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

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DIVORCE
Retirement Benefits

HUSBAND NOT ENTITLED TO AMENDED QDRO BECAUSE NO EVIDENCE THAT EXISTING QDRO'S ERRONEOUS DATE OF DIVISION AFFECTED THE DECREE'S PROPERTY DIVISION.

Gow v. Sevener, No. 05-16-01037-CV, 2017 WL 5897448 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.) (11-30-17).

Facts: In the divorce decree, Wife was awarded a specific dollar amount of Husband's 401(k) valued as of a date certain and including any future interest dividends, gains, or losses on that amount. Husband was awarded the remaining balance as of that date certain. A QDRO was signed at the same time pursuant to the decree, but the date certain was a few days later than that specified in the decree. Neither party timely appealed the decree or the QDRO.

About six months later, Husband filed a petition requesting an amended QDRO TO correct the valuation date. At a hearing, Wife introduced evidence that the QDRO had already been accepted by the plan administrator and that she had already received the funds awarded her. The trial court denied Husband's request, and he appealed.

Holding: Affirmed

Opinion: A party may petition for a QDRO if (1) no prior QDRO has been issued, or (2) the plan administrator determines the existing QDRO is insufficient. An order that modifies a divorce decree's property division is void.

Here, there was no evidence how the date discrepancy affected Wife's distribution or that the QDRO required clarification or amendment.

SAPCR
Procedure and Jurisdiction

TO HAVE THE RIGHT TO INTERVENE, INTERVENORS MUST SHOW THAT THEY "HAD SUBSTANTIAL PAST CONTACT" WITH THE CHILDREN.

In re Tinker. ___ S.W.3d ___, No. 10-17-00194-CV, 2017 WL 6374803 (Tex. App.—Waco 2017, orig. proceeding) (12-13-17).

Facts: The children were placed with the Tinkers, the maternal great-aunt and uncle of the children, by DFPS and the Tinkers were named the sole managing conservators of the children in a final order entered in 2010. That order named the children's parents, Mary and Mario, as possessory conservators. In 2014, the Tinkers filed a petition to terminate the parent-child relationship between the children and their parents.

Subsequently, Julia and Roberto filed a petition in intervention seeking possession and access to the children and also filed a motion to transfer venue from Burleson County to Brazos County with an affidavit signed by Julia alleging that the children were residing in Brazos County. Julia and Roberto served the Tinkers through their attorney. However, an affidavit contesting the motion to transfer was untimely pursuant to the Family Code. The trial court in Burleson County entered an order transferring the proceedings to Brazos County.

The Tinkers first filed a plea to the jurisdiction in Burleson County, and later filed a motion to strike the intervention in Brazos County. The trial court in Brazos County conducted a temporary hearing which included the hearing on the motion to strike the intervention. The trial court denied the motion and determined that Julia and Roberto had standing to intervene as grandparents of the children. The Tinkers sought mandamus relief asking the Court to order the trial court withdraw its order finding that Julia and Roberto had standing to intervene. The Tinkers further seek an order requiring that the proceeding be transferred back to Burleson County because the transfer of venue was improperly ordered due to the lack of standing.

Holding: Mandamus conditionally granted.

Opinion: In order for Julia and Roberto to have the right to intervene in this proceeding, one requirement pursuant to Section 102.004(b) was to show that they "had substantial past contact" with the children. The affidavit filed in support of the petition in intervention mentions one time when Julia saw one of the children briefly in September of 2013 when she was a substitute teacher at the child's school, which was more than one year prior to the filing of the petition in intervention. As to Roberto, there is no mention of any contact having ever taken place between him and the children in the affidavit.

The evidence presented by Julia at the temporary hearing relating to past contact with the children was that neither she nor Roberto had visited with the children since the entry of the order in 2010. In a 3-week period beginning in August of 2014, Julia sent 3 letters asking for a visit to Mr. Tinker through the Parks and Recreation Department at the City of College Station where Julia believed Mr. Tinker was employed, which were signed for by a third party. There

was no response to the letters. The only other contact between Julia and the Tinkers and the boys had taken place "a few years" before the temporary hearing at a Walmart where Julia saw the boys but did not have contact with them due to an altercation between her and Mrs. Tinker where the police were called. There was no other evidence of attempts by Julia or Roberto to contact the children between 2010 and the letters sent in 2014.

Even accepting Julia and Roberto's testimony regarding contact with the children as true, the evidence does not raise a fact issue on substantial past contact. Therefore, Roberto and Julia lacked standing to intervene in the proceeding that was pending in Burleson County that was transferred to Brazos County.

Even though controverting affidavit filed untimely, because Julia and Roberto did not have standing to intervene in the first place, the parties should be returned to the position they were in prior to the filing of the petition in intervention. In order to accomplish this, the proceeding should be transferred back to Burleson County.

SAPCR
Temporary Orders

TRIAL COURT MAY NOT CHANGE THE CONSERVATOR WITH THE RIGHT TO DETERMINE THE CHILD'S PRIMARY RESIDENCE IN A TEMPORARY ORDER UNLESS IT IS SHOWN THAT THAT THE CHILD'S PRESENT CIRCUMSTANCES WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

In re Charles, No. 03-17-00731-CV, 2017 WL 5985524 (Tex. App.—Austin 2017, orig. proceeding) (mem. op.)(12-01-17).

Facts: In January 2014, the trial court signed an order giving Mother the right to determine the child's primary residence. In January 2016, the trial court signed an order, which stated that the Child's primary residence would be kept "in Bell or any contiguous county." In August 2017, Father filed a petition to modify, seeking the right to designate the Child's primary residence. Father's motion and affidavit did not refer to the requirements of section 156.006, make any allegations that the present circumstances would significantly impair the child's well-being, or provide any factual basis for inferring such a fact.

The trial court held a hearing in September 2017. At the hearing, Father testified that Mother had moved to Arlington, violating the limitation that she stay in Bell County or a contiguous county, that Mother had hidden the child from Father, and that Mother would not tell Father where the child was or let him speak to her. Father also testified that the child was "not being well taken care of" by Mother.

Mother gave some controverting testimony.

At the conclusion of the hearing, the trial court stated that it was making "temporary orders pending further hearing and further orders" and that under those temporary orders, Father would have the right to designate the child's primary residence. The court stated that because Mother had "chosen to leave the area," she would have to pick up and drop off the child for her visitations. The trial court did not state any findings of fact or refer to the standards set out in section 156.006. Mother sought mandamus relief from this order.

Holding: Mandamus conditionally granted

Opinion: The trial court abused its discretion in holding a hearing based on Father's motion to modify and accompanying affidavit. Section 156.006 provides that a trial court must deny relief and refuse to schedule a hearing on a motion to modify if the party seeking the change does not provide an affidavit setting out "facts that support the allegation that the child's present circumstances would significantly impair the child's physical health or emotional development." Although holding a hearing on an insufficient affidavit may be harmless error if the evidence provided at the hearing supports an allegation of significant impairment, based on the evidence produced in this hearing, the court abused its discretion in issuing the temporary order taking from Mother the right to designate the child's primary residence. "Texas courts have recognized that the 'significant impairment' standard in section 156.006(b)(1) is a high one," and that standard requires "evidence of bad acts that are more grave than violation of a divorce decree or alienation of a child from a parent."

