as it was the "only way to reach" her, she used it on a daily basis, and she had the right to place a password on the phone.

APPELLANT FAILED TO PUT ON ANY EVIDENCE TO SUPPORT MOTION TO SUSPEND ENFORCEMENT OF JUDGMENT.

In re Guardianship of Laroe, No. 05-15-01006-CV, 2016 WL 861687 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (03-07-16).

Facts: After the trial court appointed Appellee as the guardian of the Ward, Appellant filed a motion with the trial court to suspend enforcement of the judgment. The trial court denied the motion. Appellant then filed a motion with the appellate court seeking an independent review of the motion to suspend enforcement of the judgment or, alternatively, review of the trial court's order denying the motion.

Holding: Motion Denied; Judgment Affirmed
Opinion: Rather than put on any evidence at the hearing on her motion to suspend the judgment, Appellant relied solely on the trial testimony that led to the trial court's judgment. Thus, the trial court did not abuse its discretion in denying the motion to suspend enforcement of the judgment.

FATHER'S ATTORNEY NOT DISQUALIFIED BASED ON LAWYER-WITNESS RULE BECAUSE MOTHER DID NOT ESTABLISH ATTORNEY'S TESTIMONY WAS NECESSARY TO ESTABLISH AN ESSENTIAL FACT.

In re Groves, No. 01-15-00537-CV, 2016 WL 921645 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (mem. op.) (03-10-16).

Facts: During a SAPCR, Father alleged that the Child made an outcry against her step-father. Before filing Father's affidavit, Father's Attorney spoke with the Child to make sure that the Child understood the difference between the truth and a lie. Father's Attorney later stated that it slipped his mind that an amicus attorney was to be appointed for the Child. Mother filed a motion to disqualify Father's Attorney from representing Father because Father's Attorney had made himself an essential fact witness and would be prejudiced by his dual role as an advocate and a witness. The trial court granted Mother's request to disqualified Father's Attorney from the case and ordered him to take the ad litem's CLE that is offered for CPS cases and to pay a fine of $2500. Father and Father's Attorney filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted
Opinion: The court's power to sanction exists only to the extent necessary to deter, alleviate, and counteract bad-faith abuse of the judicial process, such as significant interference with core judicial functions. The trial

court entered no findings to support its award of sanctions. Additionally, no evidence was introduced at the hearing. Motions and arguments of counsel do not constitute evidence for purposes of a sanctions proceeding.

Further, disqualification based on the lawyer-witness rule is only appropriate when there is a genuine need for the attorney's testimony to establish an essential fact. Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice.

GRANDPARENTS LIABLE FOR AIDING MOTHER IN PREVENTING FATHER'S VISITATION AND FOR MAKING FALSE AND INCOMPLETE STATEMENTS TO STATE OFFICIALS DURING INVESTIGATIONS INTO MOTHER'S FALSE ALLEGATIONS OF ABUSE AGAINST FATHER.

***Bos v. Smith*,** ___ S.W.3d ___, No. 13-14-00456-CV, 2016 WL [Not on WL] (Tex. App.—Corpus Christi 2016, no pet. h.) (03-10-16).

Facts: Father had twin daughters from a prior relationship, and Mother had a daughter from a prior relationship. Together, Mother and Father had two other Children. During their divorce proceeding, Mother falsely accused Father on multiple occasions of sexually abusing his children. Mother's parents (the "Grandparents") supported and promoted Mother's accusations. In a separate proceeding, Father sued the Grandparents for negligence, defamation, interference with custody rights, and conspiracy. The Grandparents moved to designate Mother as a responsible third party and argued that she was negligent by fabricating the allegations of sexual abuse, by coaching the Children to repeat the allegations, and by deceiving the Grandparents and the State authorities regarding the allegations.

A court-appointed psychologist testified that Mother suffered from anxiety, depression, bipolar disorder, borderline personality disorder, and narcissism and that the disorders would have manifested around age 18 or 19, which should have been apparent to the Grandparents. When Mother was a teenager she was admitted to a psychiatric hospital for inpatient treatment, though the Grandfather claimed not to recall any particular diagnosis. Mother threatened suicide on multiple occasions and at one point threatened to kill herself and the Children. Before her relationship with Father, Mother had been sued by an ex-boyfriend for bringing false criminal charges against him, and the Grandparents paid the settlement on Mother's behalf.

