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

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GEORGANNA L. SIMPSON, P.C.
ATTORNEY AT LAW
1349 Empire Central Drive
Woodview Tower, Suite 600
DALLAS, TX 75247-4042
PHONE 214-905-3739 • FAX 214-905-3799
EMAIL: georganna@glsimpsonpc.com

BETH M. HEARN
ATTORNEY AT LAW
555 Republic Drive, Ste. 200
Plano, TX 75074
Phone: 469-509-6253 • Fax: 469-519-4253
EMAIL: beth@bhearnlegal.com

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

EVIDENCE SUPPORTED AWARD OF SPOUSAL MAINTENANCE WHILE WIFE PURSUED MASTER'S DEGREE IN NURSING.

Alfayoumi v. Alzoubi, No. 13-15-00094-CV, 2017 WL 929482 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (03-09-17).

Facts: After a bench trial in their divorce proceeding, the trial court awarded Wife spousal maintenance. Husband appealed.

Holding: Affirmed

Opinion: When the parties separated, Wife resumed the pursuit of her career in the medical profession by returning to college for a master's degree in nursing. Thus, the trial court could have found that Wife overcame the presumption against spousal support by showing diligence in developing necessary skills to provide for her own minimum reasonable needs.

Wife put her career on hold when the parties married and was a homemaker throughout the parties' 14-year marriage. Although Wife finished her bachelor's degree before having children, she never obtained a nursing license. The trial court could have found that the 14-year-old degree was insufficient by itself to allow Wife to apply her skills in a meaningful way.

Although Wife received about $250,000 in gold in the divorce, the law did not require her to spend down long-term assets or liquidate all available assets to meet her short-term needs: the costs of tuition and living expenses while in school.

Finally, Wife testified that she suffered significant depressive episodes that required counseling and that she was once committed to a psychiatric facility. The trial court could have considered the potential on-going cost of mental health counseling in determining Wife's minimum reasonable needs while pursuing her master's degree.

DIVORCE
PROPERTY DIVISION

HUSBAND'S TEN-YEARS' EXPERIENCE IN CATTLE AUCTION BUSINESS SUFFICIENT TO INVOKE THE PERSONAL-OWNER RULE SO HE COULD TESTIFY AS TO HIS BUSINESS'S VALUE.

Banker v. Banker, ___ S.W.3d ___, No. 13-15-00385-CV, 2017 WL ####### (Tex. App.—Corpus Christi 2017, no pet. h.) (03-02-17).

Facts: During the marriage, the parties purchased two businesses. Husband ran a livestock auction house, and Wife ran an insurance agency. In their divorce decree, each party was awarded the business he or she operated. At trial, Husband did not have an expert valuation of his company. Rather, Husband testified that his estimated value was based on his personal knowledge from a lifetime of experience and education in the livestock auction market. The trial court granted the divorce on the ground of Husband's adultery and found that Wife was entitled to 55% of the community estate. Wife appealed, arguing that the trial court erred in valuing and distributing certain assets.

Holding: Reversed and Remanded in Part; Affirmed on Condition of Remittitur in Part; Affirmed in Part

Opinion: Although Wife noted some inconsistencies in Husband's testimony, he demonstrated a minimum basis of personal knowledge adequate to invoke the personal-owner rule, allowing him to testify as to the value of his company. Further, contrary to Wife's complaint, Husband was not required to use the magic words "fair market value."

No evidence supported the value assigned by the trial court as to the bank accounts awarded to Wife. However, evidence supported a lesser amount. Because the trial court found that Wife was entitled to a 55% share of the marital estate, the appellate court suggested Husband voluntarily remit the cash which was erroneously credited to him within 15 days of the appellate court's judgment. Such action would cure any reversible error.

Wife complained that the decree failed to award six community property horses. Husband contended that residuary clauses in the property division awarded the horses to him because they were in his possession. The final decree awarded Wife "any other livestock" in her possession, but did not include that phrase in the property awarded to Husband. The decree did not otherwise refer to the six horses, so that issue was remanded to the trial court for valuation and division.

SEPARATE-PROPERTY RECITAL IN GENERAL WARRANTY DEED CREATED PRESUMPTION OF SEPARATE PROPERTY.

Cardanas v. Cardanas, No. 13-16-00064-CV, 2017 WL 1089683 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (03-23-17).

Facts: During their marriage, Husband took out a loan against his separate property and had Wife use the funds to purchase a house. The general warranty deed listed Wife as grantee and as "a married woman dealing with her sole and separate property." During the divorce proceedings, Wife asserted that the house was separate property because Husband gifted it to her during the marriage. Husband claimed he never intended the house to be a gift. The trial court agreed with Wife. Husband appealed, contesting various aspects of the property division, including the characterization of the house and the valuation of a camper trailer.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A separate property recital in a written instrument negates the community property presumption and creates in its place a rebuttable presumption of separate property. Here, the general warranty deed listed Wife as the grantee dealing with "her sole and separate property." This recital created a presumption of separate property that Husband failed to rebut.

