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

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DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

PARTIES' AGREEMENT INCIDENT TO DIVORCE WAS UNAMBIGUOUS AND ENFORCEABLE.

Hallsted v. McGinnis, ___ S.W.3d ___, 2015 WL 9241689 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (12-17-15).

Facts: Husband and Wife signed an AID that was incorporated into their divorce decree. The AID provided that Husband would pay monthly alimony to Wife. In 2010, Husband stopped paying alimony. Wife sued to enforce the AID because she claimed Husband was required to pay her until 2014. Husband argued that the AID provided for permanent alimony that only terminated upon the death of a party, which violated public policy and was, thus, an unenforceable agreement. The AID provided in pertinent part:

> **Alimony**
>
> **…**
>
> **3.2 Terms, Conditions, and Contingencies**
>
> Amount – [Husband] wil pay**…**
>
> In addition, [Husband] will pay**…**as additional alimony**…**
>
> [terms regarding additional alimony]**…**
>
> *Term – …last payment being due on January 1, 2014…*
>
> Death of Receiving Party – **…**
>
> Death of Paying Party –**…**

(emphasis added). Husband argued that because the "Term" provision was indented under the additional alimony provisions, it only applied to that section. Wife argued that the "Term" provision was headed similarly to other major section of 3.2 and applied to all alimony payments. The trial court denied Wife's requested relief, and she appealed.

Holding: Reversed and Remanded

Opinion: The express language of the contract supported the contention that "Term" applied to both the alimony payments and the additional alimony obligations. Thus, Wife was entitled to receive alimony payments until January 1, 2014.

Additionally, Husband's argument that a provision for "permanent" alimony would be unenforceable as a matter of public policy was without merit. The public policy limits a court's authority, not what can be agreed to between two individuals.

SAPCR
ENFORCEMENT OF POSSESSION

AWARD OF ADDITIONAL MAKE-UP POSSESSION COULD NOT EXCEED DURATION OF DENIED POSSESSION.

ATTORNEY'S FEES AWARD IN NON-ENFORCEMENT MODIFICATION SUIT COULD ONLY BE ENFORCEABLE AS A DEBT—NOT AS CHILD SUPPORT.

In re Braden, ___ S.W.3d ___, 2015 WL 7739850 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (12-01-15).

Facts: Mother and Father had one Child, of whom they were joint managing conservators. Father lived in New York, and Mother and the Child lived in Texas. Father filed a motion for enforcement of possession and a motion to modify. Father asked the court to hold Mother in contempt and to award him additional periods of possession to compensate for a four-day visit to New York for which Mother failed to surrender the Child. After a hearing, the trial court found Mother in contempt, awarded Father 62 days of make-up visitation, and awarded Father a judgment for attorney's fees. Mother filed a petition for writ of mandamus complaining that the trial court abused its discretion by providing that the attorney's fee award was enforceable by contempt and by awarding Father 62 days of make-up possession.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A trial court may not characterize attorney's fees awarded in a non-enforcement modification suit as additional child support. Although Father's attorney testified about attorney's fees, he did not segregate fees incurred for work performed in connection with the enforcement proceeding from fees incurred for work performed in connection with the modification proceeding. Thus, the trial court erred in characterizing the entire award of attorney's fees as "in the nature of child support."

A trial court has the discretion to award additional periods of possession to compensate for the denial of court-ordered possession or access. However, the additional periods must be of the same type and duration of the possession or access that was denied. Here, the trial court abused its discretion in awarding 62 days of additional possession to compensate Father for the 4 days denied him.

SAPCR
CHILD SUPPORT

MOTHER AWARDED FATHER'S SHARE OF EQUITY IN HOME AS LUMP CHILD SUPPORT PAYMENT BECAUSE FATHER INCARCERATED FOR DURATION OF CHILD SUPPORT OBLIGATION.

Tran v. Nguyen, ___ S.W.3d ___, 2015 WL 7475221 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (11-24-15).