SAPCR
Alternative Dispute Resolution

THE MERE POSSIBILITY OF TERMINATION AT THE TIME AN MSA IS ENTERED DOES NOT SUFFICE TO MAKE SECTION 153.0071 INAPPLICABLE.

In re G.V., ___ **S.W.3d** ___, No. 02-17-00220-CV, 2017 WL 6422132 (Tex. App.—Fort Worth 2017, no pet. h.) (12-18-17).

Facts: DFPS filed its "Original Petition for Protection of a Child, For Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship" against Father and Mother in regards to 3-month-old Betty, who had several fractures, and two-year-old Andrew, who had no injuries. The petition sought termination under Chapter 161 and also encompassed conservatorship and child-support issues under Chapter 153. After an evidentiary hearing, the Department was appointed as the children's temporary conservator.

The children were placed with the Jones, Mr. Jones being Father's paternal great uncle. Subsequently, Jane Doe, a person who had had regular contact with the children in the past, filed an intervention seeking appointment as the children's possessory conservator alleged that appointment of Mother and Father as conservators would significantly impair the children's physical health or emotional development.

Subsequently, the Department, the Joneses, Father, Mother, and Jane Doe filed a "Binding [Mediated] Settlement Agreement" pursuant to Family Code Section 153.0071. After which, the Department filed a "Motion to Modify Managing Conservatorship in a Suit Affecting the Parent-Child Relationship." The Department sought to have itself removed as managing conservator and to have the Joneses appointed as managing conservators. The Department additionally sought to have Father, Mother, and Jane Doe appointed as possessory conservators.

Afterwards, Father and Mother replaced their original attorney and filed a joint objection to the MSA but not on any of the grounds set forth in Section 153.0071. On June 1, 2017, relying specifically on section 153.0071(e), the Department filed a motion to enter judgment. At the hearing, the Department put on no evidence. That same day, the trial court signed its "Final Order in Suit Affecting the Parent-Child Relationship" and appointed the Joneses as the children's permanent managing conservators and Father, Mother, and Jane Doe were appointed possessory conservators. Mother and Father appealed.

Holding: Affirmed

Majority Opinion (Kerr): Father and Mother asserted that section 153.0071(e) does not apply to suits to terminate the parent–child relationship brought under family code Chapter 161. They contend that because termination under Chapter 161 was foundational to this suit, the trial court erred by granting the motion to enter judgment on the MSA based on section 153.0071. Although the Department's suit did not result in a Chapter 161 termination, Father and Mother argue that because termination was still a possibility at the time they negotiated and agreed to the MSA, section 153.0071 does not apply.

The mere possibility of termination at the time an MSA is entered does not suffice to make section 153.0071 inapplicable—that is, the parents do not have the ability to revoke an otherwise-binding MSA that modified managing conservatorship simply because the Department initially and conditionally pleaded for termination.

Dissenting Opinion (Walker): The State's contractual rights to enforce a mediated settlement agreement (MSA) in a parental-rights-termination suit so not trump the rights—inherent, constitutional, and statutory—that Texas parents possess concerning their children.

SAPCR
Conservatorship

FOR NONPARENT TO BE APPOINTED AS MANAGING CONSERVATOR, THE NONPARENT'S EVIDENCE MUST USUALLY INCLUDE SHOWING OF PHYSICAL ABUSE, SEVERE NEGLECT, ABANDONMENT, DRUG OR ALCOHOL ABUSE, OR VERY IMMORAL BEHAVIOR ON THE PART OF PARENT.

In re M.F.M., No. 07-16-00117-CV, 2017 WL 5473757 (Tex. App.—Amarillo 2017, no pet. h.) (mem. op.) (11-14-17).

Facts: M.F.M. born to unmarried Mother and Father in 2008. At the time of final hearing, M.F.M. almost 8 years old. M.F.M. lived with Mother and Grandmother for most of her life. Mother died in September 2013. M.F.M. continued to live with Grandmother after Mother's death.

In August 2014, Father filed an original SAPCR seeking SMC of M.F.M. After a hearing in January 2015, the trial court signed temporary orders, granting Grandmother and Father temporary JMC of M.F.M. and giving Grandmother

the exclusive right to designate M.F.M's's residence and ordered Father to pay monthly child support of $500. In her counter-petition, Grandmother asked the court to appoint her SMC of M.F.M.. Father requested that he be appointed SMC because he is the remaining biological parent.

At the conclusion of the hearing, the court appointed Grandmother and Father as JMCs, giving Grandmother the exclusive right to designate M.F.M's residence, and found such placement was in the child's best interest. The court stated, "I do think that taking the child from the grandmother and forcing her to go with a father, whom she barely knows, would be detrimental to the child. The father should have standard visitation." Father appealed.

Holding: Reversed

Opinion: Although trial courts are afforded broad discretion in deciding family law questions, the legislature has explicitly limited the exercise of that discretion when a nonparent seeks to be appointed as managing conservator. When a court determines conservatorship between a parent and a nonparent, a presumption exists that appointing the parent as the sole managing conservator is in the child's best interest. Evidence showing that the nonparent would be a better custodian of the child does not suffice, and close calls should be decided in favor of the parent. *Id.* (citation omitted). The nonparent may rebut the presumption with affirmative proof, by a preponderance of the evidence, that appointing the parent as managing conservator would significantly impair the child, either physically or emotionally. Courts generally require the nonparent to present evidence that a parent's conduct would have a detrimental effect. That evidence must support a logical inference that the parent's specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed. Such evidence usually includes a showing of physical abuse, severe neglect, abandonment, drug or alcohol abuse, or very immoral behavior on the part of the parent.

Father testified that he and Mother had a 2-year dating relationship. When the couple broke up, M.F.M. lived with Mother while Father went back to Mexico. M.F.M. was approximately 8t months old at that time. Father admitted he did not provide financial support for M.F.M. from the time of the break up in 2009 until he was ordered to pay child support in 2014. Father testified that before Mother died, it was Mother's responsibility to provide for all of the child's needs "because she had her." He told the court he maintained regular telephone contact with Mother and M.F.M. for a period of time but was unaware Mother died until some months after her passing. He did acknowledge he was aware M.F.M. lived with Grandmother and had gone to her home to confirm the death of Mother. He did not attempt to take custody of M.F.M. at that time.

From the time of Father's breakup with Mother, Father knew where M.F.M. lived but chose to leave her in the care of Mother and Grandmother. Father testified he called every 15 days or so while he was in Mexico but Grandmother testified he did not. Father failed to support M.F.M. and left her with Grandmother after Mother's death. Father was not involved with M.F.M. before Mother died and only he asserted he made efforts to retrieve the child after her death.

Father testified to his plans for M.F.M. and his willingness and ability to care for her. He told the court he was now married, both he and his wife are employed, they live in a 2-bedroom apartment and have a room for M.F.M. Photographs of that room were admitted. Father also testified he and his wife had the ability to support M.F.M., had spoken with doctors for her care, and had determined the school she would attend. Father's wife also testified she loved M.F.M. and would like for the child to live with her and Father. She told the court she believed Father loved the child and was able to care for her and financially provide for her. The wife also testified to visits with the child during the pendency of the case.

