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

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DIVORCE
PROCEDURE AND JURISDICTION

***MAJORITY*: WIFE'S GALVESTON COUNTY PETITION FOR DIVORCE DISMISSED BECAUSE SHE NEVER LIVED IN GALVESTON COUNTY.**

***DISSENT*: GALVESTON NEVER COULD HAVE ACQUIRED SUBJECT MATTER JURISDICTION BECAUSE CASE WAS ALREADY FULLY TRIED BEFORE AN ASSOCIATE JUDGE IN HARRIS COUNTY.**

***Alwazzan v. Alwazzan*,** ___ S.W.3d ___, No. 01-16-00589-CV, 2018 WL 6382061 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (12-06-18).

Facts: Husband was a citizen of the Kingdom of Bahrain and attended college in Texas, where he met Wife. They married, and Husband became of dual citizen of the U.S. and Bahrain. They had three Children and lived in Montgomery County. Wife filed for divorce in Montgomery County. The parties signed an MSA settling all issues between the parties. The MSA was filed with the Court, and Wife was supposed to obtain a final divorce decree. Husband returned to Bahrain.

Instead of obtaining a decree, Wife obtained new counsel, filed a non-suit in Montgomery County, and filed a new divorce petition in Harris County without mentioning the Montgomery County action or the MSA. Husband filed an answer and counter-petition. This time, Wife added Husband's alleged company and asserted there was a community property interest in the company. The court signed temporary orders that were to continue until a final decree or further orders of the court. The case was tried before an associate judge. Husband did not appear but was represented by counsel. At the conclusion of the trial, the parties agreed on the record to waive a de novo hearing before the district judge. "[E]verybody is waiving appeal to the referring Court…so that we're trying it once." Wife was awarded a $3.5 million judgment against Husband but was awarded no monetary award against the company. She asked the judge to reconsider the ruling and grant her judgment jointly and severally against Husband and the company. The associate judge denied Wife's request and issued a hand-written report for the referring judge.

Before obtaining a final decree from the district judge, Wife filed a non-suit in the Harris County action, which was served on Husband's attorney. That same day, she filed a new divorce petition in Galveston County naming both Husband and his alleged company as respondents. She represented that she was "a resident of [Galveston County] or will have resided in [Galveston County] by final trial for the preceding 90-day period." She asserted that the Children were not under the continuing jurisdiction of any other court. She did not mention the MSA or either the Montgomery County or Harris County suits. Wife obtained an order to serve Husband by publication, despite her having confirmation from her Children—who had recently visited Husband—that Husband had received and read her various emails on other topics. Additionally, without presenting any facts to support her claim that Husband exercised control over his alleged company, that any of the company's assets were part of the community estate, or that the company was within Texas's reach under its long-arm statute, Wife asserted that the company could be served through the Secretary of State. Wife purportedly served the company but provided the Secretary of State with an incorrect address for the company. Counsel for trial was appointed on Husband's behalf.

At trial, Wife asserted Husband left her penniless for another woman, that he was transient, and that his company was a corporate sham used to misappropriate funds from the community estate. After trial, the court signed a decree granting divorce on the grounds of adultery, cruelty, and abandonment, made orders for the Children, and awarded Wife a $416,532,514.56 judgment jointly and severally against Husband and the company.

A year later, when Wife was struggling to enforce the judgment, she filed an application for turnover and appointment of a receiver. A receiver was appointed, and HSBC Bank suspended a series of Husband's company's wire transfers. Subsequently, Husband's company filed a special appearance. Husband filed a plea to the jurisdiction and a motion for new trial. His company filed a separate bill of review, arguing Galveston County lacked jurisdiction, Wife never properly served him, and res judicata barred her claims. During the hearing for the motion for new trial, the trial court learned of the prior two actions in Montgomery County and Harris County. The court remarked, "[T]his is probably one of the most egregious examples of forum shopping out there…I'm going to grant the plea to the jurisdiction and dismiss this case." The court ordered that the action be dismissed and the divorce decree and all subsequent supplemental orders be vacated. Subsequently, Husband and the company obtained sanctions against Wife in the form of attorney's fees. The court did not sanction Wife's attorneys.