Facts: Mother and Father had two Children during their relationship. Mother had another child from a prior relationship, although that child believed Father was her father until she was ten-years old. When the oldest child was thirteen, Father sexually molested her multiple times over the course of a year. When the crime was discovered, Mother and Father separated. Father pleaded guilty and was sentenced to 12 years in prison. Mother filed a petition for divorce, alleging a common-law marriage. Father filed a counter-petition. The trial court granted a divorce based on Father's sexual-assault conviction, appointed Mother sole managing conservator, and divided the marital estate.

During trial, Mother testified that prior to his incarceration, Father was a banker and that his net monthly resources were $3600 at that time. The trial court acknowledged that Father would not be up for parole before his child support obligation expired. The trial court determined that from the time of divorce through the time the Children turned 18, Father would owe more in child support than his community share of the equity in the parties' home. Thus, at Mother's request, the trial court awarded to Mother Father's share of the equity in satisfaction of his child support obligation.

Father appealed, contending, among other complaints, that the trial court erred in calculating his child support obligation based on his salary prior to his incarceration. Father asserted that the trial court should have based his obligation on the presumption that he made the federal minimum wage for a 40-hour work week. Mother did not file a response in the appellate court.

Holding: Affirmed

Majority Opinion: (J. Jamison, J. Busby)

An appellate court is not required to accept as true uncontradicted assertions of fact that are unsupported by record references. Here, Father did not offer a citation to the record to support his assertion that the trial court simply applied the guidelines.

Further, Tex. Fam. Code § 154.122(b) sets out fourteen factors a court may consider in determining whether the child support guidelines would be unjust or inappropriate in a particular case. While the trial court did not issue findings in support of a deviation from the guidelines, Father did not challenge that failure on appeal.

Here, Mother would be caring for the Children 100% of the time, Father would be unable to pay child support while in prison, and the equity in the house was an available financial resource that could be awarded to wife as a lump sum child support payment.

Dissenting Opinion: (C.J. Frost)

Tex. R. App. P. 38.1(g) provides that an appellate court must accept as true facts cited in a brief's statement of facts unless contradicted by another party. That rule also separately requires that the statement of facts be supported by the record. Thus, an appellate court must take as true uncontradicted facts regardless of whether those facts are supported by the record.

Further, a trial court is required to issue specific findings—whether or not requested by a party—if a child support order deviates from the Family Code's guidelines.

Here, Father asserted that the trial court's child support order was based on the Family Code's guidelines and his income prior to his incarceration. Mother did not file a responsive brief or challenge Father's statement of facts. Additionally, the trial court did not issue any findings to support a deviation from the guidelines. Moreover, because Father asserted that the trial

court followed the guidelines, he did not have a reason to assert that the trial court erred in failing to issue findings to support a deviation from the guidelines, and he should not have been required to do so.

Additionally, the majority decided an issue of first impression not briefed by the parties, concluding that the trial court could have deviated from the child-support guidelines and based its child-support determination on the equity interest in the parties' home because it was a "financial resource" under Tex. Fam. Code § 154.123(b)(3), without any determination that the interest was party of Father's "net resources."

ADULT CHILD'S COMPETENCY TO TESTIFY DID NOT CONTROVERT TRIAL COURT'S DISABILITY FINDING OBLIGATING FATHER TO PAY CHILD SUPPORT INDEFINITELY.

Thompson v. Smith, ___ S.W.3d ___, 2015 WL 9242216 (Tex. App.—Houston [2015, no pet. h.) (12-17-15).

Facts: Mother and Father divorced when the Child was 7-years old. The Child was born with a congenital defect that caused a malformation of her jaw and tongue, and she suffered from brain damage that affected her motor skills. Additionally, when the Child was 5-years old, she was injured and left intellectually disabled. Mother had primary custody of the Child, and Father paid child support. Father had little contact with the Child after the divorce. When the Child was almost 30-years old, Mother filed a petition seeking support for the adult disabled Child. At trial, multiple witnesses testified that the Child could not be left unsupervised and had harmed herself on purpose (cutting and suicide attempts) and on accident (fires while attempting to cook). The trial court granted Mother's petition and ordered Father to provide indefinite support for the Child. Father appealed, arguing that the evidence did not support findings that the Child was disabled because, in part, the Child was competent to testify. Additionally, Father argued that the evidence did not support the statutory factors for determining the amount of support because Mother allegedly did not disclose all the financial resources available to her. Father pointed to Mother's testimony that her current husband had supported the Child until the age of 18 and thereafter refused to do so.