Grandmother testified her husband worked while she stayed home with M.F.M. She told the court M.F.M. was eight years old, had lived with her since 2010, had attended the same school during the past 2 years, and had done very well. She denied Father had maintained contact with M.F.M. and Father knew from at least February 2014 that M.F.M. lived with her. He came to her home looking for Mother at that time and voluntarily left M.F.M. in her care.

A counselor testified she met with M.F.M. seven times. She described M.F.M. as "a pretty happy, fun-loving, very open child." She told the court M.F.M. "had recently started visits with her biological father, who she refers to, to me, as Manuel. And she was experiencing some conflictual feelings and some confusion and things of that nature." The counselor also testified M.F.M. told her "her dad has said that they're going to take her away from grandma without grandma knowing. That made her feel unsafe and scared to go." Also, M.F.M. told her counselor her father's wife "wasn't very nice to her" and "hated her and her family" and that her father "didn't like her grandmother or her family or cousins." The counselor said, "[a]nd so she—she felt really conflicted, because she's, like, 'I love these people. I've been living with them. They're my family. But I meet this person, and he doesn't love my family, and I feel very confused." M.F.M. also told her counselor she felt like the father was "trying to win me" by buying her many things.

Counselor testified M.F.M. seemed well-adjusted to living with Grandmother. Counselor also noted the passing of a mother is "very significant to a child on an attachment level, an emotional level, even school attendance and participation level." Counselor opined that "remaining with grandmother is probably going to be the best thing ... the fact that she doesn't feel currently bonded to her dad ... would put her at risk." She recommended M.F.M. remain living with Grandmother" and continue visitation Father and in her best interest to grow a relationship with Father.

During cross-examination, the counselor testified, "I believe that due to the lack of bond that she has with [the father], I think that it would emotionally be detrimental to her at this time for her to go primarily live with him." She also told the court that while she wanted M.F.M. to have a relationship with Father, she thought "it could potentially signifi-

cantly impair [M.F.M.] because she would lose everything that she knows and move to a place where she doesn't know anything other than the people she lives in the home with."

The Court concluded that although the trial court had before it evidence that it would likely be difficult for M.F.M. to be removed from Grandmother's home, the evidence did not support a finding that appointment of Father as M.F.M's SMC would significantly impair M.F.M.'s physical health or emotional development. While acknowledging Counselor's testimony in which she pointed specifically to the death of M.F.M.'s mother as being significant with regard to attachment, explicitly noted the child's lack of bond with Father, and clearly told the court it would "emotionally be detrimental to [M.F.M.] at this time for her to go primarily live with him," the Court concluded this evidence did not rise to the level of significant impairment to M.F.M's physical or emotional development as required under the statute.

ABSENT EVIDENCE SHOWING THAT IT HAS HAD A MATERIAL, ADVERSE EFFECT ON THE ABILITY TO PARENT, IMMIGRATION STATUS SHOULD NOT BE USED AS A BASIS TO DENY JOINT MANAGING CONSERVATORSHIP.

Turrubiartes *v. Olvera*, ___ S.W.3d ___, No. 01-16-00322-CV, 2017 WL 6459478 (Tex. App.—Houston [1st Dist.] no. pet. h.)(12-19-17).

Facts: Mother and Father have 3 children, who were born before their marriage. The couple married in February 2013 and separated in October or November 2014, after Mother and a neighbor had an altercation. The altercation arose when Father told the neighbor that the neighbor's husband and Mother were having an extramarital affair. After the altercation with her neighbor, Mother left with the children.

The trial court heard mostly conflicting testimony from Mother and Father as to conservatorship. No other witnesses testified and the parties introduced little documentary evidence. The trial court heard non-conflicting testimony from both Mother and Father about her immigration status. While Father is a United States citizen, Mother is an undocumented immigrant. Mother drives without a driver's license, which she cannot obtain as an undocumented immigrant. She testified that she intends to apply for legal status in the country. But Mother conceded that she had not yet applied for that status.

The trial court divided the property as requested by Father, and appointed him as sole managing conservator and Mother as possessory conservator. The trial court also ordered Mother to have a licensed driver pick up and return the children during the periods when they were to be in her custody.

Mother filed a motion for new trial contending that the trial court refused to appoint her as a joint managing conservator based on her national origin and immigration status. The trial court denied her motion. The trial court made two dozen fact findings; nine refer to Mother's immigration status. Among other things, the court concluded that Mother lacked stability "due to her immigration status." It also noted that Father, by contrast, is a United States citizen.

Holding: Portion of final decree of divorce appointing the father as sole managing conservator reversed, the remainder of the decree affirmed, and case remanded to the trial court for a new trial solely on the issue of conservatorship.

Opinion: Immigration status, standing alone, is not probative of Mother's fitness to be a parent to her children so as to deny her joint managing conservatorship. The trial court heard no evidence in this case regarding any detention or immigration-related charge, any pending removal proceeding, or that Mother was a subject of any criminal prosecution. The trial court expressly found that there was no evidence that Mother "has been detained by immigration authorities since coming to this country in 2006, or that she is the subject of any removal proceedings against her." The trial court's orders otherwise protected the children by requiring that they travel with a licensed driver and by designating Father as the parent to determine the children's residence and school.

Given that the court granted primary possession of the children to Father and ordered Mother to have a licensed driver pick up and return the children in connection with her periods of possession, her immigration status was collateral to the children's best interest. Absent evidence showing that it has had a material, adverse effect on the ability to parent, immigration status should not be used as a basis to deny joint managing conservatorship.

SAPCR
Possession

UNDER LIMITED CIRCUMSTANCES, A COURT MAY DELEGATE SOME AUTHORITY TO A NEUTRAL THIRD PARTY IN ORDER TO BOTH PROTECT THE BEST INTEREST OF A CHILD AND TO MINIMIZE, WHEN POSSIBLE, THE RESTRICTIONS PLACED ON A PARENT'S RIGHT TO POSSESSION OF AND ACCESS TO HIS CHILD. HOWEVER, THE ORDER DOING SO MUST BE SUFFICIENTLY SPECIFIC SO AS TO BE ENFORCEABLE BY CONTEMPT.

Waters v. Waters, No. 04-16-00690-CV, 2017 WL 6345223 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.)(12-13-17).

Facts: Beth filed a petition for divorce on June 6, 2016, and the trial court called the case for trial on September 26, 2016. At that time, Father was serving a fifteen year prison sentence for aggravated assault with a deadly weapon and was awaiting trial on other charges. Father represented himself at trial pro se.

Based on the testimony presented, the trial court signed a final decree of divorce appointing Beth as sole managing conservator and Father as possessory conservator.[2] The decree ordered the children to continue counseling and ordered both Beth and Father to comply with the counselor's requests. The decree ordered that any possession and access between Father and the children would be determined by the children's counselor. Among other issues, Father challenged the trial court's order giving the children's counselor the authority to determine Father's possession time with the children.

Holding: Affirmed in part, reversed and remanded in part.

Opinion: Generally, trial courts must exercise their judicial power to decide disputed issues and not delegate the decision of questions within their jurisdiction. However, limited circumstances may require the delegation of some authority to a neutral third party in order to both protect the best interest of a child and to minimize, when possible, the restrictions placed on a parent's right to possession of and access to his child. However, we also noted the trial court's ability to obtain assistance from a third party is not limitless. The trial court must maintain the power to enforce its judgment. Specifically, the trial court's order appointing a third party to assist in deciding issues related to possession and access must be sufficiently specific so as to be enforceable by contempt.

