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

April 10, 2019

GEORGANNA L. SIMPSON, P.C.
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. JOHNSON
ATTORNEY AT LAW
1349 Empire Central Drive
Woodview Tower, Suite 600
DALLAS, TX 75247-4042
Phone: 469-509-6253 • Fax: 214-905-3799
EMAIL: beth@bethmjohnson.com

DIVORCE
PROCEDURE AND JURISDICTION

HUSBAND ENTITLED TO RESTRICTED APPEAL BECAUSE WIFE OFFERED NO EVIDENCE TO PROVE UP DEFAULT DIVORCE.

In re Marriage of Leang and Sun, No. 07-18-00352-CV, 2019 WL 1008490 (Tex. App.—Amarillo 2019, no pet. h.) (mem. op.) (03-01-19).

Facts: Five months after Wife obtained a default divorce, Husband filed a restricted appeal.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The allegations of a divorce petition cannot be taken as confessed if the respondent fails to file an answer. At the final hearing, Wife offered no evidence regarding the extent of the marital estate, the income or debt of either party, the residence of the children, the relationship of the children with either parent, or the ages of the children. Thus, the court made factually-based decisions without supporting evidence, which constituted error on the face of the record.

DIVORCE
PROPERTY DIVISION

EVIDENCE SUPPORTED FINDING THAT OMISSION OF AWARD OF RETIREMENT BENEFITS FROM DIVORCE DECREE WAS CLERICAL ERROR CORRECTABLE BY JUDGMENT NUNC PRO TUNC.

Vela v. Vela, No. 13-17-00217-CV, 2019 WL 1388526 (Tex. App.—Corpus Christi 2019, no pet. h.) (mem. op.) (03-28-19).

Facts: Five years after a divorce, Wife sought a judgment nunc pro tunc of the divorce decree. An agreed QDRO awarded her 35% of Husband's retirement, but the divorce decree failed to award her any of Husband's retirement. Wife asserted that the omission from the decree was a clerical error. Husband asserted that changing the decree would constitute an improper modification of the property division, which the trial court lacked subject matter jurisdiction to do. The trial court signed a judgment nunc pro tunc pursuant to Wife's request, and Husband appealed, arguing that the QDRO was void and the nunc pro tunc was improper.

Holding: Affirmed

Opinion: Husband signed the QDRO, and the QDRO was presented to the trial court at the same time as the agreed divorce decree. The docket sheet noted that both documents were presented to the court at the same time. Husband testified that he had believed that Wife would receive some portion of his retirement benefits. Wife presented the QDRO to Husband's employer and began collecting benefits. Husband did not challenge the QDRO until three months after that. Sufficient evidence indicated that the original decree signed did not reflect the judgment as rendered. Thus, the nunc pro tunc corrected a clerical error and did not require any judicial reasoning or determination to correct the error.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

MONEY AND SHARES OF STOCK ARE NOT TANGIBLE PROPERTY FOR THE PURPOSES OF TEX. FAM. CODE § 9.003, SO WIFE'S ENFORCEMENT WAS NOT TIME-BARRED

***Chakrabarty v. Ganguly*, ___ S.W.3d ___, No. 05-17-01195-CV, 2019 WL 1071844 (Tex. App.—Dallas 2019, no pet. h.) (on reh'g en banc) (03-07-19).**

Facts: Four years after a divorce, Wife filed a motion for enforcement and an original petition for breach of alimony contract. After a bench trial, the court ordered Husband to take a number of actions consistent with the divorce decree, including transfer funds pursuant to the decree. Husband appealed.

On appeal, the Dallas court held that, pursuant to its own precedent in *Long v. Long*, 196 S.W.3d 469 (Tex. App.—Dallas 2006, no pet.), money is tangible personal property. Texas Family Code Section 9.003(a) requires that a suit to enforce the division of tangible personal property be brought within two years of the divorce or the date the property came into existence, or else the suit is time-barred. Based on *Long*, the appellate court found Wife's enforcement action was time-barred, and it reversed and rendered that Wife's motion was denied with respect to her complaints regarding the transfer of funds. Wife filed a motion for rehearing en banc.

