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

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NO LEGAL AUTHORITY SUPPORTED HUSBAND'S CLAIM THAT DELIVERY OF A GIFT COULD BE MADE RETROACTIVE TO AN EARLIER DATE.

Pearson v. Pearson, No. 03-13-00802-CV, 2016 WL 240683 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (01-15-16).

Facts: Long before the marriage, Wife's grandparents started a family-owned and -operated manufacturing Business. It was incorporated and issued 100 shares of stock. The Business's records were informally kept. During the marriage the Business was struggling and in debt. Husband was a computer programmer with a background in design. He worked for a plumbing and air conditioning contractor for $250,000 a year. Wife encouraged Husband to work at her family's Business with her parents to help them improve the Business. Husband personally researched Texas property laws regarding community and separate property and learned that gifts were considered separate property. After discussing the situation with "lots of lawyer friends" and "lots of friends who had divorced," he told Wife that he would work at her family's Business only if 50% of the stock was his separate property. He did not recall whether he discussed his legal research with Wife. Subsequently, Husband agreed with Wife's parents that he would work for the company on the condition that he be given 50 shares of stock as his separate property. Wife's parents agreed but because Wife's grandparents were still living, the parents did not own 50 shares of stock to transfer at that time. The agreement was written and signed by Wife's parents and by Husband. Wife's parents testified that the agreement to transfer 50 shares to Husband was contingent on his working for the Business and successfully turning the Business around. They testified that they had no intention to cut Wife out of the Business and never saw the transfer as a "gift."

Husband began working at the Business for less than a third of his prior salary, and the Business became profitable again within 2 years. Within a year after starting work, Wife's grandmother died, which meant Wife's parents had enough stock to transfer 50 shares to Husband, but no formal transfer of stock occurred until the end of that year (10 months later). Nevertheless, gift tax returns and the Business tax return prepared the following tax year showed the transfer effective the day after Wife's grandmother's death. Seven months after the Grandmother's death (before the formal transfer of sock), the Business was converted to a limited partnership, and the partnership agreement showed that Husband had a 50% partnership interest.

After hearing testimony, the trial court determined that the transfer was not a gift but was in consideration for Husband's improving the company. Thus, the interest was community property. Husband appealed, arguing that the trial court erred in finding the transfer of stocks was community property and that the restriction on his piloting unreasonably restricted his recreational activities with his Children.

Holding: Affirmed

Opinion: All the testimony at trial showed that the transfer was dependent on Husband working at the Business, improving its performance, and increasing its profits. He accepted the position for a substantial decrease in salary on the basis that he would work to improve the Business in exchange for an ownership interest. Thus, the evidence suggested the transfer was consideration and not a gratuitous gift.

Additionally, a gift requires delivery, and it was undisputed that no formal transfer took place for ten months. Although a partnership agreement can have a retroactive date, Husband cited no law stating a gift could be made retroactive to an earlier date. There was no delivery at the time of the agreement.

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

In re Sandoval, No. 04-15-00244-CV, 2016 WL 353010 (Tex. App.—San Antonio 2016, orig. proceeding) (mem. op.) (01-27-16). (prior opinion: ***In re Sandoval***, __ S.W.3d __, No. 04-15-00244-CV, 2015 WL 4759972 (Tex. App.—San Antonio 2015, orig. proceeding) (08-12-15)).

After the appellate court granted Mother's petition for writ of mandamus, Father filed a motion for rehearing en banc. The appellate court denied Father's motion but withdrew its prior opinion and substituted a new opinion to clarify the panel's reasoning. This new opinion was accompanied by one concurring and two dissenting opinions, which were drafted by justices who had not sat on the original panel.

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

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

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

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

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

Holding: Motion for En Banc Reconsideration Denied

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

> even if [Father was] considered a man from birth for legal purposes, [Father's] status as a man is not sufficient to confer statutory standing as "a man whose paternity of the child is to be adjudicated." Tex. Fam. Code ann. § 160.602(a)(3). If all that was required for standing was to be a man, then any

> man could maintain a suit to adjudicate parentage of any child. We do not believe that to be what the Texas Legislature intended.