Because Wife's unsworn inventory was not admitted as evidence, its valuations, including that of the camper trailer, was not evidence that could be relied upon by the trial court. All admitted evidence of value of the trailer was significantly less than the value assigned by the trial court in its findings. Thus, Husband was correct that no evidence supported the trial court's valuation of the trailer.

SAPCR
PROCEDURE AND JURISDICTION

COUNTY COURT LACKED JURISDICTION TO ENTER FINAL ORDER TERMINATING PARENTS' RIGHTS BECAUSE ANOTHER COURT HAD CONTINUING, EXCLUSIVE JURISDICTION OVER THE CHILDREN.

In re J.I.M., ___ S.W.3d ___, No. 06-16-00080-CV, 2017 WL 929545 (Tex. App.—Texarkana 2017, no pet. h.) (03-09-17).

Facts: In 2010, a district court entered a judgment establishing parentage of Child. In 2015, TDFPS filed a petition in a county court pursuant to Tex. Fam. Code Ch. 262. The petition indicated that TDFPS did not believe that another court had continuing exclusive jurisdiction; however, the affidavit attached to the petition averred "The Court records reflect that the children have lived their lives in [a different] County, Texas and each has been the subject of a suit affecting the parent-child relationship in Texas." The OAG filed an Answer specifically informing the county court of the district court's order. Additionally, the district court's order was admitted as an exhibit at trial. Nevertheless, the county court signed a final order terminating Mother's and Father's parental rights to Child. Mother appealed.

Holding: Judgment Vacated; Case Dismissed

Opinion: Tex. Fam. Code Ch. 262 required the county court to transfer the case to the court of continuing exclusive jurisdiction, if one existed. A district court acquired continuing, exclusive jurisdiction in 2010, but the county court failed to transfer the case. The county court lacked jurisdiction to enter a final order, so its judgement was void.

ORDER GRANTING GRANDMOTHER POSSESSION OVER MOTHER'S OBJECTION REVERSED FOR FAILURE TO INCLUDE TEX. FAM. CODE § 154.433 FINDINGS.

In re J.R.W., No. 05-15-01479-CV, 2017 WL 1075610 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (03-21-17).

Facts: Mother and Father had one Child. Father initiated a SAPCR, seeking joint managing conservatorship with Mother. Mother filed a general denial. Paternal Grandmother intervened seeking possession. Mother challenged Grandmother's standing, but the trial court overruled Mother's objections. Mother and Grandmother both asserted that Father had committed family violence and suffered from drug addiction and mental illness. After a final trial, the court appointed Mother and Grandmother as joint managing conservators. Mother appealed, challenging Grandmother's standing.

Holding: Reversed and Remanded

Opinion: The appellate court found Grandmother had standing under Tex. Fam. Code § 153.433 because (1) neither parent's parental rights had been terminated; (2) Grandmother introduced sufficient evidence that denial of her possession or access would significantly impair the child's physical health or emotional well-being; and (3) Father did not have actual or court-ordered possession or access to the Child.
However, Tex. Fam. Code § 153.433 requires an order granting possession or access to a grandparent over a parent's objections to state with specificity that the statute's requirements were satisfied. Here, even if the evidence would support an implied finding that the statute's requirements were met, the order failed to state such with specificity.

GRANDMOTHER NOT ENTITLED TO TEMPORARY ORDERS FOR VISITATION BECAUSE SHE FAILED TO OVERCOME PRESUMPTION MOTHER WOULD ACT IN CHILD'S BEST INTEREST.

In re S.S., No. 03-17-00116-CV, 2017 WL #### (Tex. App.—Austin 2017, orig. proceeding) (mem. op.) (03-28-17).