Holding: Affirmed

Opinion: The briefing before the panel that decided *Long* in 2006 failed to bring to the court's attention case precedent that had held money was not tangible property. In 1984, in a non-family law case, the Texas Supreme Court held money and stocks were intangible property. After *Long*, San Antonio and Corpus Christi both held that money is not "tangible personal property" under Tex. Fam. Code § 9.003(a). Moreover, Colorado and Wisconsin have reached the same conclusion. Accordingly, *Long* is overruled. Therefore, Wife's enforcement action was not time-barred under Family Code § 9.003.

Contrary to Husband's assertion, the enforcement order did not modify the divorce decree. Husband was ordered to pay Wife certain sums, and the trial court found he failed to do so. Husband did not challenge that finding on appeal.

WIFE COULD NOT BE HELD IN CONTEMPT FOR FAILURE TO PAY A DEBT TO A THIRD PARTY.

In re Zarate, No. 04-19-00064-CV, 2019 WL 1139855 (Tex. App.—San Antonio 2019, orig. proceeding) (mem. op.) (03-13-19).

Facts: A divorce decree awarded Husband one of the parties' homes and ordered Wife to pay the mortgage. Although she made payments for three years, she stopped making payments, and Husband began making the payments. Husband filed a motion for enforcement by contempt and asked that Wife be held in contempt, jailed, and fined. The trial court signed an order of contempt, and Wife filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: An order to pay a debt is not enforceable by contempt because that would violate the Texas Constitution's prohibition against imprisonment for failure to pay a debt. In his response in the appellate court, Husband argued that Wife was held in contempt for her refusal to comply with the court's order to indemnify him, not for her failure to pay a debt. However, the order of contempt clearly held wife in contempt for "not paying the remaining balance…owed to [the bank]." Additionally, Husband sought contempt for Wife's failure to make payments on the promissory note. He did not seek an equitable lien or a judgment for damages under the divorce decree's indemnity provisions, assert the right to seek indemnification, or otherwise ask for enforcement of the indemnity provisions.

SAPCR
Procedure and Jurisdiction

FATHER ENTITLED TO RESTRICTED APPEAL BECAUSE NO PROOF OF SERVICE IN COURT'S RECORD.

In re U.U., No. 04-18-00468-CV, 2019 WL 1139581 (Tex. App.—San Antonio 2019, no pet. h.) (mem. op.) (03-13-19).

Facts: Mother obtained an order for alternative service of her SAPCR petition on Father. However, no return of service was contained in the clerk's record. The trial court signed a default order against Father. More than three months later, Father filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: Because the record did not affirmatively demonstrate proper service, there was error apparent on the face of the record, and Father was entitled to a restricted appeal.

SAPCR
Amicus attorneys/Ad Litems/ Parenting Facilitators & Coordinators

AMICUS ATTORNEY IMMUNE FROM FATHER'S CLAIMS OF NEGLIGENCE, FRAUD, AND IIED ALLEGEDLY ARISING DURING SAPCR AND DIVORCE PROCEEDING.

Tanner v. Black, No. 01-17-00883-CV, 2019 WL 1064568 (Tex. App.—Houston [1st Dist.] 2019, no pet. h.) (mem. op.) (03-07-19).

Facts: An amicus attorney was appointed in a divorce with children. After the divorce was finalized, Father sued the amicus attorney for breach of fiduciary duty, negligence, IIED, fraud, and deceptive trade practices. The amicus responded and asserted statutory immunity. The trial court granted the amicus attorney a summary judgment based on the amicus attorney's no-evidence and traditional MSJ. Father appealed, complaining the trial court abused its discretion in granting no-evidence summary judgment on the negligence, IIED, and fraud claims and in finding the amicus was immune from suit.