Holding: Affirmed

Opinion: The standard for competency to testify does not correspond to the factors used to determine whether an adult child is disabled under the family code.

Mother's husband had no legal obligation to support the Child. Mother provided an estimate of her current husband's net monthly income, giving the trial court sufficient evidence to calculate Mother's half of the community property.

MISCELLANEOUS

NO FIDUCIARY RELATIONSHIP BETWEEN HUSBAND AND HIS MISTRESS.

Markl v. Leake, 2015 WL 6664843 (Tex. App.—Dallas 2015, no pet.) (mem. op.) (11-02-15).

Facts: Husband and Wife sued Husband's Mistress for breach of fiduciary duty, fraud, constructive trust, conversion, and promissory estoppel. During Husband and Mistress's 10-year extramarital relationship, Husband gave Mistress money, put her on his business's payroll, gave her a gasoline credit card, and maintained her vehicle and real property. Husband claimed that based on their "committed relationship" he invested $25,000 on Mistress's primary residence and $10,000 on her rental property. Husband testified that there was a plan for him to live with Mistress in her residence or to receive the residence on her death. The couple each owned a life insurance policy designating the other as a beneficiary. Mistress previously had a will granting Husband her assets upon her death.

Subsequently, Mistress began a relationship with Husband's nephew, and the relationship between Husband and Mistress ended. Mistress acknowledged having a serious relationship with Husband but described it as simply a dating relationship without any heightened duty of trust. Mistress also testified that Husband often told her that he was planning to divorce his wife and marry Mistress. Mistress had revoked the will leaving her assets to Husband and had changed the beneficiary of her life insurance policy.

Husband and Wife sought a temporary injunction to prevent Mistress from disposing of her residence and rental property. They alleged that the evidence clearly established fiduciary relationships between Husband and Mistress and between Wife and Mistress. The trial court denied their request, and Husband and Wife filed an interlocutory appeal.

Holding: Affirmed

Opinion: Husband and Wife cited no authority recognizing a fiduciary relationship between a wife and her husband's para-

mour. Further, there was no evidence that Wife was aware of the extramarital relationship when it was ongoing. Additionally, Husband cited no authority declaring the existence of a fiduciary relationship based on an extramarital affair. While the life insurance policies and Mistress's prior will evidenced some subjective trust between Husband and Mistress, those documents did not establish a fiduciary relationship. Further, Mistress testified that she attempted to reimburse Husband for his labor on her residence, but he refused to accept payment, indicating that his efforts were intended as gifts.

TRIAL COURT LOST JURISDICTION OVER WIFE'S COUNTERCLAIMS AGAINST HUSBAND'S PARAMOUR WHEN HUSBAND DIED DURING DIVORCE.

In re Footman, 2015 WL 7164170 (Tex. App.—Austin 2015, orig. proceeding) (mem. op.) (11-10-15).

Facts: Husband and Wife were parties to a divorce. Wife filed a counter-petition asserting Husband breached his fiduciary duty to her by wasting money on his Paramour. While the proceedings were still ongoing, Husband died. In an amended counter-petition, Wife named Paramour as a defendant and sought to have Husband and Paramour found jointly and severally liable for breach and fraud on the community. Husband's attorney filed a motion to dismiss, and Wife filed a motion to sever the claims against Paramour and dismiss only the divorce proceeding. The trial court granted Wife's motion and severed the proceeding against Paramour. Paramour filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Death of a party abates a divorce and its incidental inquiries of property rights and child custody. Additionally, death of a party to a divorce withdraws the court's subject matter jurisdiction. Thus, when Husband died, the trial court lost its jurisdiction to do anything other than sign an order of dismissal.

WIFE NOT ENTITLED TO DIVORCE ON GROUND OF CRUELTY EVEN IF RECORD SUPPORTED SUCH A FINDING.