Facts: Mother and Father were married and living together at the time of Father's death by car accident. Mother and the Child's paternal family did not get along well. Paternal Grandmother filed a petition seeking joint conservatorship with the right to determine the Child's primary residence or, in the alternative, a visitation order. Mother sought to dismiss Grandmother's petition, asserting Grandmother had not shown that the Child would be significantly impaired if Grandmother did not have access to the Child. Grandmother's affidavit asserted that she had an extremely close relationship with the Child, that she had been the Child's primary caretaker for a month or two, and that since Father's death, Grandmother had only been allowed to see the Child twice. At the hearing, Grandmother expressed concerns that Mother was inattentive and angry. Mother testified that during a visit with herself, the Child, and Grandmother, Grandmother spent all but 15 minutes watching and taking notes. Mother contested Grandmother's alleged involvement with the Child, stating that Grandmother was an important part, but not a consistent part, of the Child's life. Further, Mother testified that she had just lost her husband and was open to the Child having more of a relationship with Grandmother in the future. The trial court denied Mother's motion to dismiss and granted Grandmother Saturday visitation on the second and fourth Saturday of each month. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Although a close question, the trial court did not abuse its discretion in finding Grandmother's affidavit met the bare minimum of allegations necessary under Tex. Fam. Code § 153.432 ("allegation that denial of possession or access to the child…would significantly impair the child's physical health or emotional well-being"). Further, Mother did not adequately raise the issue of Tex. Fam. Code § 102.004 standing before the trial court, and the appellate court opined that it would "not hold that the trial court abused its discretion in refusing Mother's vague oral motion to dismiss Grandmother's conservatorship claim."

However, even taking Grandmother's allegations as true, the evidence did not satisfy the "hefty statutory burden" to overcome the presumption that Mother would act in the Child's best interest.

SAPCR
CONSERVATORSHIP

NON-PARENT CONSERVATORS FAILED TO REBUT PARENTAL PRESUMPTION THAT MOTHER SHOULD HAVE BEEN APPOINTED SOLE MANAGING CONSERVATOR.

R.H, v. D.A., No. 03-16-00442-CV, 2017 WL 875317 (Tex. App.—Austin 2017, no pet. h.) (mem. op.) (03-02-17).

Facts: Mother and Father took the Child to the ER for a clavicle injury. The Father had reported that the Child fell off the bed while he was changing the Child's diaper. After an examination, the doctor said Father's story could not be true. When Mother discovered Father lied, they broke up. TDFPS sought conservatorship of the Child and initially removed the Child and placed him with Father's Aunt and Uncle. After a trial, the court did not terminate Mother's parental rights but appointed Aunt and Uncle as the Child's managing conservators. Mother appealed, arguing that Aunt and Uncle failed to overcome the parental presumption. Be-

cause no party appealed the court's decision not to terminate Mother's parental rights, the only question before the court was the propriety of the trial court's decision with respect to conservatorship.

Holding: Reversed and Remanded

Opinion: Aunt and Uncle's evidence was merely speculative. The TDFPS supervisor conclusorily asserted that Mother failed to tend to the Child's injury immediately without providing any basis for a finding that Mother was aware of the Child's injury and failed to act or, even if so, whether significant harm would likely occur if Mother were appointed sole managing conservator. Aunt and Uncle additionally relied on an unsubstantiated report of conduct unrelated to Mother's care of the Child, which could not support an inference that Mother would probably cause significant harm to the Child. Further, although Mother was unemployed at the beginning of the case, at trial, she had been employed for four months, was maintaining a two-bedroom apartment, and providing for the needs of the Child. Finally, TDFPS was satisfied that Mother had sufficiently demonstrated her ability to parent the Child.

SAPCR
POSSESSION

TRIAL COURT FAILED TO STATE SPECIFIC REASONS FOR VARIANCE FROM STANDARD VISITATION ORDER DESPITE MOTHER'S TIMELY REQUEST FOR FINDINGS.

In re Rangel, No. 04-17-00060-CV, 2017 WL 1161173 (Tex. App.—San Antonio 2017, orig. proceeding) (mem. op.) (03-29-17).

Facts: Temporary orders restricted Mother's access to the Child. Subsequently, after a five-day hearing, the trial court rendered additional temporary orders further restricting Mother's access, requiring her possession with the Child be supervised and revoking most of her rights and duties with respect to the Child. Mother filed a petition for writ of mandamus, arguing the trial court erred in imposing extreme restrictions without providing a means to remove the restrictions, depriving Mother her fundamental rights to parent the Child, and failing to include findings pursuant to the Tex. Fam. Code.

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

Opinion: The trial court's additional orders failed to include Tex. Fam. Code § 153.258 mandatory findings despite Mother's timely request.

SAPCR
CHILD SUPPORT

EVIDENCE SUPPORTED FINDING THAT CHILD WITH ASPERGER'S SYMPTOMS WAS CAPABLE OF SELF-SUPPORT.

In re J.S., No. 05-16-00138-CV, 2017 WL 894541 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (03-06-17).

Facts: When Mother and Father divorced, they were named joint managing conservators of their Children. While the divorce was pending, the older Child ("Son") was diagnosed with "multiple symptoms consistent with Asperger's." A little over a year after the divorce, Mother filed a petition to modify conservatorship and child support. In its final order, the trial court found that Son did not require substantial care and personal su-

pervision. The trial court did not modify Father's child support obligation but extended Father's medical support obligation for Son until Son turned twenty-one. Mother appealed, complaining the trial court erred in finding the Son did not qualify for extended child support under Tex. Fam. Code § 154.302(a).