Holding: Affirmed

Opinion: The amicus attorney did not owe Father a duty of care, so he could not raise a claim of negligence against her. Father claimed the amicus's admitted bias that "children are better with their mothers" supported his claim for IIED. However, that was insufficient to satisfy the high threshold for extreme or outrageous conduct. Further, Father failed to produce any evidence to support his claims of fraud. Thus, the trial court did not err in granting the amicus's no-evidence MSJ with regards to Father's claims of negligence, IIED, and fraud.

The Texas Family Code provides immunity for an appointed amicus attorney for actions taken within the scope of the appointment. However, exceptions to the immunity apply when the amicus acts with conscious indifference or reckless disregard, bad faith or malice, or gross negligence or willful wrongfulness. Father conclusorily asserted that all three of the exceptions applied but offered no competent summary judgment evidence and cited no supporting authority for his claim. Thus, the trial court did not err in granting the amicus's traditional MSJ on the ground of her immunity.

SAPCR
Alternative Dispute Resolution

TRIAL COURT BOUND BY PARTIES' MSA.

Briscoe v. Briscoe, No. 04-18-00437-CV, 2019 WL 1049272 (Tex. App.—San Antonio 2019, no pet. h.) (mem. op.) (03-06-19).

Facts: Wife had a Child from a prior relationship, and that Child's father's rights had been terminated. Husband intended to adopt the Child, however, in his divorce petition, he stated that the Child was a child of the marriage. In a subsequent MSA, the parties agreed that Wife and Husband "shall continue with the adoption process, and Wife agreed to the adoption of [the Child] by Husband." Husband filed a motion to enter a decree based on the MSA. Wife hired a new attorney, who filed an amended answer claiming that because the Child was not "of the marriage," the trial court lacked jurisdiction over the Child and could not order that the adoption occur. The trial court determined that it, and Wife, were bound by the MSA and rendered a final decree, in which it recited that the Child was "of the marriage." Mother appealed, arguing the trial court erred in adjudicating the Child's parentage and in "holding [Wife] waived the prerequisites of adoption."

Holding: Reversed and Remanded

Opinion: As of the rendition of the decree, the adoption had not been completed. Thus, the Child was not "of the marriage," and the trial court erred in varying the decree from the parties' agreement. Wife, however, was bound by the terms of the MSA, in which she agreed to the Child's adoption by Husband and to continue with the adoption process. Therefore, the case was remanded back to the trial court to enter a new order that comported with the MSA.

SAPCR
CONSERVATORSHIP

FATHER'S IMMIGRATION STATUS ALONE DID NOT PRECLUDE COURT FROM APPOINTING HIM AS THE PARENT WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S PRIMARY RESIDENCE.

E.T.-M. v. TDFPS, No. 03-18-00622-CV, 2019 WL 988222 (Tex. App.—Austin 2019, no pet. h.) (mem. op.) (03-01-19).

Facts: A divorce decree had appointed Mother sole managing conservator and Father possessory conservator. A few years later, Mother attempted to commit suicide by overdosing on ibuprofen. TDFPS filed a suit to protect the Child. After a final hearing, during which Mother completed some services, the trial court—on the recommendation of TDFPS and the ad litems—appointed the parents joint managing conservators and granted Father the exclusive right to designate the Child's primary residence. Mother appealed, arguing that Father's illegal immigration status precluded the trial court from appointing him as the conservator with the exclusive right to designate the Child's primary residence.

Holding: Affirmed

Opinion: Father's immigration status alone did not prohibit the trial court from appointing Father as the conservator with the exclusive right to designate the Child's primary residence. Father disagreed with Mother's assertion that he could be departed "at any time" and offered into evidence a copy of a "Petition for Alien Relative" filed by his Wife for his benefit. Further, while Mother was making progress, she had a history of alcohol abuse, suffered from various symptoms of depression, and had tried to commit suicide three times. Considering the *Holley* factors, the trial court did not abuse its discretion in granting Father the exclusive right to designate the Child's primary residence.