Here, the record supports the trial court's conclusion that restricting Father's possession and access is in the children's best interest. The record also supports the trial court's decision to appoint the children's therapist to assist the court in deciding issues related to Father's possession and access. The trial court's order, however, fails to provide any guidelines or specific terms under which Father would be permitted to exercise his right of possession and access.

SAPCR
Child Support

ONCE AN OBLIGOR OFFERS PROOF OF HER CURRENT WAGES, THE OBLIGEE MUST DEMONSTRATE THE OBLIGOR IS INTENTIONALLY UNEMPLOYED OR UNDEREMPLOYED IN ORDER TO RECEIVE CHILD SUPPORT COMPUTED ON EARNING POTENTIAL.

In re J.D.A., No. 05-17-00053-CV, 2017 WL 6503094 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.)(12-19-17).

Facts: Mother and Father, parents of child, divorced in August 2011. Following trial, the trial court signed a divorce decree appointing Mother and Father as joint managing conservators, giving Mother the exclusive right to designate the primary residence, and ordering Father to pay monthly for child support.

In November 2015, the parties entered into an MSA and an Agreed Order was entered, which kept in place prior orders but included a geographical restriction to the child's elementary school in Coppell until Father moved within that area, and at that time would have increased access. Three months after Father moved into the area, Mother advised that she was moving to Arlington. Father then filed a motion to modify seeking primary conservatorship of the child and child support from Mother and supervised possession for Maternal Grandfather.

At trial, Mother testified that she moved for financial reasons, that she was a self-employed CPA, that she made $15,000/year, and that she couldn't work more because of her MS, which caused fatigue and limited the hours that she could work. Mother testified as to her monthly expenses. Father acknowledged that Mother suffered from fatigue and questioned her ability to raise the child and told the court that he believed Mother made more than she testified to. The trial court asked Mother why she was underemployed; Mother responded that it was due to her health and the ongoing litigation. The trial court then stated on the record, "I'll look up what a public accountant makes, and I'll determine what your child support is on that amount." The trial court issued a ruling that day naming father as primary JMC and ordered Mother to pay $652/month in child support based on the trial court's findings that Mother was intentionally underemployed and the median salary for a CPA in Tarrant County was $50,000. The ruling also included a permanent

injunction precluding Maternal Grandfather from unsupervised access to J.D.A. The trial court subsequently entered a Final Order. Although timely requested, the trial court never filed FOF and COL. Mother appealed.

Holding: Modified in part, reversed in part, and remanded.

Opinion: Once an obligor offers proof of her current wages, the obligee must demonstrate the obligor is intentionally unemployed or underemployed in order to receive child support computed on earning potential. At the close of evidence, the trial court entered findings into the record, including that Mother is a CPA, Mother is intentionally underemployed, and the median annual salary for a CPA in Tarrant Count is $50,000. The Final Order incorporated those findings and assessed monthly child support of $652, which the trial court derived by applying the statutory percentage guideline to a monthly net resource amount based on an annual income of $50,000.

The evidence of Mother's current wages was $1000 per month. Although Father had the burden to show intentional underemployment, he neither alleged in his petition to modify that Mother was intentionally underemployed nor produced any evidence on the issue beyond his wholly speculative testimony that he believed she was making more and was "either lying to the court or underemploying herself." Father produced no evidence to show what Mother previously earned. Without some evidence of Mother's past income, the trial court had no basis for finding that she was intentionally making "significantly less."

Further, the record is devoid of any evidence of Mother's earning potential. Although the trial court planned to "look up what a public accountant makes" and subsequently entered a finding that the median salary of a CPA in Tarrant County was $50,000, there was no evidence admitted in the record at trial to support that finding or any finding that Mother actually had the capacity to earn $50,000 annually or any level of annual earning other than $12,000 to $15,000.

Because there was no evidence of a "substantive and probative character" to support the trial court's finding that Mother is either intentionally underemployed or has an earning potential of $50,000 per year, the trial court abused its discretion by ordering Mother to pay $652 in monthly child support.

SAPCR
Child Support Enforcement

THE TEXAS FAMILY CODE PROHIBITS A TRIAL COURT FROM HOLDING A PARTY IN CONTEMPT BY DEFAULT.

In re Daniels, No. 05-17-01260-CV, 2017 WL 6503107 (Tex. App.—Dallas 2017, orig. proceeding) (mem. op.)(12-19-17).

Facts: On April 17, 2017, Father filed a motion to enforce the trial court's November 7, 2016 child support order. In the motion, he argued that Mother was in contempt of court for failure to pay child support and requested, among other relief, that Father be incarcerated for up to 180 days and fined up to $500 for each violation of the order. By order dated April 24, 2017, the trial court ordered Mother to appear and respond to the motion at a hearing scheduled for June 16, 2017. Mother filed a vacation letter on May 4, 2017 setting out dates that she was unavailable due to vacation or work-related travel. In the letter, Mother asked the trial court not to set trial, hearings, or any matters on the dates listed. One of the travel dates listed was June 16, 2017, the date set for the hearing on Father's motion for enforcement. Mother filed a formal answer denying the allegations in the motion for enforcement on May 25, 2017.

The trial court held the hearing as scheduled on June 16, 2017 and entered a default judgment holding Mother in contempt for failure to pay child support. The contempt order states that Mother was present for trial on the motion for enforcement, but that is incorrect. Mother did not appear at the hearing. The trial court found Mother in contempt for failing to make 5 child support payments, found an arrearage, awarded Father attorney's fees, assessed an $100 fine against Mothers, and ordered Mother committed to the county jail for 15 days. The trial court suspended commitment and, as a condition of the suspension, ordered Mother to pay $252.00 per month beginning July 1, 2017 until she has paid the full child support arrearage and accrued interest.

Thereafter, Mother filed a motion to set aside default judgment and motion for new trial. In an affidavit in support of those motions, Mother stated that she did not intentionally fail to appear at the hearing. She averred that she did not see the notice of hearing when she received the motion for enforcement because it was attached to the back of the motion, and she trusted that the court would not set a hearing on any of the dates listed in her vacation letter. Mother sought mandamus relief.

Holding: Mandamus conditionally granted.

Opinion: The Texas Family Code prohibits a trial court from holding a party in contempt by default. Tex. Fam. Code §§ 157.066, 157.115(b). If a respondent fails to appear, the trial court may order a capias be issued but may not hold the party in contempt. *Id.* Violating sections 157.066 and 157.115 renders the contempt order void. In addition, the con-

tempt and commitment orders are void because the trial court failed to admonish Mother of her right to counsel in accordance with section 157.163 of the family code.

MISCELLANOUS

TRIAL COURT CANNOT LIMIT EVIDENCE PRESENTED AT DE NOVO HEARING TO JUST THE TRANSCRIPT FROM THE HEARING BEFORE THE ASSOCIATE JUDGE.

In re R.R., ___ S.W.3d __, No. 03-17-00692-CV, 2017 WL 5559945 (Tex. App.—Austin 2017, orig. proceeding) (mem. op.) (11-17-17).