Father did not meet the statutory requirements for standing as a presumed Father or as the acknowledged Father. Father's suit was not brought within 90 days of the date on which his actual care, control, and possession of the Children terminated. Father did not raise any basis on which he would have standing to file a SAPCR.

Concurring Opinion: (J. Alvarez, C.J. Marion, J. Pulliam, J. Angelini, J. Barnard) Courts of Appeals are not free to mold Texas law but are bound by precedents of the Texas Supreme Court and constrained by the Texas Family Code. When a statute does not define a term, the court turns to its ordinary meaning. Father did not meet the definition of "man" as defined by Webster's Dictionary, so he could not have standing under Tex. Fam. Code § 160.602. Additionally, Father failed to file within the time period during which he would have had standing under Tex. Fam. Code § 102.003(a)(9). Justice Alvarez asked the Texas Legislature to remedy the "unfair," "heart-wrenching" situation in which Father found himself.

Dissenting Opinion: (J. Chapa) Mandamus relief cannot be appropriate merely to correct any incidental ruling that would cause any delay in a child-custody dispute. While some erroneous jurisdictional rulings could lead to conflicting custody orders from different courts in different territorial jurisdictions, there was no such risk of that occurring in this case. Additionally, as the trial court did not divest Mother of possession of the Children, there were no extraordinary circumstances for which mandamus relief was necessary. Thus, because appellate relief would have been adequate, Mother should not have been entitled to mandamus relief. "Due to the extraordinary number of child-custody disputes in this court's jurisdiction, including those involving parental termination, mandamus cannot be appropriate to correct any incidental ruling that would cause a delay in a child-custody dispute.

Dissenting Opinion: (J. Martinez) In 1985, the Texas Legislature enacted the Code Construction Act, which provides that "[w]ords of one gender include the other genders." The Legislature's clear intent was to apply its provisions gender-neutrally. Additionally, the Texas Legislature previously adopted an understanding of gender that is broader than one's anatomy at birth by granting legal recognition as a "man" to a person born anatomically female. Here, a court of law ordered legal recognition to Father's identity as a man. "That he was born female is now altogether secondary." "[Father] asked for equal dignity in the eyes of the law, and both the Constitution and the trial court granted him that right." "The statute does not impose biological sex as the fixed marker of gender identity, nor should it be interpreted to use it as a mechanism for discrimination." Both *Windsor* and *Obergefell* struck down laws discriminating against same-sex couples, in part, because of the harm to the couples' children. "What good is the right to same-sex marriage if it does not include a right to be a parent to your children?" Father was male as a matter of law, and whether he could meet his burden to prove his allegation of paternity—which was still to be adjudicated—was not before the appellate court for review.

SAPCR
CHILD SUPPORT

MOTHER SHOWED A MATERIAL AND SUBSTANTIAL CHANGE IN HER INCOME BECAUSE AT THE TIME SHE AGREED TO NO CHILD SUPPORT, MOTHER HAD NOT ANTICIPATED STEADILY DECREASING COMMISSION CHECKS.

In re Moore, ___ S.W.3d ___, No. 05-14-01173-CV, 2016 WL 80205 (Tex. App.—Dallas 2016, orig. proceeding) (01-07-16).

Facts: When they divorced, Mother and Father agreed that neither would be required to pay child support for their only child. Both parents earned a salary plus regular fluctuating commissions. In the years following the divorce, Mother's commission began steadily decreasing due to factors outside of her control. Mother filed a SAPCR seeking child support from Father. She entered evidence showing her decreased income and Father's increased income since the divorce. Additionally, Mother showed that she had to dip into the Child's college savings in order to pay household expenses. The trial court ordered Father to pay child support, retroactive child support, and attorney's fees. Father appealed. Mother then filed a motion for temporary orders pending appeal seeking conditional appellate attorney's fees. The trial court granted her motion, and Father filed a petition for writ of mandamus challenging that order.

Holding: Affirmed; Writ of Mandamus Denied

Opinion: The evidence showed that Mother did not anticipate a steadily decreasing income at the time she agreed to no child support. Based on her decreased income, Father's increased income, and Mother's need to use her savings to cover expenses, the trial court did not abuse its discretion in finding a material and substantial change in circumstances.