CREDIBLE EVIDENCE OF MOTHER'S HISTORY OR PATTERN OF PAST OR PRESENT NEGLECT OR PHYSICAL ABUSE DIRECTED AT THE CHILDREN PRECLUDED TRIAL COURT FROM APPOINTING HER AS MANAGING CONSERVATOR.

In re M.M., No. 12-18-00243-CV, 2019 WL 1032736 (Tex. App.—Tyler 2019, no pet. h.) (mem. op.) (03-05-19).

Facts: Mother had two Children by different fathers. One of the fathers signed an affidavit relinquishing his parental rights, and the other father died. In a period of about 14 months, TDFPS received six intakes involving Mother and the Children. TDPFS filed a petition for protection of the Children, for conservatorship, and for termination of Mother's parental rights. After a bench trial, the trial court appointed Maternal Grandmother as the Children's managing conservator and appointed Mother as a possessory conservator. Mother appealed, arguing that the evidence was insufficient to overcome the presumption that appointing her a managing conservator would be in the Children's best interest.

Holding: Affirmed

Opinion: One of the Children, who was three-years old, could curse like an adult. Both Children had terrible tempers that consistently worsened after seeing Mother. The Children' behavior improved with consistent therapy and Mother's absence. They were kicked out of two daycares for their behavior. Mother's focus appeared to be on Grandmother and on TDFPS's and Grandmother's failure to be supportive of Mother. Mother accepted little responsibility for the situation and did not believe that her choice of boyfriends was relevant, even when one of them had a criminal history.

SAPCR
CHILD SUPPORT

NO EVIDENCE TO SUPPORT CHILD SUPPORT ORDER.

In re D.T., No. 05-17-01224-CV, 2019 WL 1109697 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.) (03-11-19).

Facts: After a contentious divorce proceeding, the trial court rendered a final decree that ordered Father to pay child support for the parties' Child. Father appealed, complaining in part that the evidence was insufficient to support the ordered amount of child support.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: The evidence regarding Father's net resources was inconsistent and imprecise. Father testified that his income was $74,500 but also that he earned the same as Mother, which he said was between $100k and $150k. Mother offered a tax statement that showed Father's income was $91,000. In her requested relief, Mother requested $1268 a month, which she claimed was based on $91,000, but her math was wrong. $1268 a month would be based on an income of $102,916.56. Despite Mother's requested relief, the trial court ordered Father to pay $1450 a month, without explanation and without issuing the findings that would have been required if the court had chosen to deviate from the statutory guidelines.

SAPCR
MODIFICATION

MOTHER'S DECISION TO BEGIN STRICTLY ENFORCING POSSESSION ORDER DID NOT CONSTITUTE MATERIAL AND SUBSTANTIAL CHANGE.

In re C.W.J., No. 11-17-00085-CV, 2019 WL 1067489 (Tex. App.—Eastland 2019, no pet. h.) (mem. op.) (03-07-19).

Facts: Mother and Father divorced, and the decree included orders for their Children. Three years later, Father filed a petition to modify, seeking a week-on/week-off possession schedule instead of the standard possession order. In the alternative, he requested an expanded standard possession order. He additionally sought to change his weekday visitation from Thursday to Sunday. Father complained that Mother had "a majority of the Sundays," and he wanted to take the Children to church on Wednesdays. Initially, after the divorce, the parties agreed on a possession schedule of every other weekend, but after time, Mother began to strictly enforce the order as written. She testified that Father was inconsistent with exercising possession, and that inconsistency was difficult for the Children and their school schedules. The trial court denied Father's requested modification on the grounds that he failed to establish a material and substantial change since the divorce. Father appealed, pro se, raising a number of issues, including that the standard possession order was unconstitutional because it violated his right to privacy, his right to influence and educate his Children, his and the Children's rights to freedom of association under the First Amendment, and his freedom of speech under the First Amendment.

Holding: Affirmed

Opinion: A facial challenge to the Constitution must be asserted in the trial court in order to be raised on appeal. Contrary to Father's assertion, the fundamental error doctrine does not apply to constitutional challenges in a suit to modify the parent-child relationship. Fundamental error has been employed in rare instances when a court lacks subject-matter jurisdiction or in juvenile delinquency cases when certain types of error are involved.