Mother's false allegations led to multiple, invasive interviews of Father and of all his children. Father testified that the feelings of betrayal and fear were gut wrenching and horrifying. He further testified that during the ordeal he was unable to function, he had extreme difficulty sleeping, and his law practice was almost destroyed. There were days that Father was physically ill or in a daze. After the many investigations, TDFPS ultimately ruled out all of the charges.

In the negligence and defamation suit, the trial court found the Grandparents liable for making defamatory statements to TDFPS and conspiring to interfere with Father's possession. The court awarded Father $4,500,000 in damages for mental anguish, $5,736,000 in damages for injury to reputation, and $236,000 in economic damages for attorney's fees. Mother agreed to terminate her parental rights to avoid jail time. The Grandparents raised 21 issues in their appeal.

Holding: Affirmed in part; Reversed and rendered in part; Reversed and remanded in part

Opinion: Mother nearly always made long phone calls to the Grandparents before and after denying Father visitation. On one occasion, Grandmother was aware of Father's right to possession but took the Child to a birthday party to prevent Father's visitation.

During the CPS investigations, the Grandparents failed to respond fully to CPS and the police regarding Mother's history of fabricating allegations. They failed to inform CPS or the police of Mother's psychological problems or of Mother's prior charges for false criminal accusations.

Further, based on the facts and circumstances of this case, the Grandparents owed a fiduciary duty of care to place the interests of the Children before their own, to protect the Children, and to prevent a dangerous person, Mother, from harming them and others associated with them. The Grandparents had previously filed suit against Mother to obtain custody of her oldest daughter, and they had paid $20,000 on Mother's behalf to settle a lawsuit in which it was alleged that Mother made false criminal allegations against her ex-boyfriend. By turning a blind eye to Mother's shortcomings as a parent, the Grandparents breached their duty to the Children.

Father established that he was entitled to some attorney's fees but failed to segregate recoverable fees from non-recoverable fees. Thus, the appellate court remanded that issue for further proceedings. Because the appellate court remanded the economic damages award, it was required to remand the whole case for a new trial on both liability and damages. However, the court noted that the error regarding economic damages could be cured if Father were to voluntarily remit the award for economic damages within 15 days of the appellate court's judgment.

Supplemental Opinion (03-31-16)**: Judgment, but not opinion, vacated and modified: Affirmed in part; Reversed and rendered in part**. Because Father timely filed his consent to the suggestion of remittitur, the appellate court modified the trial court's judgment to delete Father's economic damages. A new trial was no longer necessary.

APPELLATE COURT REMANDED PROCEEDINGS WHEN NO PARTY ASKED FOR TRIAL COURT'S JUDGMENT TO BE AFFIRMED.

In re J.W., No. 13-14-00559-CV, 2016 WL 1316687 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (03-10-16).

Facts: TDFPS initiated a suit seeking protection for the Parents' youngest Child. Initially, TDFPS was named temporary sole managing conservator of the Child, but TDFPS was later dismissed as a party. The trial court set a hearing for which neither the Parents nor their attorney appeared, at the conclusion of which, the trial court appointed the Child's Aunt as the permanent managing conservator. The Parents appealed, arguing that neither they nor their trial counsel received notice of the final hearing and, in the alternative, their trial counsel rendered ineffective assistance of counsel for failing to appear at the final hearing. TDFPS also asked the appellate court to reverse and remand the case because the Parent's trial counsel rendered ineffective assistance of counsel.

Holding: Reversed and Remanded
Opinion: No party asked the appellate court to affirm the trial court's judgment. Because the court of appeals could not grant relief not requested, it reversed and remanded the case for further proceedings.

HUSBAND'S GUARDIAN HAD RIGHT TO SUSPEND ENFORCEMENT OF JUDGMENT FOR DEBT EVEN THOUGH UNDERLYING DEBT WAS FOR TEMPORARY SPOUSAL SUPPORT.