The order for conditional appellate attorney's fees would not be enforceable until the completion of the appeal. Thus, because Father's petition for writ of mandamus could adequately be addressed simultaneously with his appeal, he was not entitled to mandamus relief.

Mother's attorney testified about his experience and familiarity with family law cases, including appeals, the work to be done, and the reasonable rates associated with those cases. Mother's attorney entered an exhibit, without objection from Father, containing an opinion of the value of services required if Father appealed. The trial court was familiar with the lawyer's hourly rate and was familiar with reasonable rates in family law cases.

SAPCR
CHILD SUPPORT ENFORCEMENT

VALID CHARGING ORDER DIRECTED FATHER'S LLC TO SATISFY OAG CHILD SUPPORT LIENS ONLY UPON DISTRIBUTION OF FATHER'S INTEREST IN LAWSUIT IF, AS, AND WHEN THAT DISTRIBUTION OCCURRED.

Spates v. OAG, ___ S.W.3d ___, No. 14-14-00741-CV, 2016 WL 354417 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (01-28-16).

Facts: Father had three Children with three different mothers. Each had secured a judgment through the OAG for unsatisfied child support from Father. Father was the owner and sole member of an LLC, which sued another company for breach of contract and tortious interference with a contract. Upon learning of the suit, the OAG made an appearance and filed three child support liens against Father's interest in the proceeds of the suit. After the LLC and defendant company reached a settlement agreement, the OAG filed a request for a charging order, which the trial court granted. The charging order directed the clerk to disburse the settlement funds, which were in the court's registry, to the LLC and further ordered the LLC, upon distribution of the funds due to Father, to pay the OAG in satisfaction for the child support liens. Father and the LLC appealed.

Holding: Dismissed in Part; Affirmed in Part

Opinion: Because Father was not a party to the underlying suit, he had no standing to appeal. However, the appellate court had jurisdiction to review the LLC's interlocutory appeal of the charging order because it resolved property rights and imposed obligations on the LLC, an interested third party.

When Father's child support obligations were reduced to judgment, the OAG became a judgment creditor entitled to seek satisfaction of the debt as prescribed in the Business Organizations Code, which precludes the OAG from (1) foreclosing on the lien created by the charging order; (2) compelling the LLC to make a distribution to Father; (3) taking possession of Father's membership interest; or (4) exercising any other legal or equitable remedies with respect to company property. The charging order complied with the requirements of the Business Organizations Code, and the OAG was only entitled to collect on the debt if and when the LLC made a distribution to Father.

SAPCR
MODIFICATION

TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONDITIONED FATHER'S FUTURE FILINGS REGARDING THE CHILDREN ON AN ACCOMPANYING SWORN AFFIDAVIT STATING GOOD CAUSE AND PREPAYMENT OF ATTORNEY'S FEES.

Byars v. Evans, No. 07-14-00064-CV, 2016 WL 105671 (Tex. App.—Amarillo 2016, no pet. h.) (mem. op.) (01-08-16).

Facts: Mother and Father were designated joint managing conservators of their three Children in a final decree based upon their MSA. Mother was given the exclusive right to designate the primary residence of the Children with a geographical restriction. Less than a year later, Father filed a petition to modify. Mother filed a counter-petition, asking for

the exclusive right to manage the Children's education, health, and welfare, and to remove the geographical restriction on the Children's residence. Mother asked for a protective order against Father and asked that Father be denied access to the Children because he had terrorized her and her family. After a final hearing, the trial court signed an order maintaining the parents as joint managing conservators. The trial court granted Mother's request to move to Florida on the condition that Father failed to visit the Children for three months for any reason other than deployment, hospitalization, or physical inability. The court also awarded Mother attorney's fees and authorized a wage withholding order to satisfy the award. Twenty days later, Mother filed a motion to modify, correct, or reform the judgment. Father then filed a motion to recuse the judge and a motion for new trial. Mother argued that Father's motion to recuse was untimely. After a post-judgment hearing, the trial court denied Father's motions, granted Mother's motion, and entered a new order unconditionally removing the geographical restriction and conditioned any future filings by Father regarding the Children on payment of no less than $10,000 attorney's fees and the requirement to file a supporting affidavit stating good cause for the motion. Father appealed, arguing that the trial court erred in signing an order substantively modifying the prior order without granting him a new trial. Father additionally asserted that the trial court erred in denying his motion to recuse, in placing a condition on future filings, and in authorizing an income withholding order to collect the attorney's fees award.