The fact that the Children were older, in and of itself, was not a material and substantial change. Additionally, although Father complained of Mother's relationship with a particular friend, the evidence showed Mother had a close relationship with that friend before the divorce. Further, Mother's decision to begin strictly enforcing the standard possession order set out in the parties' divorce decree was an anticipated circumstance that could not constitute a material and substantial change. Finally, to the extent that Father's and Mother's evidence differed, the trial court was the sole judge of factual disputes.

Contrary to Father's assertion, the trial court was not required to honor his "election" to take an expanded visitation schedule because such an election must be made before the possession order is rendered, not years later in a modification proceeding.

UNDER ABUSE OF DISCRETION STANDARD, EVIDENCE SUPPORTED MODIFICATION OF POSSESSION AND ACCESS.

In re K.D.B., No. 01-18-00840-CV, 2019 WL 1119404 (Tex. App.—Houston [1st Dist.] 2019, no pet. h.) (mem. op.) (03-12-19).

Facts: When the first Child was born, an order adjudicating the Child's father's parentage was entered. The parents were appointed joint managing conservators. Many years later, the second Child was born. An order adjudicating that Child's father's parentage (a different man) was entered. The parents were appointed joint managing conservators. Three years after the second order, TDFPS moved to modify conservatorship of both Children because it had received a referral of neglectful supervision by Mother, and Mother had tested positive for drugs. After a hearing, the trial court

appointed both fathers sole managing conservators of their respective Children and appointed Mother possessory conservator with supervised visitation. Mother appealed, arguing that the evidence did not support findings of a material and substantial change or that the modification was in the Children's best interest. Additionally, Mother argued TDFPS failed to overcome the parental presumption that appointing her a joint managing conservator was in the best interest of the Children. Finally, she argued that there was no evidence to support the requirement that her visitation be supervised.

Holding: Affirmed

Majority Opinion: (J. Keyes, J. Higley) Although there was no direct evidence of the circumstances at the time of the prior orders, the trial court had at that time appointed Mother a joint managing conservator with the two fathers, respectively. Moreover, TDFPS was not involved at the time of the prior orders. Rather, TDFPS became involved, and the cases escalated due to some issues with compliance. Additionally, a parent becoming an improper person to exercise custody can be a material and substantial change, as can a parent's drug use.

Considering all the evidence in light of the *Holley* factors, the evidence supported a finding that the modification was in the Children's best interest.

Contrary to Mother's assertion, the parental presumption does not apply in modification proceedings. Thus, TDFPS was not required to overcome a presumption that appointing Mother a managing conservator was in the Children's best interest.

Based on Mother's drug use, her failure to complete treatment, threatening statements against the other people involved in the case, and willingness to defy court orders, the evidence supported a finding that supervision was in the Children's best interest.

Concurring and Dissenting Opinion: (J. Landau) Applying the abuse of discretion standard, the evidence supported the findings that a material and substantial change had occurred and that the modification of conservatorship was in the best interest of the Children.

However, TDFPS had the burden to put forth evidence regarding whether Mother's visitation should have been supervised. No one disputed that Mother loved the Children and made efforts to be involved in their lives. There was no suggestion Mother acted inappropriately towards the Children or mistreated them. There was no testimony from the fathers or from the 15-year-old Child suggesting a preference for supervised visitation. Mother's positive drug tests alone—without an indication that she used the drugs around the Children or that her drug use affected her interactions with them—was insufficient to support supervised visitation. Vague allegations to Mother's mental health or her hostility towards TDFPS did not support a conclusion that supervision was necessary.

BECAUSE MOTHER NONSUITED, FATHER COULD NOT RELY ON JUDICIAL ADMISSION AS A WAIVER OF HIS BURDEN TO ESTABLISH A MATERIAL AND SUBSTANTIAL CHANGE.