***Mathis v. Benavides*, ___ S.W.3d ___, No. 04-15-00555-CV, 2016 WL 1039135 (Tex. App.—San Antonio 2016, no pet. h.) (03-16-16).

Facts: Husband had been declared legally incapacitated, and his Permanent Guardian filed for divorce from Wife. Wife and the Permanent Guardian entered into a Rule 11 agreement providing that the Permanent Guardian would pay Wife temporary spousal maintenance. However, the Permanent Guardian subsequently stopped making payments. Wife filed a cross-claim for breach of the Rule 11 agreement in a separate ongoing civil suit. The court granted Wife a partial summary judgment and severed the breach of contract action, making the order a final appealable judgment. The Permanent Guardian appealed that order and pending the appeal, the Permanent Guardian filed a notice of supersedeas deposit in lieu of bond to suspend enforcement of the judgment. Wife filed a motion to strike arguing that the deposit was an improper attempt to supersede the judgment because the judgment was an order fixing temporary spousal support, and such an order may not be superseded. The trial court granted Wife's motion to strike, and the Permanent Guardian filed a motion with the appellate court to review the trial court's determination of whether to permit suspension of enforcement.

Holding: Vacated
Opinion: TRAP 24.1 provides that unless the law or TRAP provides otherwise, a judgment debtor may supersede a judgment by making a deposit with the trial court clerk in lieu of a bond. Under the Texas Family Code, an order for temporary spousal support may not be superseded. Here, although the underlying agreed order

was in part for the purpose of spousal maintenance, the judgment for the debt was a final appealable judgment. No exception to TRAP 24.1 applied.

MOTHER'S ATTORNEY OBTAINED SUMMARY JUDGMENT AGAINST FATHER IN SEPARATE TRIAL COURT FOR BREACH OF CONTRACT WHEN FATHER FAILED TO PAY ATTORNEY'S FEES AS AGREED.

***Nuszen v. Burton*, ___ S.W.3d ___, No. 14-15-00393-CV, 2016 WL 1072489 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (03-17-16).**

Facts: In a child-custody proceeding in a Family Court, Father was ordered to pay Mother's Attorney $50,000 in interim attorney's fees. Father filed a petition for writ of mandamus, which was denied. Subsequently, the Attorney and Father orally agreed on the record that Father would pay $30,000 instead, in installments. When Father failed to pay, the Attorney sued Father by filing an original petition in a different District Court. The Attorney filed a motion for summary judgment in the District Court. Father filed an amended motion to dismiss, which was liberally construed as a response to the Attorney's motion for summary judgment. After reviewing the record, the District Court granted the Attorney a summary judgment and denied Father's motion to dismiss. Father appealed that judgment, arguing that because the Family Court declined to award attorney's fees in its final judgment, the District Court was barred from granting summary judgment on the theory of res judicata.

Holding: Affirmed
Opinion: The appellate record did not include a copy of the Family Court's final judgment, and Father did not request the clerk to supplement the appellate record. When the summary judgment record is incomplete, the omitted documents are presumed to establish the correctness of the judgment.

Regardless, even if Father had supplemented the appellate record, his res judicata argument still failed because:

1. the Attorney was not a "party" to the child-custody dispute, and the agreement entered into between the Attorney and Father was not in furtherance of any issue before the family court; and
2. the issue between the Attorney and Father was a breach-of-contract action based on an entirely different subject matter from the child-custody dispute in the family court.

Additionally, in his summary judgment evidence, the Attorney established all the elements of a contract, including consideration: while the Attorney was originally owed $50,000, he agreed to be paid only $30,000.

HUSBAND'S PLEADING AND TESTIMONY SUFFICIENT TO ESTABLISH WIFE WAS A DOMICILIARY OF TEXAS AFTER WIFE FAILED TO FILE AN ANSWER IN DIVORCE PROCEEDING.

Guadalupe v. Guadalupe, No. 11-14-00061-CV, 2016 WL 1072651 (Tex. App.—Eastland 2016, no pet. h.) (mem. op.) (03-17-16).

