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

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DIVORCE
GROUNDS FOR DIVORCE

EVIDENCE SUPPORTED FINDING OF ADULTERY AS GROUND FOR DIVORCE.

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

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

Holding: Affirmed

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

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

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

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

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

Holding: Affirmed as Modified

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

DIVORCE
PROPERTY DIVISION

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

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

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

Holding: Affirmed

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

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

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

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

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

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

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

Holding: Affirmed as Modified

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

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

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

In re Marriage of Manor, No. 07-16-00143-CV, 2018 WL 1415407 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (03-21-18).

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

Holding: Affirmed

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

SAPCR
AMICUS ATTORNEYS/AD LITEMS

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

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

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

Holding: Affirmed

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

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

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

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

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

sion, the trial court signed a final order reflecting the parties' prior agreement and included a division of the pension. Wife appealed.

Holding: Reversed and Remanded

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

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

SAPCR
CONSERVATORSHIP

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

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

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

Holding: Affirmed

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

SAPCR
CHILD SUPPORT

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

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

Facts: In their divorce decree, Mother and Father were appointed joint managing conservators, and Father was ordered to pay child support. Later, Father filed a SAPCR seeking to reduce his child support obligation to zero. Father had been discharged from the army due to a disability, and his only source of income was his disability retirement pay, which was less than a quarter of his previous pay. Father's attorney argued that disability payments could not be included as income when calculating child support. The OAG argued that it should be included. Mother argued that Father was intentionally underemployed, to which Father objected because Mother had not previously raised this affirmative defense. The trial court overruled Father's objection to Mother's claim and agreed with the OAG that the disability retirement pay should be included. Further, the court found that Father was capable of being a percussionist or giving music lessons and estimated the amount he could earn doing that. After determining that Father's monthly net resources were about 150% of his actual earnings, the court signed an order for Father's new child support obligation. Father appealed.

Holding: Reversed and Remanded

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

★★★TEXAS SUPREME COURT ★★★

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

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

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

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

Holding: Petition for Review Denied

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

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

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

MISCELLANOUS

PETITIONER UNABLE TO ARTICULATE COHERENT REASON TO CHANGE NAME.

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

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

Holding: Affirmed

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

★★★TEXAS SUPREME COURT ★★★

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

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

Facts: Employee was injured while working on an off-shore drilling rig. He sued his employer in a personal injury suit. During trial, Employer claimed that Employee had been exaggerating his injuries and sought to enter into evidence a video filmed by a private investigator that showed Employee doing tasks around his home that allegedly caused the Employee immense pain. Employee argued that he did those tasks despite the pain, he could not do them for as long as he used to, and he had to take many pain killers to endure the pain during and after completing those activities. The trial court informed Employer that the videos could be used as rebuttal evidence only, and because Employee admitted to the jury that he attempted to do those tasks to the extent he was able, there was nothing to rebut. After a jury trial, Employee was awarded $10 million in damages, including about $4 million for pain and suffering. Employer appealed, arguing the trial court erred in excluding the video.

Holding: Reversed and Remanded

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

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

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

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

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

Holding: Reversed and Rendered and Remanded

Opinion: The TCPA exists to safeguard the constitutional rights of people to petition, speak freely, associate, freely, and otherwise participate in government to the maximum extent permitted by law while simultaneously protecting an individual's right to file meritorious lawsuits for demonstrable injury. The TCPA is sometimes referred to as an anti-SLAPP (strategic lawsuit against public participation) law. The TCPA's dismissal procedure is a two-step process. First, the movant must show that the legal action against her is based on, relates to, or is response to her exercise of the right of free speech, right to petition, or right of association, as defined by the TCPA. Second, the nonmovant must

establish by clear and specific evidence a prima facie case for each essential element of the claim in question. This requires more than mere notice pleading.

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

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

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

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

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

Holding: Writ of Mandamus Conditionally Granted

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

TRIAL COURT HAD NO BASIS FOR RULE 13 SANCTIONS.

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

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

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

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

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

Holding: Reversed in Part; Affirmed in Part

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

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

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

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

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

Holding: Affirmed

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

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