In re H.P.J., No. 14-17-00715-CV, 2019 WL 1119612 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.) (mem. op.) (03-12-19).

Facts: Father filed a suit to modify, seeking primary custody and to prevent Mother's access to the Child or require that her access be supervised. Mother filed a counterpetition asking that exchanges be at a neutral location and that communications be through a service like OurFamilyWizard. Before trial, Mother nonsuited her petition. At trial, Mother's and Father's testimony was contentious and conflicting. The trial court signed a final judgment finding no material and substantial change and denying Father's requested relief. Father appealed. Among other complaints, Father argued that the trial court erred in not finding that the following constituted a material and substantial change: Mother's marriage and changes in the parties' living arrangements. Father additionally argued that Mother's pleading constituted a judicial admission of a material and substantial change.

Holding: Affirmed

Opinion: Not every change in conditions justifies a change in custody, but only those changes which reasonably could be said to injuriously affect the child's best interests. Change alone does not justify modification unless changed needs are also shown. While a parent's remarriage *may* constitute a material and substantial change, a remarriage alone is insufficient to support a change. Here, none of the asserted changed circumstances were shown to have injuriously affected the Child or Father's relationship with the Child.

To operate as a formal waiver of proof, a judicial admission must be made in a party's live pleading—a judicial admission cannot be based on statements contained in pleadings that are abandoned. After the trial court granted

Mother's notice of nonsuit, Mother's counterpetition was no longer a live pleading and could not supply a basis for judicial admissions.

Finally, to the extent Mother and Father offered conflicting testimony, the trial court was free to believe Mother's version of events.

CHILDREN'S DESIRE FOR STABILITY CONSTITUTED MATERIAL AND SUBSTANTIAL CHANGE.

In re J.J., No. 09-18-00068-CV, 2019 WL 1186768 (Tex. App.—Beaumont 2019, no pet. h.) (mem. op.) (03-14-19).

Facts: The parties reached an agreement in their divorce which provided that the parties had agreed to a week-on/week-off possession schedule. Additionally, Father was responsible for paying for day care in lieu of child support. Subsequently, when the Children had become teenagers, Mother filed a motion to modify. She sought a standard possession order and increased child support. Father, pro se, filed a motion to enter judgment on the MSA from the divorce. The trial court granted Mother's modification. Father appealed, arguing that the trial court erred in altering the terms of the parties' MSA.

Holding: Affirmed

Opinion: A trial court may modify conservatorship and child support if the circumstances materially and substantially changed since the parties' entered into their MSA. Mother asserted that the substantial change was the Children's desire, which had to do with being more stable, knowing where their stuff was, and knowing what was going on and they wanted. The Children did not want to move their possessions back and forth between their parents' homes so often. They had more privacy at Mother's home. They wanted more stability and had issues with Father and his wife. Further, since the Children were now teenagers, the parents' agreement that Father would pay for daycare in lieu of child support was no longer in the Children's best interest.

MOTHER NOT REQUIRED TO ATTACH SECTION 156.102 AFFIDAVIT TO MODIFICATION PETITION FILED BEFORE ORDER SIGNED IN PRIOR MODIFICATION SUIT BECAUSE NO PERSON HAD EVER BEEN GRANTED EXCLUSIVE RIGHT TO DESIGNATE CHILD'S PRIMARY RESIDENCE.

In re A.D.C., No. 11-17-00190-CV, 2019 WL 1428630 (Tex. App.—Eastland 2019, no pet. h.) (mem. op.) (03-29-19).

Facts: A divorce decree appointed the parents as joint managing conservators. It did not grant either parent the exclusive right to designate the Child's primary residence but did place a geographic restriction on the Child's residence. The parents were given a 50/50 possession order. About five years later, Mother filed a petition to modify, and Father responded with a counterpetition. Both parents sought the exclusive right to designate the Child's primary residence. The trial court found there had been no material and substantial change and that modification was not in the Child's best interest. After the trial court's oral rendition but before it signed a final order, Mother filed a new petition to modify, this time asserting that the paternal grandfather had been recently arrested for indecency with a child. After a final hearing in that case, the trial court appointed the parents joint managing conservators and granted Mother the exclusive right to designate the Child's primary residence. Father appealed, arguing that the trial court lacked jurisdiction over Mother's second modification request because she failed to attach an affidavit pursuant to Tex. Fam. Code § 156.102, which applies to suits to change the person with the exclusive right to designate a child's primary residence within one year of a prior order.