Facts: Wife was in the U.S. Air Force when Husband filed a petition for divorce. He alleged that Wife had been a domiciliary of Texas for six months. Wife was served at Dyess Air Force Base in Taylor County. She did not file an answer. Husband filed an amended petition and served Wife with the amended petition in Puerto Rico by certified mail. She did not file an answer to the amended petition. The trial court heard the prove-up of the default divorce and signed a final decree. Less than six months later, Wife filed a restricted appeal.
Holding: Affirmed
Opinion: To be entitled to a restricted appeal, a party must establish error on the face of the record. Here, Wife did not allege that service was improper. She alleged that Husband's petition improperly recited that she was a domiciliary of Texas. In a suit for divorce, when a party fails to answer, the allegations in the petition are deemed admitted if more than a scintilla of evidence sufficiently supports the allegations. Here, during the prove-up hearing, Husband testified that Wife had been a domiciliary of Texas for six months. Additionally, Husband testified that Wife was stationed in Taylor County at the time she was served.

Further, that Wife moved to Puerto Rico after Husband served her with the original petition was of no consequence. Accordingly, Wife was not entitled to a restricted appeal.

HUSBAND NOT ENTITLED TO CONTINUANCE BECAUSE CAUSE HAD BEEN PENDING FOUR YEARS, AND HUSBAND'S NEW COUNSEL AGREED TO REPRESENT HIM AT TRIAL KNOWING SHE HAD ONLY SIX DAYS TO PREPARE.

In the Matter of the Marriage of Ramsey and Echols**,** ___ S.W.3d ___, No. 10-14-00252-CV, 2016 WL 1239072 (Tex. App.—Waco 2016, no pet. h.) (03-24-16).

Facts: Husband and Wife's divorce proceeding lasted almost 4 years. During the course of the proceedings, Husband had five attorneys. An agreed scheduling order included a date for final trial. Soon before trial, the court moved up the date of trial, allowed Husband's fourth attorney to withdraw, and refused to grant Husband a continuance. At the conclusion of the final bench trial, the trial court confirmed the parties' separate property and divided the community estate. Husband appealed, arguing that the trial court mischaracterized a community-property framing business as Wife separate property and his separate-property fencing business as community property.

Holding: Affirmed
Majority Opinion: (J. Scoggins, J. Davis) Husband had five attorneys during the four-year divorce proceeding. His fourth attorney withdrew because Husband had not been making payments. The attorney who represented Husband at trial knew of the trial date when agreeing to take the case.

Wife filed an assumed name certificate for the framing business before marriage, the business was listed as a sole proprietorship in the parties' tax returns, and Husband never received compensation from the business. The trial court did not err in finding the framing business was Wife's separate property

Even if the trial court erred in characterizing the fencing business as community property, Husband failed to show that the error resulted in "a disparity in the property division of such substantial proportions that it constituted and abuse of discretion"

Concurring Opinion: (C.J. Gray) "A client's legal position should not be made impossible by allowing, over the client's objection, the late withdrawal of an attorney (after a trial has been scheduled by agreement and then moved up) and not also establishing a new schedule that will allow the client to obtain and give new counsel time to prepare and present a complicated case." "Where was the harm in a one month continuance?" However, "[t]he overall result of the characterization and division of property [did] not appear to have been adversely impacted by the limited time to prepare for trial." Thus, "the error [was] harmless."

JUDGMENT NUNC PRO TUNC PROPER MECHANISM TO CORRECT ENFORCEMENT ORDER WHEN COURT SCANNER FAILED TO FULLY SCAN HANDWRITTEN PORTIONS OF ORDER.

In re A.M.C.**,** ___ S.W.3d ___, No. 14-15-00060-CV, 2016 WL 1165858 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (03-24-16).

Facts: Father filed a motion for enforcement of possession, and the trial court found Mother in contempt for violating the divorce decree. When the enforcement order was scanned into the court's file, some handwritten orders in the margin of the typed order were clearly "cut off" by the court's scanner. Father filed a motion for judgment nunc pro tunc to correct the enforcement order to include the omitted language. Initially, the trial court attempted to find the original copy of the order, but it could not be located. Father's counsel testified that Mother's attorney had kept a copy of the order and, upon request, had emailed a copy to Father's counsel. The emailed copy was reviewed during the hearing on Father's motion for judgment nunc pro tunc but was not included in the appellate record. The trial court granted Father's motion and entered a corrected order. Mother appealed, arguing that the trial court added conditions on her contempt probation that were not in the original enforcement order.