Wife appealed, arguing that no jurisdictional grounds were presented to support vacatur and dismissal. Wife also challenged the sanctions award.

Holding: Affirmed as Modified

Majority Opinion: (J. Higley, J. Jennings)

***Dismissal improper on lack of subject-matter or personal jurisdiction*:**

The powers of an associate judge are prescribed by statute. Here, the Harris County associate judge's order did not include a waiver of the right to appeal pursuant to § 201.015—it was silent as to the parties' right to seek a de novo hearing—so the order was not a § 201.007(a)(16) order. Moreover, the parties' agreement to waive a de novo appeal was not made in writing or at the beginning of the hearing as required by the statute. Because the associate judge's authority is statutory, the statutory procedural requirement must be met. Because they were not, there was no final order before Wife nonsuited the Harris County action. The associate judge's order was not a final order, only a report. Moreover, because the associate judge was not authorized to sign a final order, the order could not "become final" as a result of the parties failing to timely request a de novo hearing. Thus, Harris County did not have continuing, exclusive jurisdiction over Wife's claims.

Even if Wife's service on Husband and the company was ineffective, the proper remedy would be a new trial, not dismissal.

***Alternate ground to affirm relief—residency requirement*:**

In his cross-point, Husband asserted that the case was properly dismissed because Wife did not and could not satisfy the residency requirement to maintain a divorce proceeding in Galveston County. The policy ground behind the county-residency requirement is to prevent forum shopping. Residency must be established as of the date the suit of divorce is filed. Here, there was no credible evidence Wife was ever a resident of Galveston County. While a case may be abated until the requirement has been met, that was not feasible in this case. Wife was not a resident of Galveston County during the 90-day period before filing, nor was she a resident at any time while the suit was pending. There was no way for Wife to cure the failure. Wife's failure to meet the 90-day residency requirement provided an independent ground to affirm the relief provided by the trial court.

***Sanctions*:**

Wife argued that because the court improperly dismissed her case on jurisdictional grounds, those grounds could not be relied upon for sanctions. However, a sanctions award may be upheld if any of the sanctionable conduct in the order has support in the record. Wife falsely averred that she did not know Husband's whereabouts or how to contact him. Thus, the sanctions were supported by the record. However, the award of appellate attorney's fees was modified to make them conditional upon Wife's failure to obtain relief in the appellate and Supreme courts.

Dissenting Opinion: (J. Keyes)

The dissent would have held that the Harris County district court had both subject-matter jurisdiction and personal jurisdiction over all the parties, that the Harris County divorce was final, and that subject-matter jurisdiction not only did not attach in Galveston County but could not attach, and therefore that the Galveston County court correctly entered judgment dismissing the case for lack of jurisdiction. The dissent would have transferred the case to Harris County for entry of a divorce decree.

The non-suit obtained by Wife in Harris County was improper, and all claims pertinent to that divorce action were finally adjudicated by the associate judge of that court. The final order of the associate judge constituted a decree of divorce, effective as of the day it was signed. All subsequent claims other than post-judgment motions filed in Harris County should have been dismissed with prejudice.

***Montgomery County*:**

The MSA became valid and enforceable when it was signed by the parties and filed in the trial court. However, Wife breached the agreement with her bad-faith dismissal of the Montgomery County action. Additionally, because Husband did not continue performing under the MSA and instead retained counsel and made an appearance in the Harris County suit, the breach was mutual. Thus, both parties knowingly and voluntarily waived any rights accorded to them by the MSA. Accordingly, the Montgomery County MSA did not affect the proper disposition of this dispute.

***Galveston County (residency)*:**

While pleadings are construed liberally in favor of the plaintiff, if the pleadings affirmatively negate the existence of jurisdiction, the plea to the jurisdiction may be granted without affording the plaintiff the opportunity to amend. Here, it was undisputed that Father did not live in Galveston County. Further, there was no credible evidence Wife was ever a residence of Galveston County; Wife changed the typical pleading language to obscure the fact she had no basis for venue.