Holding: Affirmed as Modified

Opinion: A trial court has plenary power to reverse, modify, or vacate its judgment at any time before it becomes final. A timely filed post-judgment motion extends the trial court's plenary power to reconsider its ruling until thirty days after the post-judgment motion is overruled. Mother and Father each filed post-judgment motions, and the trial court retained its plenary power when it entered a new order granting Mother's motion.

To be timely, a motion to recuse must be filed more than ten days prior to the date set for hearing *and* as soon as practicable after the movant knows of the ground stated in the motion. Father was aware of his alleged grounds for recusal well before the actual trial on the merits, so the fact that he filed more than ten days before the hearing on the post-judgment motions was irrelevant.

The trial court's conditions on further motions by Father regarding the Children were not an absolute denial of access to the courts. His access was reasonably conditioned—based on his prior behavior—upon a showing of good cause through a sworn affidavit. Additionally, the condition that he pay attorney's fees was akin to conditions imposed upon a vexatious litigant through the use of a pre-filing order.

Because the awarded attorney's fees were not incurred in a suit to enforce child support, the award was only enforceable as a debt and could not be collected by way of an income withholding order.

MISCELLANOUS

INCONSISTENCIES IN PROCESS SERVER'S AFFIDAVIT FAILED TO SUPPORT ORDER FOR SUBSTITUTED SERVICE.

Cancino v. Cancino, No. 03-14-00115-CV, 2016 WL 234514 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (01-13-16).

Facts: Wife was from Poland, and Husband was from the U.S. They married and lived in Texas, where they had one child. A few years later, they separated, and Wife and the child moved to Poland. Husband filed for divorce and sent a waiver of service to Wife in Poland, but she did not sign it. A few months later, Husband heard that Wife was in Texas. The car Wife was seen driving belonged to a friend known to Husband, so he contacted a process server to attempt service on Wife at the friend's address. Husband filed a motion for substituted service and attached the process server's affidavit stating that he had attempted service three times. The trial court granted the motion, and Wife was served by leaving a copy of citation on the door of the friend's house. Wife later explained that she had stayed two non-consecutive nights at that house during a short trip to Texas. The citation was left on the door the day after Wife returned to Poland. The friend sent the citation to the trial court with a letter explaining Wife had left the country. The friend's wife took a picture of the citation and emailed the picture to Wife.

After the trial court denied Wife's special appearance, Wife did not participate further in the proceedings. Husband obtained a default judgment, and Wife appealed, arguing that she was not properly served with citation.

Holding: Reversed and Remanded

Opinion: The process server's affidavit referred to Wife's friend's house as Wife's residence or place of abode despite Husband's knowledge the Wife lived in Poland. During trial, Husband testified about packages he mailed to Wife in Poland for their child indicating he was fully aware that Wife lived in Poland. The first of the attempted dates listed by the process server was the day before Husband knew Wife was in Texas. The affidavit stated that Husband said he saw Wife at her friend's house, but Husband testified that he did not see Wife at all while she was in Texas. Because the attempted service of process did not strictly comply with the rules governing service of process, the default judgment could not stand. Actual knowledge of the suit does not relieve a plaintiff from strict compliance with rules of service.

FATHER'S FAILURE TO TIMELY OBJECT TO ASSIGNED JUDGE IMPLIEDLY WAIVED PRIOR PRO FORMA OBJECTION IN MOTHER'S PLEADINGS.

In re Carnera, No. 05-16-00055-CV, 2016 WL 323654 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.) (01-27-16).

Facts: Mother filed a SAPCR that was assigned to the 254th District Court. The elected judge died before finishing the case and a former judge was assigned to preside over the case. Both sides appeared, announced ready, and proceeded to trial before the assigned judge. The trial court determined that Father owed Mother about $25k in child support arrears. Father moved to vacate the judgment on the ground that the assigned judge was not permitted to hear the case because Mother had included a pro forma visiting judge objection in her pleadings. The trial court denied Father's motion, and he filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: An objection to an assigned judge must be timely made. A pro forma blanket objection in a petition is insufficient when no visiting judge has been assigned. Additionally, a party may withdraw a previously filed objection and impliedly does so when it participates in a proceeding without advising the assigned judge that an objection has been filed. The purpose of the statutory requirement of an immediate objection to an assigned judge is to avoid a party's attempt to "sample" the judge, as Father tried to do in this case.