Holding: Affirmed

Opinion: When determining whether an error is clerical, as opposed to judicial, an appellate court will defer to the trial court's fact-finding if some probative evidence supports it. Here, the missing language in the scanned

order was clearly omitted due to the scanner failing to pick up the full image. Further, the evidence supported a finding that shortly after the final hearing, Mother's counsel emailed a complete copy of the signed order to Father's counsel.

HUSBAND HAD ADEQUATE TIME FOR DISCOVERY BEFORE COURT GRANTED NO-EVIDENCE SUMMARY JUDGMENT; WIFE'S FAILURE TO DISCLOSE APPRAISAL OF FAMILY BUSINESS WAS NOT EXTRINSIC FRAUD.

Saldana v. Saldana, No. 10-15-00411-CV, 2016 WL 1238730 (Tex. App.—Waco 2016, no pet. h.) (mem. op.) (03-24-16).

Facts: During their divorce proceedings, Husband and Wife agreed to temporary orders that granted Wife exclusive use and possession of the family business. Immediately after the temporary orders were entered, Husband began to doubt Wife's ability to run the business and spent every day parked a quarter-mile away and in an attempt to see what Wife was doing. When Husband tried to approach the property, Wife told him to leave or else she would call the police.

In Husband's inventory and appraisement, he asserted that the business was worth at least two million dollars. In her inventory and appraisement, Wife state that the value of the business would be supplemented. Wife informed husband that she was having the business appraised. At 4:25pm the day before mediation, an appraisal was faxed to Wife's lawyer. The appraisal valued the business at about $350,000 and was not disclosed during mediation. Believing the business to be worth over two million dollars, but not waiting for the expected appraisal, Husband agreed to pay Wife $2.6 million in exchange for the business. A final decree was entered incorporating the agreement.

After the divorce, Husband filed for bankruptcy. Through the bankruptcy proceeding, Husband learned that Wife had received the appraisal before mediation, although she claimed not to have seen it before mediation. The bankruptcy court stayed the proceedings so the family court could determine whether Husband had a legitimate fraud-based claim against Wife.

Husband filed a petition for bill of review in the family court asserting that Wife committed extrinsic fraud by misrepresenting the value of the business. Wife filed traditional and no-evidence motions for summary judgment asserting that Husband was not entitled to a bill of review. The trial court granted Wife a summary judgment and dismissed Husband's petition for bill of review. Husband appealed arguing that he had not been afforded adequate time for discovery and that more than a scintilla of evidence existed of extrinsic fraud.

Holding: Affirmed

Opinion: A party may move for no-evidence summary judgment after "adequate time" for discovery has passed. Here, in asserting that he had not been afforded adequate time for discovery, Husband simply made generalized statements that he needed more information to buttress his bill-of-review claims. Husband made no effort to specify the additional evidence needed or the reason he did not obtain the evidence during the discovery period. Additionally, he did not state how much time he had for discovery, what discovery was completed, or why the time was not adequate. An appellate court will not make an appellant's arguments for him.

Further, at best, Wife's nondisclosure of the appraisal amounted to intrinsic fraud, which would not support fraud in a bill of review.

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 1238224 (Tex. App.—San Antonio 2016, no pet. h.) (03-30-15) (on reh'g).

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 informed the court that he was in

the same type of business 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. Additionally, any error in dismissing the first-dismissed juror was harmless because the alternate juror was qualified to sit as a juror and heard all the same evidence.

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. The trial court was in the best position to determine whether the second-dismissed juror was physically incapable of attending trial.

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.

During the initial trial, Father did not challenge Mother's failure to adequately segregate her attorney's fees. However, after its initial judgment, the trial court granted Father a new trial to address certain issues, including attorney's fees. During the new trial, Father complained of Mother's failure to adequately segregate her attorney's fees and, thus, preserved the issue for appeal. Nevertheless, the record belied Father's assertions. Each of Mother's three attorneys testified as to how much time was spent on each matter.