Holding: Affirmed

Opinion: Tex. Fam. Code § 156.102 did not apply to Mother's motion because (1) her last petition to modify was denied, so there was no order for conservatorship resulting from the suit; and (2) there was no prior order that had granted any conservator the exclusive right to designate the Child's primary residence.

SAPCR
Enforcement of Child Support

EVIDENTIARY HEARING CURED ANY DEFECT STEMMING FROM MOTHER'S FAILURE TO FILE VERIFIED MOTION FOR ENFORCEMENT.

In re N.V.R., No. 12-18-00146-CV, 2019 WL 1416634 (Tex. App.—Tyler 2019, no pet. h.) (mem. op.) (03-29-19).

Facts: Father had been ordered to pay child support but failed to do so. Mother filed a motion for enforcement. After a hearing, the trial court found that Father failed to pay the ordered support, found him in contempt, and ordered him confined. Further, the court found Father had the ability to pay and entered an order of withholding for the arrearages. Father appealed, arguing that because Mother's enforcement motion was unverified, she lacked standing.

Holding: Affirmed

Opinion: A verified complaint is not required as a prerequisite to constructive contempt except where specifically required by statute. In any case, here, it was undisputed that the trial court held a hearing on Mother's motion and that Father attended the hearing. As a result, the fact that Mother's motion was unsworn did not deprive the trial court of jurisdiction.

SAPCR
Family Violence/Protective Order

PROTECTIVE ORDER ENTERED IN SEPARATE CAUSE NUMBER FROM PENDING SAPCR WAS IMMEDIATELY APPEALABLE.

Watts v. Adviento, No. 02-17-00424-CV, 2019 WL 1388534 (Tex. App.—Fort Worth 2019, no pet. h.) (mem. op.) (03-28-19).

Facts: Girlfriend obtained a family-violence protective order against Boyfriend to protect herself and three children, as well as two other members of her family or household. After a hearing, the trial court granted a final protective order. Boyfriend appealed, arguing the evidence was insufficient to support the order. In her appellee's brief, Girlfriend argued the appellate court lacked jurisdiction over the appeal because it was entered "during the pendency" of a SAPCR involving Girlfriend and Boyfriend's child.

Holding: Affirmed
Opinion: The Texas Family Code provides that a protective order is immediately appealable unless it was rendered against (1) a party in a suit for dissolution of marriage or (2) a party in a suit affecting the parent-child relationship. Here, there was no question that the parties were not married, so there was no suit for dissolution of marriage. Although a SAPCR was pending, it was a separate cause number from the case in which the protective order was granted. Because the protective order was not entered in the SAPCR, it was immediately appealable.

Miscellaneous

APPLICANT NOT ENTITLED TO NAME CHANGE FOR FAILURE TO COMPLY WITH STATUTE.

In re Williams, No. 14-18-00245-CV, 2019 WL 1030394 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.) (mem. op.) (03-05-19).

Facts: Applicant sought to have his name and nationality changed. The trial court denied his petition. Applicant appealed.

Holding: Affirmed
Opinion: Applicant failed to disclose his criminal history information as required by the name-change statute. Because the criminal history information was disclosed by a background check and not by applicant, the trial court did not abuse its discretion in denying Applicant's request. Further, contrary to Applicant's assertion, his U.S. birthright citizenship was bestowed on him by the U.S. Constitution, not by a contract. So, the fact that he was a minor without capacity to

contract at the time was irrelevant. Applicant presented no basis for changing his Race/Nationality from "Black/African American" to "Moor/Americas Aboriginal National…but not a citizen of the United States."