Villalpando v. Villalpando, ___ S.W.3d ___, 2015 WL 7259291 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (11-17-15).

Facts: Husband and Wife had two Children during their marriage. Husband filed for divorce on the basis of insupportability. Wife filed a counter-petition for divorce on the grounds of cruel treatment. During trial, Husband admitted to having a problem with alcohol during the marriage. Wife testified that Husband pushed her, pulled her hair, left bruises on her arms, threatened to kill her, threatened to take the Children from her, and threatened to kill himself. Wife's sister corroborated her testimony. The trial court granted a divorce solely on the basis of insupportability. Wife appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 6.002 allows a court to grant a divorce on the basis of cruel treatment, but it does not require a court to do so—even if the record reveals evidence of cruelty.

PROCESS SERVER'S AFFIDAVIT SUFFICIENT TO SUPPORT ALTERNATIVE SERVICE BECAUSE FATHER'S CAR WAS SEEN AT ADDRESS WHERE SERVICE WAS ATTEMPTED AND WOMAN ANSWERED DOOR STATING FATHER WAS NOT HOME.

In re C.L.W., ___ S.W.3d ___, 2015 WL 8388185 (Tex. App.—San Antonio 2015, no pet. h.) (12-09-15).

Facts: Mother and Father had three Children when they divorced. A year later, Mother filed a SAPCR seeking to deny Father access to the Children because she claimed that Father's new girlfriend was physically and verbally abusive to the Children. Mother attempted service on Father through a process server. After three failed attempts, Mother filed a motion for alternative service and attached the process server's affidavit, which stated that service had been attempted three times at his home address—which was a different address than what was listed for Father in the final divorce decree. The trial court granted the motion for alternative service, and service was completed by attaching the petition to the door of Father's home. Father defaulted. Subsequently, Father filed a notice of restricted appeal, alleging error was apparent on the face of the record. Father argued the trial court erred in granting the motion for alternative service because the supporting affidavit was insufficient.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: (J. Chapa, J. Martinez) The process server's affidavit noted that Father's vehicle was twice seen at the address where service was attempted. Additionally, on the second attempt, a woman answered the door, stated that Father was not home, and indicated that she would give Father a message. The affidavit was sufficient to assure the trial court that alternative service would be reasonably effective to provide notice.

Dissenting Opinion: (J. Alvarez) The process server's affidavit included no evidence that the attempted service address was Father's residence or a place where he could probably be found. Although the process service indicated that she saw Father's vehicle there, she did not provide any information to support how she knew the vehicle to be Father's. Additionally, the default orders were later served on Father by mail to a different address—the address listed as Father's in the final divorce decree.

AWARD OF ATTORNEY'S FEES IN FAMILY LAW PROCEEDING NOT DEPENDENT ON WHICH PARTY PREVAILED.

In re R.E.S., ___ S.W.3d ___, 2015 WL 8392673 (Tex. App.—San Antonio 2015, no pet. h.) (12-09-15).

Facts: Mother filed a SAPCR asking the trial court to modify its prior order and appoint her the conservator with the exclusive right to designate their two Children's primary residence. Father filed a counter-petition asking only that the court maintain his exclusive right to designate the Children's primary residence. After a hearing, the trial court granted Mother the exclusive right to designate the Daughter's primary residence but provided that Father would maintain the exclusive right to designate the Son's primary residence. Additionally, the trial court granted Father's request for attorney's fees but denied Mother's request for the same. Mother appealed, arguing that the trial court abused its discretion in awarding Father attorney's fees because he was not the prevailing party.

Holding: Affirmed

Opinion: Tex. Fam. Code § 106.002 does not impose a prevailing-party requirement on an award for attorney's fees. Although success on the merits may be relevant, it is not a compulsory requirement under the statute. While Mother was successful in modifying custody of her daughter, Father was successful in maintaining the status quo of custody of his son, so, as in most family law cases, there was no "prevailing party."

FATHER'S ALTERNATIVE REQUESTED RELIEF AT TRIAL DID NOT CONSTITUTE "INVITATION OF THE ERROR" AND DID NOT BAR HIS POSITION ON APPEAL.