HUSBAND'S HEIRS LACKED STANDING TO BRING CLAIM OF FRAUD ON THE COMMUNITY AGAINST SURVIVING SPOUSE.

Grothe v. Grothe, No. 11-14-00084-CV, 2016 WL 1274059 (Tex. App.—Eastland 2016, no pet. h.) (mem. op.) (03-31-16).

Facts: Husband and Wife were married for more than twenty-five years when he died. Husband had two children from a prior marriage. Before he died, Husband filed for divorce but no final judgment was rendered. The children filed a handwritten will that they later withdrew because they became uncertain as to whether it was entirely in Husband's handwriting. The children also asserted that Wife had committed fraud against the community. Wife filed an application to probate a will that purported to leave all of Husband's property to her. A jury determined that the will filed by Wife did not meet the requirements of a valid will and that Wife had depleted the community estate by about $130,000. The trial court entered a judgment denying probate and awarding damages against Wife. In her appeal, Wife argued that the Children did not have standing to assert a claim of fraud on the community.

Holding: Affirmed in part; Reversed and rendered in part

Opinion: There is not an independent tort for fraud on the community. To have standing to bring a claim of fraud on the community, a party must have a justiciable interest in the community property.

★★★TEXAS SUPREME COURT ★★★

DISTRICT CLERK HAD MINISTERIAL DUTY TO TABULATE COURT COSTS AND APPLY UNCONTESTED AFFIDAVITS OF INDIGENCY.

***Campbell v. Wilder*, ___ S.W.3d ___, No. 14-0379, 2016 WL 1267876 (Tex. 2016) (04-01-16).**

Facts: Six named Petitioners filed for divorces in Tarrant County, and each filed uncontested affidavits of indigency in lieu of paying costs. The Petitioners' final decrees each provided that costs of court were to be borne by the party who incurred them. Each Petitioner subsequently received collection notices from the District clerk, demanding court costs and threatening to have their property seized to satisfy the debt. The Texas Advocacy Project protested on the Petitioners' behalf. The Clerk responded that he was bound by the allocation of costs in the decrees and encouraged the Petitioners to return to family court to have costs re-taxed. The Petitioners sued for mandamus, injunctive, and declaratory relief in a district court that had not rendered any of the Petitioners' divorce decrees. That court temporarily enjoined the Clerk from "continuing his policy of collection of court costs from indigent parties who have filed an affidavit on indigency." The Clerk appealed, and a divided appellate court vacated the injunction and dismissed the case for want of jurisdiction. Petitioners sought review from the Texas Supreme Court.

Holding: Reversed and Remanded

Opinion: The Clerk contended that the Texas Civil Practices & Remedies Code deprived the civil district court of jurisdiction. Tex. Civ. Prac. & Rem. Code § 65.023(b) provides that "[a] writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered." The purposes of the statute are "to protect the judgments and processes of one court from interference by another by direct attack" and to "prevent[] a defeated party from proceeding from one court to another, after his defeat, or in the hope of avoiding defeat, in an attempt to relitigate the case." However, courts must consider whether, under the specific circumstances of each case, the requested injunction may be issued independently of the judgment.

Here, despite the Clerk's assertion, the divorce decrees did not require the Petitioners to pay costs. The decrees only allocated costs between the parties of each case, requiring each party to bear his or her own costs—whatever they were. Thus, the injunction was independent of the matters adjudicated in the divorce, and Tex. Civ. Prac. & Rem. Code § 65.023(b) did not apply. When a party files an uncontested affidavit of inability to pay costs, there are no costs to bill. It is the ministerial duty of the Clerk to tabulate the costs and apply the affidavit of indigency.

The Clerk further argued that injunctive relief was improper because Petitioners had an adequate remedy at law. Generally, the existence of an adequate remedy at law will bar equitable relief. However, if an otherwise complete and adequate remedy at law would lead to a multiplicity of suits, that relief is not adequate. It would be wasteful to force each individual Petitioner to file a motion to re-tax costs when a single injunction would do.

Finally, contrary to the Clerk's contention, the injunction was not overly broad by applying to all indigent parties because when a policy or procedure is challenged as being in conflict with state law, any injunction that issues will necessarily affect individuals beyond the named parties.