Facts: In February 2017, the Department sought emergency custody over the Child, who was about 7 months old at the time. The Department alleged Mother brought Child to an emergency room because she noticed his leg was swollen and that the doctors determined that Child had fractures in his right femur and left tibia, as well as "numerous other fractures in various stages of healing." The doctors contacted the Department because they suspected physical abuse, and relator gave several possible explanations for Child's injuries, including having his legs caught between the slats of his crib, falling from the bed to the floor, or having his leg caught in a walker. The cause was referred to the associate judge for a hearing on aggravated circumstances, which allows a trial court to waive the requirement of a service plan or to attempt to reunify the family and to accelerate the trial schedule. The associate judge held a hearing, at which several witnesses testified, and on August 11, she issued an order determining that relator had subjected Child to aggravated circumstances, stopping all visitation between Mother and Child immediately, and waiving the requirement of a service plan or reasonable reunification efforts. Mother filed a request for a de novo hearing. The Department objected, arguing among other things that the district court should only consider the transcript from the associate judge's hearing. The district court held a hearing on the issue and signed an order stating that it would limit its consideration to the transcript from the associate judge's hearing. Mother sought mandamus relief.

Holding: Conditionally granted

Opinion: In the de novo hearing, which is mandatory when properly requested, the parties may present witnesses on the issues specified in the request for hearing, and the referring court may also consider the record from the hearing before the associate judge. A de novo hearing is a new and independent action on those issues raised in the request for a hearing. Because a de novo hearing is a new and independent action, the party with the burden of proof, having prevailed before the associate judge, must still carry its burden in a de novo hearing before the referring court. The statute further provides that in the de novo hearing, the referring court may consider the transcript from the hearing before the associate judge, but also that the parties *may present witnesses* on the issues specified in the request for hearing.

NOTICE OF APPEAL UNTIMELY FILED BECAUSE APPELLATE DEADLINES NOT EXTENDED BY LATE-FILLED REQUEST FOR FINDINGS.

Zhuang v. Zhang, No. 01-17-00518-CV, 2017 WL 5712544 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (mem. op.) (11-28-17).

Facts: Husband attempted to appeal the final decree of divorce. Wife filed a motion to dismiss because Husband's notice of appeal was untimely.

Holding: Dismissed for Want of Jurisdiction

Opinion: Husband's request for findings was untimely because it was not made within 20 days after the final decree was signed. Thus, the appellate deadlines were not extended, and the notice of appeal filed 60 days after the judgment was untimely.

SUBSTITUTE SERVICE INVALID BECAUSE SERVICE OCCURRED BEFORE ORDER ISSUED.

Owsley v. Owsley, No. 13-17-00025-CV, 2017 WL 1075597 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (11-30-17).

Facts: Husband acquired an order for substitute service on Wife in his suit to enforce the divorce decree. The substitute service order stated that service could be made by serving the office manager at Wife's office and by taping a copy of the citation and petition to Wife's door at her home. The process server's affidavit stated that he personally served Wife by affixing the documents to her door and that he personally served a female who identified herself as the office manager at Wife's office. However, the affidavit stated that the citation was affixed to Wife's door nearly a month before the order for substitute service was signed. After receiving notice of the default judgment, Wife appealed.

Holding: Reversed and Remanded

Opinion: Substitute service may only be made with prior authorization.

TEXAS LAW DOES NOT ALLOW A PARTY TO EVADE DISCOVERY REQUESTS BY SIMPLY ASSERTING THAT THE OTHER PARTY ALREADY HAS THE INFORMATION.

In re Sting Soccer Group, LP, No. 05-17-00317-CV, 2017 WL 5897454 (Tex. App.—Dallas 2017, orig. proceeding) (mem. op.) (11-30-17).

Facts: A Manufacturer and a Store were parties to a contract in which the Store would be the exclusive provider for the Manufacturer's goods. The Store failed to sell all of the 2016 inventory. The Manufacturer expected the Store to purchase 2017 inventory, but the Store believed the Manufacturer should be required to buy back the unsold 2016 inventory. The Manufacturer notified the Store it was terminating the contract, and the Store sued the Manufacturer and other defendants for breach of contract and breach of fiduciary duty. The Manufacturer served discovery requests on the Store, to which the Store responded with multiple objections. The Manufacturer filed a motion to compel, and the trial court sustained many of the Store's objections. The Manufacturer sought mandamus relief.

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

Opinion: Work product is not a proper objection to contention interrogatories (requests seeking a party's legal or factual contentions). Thus, the Store could not use the work-product objection to avoid those interrogatories. Further, no authority supported the Store's assertion that the Manufacturer should have made those requests through a request for disclosure as opposed to interrogatories.

Interrogatories are limited to a total of 25, including subparts. However, simply identifying the type of facts the serving party would like to know does not count as "subparts." Thus, the Manufacturer did not exceed 25 interrogatories, and the Store's objection lacked merit.

Texas law does not allow a party to evade discovery requests by simply asserting that the other party already has the information. Not only do such requests ensure that the parties have the same basic documents, requiring your opponent to produce certain documents enables the party seeking discovery to activate the automatic authentication rights provided by Tex. R. Civ. P. 193.7.

Although the Store argued that the requests for production were overbroad, burdensome, and an improper fishing expedition, the Store presented no argument or evidence to support that objection. Thus, the trial court erred in sustaining that objection.

The trial court did not err in sustaining the Store's objections to the Manufacture's requests for admissions of legal conclusions because parties may not be compelled to answer such requests and such an admission would have no effect on the trial court's conclusions of law.

Finally, the Store argued that the discovery requests were unduly burdensome because of the multiple defendants with substantially similar discovery requests. However, the Store chose to sue multiple defendants, and those defendants were under no obligation to consolidate their discovery requests.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM ONLY AVAILABLE IF ANOTHER THEORY OF RECOVERY WOULD NOT SUFFICE.

Finley v. May, No. 07-17-00233-CV, 2017 WL 5763076 (Tex. App.—Amarillo 2017, no pet. h.) (mem. op.) (11-28-17).

Facts: Father sued Mother for intentional infliction of emotional distress claiming that she caused him such distress by her efforts to alienate their 2 children from him. Her efforts were purportedly manifested through her interference with his possessory rights regarding the children and her utterance of false accusations about him. The trial court denied Ex-Husband's claim.

The trial court disallowed any recovery any acts that occurred prior to the children's 18th birthday; however, it allowed him to prosecute his suit to the extent he sought redress for misconduct occurring thereafter. Father apparently construed the decision to mean that his suit for IIED was untimely or barred by the statute of limitations in part. In addition to finding that Father's suit was limited to misconduct occurring after the children turned 18, the trial court found that IIED is a 'gap-filler' cause of action available only when no other alternative cause of action is available to plaintiff."

Holding: Affirmed

Opinion: The Texas Supreme Court observed that "intentional infliction of emotional distress is a 'gap-filler' tort that should not be extended to circumvent the limitations placed on the recovery of mental anguish damages under more established tort doctrines." Its "purpose is to supplement existing forms of recovery by providing a cause of action for egregious conduct 'that its more established neighbors in tort doctrine would technically fence out.' "

The appellate court further held that Father had other remedies pursuant to Chapter 42 of the Family Code, which provides that a "person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person." Furthermore, the legislature defined "possessory right" to mean "a court-ordered right of possession of or access to a child, including conservatorship, custody, and visitation." The damages recoverable included, among other things, those attributable to "mental suffering and anguish incurred by the plaintiff because of a violation of the order."