ATTORNEY NOT ENTITLED TO RECOVERY OF FEES BECAUSE NO EVIDENCE OF TYPE OF WORK PERFORMED.

Carney v. Ahmad, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo 2016, no pet. h.) (mem. op.) (01-28-16).

Facts: Client hired Attorney to represent him in his divorce. At some point, Attorney withdrew based on Client's failure to pay attorney's fees in full. Attorney intervened in the divorce and served Client with requests for admission, which were never answered. Later, the trial court severed the intervention, and Attorney's suit was tried to the bench. At the final hearing, the trial court permitted Client to withdraw his deemed admissions. After hearing evidence, the trial court denied Attorney's requested relief, and Attorney appealed.

Holding: Affirmed

Opinion: An attorney seeking the recovery of attorney's fees from a client must establish a valid contract, performance by the attorney, breach by the client, and damages. Here, Attorney entered evidence of fees incurred and fees paid but did not provide any details at all of the work performed because of the attorney-client privilege. For a fact finder to determine whether the attorney is due unpaid compensation under the contract, it must have some evidence of the "services rendered."

The only admissions served on Client were served in the divorce proceeding. No discovery was served on Client in the suit for attorney's fees. Any admission made by a party through discovery may be used solely in the pending action and not in any other proceeding.

FATHER NOT ENTITLED TO ORALLY REQUESTED TRIAL AMENDMENT.

In re J.C.J., No. 05-14-01449-CV, 2016 WL 345942 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (01-28-16).

Facts: Mother and Father never married and separated soon after the Child was born. Father initiated a suit to establish his paternity. About a year later, Father was convicted of engaging in organized criminal activity and of making a false statement to obtain property or credit. While Father was incarcerated, the trial court held a final hearing in the SAPCR. The trial court ordered Father to post two bonds: one to offset the costs of recovering the Child if she were abducted by Father to a foreign country; and the second conditioned on Father's compliance with the possession order. Additionally, because the trial court found a history of family violence, it ordered that Father's periods of visitation be supervised.

When Father was released from prison, he filed a motion to confirm his child support arrearages and to modify seeking unsupervised possession of the Child. Mother filed a counterpetition for enforcement, to modify the prior order to increase the bonds Father was required to post, and to require Father to pay for counseling for the Child.

At the final hearing, Father requested a trial amendment to include a specific request to eliminate the bond requirements. He believed the request was already implicitly included in his request for unsupervised possession but was requesting a trial amendment for clarification. Mother objected that she was not aware Father was seeking to eliminate the bonds. Her counsel stated that Mother would be prejudiced by the amendment because he had not researched or prepared for addressing a bond reduction request, had not looked at the appropriate standard for the trial court to apply in analyzing a bond reduction request, and had never dealt with the issue in a prior case. The trial court denied Father's request for a trial amendment. After the trial court entered a final order, Father appealed, complaining, among other issues, of the trial court's refusal to grant his trial amendment.

Holding: Affirmed

Opinion: A trial amendment must be filed as a written pleading; an oral amendment at trial is insufficient. Although the defect may be waived by a failure to object, here, Mother objected. Additionally, even if Father appropriately presented his requested trial amendment, the trial court did not err in denying his request. His request to remove a bond was a separate issue from whether he should have been allowed unsupervised possession and was a new cause of action. Further, although Father argued in a prior hearing that the bond was excessive, he offered no testimony that would have put Mother on notice that he was seeking to remove the bond entirely. Finally, to address the elimination of the bond requirement, Mother would have had been prepared to offer evidence of conduct by Father relevant to either a potential risk of child abduction or Father's ongoing refusal to comply with the court orders, which Mother's counsel indicated he was not prepared to do. Thus, Father's oral request to amend his pleadings was prejudicial on its face, and the trial court did not abuse its discretion in denying Father's request.