MOTHER COULD NOT PREVAIL ON CONSPIRACY CHARGE BECAUSE SHE FAILED TO SUBMIT A QUESTION TO THE JURY REGARDING ANY UNDERLYING TORT.

In re T.A.Q., No. 14-17-00954-CV, 2019 WL 1186829 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.) (mem. op.) (03-14-19).

Facts: During a SAPCR proceeding in which the paternal grandparents intervened, Mother amended her live petition to include civil tort claims against Father and his parents. Mother asserted that the three had engaged in unlawful action to keep the Child away from her and to alienate the Child from her. She asserted claims of civil conspiracy, abuse of process, and IIED. She sought actual and exemplary damages. A jury returned a verdict on issues of conservatorship and found that the grandmother (the grandfather passed away before trial) engaged in a civil conspiracy against Mother and awarded Mother mental anguish damages and exemplary damages. The jury did not find that Father engaged in the conspiracy or that either of them committed an abuse of process. Mother did not submit a question to the jury on IIED. The grandmother and Father appealed, raising a number of issues, including that the evidence was insufficient to support the conspiracy finding and the damages awards.

Holding: Reversed and Rendered in Part; Affirmed in Part
Opinion: To prevail on a civil conspiracy claim, the plaintiff must show the defendant was liable for some underlying tort. Mother did not submit to the jury any question regarding an underlying tort, only on the charge of conspiracy. Thus, Mother could not prevail on her conspiracy claim. Further, because the damages award was based on the jury finding of a conspiracy, Mother could not be entitled to those damages.

MOTHER IN CRIMINAL AND CIVIL CONTEMPT FOR VIOLATIONS OF STANDING ORDERS.

In re Caldwell-Bays, No. 04-18-00980-CV, 2019 WL 1370316 (Tex. App.—San Antonio 2019, orig. proceeding) (mem. op.) (reh'g denied) (03-27-19).

Facts: Mother filed a petition for divorce with Children, alleging that she and Father were informally married. Father denied the existence of a marriage, and after a hearing, the trial court rendered a partial summary judgment holding no marriage existed. During the proceedings, two standing orders were entered, one regarding property and one regarding Children. In both, the parties were ordered to refrain from encumbering property of one or both parties. After the summary judgment, but before the final trial, Mother entered into an agreement with her attorneys to encumber two pieces of her separate real property for the purpose of paying attorney's fees. Father filed a motion for enforcement by contempt of the standing orders. Mother argued that the standing orders no longer applied because they were rendered in conjunction with the divorce, which Father contested and which a summary judgment had resolved. The trial court held Mother in both criminal and civil contempt. She was found in contempt for four violations of the orders, sentenced to three days in jail for each offense to run concurrently for the criminal contempt and sentenced to not more than 180 days for the civil contempt. She could purge herself of the civil contempt by obtaining a release of all encumbrances against her separate real property that she had granted in favor of her attorneys. Mother filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Denied

Opinion: The allegations contained in the pleadings determine the nature and character of a suit. Father had a right to assume that the case made by the pleadings was the case he was called upon to defend. Father's denial of a marriage did not change the nature of the case. Additionally, the partial summary judgment was merely an interlocutory order, and the standing orders were to remain in place until a final order was rendered.

Mother was ordered not to encumber property, yet she entered an agreement to execute a deed for one property in favor of her attorneys and did execute a deed in favor of her attorneys on another property. Mother violated the standing orders.

Mother's complaint that she was not afforded a hearing before the standing orders were rendered lacked merit. Tex. Fam. Code § 6.501(a) permits a trial court to enter the Standing Orders on its own motion without notice or hearing. Moreover, the orders included a provision that they were to be attached to the original petition, and if no party contested the orders within 14 days, they would continue in full force. This provision satisfied Tex. Fam. Code § 6.502's requirement that each party be afforded the right to participate in an adversarial hearing. Mother attached the standing orders to her original petition and raised no complaint regarding the standing orders.