The appellate court further noted that Father's decision to wait until the children turned 18 did nothing to prevent Mother's alleged bad behavior, whereas a suit prior to that time would have served a more remedial purpose. The mere possibility that IIED might result in a higher damage recovery, does not justify ignoring the Supreme Court's mandate that IIED claims are only available when recovery under another theory would not suffice.

TO PRESERVE ERROR, THE COMPLAINING PARTY MUST MAKE A TIMELY OBJECTION WITH SUFFICIENT SPECIFICITY TO MAKE THE TRIAL COURT AWARE OF THE COMPLAINT.

In re M.M.W., ___ S.W.3d ___, No. 06-17-00067-CV, 2017 WL 5907851 (Tex. App.—Texarkana 2017, no pet. h.) (12-01-17).

Facts: DFPS sought termination of Mother's parental rights to her two children on various grounds. After a trial, Mother's parental rights were terminated. Mother appealed. In her sole issue, Mother argued that the trial court should have excluded testimony from both the Department's caseworker and the Court Appointed Special Advocate that termination of Mother's parental rights was in the best interests of the children. Specifically, Mother points out that the Department failed to qualify the witnesses as expert witnesses. Accordingly, she argues that the trial court should have excluded the lay witness testimony because it was opinion testimony that was not helpful to the jury in determining a fact in issue.

Holding: Affirmed

Opinion: Mother failed to preserve error pursuant to Texas Rule of Appellate Procedure 33.1. In order to preserve error on this point, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:
    (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context.

Here, when the Department asked each witness whether they believed that Mother's parental rights should be terminated, Mother objected on the ground that the question "[c]all[ed] for a conclusion." No further explanation was provid-

ed. After this objection was overruled, both witnesses answered in the affirmative. This objection was no specific enough to preserve Mother's complaint.

THE COURT OF CONTINUING JURISDICTION MAY ASSIGN, BUT NOT TRANSFER, A CASE TO ANOTHER COURT WITH CONCURRENT JURISDICTION WITHIN THE SAME COUNTY WITHOUT THE FILING OF A MOTION BY A PARTY.

Ward v. Ward, No. 09-17-00024-CV, 2017 WL 6062133 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.)(12-07-17).

Facts: Husband filed for divorce in the 253rd District Court in Liberty County. After Wife filed her answer, the case was transferred to the 75th District Court. Subsequently, the Judge of the 75th District Court signed a final decree of divorce. Several months later, Wife filed a motion to clarify several aspects of the property division. Several months after that, Husband filed a petition to modify his child support. Subsequently, the parties each filed motions for enforcement. The Judge of the 75th District Court signed an "Order Assigning Case[,]" in which it stated that the cause "is hereby assigned to the County Court at Law of Liberty County, Texas. The County Court at Law will have jurisdiction over this cause for all purposes."

Several months later, the County Court at Law conducted a hearing on all of the party's various motions. The trial court signed the order on February 11, 2016, and wrote underneath the date that the order is "effective 12–21–15[.]" The order denied Wife's motions and granted Husband's.

On June 21, 2016, Wife filed an expedited motion to set aside the trial court's order due to the County Court at Law's alleged lack of jurisdiction. In that pleading, Wife alleged that her attorney did not receive notice of the February 11 hearing for entry of the court's judgment of December 21, 2015, nor did her attorney receive notice that the trial court had signed a final, appealable order. According to Wife, the "transfer" of the petition to modify to the County Court at Law was issued *sua sponte*, and the County Court at law therefore lacked jurisdiction to enter any orders. As support for her jurisdictional argument, Lisa cited sections 155.001, 155.002, and 155.202(b) of the Texas Family Code. Wife argued that a transfer from a court with continuing, exclusive jurisdiction to another court requires a written motion, hearing, and order, and that since none existed, the County Court at Law lacked jurisdiction. Wife's motion was denied. Wife appealed.

Holding: Affirmed

Opinion: Under Government section 74.093, "the only limitation on local rules governing transfer of cases within a county is that the case must be transferred to a court that has jurisdiction over the case." The Government Code specifically provides that "a county court at law in Liberty County has concurrent jurisdiction with the district court in family law cases and proceedings." When the two courts at issue have concurrent jurisdiction, the jurisdictional limitation on transfers contained in section 74.093 is not implicated.

Given that the judge of the 75th District Court entitled his order "Order Assigning Case[,]" stated in the order that the case "[i]s hereby assigned to the County Court at Law of Liberty County, Texas[,]" and noted in the order that the County Court at Law "will have jurisdiction over this cause for all purposes[,]"the order was an *assignment* of the case to a court that had concurrent jurisdiction, not a *transfer* of the case to the County Court at Law by the court of continuing, exclusive jurisdiction as contemplated by the Family Code. *See* Tex. Fam. Code Ann. §§ 155.001(a), (c), 155.002; Tex. R. Jud. Admin. 9.

ABATING CASE FOR APPROXIMATELY FIVE YEARS FOR A RULING BY IRS EFFECTIVELY VITIATES DEFENDANT'S ABILITY TO PRESENT A CLAIM OR DEFENSE.

In re Shulman, ___ S.W.3d ___, No. 14-17-00508-CV, 2017 WL 6331176 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (12-12-17).

Facts: Wife engaged attorney Shulman to provide tax planning advice regarding certain property transfers benefitting Wife as a result of a divorce settlement with Husband. Wife later sued Shulman alleging negligence, breach of fiduciary duty, and other claims. Wife claims principally that Shulman's alleged wrongful conduct exposed her to approximately $1.6 million in potential federal tax liability. After Shulman moved for summary judgment, Wife filed a motion to abate all of her claims until potentially August 2021, when she contends the limitations period for the IRS to assess taxes will

expire. The trial court abated the case "until August 15, 2021 or until the IRS assesses the tax liability at issue in the lawsuit, whichever is sooner." Before abating the case, the trial court signed a separate order compelling Shulman to produce documents Shulman contends are subject to the attorney-client privilege. Shulman requests mandamus relief as to both orders.

Holding: Mandamus conditionally granted in part and denied in part.

Opinion: Under the present circumstances, abating the case for the time period at issue is an abuse of discretion and effectively vitiates Shulman's ability to present a claim or defense so mandamus granted as to that order. However, as to the order to produce documents because the trial court has not finally refused Shulman's motion to reconsider and request to review the documents *in camera* so mandamus is denied as to that order.

THE PARTY WHO IS SUBJECT TO BEING SANCTIONED MUST BE GIVEN NOTICE REASONABLY CALCULATED, UNDER THE CIRCUMSTANCES, TO APPRISE THE PARTY OF THE PENDENCY OF THE ACTION AND AFFORD HIM THE OPPORTUNITY TO PRESENT HIS OBJECTIONS.

Bellow v. McQuade, No. 09-16-00165-CV, 2017 WL 6559053 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.)(12-21-17).