Holding: Affirmed

Opinion: Although Mother testified that Son needed significant assistance with his disabilities, two of Son's teachers testified that Son performed well in school, had friends, and participated in class discussions. Father testified that he had never seen Son talking to himself or pacing in circles, as described by Mother. Son expressed an interest in pursuing a career in engineering. The court-ordered forensic custody evaluator testified that while Son likely would need assistance reminding him to attend to his hygiene, he would do well in a small group and in structured situations.

MOTHER FAILED TO PRESENT ANY EVIDENCE TO SUPPORT FINDING OF FATHER'S AVAILABLE NET RESOURCES.

Reagins v. Walker, ___ S.W.3d ___, No. 14-15-00764-CV, 2017 WL 924498 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (03-07-17).

Facts: Mother and Father each filed a motion to modify child support. At trial, neither Father nor his attorney appeared. Mother testified that she had not been provided any information regarding Father's salary. She conducted internet searches to discover that:

- Father was a petroleum engineer with three degrees, at least one of which was a master's degree;
- Father worked for GE and began working there 2011;
- Father travelled overseas to work; and
- a petroleum engineer might make between $127,000 and $130,000 a year.

Based on this testimony, the trial court found that Father's available net resources were $127,000 per year and set his child support accordingly. Father appealed, challenging the trial court's calculations.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A respondent's failure to appear at trial after filing an answer does not relieve the petitioner of the burden to offer evidence and prove her case. Here, Mother admitted to having no personal knowledge of Father's employment. Rather, she merely speculated regarding Father's position and salary and supported her speculations with general internet research. Mother did not testify as to the type of searches she conducted, what search engines she used, or what websites she visited. Mother failed to establish that Father was currently employed, that he was employed as a petroleum engineer, that he earned any particular salary, or whether he was employed part-time, full-time, or on a contractual basis.

EVIDENCE SUPPORTED ABOVE-GUIDELINE ORDER FOR CHILD SUPPORT.

In re V.J.A.O., No. 05-15-01534-CV, 2017 WL 930025 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (03-09-17).

Facts: Mother and Father met in France and had a Child, who was born in France. Shortly after the Child's birth, Father returned to Texas. Subsequently, Mother and the Child moved to Texas to live with Father. A few years later, the couple separated and shared custody of the Child. The trial court named the parents joint managing conservators, gave Mother the exclusive right to designate the Child's primary residence, and or-

dered Father to pay $5000 a month in child support. Father appealed and, among other complaints, argued that the trial court erred in awarding Mother above-guideline support. Father contended that the trial court erred in applying Below-Guideline Factors (Tex. Fam. Code § 154.123(b)) instead of Above-Guideline Factors (Tex. Fam. Code § 154.126(a)). Additionally, Father complained the evidence was insufficient to support the amount of child support awarded. Father's arguments focused on whether a French-immersion private school was a "proven need" of the Child.

Holding: Modified in Part; Affirmed in Part

Opinion: Although the trial court listed in its findings a number of factors that correlated to the Below-Threshold Factors, each of the factors was also subsumed within the three headings of Above-Threshold Factors: the needs of the Child; the resources of the parties; and the circumstances of the parties.

Needs of the Child

(1) the age and needs of the child;
(10) the identified special, extraordinary bilingual educational and cultural expenses of the child;
(12) the nationality, cultural and educational considerations related to this child's education and her best interests taking into consideration the circumstances of the parties.

Resources of the Parties

(2) the ability of [Father] and [Mother] to contribute to the child's needs;
(3) the financial resources available to [Father] for the support of the child;
(5) the amount and type of [Father's] resources, his earnings, earning capacity, the kind and nature of his assets and the revenues and value available to him from his real, personal and financial assets;
(6) the child care expenses and needs incurred and necessitated to allow each party to retain and continue their gainful employment;
(8) the other direct and indirect financial benefits [Father] has access to by virtue of his employment and investments;
(9) the provision by the parties to the child of health insurance and payment of the child's past uninsured medical expenses;
(11) the positive cash flow enjoyed by [Father] by virtue of his real, personal property and assets as well as his businesses and investments;

Circumstances of the Parties

(4) the amount of each parent's possession of and access to the child;
(7) the actual physical custody exercised by [Mother], her role as managing conservator;

While not every child living here but born outside of the United States requires private schooling with cultural immersion, Father should have anticipated this unique need for this Child. Father impregnated Mother in France and acquiesced in the Mother and Child's move from France to Texas, which required Mother to alter her career path. Further, the trial court heard a significant amount of evidence regarding the Child's background and her cultural and linguistic needs. Additionally, there was ample evidence supporting the Child's proven needs from both parents in terms of her living and personal expenses.