In re S.T., ___ S.W.3d ___, 2015 WL 9244913 (Tex. App.—Fort Worth 2015, no pet. h.) (12-17-15).

Facts: The Child was removed from Mother's care after it tested posited for cocaine at birth. Subsequently, Father's paternity was established by a DNA test. The Child was placed with foster parents, but TDFPS was interested in placing the Child with her maternal grandmother. Father was in prison when the Child was born, but he was paroled before the custody case went to trial. Father completed almost all of the services required of him and exercised all of his allotted visitation with the Child. TDFPS initially sought to terminate Father's parental rights, but those pleading were dismissed, and the only remaining question was who would be appointed the Child's permanent managing conservator.

In his pleadings, Father asked the trial court to name him permanent managing conservator, or in the alternative, appoint TDFPS managing conservator and Father possessory conservator. During his opening statement, Father asked to be appointed permanent managing conservator, or in the alternative, place the Child with her maternal grandmother. During his testimony, Father stated that he would be okay with the trial court placing the Child with him or with the Child's grandmother. During closing argument, Father asked the trial court to return the Child to him but understood that TDFPS might reasonably prefer a monitored return with TDFPS being appointed managing conservator and Father appointed possessory conservator. However, Father finally asked the trial court to return the Child to him or place her with her maternal grandmother. Ultimately, the trial court appointed TDFPS the Child's managing conservator, and Father appealed. TDFPS argued that Father waived his appellate claims because the trial court granted relief requested by Father in his alternative request for relief, and Father "invited the error."

Holding: Reversed and Remanded

Opinion: Father's requested relief at trial was equivocal—his alternative requested relief in his pleadings differed from his opening statement, which differed from his testimony, which differed from his closing statement. However, Father consistently asked for the primary relief that he be named the Child's permanent managing conservator, and the trial court did not grant that requested relief. Additionally, nothing in the record suggested that Father's shifting positions were deliberate or an attempt to ambush the court, seed the record with error, cause the error complained of on appeal, or any other misdeed. Therefore, Father's requests for alternative relief were not clear and were not clearly adverse to his position on appeal.

FATHER ENTITLED TO NEW TRIAL BECAUSE RETURN OF SERVICE NOT ON FILE AT LEAST 10 DAYS PRIOR TO DEFAULT ORDER.

Lancaster v. Lancaster, 2015 WL 9480098 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (12-29-15).

Facts: Mother and Father were married for 24 years and had 2 Children. Mother filed an application with the DA's office for a protective order against Father. After a hearing, the trial court found that Father was duly and properly served that day and had failed to appear. The trial court rendered a default two-year protective order against Father. A little over three years later, Father filed a petition for bill of review to set aside the default protective order. He alleged that he did not appear because he had been homeless, had no transportation to get to court, and had no money to obtain transportation or counsel. Additionally, Father alleged that the ADA failed to disclose pertinent facts during the temporary orders hearing. Finally, Father alleged that the return of service had not been on file the requisite 10 days before the hearing. The trial court denied Father's petition for bill of review, stating that Father failed to prove that he had a meritorious defense, that he was prevented from making his defense due to fraud, accident, or wrongful act or official mistake, and that his failure to act was unmixed with of his own fault or negligence. Father appealed.

Holding: Reversed and Remanded

Opinion: Although the disputed protective order had expired, the appellate court reviewed the merits of the appeal under the collateral consequences exception (e.g., collateral legal repercussions and social stigma) to the mootness doctrine.

When a bill-of-review plaintiff claims a due process violation, he is relieved from proving the other elements normally required to succeed on a petition for bill of review. Tex. R. Civ. P. 107 requires proof of service be on file with the clerk ten days prior to a default judgment. At the hearing, Mother stated that the return of service was filed on the same day the default protective order was granted. However, the clerk's record showed it was filed 5 days *after* the order. Either way, service of process did not strictly comply with Rule 107, and the default order was void. Father's admission that he was served a few days before the hearing (and had actual notice) was insufficient to invoke the court's jurisdiction to render a default judgment.

The appellate court noted that on remand, no new service would be necessary because Father appeared in the case by appealing the default judgment.