Facts: On January 26, 2016, Father, acting pro se, filed a verified petition for an ex parte emergency temporary restraining order and temporary injunction seeking to enjoin the Child's dentist from performing a non-emergency, invasive dental procedure that required intravenous sedation by an anesthesiologist on his three year old son. The trial court signed an Ex Parte Temporary Restraining Order on that same day.

The following day, Mother sought to intervene in the lawsuit and filed her Motion to Vacate Ex Parte Temporary Restraining Order, Motion to Dismiss for Lack of Jurisdiction and Motion for Sanctions, as well as a Motion to Show Cause. The trial court signed an Order to Appear and Show Cause ordering Father to appear before the court on the following day, January 28, 2016, at 2:30 p.m.

On January 28, 2016, prior to the show cause hearing, Father filed his Motion to Withdraw Petition for Temporary Injunction, Motion to Strike Hearing, and Motion to Rescind Emergency Temporary Restraining Order. Additionally, Father simultaneously filed pleadings, among other things, objecting to the lack of notice for the show cause hearing and request for sanctions.

On February 5, 2016, the trial court dismissing the ex parte temporary restraining order and sanctioning Father $3000. Father appealed alleging that he had not received sufficient notice as to the sanctions.

Holding: Affirmed in part and reversed and remanded in part.

Opinion: Mother's motion did not expressly state the legal basis on which she was seeking sanctions. However, from the transcript of the hearing and the wording of the trial court's order, it is clear that the trial court sanctioned Bellow for his "actions and dishonesty with the Court, both verbally and in his Verified Pleadings[,]" relying, at least in part, upon the inherent power of the court to impose sanctions.

The due process clause of the United States Constitution and of the Texas Constitution limits a court's power to impose sanctions. Accordingly, imposing sanctions requires the party who is subject to being sanctioned to be given "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections."

Here, It is undisputed that Father received less than 24 hours' notice of the show cause hearing. Because the Motion for Sanctions failed to provide Father adequate notice of his allegedly sanctionable conduct, and because Father had no notice that the trial court intended to sanction him based on its inherent authority, the trial court abused its discretion by imposing sanctions at the show cause hearing that occurred on January 28, 2016.

AN APPELLEE MAY NOT RECOVER ATTORNEY'S FEES FOR WORK PERFORMED ON ANY ISSUE OF THE APPEAL WHERE THE APPELLANT WAS SUCCESSFUL, SO APPELLATE FEES IN THAT INSTANCE MUST BE SEGREGATED.

Robertson v. Robertson, No. 13-16-00309-CV, 2017 WL 6546005 (Tex. App.—Corpus Christi-Edinburg 2017, no pet. h.) (mem. op.) (12-21-17).

Facts: This is the second appeal from the underlying divorce proceeding between Husband and Wife. The divorce involved a marital property agreement, which the appellate court found to be valid and enforceable and that, contrary to the trial court's ruling, husband's proceeds from two lawsuits were his separate property, and remanded the case back to the trial court for further proceedings. The appellate court also found that Husband had waived his complaint about the award of attorney's fees to Wife.

On remand, Wife presented an amended decree that moved the lawsuit proceeds to Husband's separate property and included a $15,000 appellate attorney's fee judgment in her favor against Husband. In response, Husband filed a counter-petition asserting that other property awarded to Wife was either of mixed character or Husband's separate property. After a hearing, the trial court agreed with Wife and signed her proposed Amended Decree. Husband appealed. He first asserted that the trial court erred in signing an amended divorce decree after *Robertson I* without hearing evidence and characterizing the property in dispute. He also complained about the $15,000 in appellate attorney's fees awarded to Wfie.

Holding: Affirmed in Part, Reversed in Part, and remanded for further proceedings.

Opinion: The scope of the remand is determined by looking to both the mandate and the opinion. Here, there is no language in *Robertson I*'s opinion or mandate providing special instructions or indicating that the appellate court limited the scope of remand to any particular issue. Instead, the Court affirmed in part and reversed in part and remanded "for further proceedings consistent with [our] opinion." Therefore, the case was reopened in its entirety on all issues of fact that were not disposed of in the portion of the original final decree which we affirmed. That included the characterization of the income listed in Schedule C's allocation of income and the proceeds from Husband's two lawsuits. Here, the law-of-case doctrine bars Husband from challenging the character of the property he seeks to dispute in this second appeal. Under this doctrine, the decisions made on questions of law on appeal govern the case throughout its subsequent stages.

Husband also challenged the trial court's award of appellate attorney's fees of $15,000. An award of appellate attorney's fees must be contingent upon the appellant's unsuccessful appeal. Thus, an appellee may not recover attorney's fees for work performed on any issue of the appeal where the appellant was successful. However, an appellee may still recover attorney's fees for work performed on any issue of the appeal where the appellant was unsuccessful. If a party is entitled to attorney's fees from the adverse party on one claim but not another, the party claiming attorney fees must segregate the recoverable fees from the unrecoverable fees. The attorney's fees for time spent on addressing the issues on which Husband prevailed should have been segregated from the recoverable fees on the issues on which Wife prevailed, but they were not. Therefore, the issue of attorney's fees is remanded to the trial court for a determination of the reasonable amount of appellate attorney's fees to be awarded to Wife in view of the fact that Husband was partially successful in the first appeal. On remand, Wife must segregate the recoverable fees from the unrecoverable fees.

PARTIES ENTITLED TO 45 DAYS' NOTICE OF TRIAL DATE.

Guevara v. Guevara, No. 13-17-00410-CV, 2017 WL 6545998 (Tex. App.—Corpus Christi-Edinburgh 2017, no pet. h.) (mem. op.)(12-21-17).

Facts: Father filed for divorce from Mother. Father requested the trial court appoint him as the sole managing conservator of their children and to order Mother to pay child support. Mother filed her original answer in response to the petition for divorce in the form of a general denial and requested attorney's fees from Father. Mother also filed a counter-petition for divorce, requesting that the trial court appoint Mother the sole managing conservator of the children and order Father to pay child support. Mother also requested the trial court deny Father access to the children due to a history of family violence in the two-year period prior to the filing of the lawsuit.

On November 2, 2016, the trial court entered a written order that set the parties' petitions for divorce for final hearing on December 14, 2016, 42 days from the date of the order. On December 2, 2016, Mother's attorney filed a motion to withdraw, stating that Mother failed to comply with their agreement and had not made any payments toward her legal fees. On December 14, 2016, Mother's attorney stated to the trial court that she e-mailed Mother the motion to withdraw, to which Mother responded, but there had been no further communication between them. The trial court granted the motion to withdraw prior to the final hearing. Mother did not appear at the final orders hearing.

After hearing minimal testimony from Father, the trial court appointed Father the sole managing conservator of the children. The trial court also ordered visitation by Mother as would be agreed to by the parties. Mother was ordered to pay child support. Mother filed this restricted appeal challenging the trial court's final decree of divorce.

Holding: Reversed and remanded.

Opinion: To prevail on a restricted appeal, the appellant must establish that: (1) it filed its notice of restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any post judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.

Mother argues that error is apparent on the face of the record and that the trial court's judgment must be set aside because the trial court did not comply with the requirements of Rule 245 of the Texas Rules of Civil Procedure, causing Mother to receive less than 45 days' notice of the final hearing. Although due process can be waived by the appellant appearing, Mother did not appear at the final hearing in this case. Mother's attorney testified that Mother was aware of the hearing date based on e-mail correspondence when she moved to withdraw from the case, but no documents were offered before the trial court or this Court to show that Mother had received proper notice of this hearing date. The clerk's record in this Court also includes an entry on the docket sheet showing that there appeared to have been a prior hearing or setting where the trial court set the December 14 date. The entry does not detail who was present at this prior court setting. However, even if the entry did show Mother was present, "docket sheets are not evidence and, therefore, cannot demonstrate that proper notice was given."

Additionally, even if Mother had notice of the final hearing, the trial court still scheduled and held the hearing with less than 45 days' notice to the parties. Mother was required to have "not less than forty-five" days' notice, and the trial court violated her due process rights by holding a hearing before that.

HUSBAND'S MOTION TO CLARIFY OF DECREE TO ADD IN ENDING DATE FOR SPOUSAL MAINTENANCE FOUR YEARS LATER WAS A COLLATERAL ATTACK ON THE DECREE BARRED BY RES JUDICATA.

Lowery v. Lowery, No. 01-16-00147-CV, 2017 WL 6520428 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (mem. op.) (12-21-17).

Facts: In 2009, Husband and Wife entered into an agreed decree based upon an MSA. The decree provided for Husband to pay spousal maintenance pursuant to Texas Family Code Chapter 8 to Wife until the first occurrence of either Wife's death, Father's death, Wife's remarriage, or further order of the court affecting the spousal maintenance obligation, including a finding of cohabitation by Wife with another person in a permanent place of abode on a continuing conjugal basis. Neither party appealed the decree.

Over 4 years later, on October 29, 2014, Husband filed an original petition to modify his spousal maintenance obligation on the ground that the obligation did not terminate in accordance with Chapter 8. When Husband quit paying the maintenance, Wife filed a motion to enforce by contempt or in the alternative clarify. Husband also filed a motion to clarify.

Ultimately the trial court found that "the language in the 'Post–Divorce Maintenance' section ... of the Final Decree of Divorce is contrary to the applicable statute at the time of the commencement of the proceedings, specifically section 8.054 of the Texas Family Code." The trial court further found that the language in the 'Post–Divorce Maintenance' section of the Final Decree of Divorce is not enforceable by contempt and may be enforceable as a contract. The trial court concluded that the maintenance obligation terminated by operation of law after thirty-six months on March 12, 2012. Wife appeals the trial court's order.

Holding: Reversed.

Majority Opinion: The record does not indicate that either party appealed the 2009 divorce decree. Thus, the 2009 divorce decree, which appears valid on its face and not appealed, is not subject to collateral attack. In his brief, Husband asserts multiple times that the trial court erred in 2009. Specifically, he states, "Ultimately, the Trial Court erred in 2009 having been given no evidence of [Wife's] ability to be unable to support herself because of a physical or mental disability to determine that the decree of divorce in this case ordering spousal maintenance past a three year period until the death of a party, the party receiving maintenance marries or further order of the Court." He also states, "In reality the Court did not terminate spousal maintenance pursuant to a Motion to Clarify, but found by becoming familiar with this divorce case that the Court in 2009 erred in judgment by not requesting evidence to support using language referring to section 8.54(b) in the Divorce Decree."

Both of Husband's statements demonstrate that his motion for clarification served to collaterally attack the 2009 unappealed divorce decree. Likewise, the trial court's January 15, 2016 order granting the motion for clarification and terminating agreed spousal maintenance had the effect of a collateral attack on the unappealed divorce decree. To the extent that the trial court, in 2009, erred in failing to provide a three-year termination date pursuant to Chapter 8 of the Family Code, such error should have been raised by direct appeal. As such, Husband's motion to clarify a provision of an unappealed divorce decree constitutes a collateral attack that is barred by res judicata.

If an appeal is not timely perfected from the divorce decree, res judicata bars a subsequent collateral attack. Even if a final judgment is erroneous or voidable, it is not void and subject to collateral attack if a trial court had jurisdiction over the parties and subject matter.

Dissenting Opinion: There was no collateral attack on the divorce decree in this case. Instead, the trial court clarified an ambiguity in the decree, as it was empowered to do. To the extent the decree was insufficiently definite to justify a contempt finding, Wife requested, in the alternative, that the trial court clarify the decree to support a future contempt finding in the event of Husband's continued nonpayment of maintenance. The Family Code expressly contemplates and authorizes the clarification of a divorce decree in this context, providing: "On the request of a party or on the court's own motion, the court may render a clarifying order before a motion for contempt is made or heard, in conjunction with a motion for contempt or on denial of a motion for contempt."

THE DEPARTMENT MAY NOT CONSENT TO IMMUNIZATION OF A CHILD WHEN IT IS AWARE THAT BOTH PARENTS HAVE EXPRESSLY REFUSED TO GIVE CONSENT TO THE IMMUNIZATION.

***In re Womack*, ___ S.W.3d ___, No. 10-17-00336-CV, 2017 WL 6614650 (Tex. App.—Waco 2017, orig. proceeding) (12-27-17).**

Facts: Shortly after Child's birth, the DFPS removed him from Father's and Mother's care and filed a petition for protection of a child, for conservatorship, and for termination. The trial court then conducted an adversary hearing and signed a temporary order on June 14, 2017, appointing the Department as temporary managing conservator of the Child and appointing Father and Mother as temporary possessory conservators of the Child. The Court gave the Department the rights and duties set forth in Family Code Section 153.371 and authorized the Department to consent to medical care for the Child pursuant to Family Code Section 266.004.

At a subsequent hearing, the Department expressed a concern that the Child had not been vaccinated. The Department explained that the Child is living in a foster home where he is exposed to social environments like daycare and church, that the Department would therefore like the Child to receive immunizations. Father and Mother were both opposed to the Child being vaccinated at this time.

At a later hearing, the trial court then held an evidentiary hearing about whether immunizations should be administered to the Child. The Child's pediatrician, first testified that she believes that the benefits of receiving immunizations outweigh the potential side effects and that it is therefore in the Child's best interest to be given vaccinations. Mother then testified that, based predominantly on the prevalence of autism in her family, she is opposed to the Child receiving vaccinations until he is "past the age of autism," which she thinks is about 5 years old. Father then similarly testified that it is still his desire that the Child not yet be immunized. Father stated that he has filled out and had notarized an affidavit so that the Child would be exempt from the immunization requirements of section 161.004 of the Health and Safety Code.

The trial court subsequently signed an Order that authorized the Department to consent to medical care for the Child finding that it is in the Child's best interest to have the normal childhood immunizations. Mother and Father sought mandamus relief.

Holding: Mandamus conditionally granted.

Opinion: Subsection 32.101(c) of the Family Code provides in relevant part:

> A person otherwise authorized to consent under Subsection (a) may not consent for the child if the person has actual knowledge that a parent, managing conservator, guardian of the child, or other person who under the law of another state or a court order may consent for the child:
> (1) has expressly refused to give consent to the immunization;

Even though the Department was authorized to consent to immunizations for the Child, because Mother and Father are parents as contemplated by the statute and both parents expressly refused to give consent to immunization, the trial court abused its discretion in entering an order giving the Department the right to consent to immunizations over the parents objections.