However, because the statutory residency requirement is not jurisdictional, subject-matter jurisdiction *could* theoretically attach over Wife's divorce action. Thus, a ruling that jurisdiction over this suit failed to attach because the parties failed to meet statutory requirements for filing a divorce action in Galveston County was not enough by itself to dis-

pose of all the jurisdictional issues properly raised by the parties and heard and addressed by the trial court or to dismiss the suit on a plea to the jurisdiction.

***Harris County (improper non-suit)*:**

TRCP 162 provides that at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit. However, a party's right to take a non-suit cannot be used to disturb a court's judgment on the merits of a claim. A trial court's decisions on the merits, such as summary judgment orders and partial summary judgment orders, are not vitiated by a subsequent non-suit. Once a judge announces a decision that adjudicates a claim, that claim is no longer subject to the plaintiff's right to nonsuit.

Here, both parties participated in trial, put on evidence, and at the end of trial, both informed the AJ that they had agreed to waive a de novo hearing. The AJ executed his written report and sent it to all counsel of record. The report addressed all disputes between the parties. After receiving the AJ report, Wife obtained an order of nonsuit from the referring judge. However, because Wife's claims had already been fully adjudicated, she was no longer entitled to a nonsuit.

***Harris County (finality of judgment)*:**

The remaining question was whether any further action was required by the Harris County court to make the judgment final. An order signed before May 1, 2017 by an associate judge under Tex. Fam. Code § 201.007(a)(16) is a final order rendered as of the date it was signed. The AJ adjudicated all the issues in the case but erroneously informed the parties that only the referring court could grant the divorce by signing the decree. The AJ subsequently signed and filed his final report on December 21, 2012. Under § 201.007(e), that final report constituted a final order of the referring court.

Further, even if the parties' agreement to waive trial de novo to the referring judge did not meet the technical requirements of § 201.007(a) by being entered "before the start of a hearing," trial de novo was waived "on the record," as permitted by § 201.015(g). Moreover, the agreement to waive a de novo hearing complied with the requirements of an enforceable Rule 11 agreement.

***Galveston County (personal jurisdiction)*:**

The validity of issuance, service, or return of citation is not presumed. The plaintiff bears the initial burden to plead sufficient allegations to bring a nonresident defendant with the reach of Texas's long-arm statute. A judgment may be challenged through a collateral attack when a failure to establish personal jurisdiction violates due process. Service by publication is constitutionally suspect and should be a last resort, not an expedient replacement for personal service. Here, Wife used notice by publication as a first resort, and service was constitutionally ineffective. Additionally, Wife did not offer any evidence that the company was formed in or was doing business in Texas. Moreover, Wife used an incorrect address for Husband's company and, thus, was not reasonably calculated to effectuate service.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

HUSBAND'S MERE DESIRE TO ENTER A NEW SETTLEMENT AGREEMENT INSUFFICIENT TO SUPPORT CLAIM DIVISION NOT JUST AND RIGHT.

Reyes v. Reyes, No. 04-18-00012-CV, 2018 WL 6518794 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (12-12-18).

Facts: Husband and Wife signed a handwritten settlement agreement and filed it with the court. The trial court rendered judgment on the agreement. Subsequently, Wife moved for entry of a final decree. While acknowledging Wife's proposed decree comported with the parties' agreement, Husband argued that she was not entitled to judgment because the agreement did not include the language from Section 6.604 admonishing the parties that the agreement was not subject to revocation. The trial court signed Wife's proposed decree, and Husband appealed.

Holding: Affirmed

Opinion: After the trial court rendered judgment on the agreement, Husband could not revoke his consent. The entry of a final decree was purely a ministerial act. Nothing in the record—other than Husband's attorney's assertion that Husband wished to enter a new agreement—supported a claim the division was not just and right.

ATTORNEY BOUND BY UNAMBIGUOUS RULE 11 AGREEMENT TO ARBITRATE ATTORNEY'S FEES DISPUTE.

Amsberry v. Salazar, No. 04-17-00704-CV, 2018 WL 6516151 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (12-12-18).

Facts: Attorney represented Wife in a divorce proceeding. Before the divorce was finalized, Attorney intervened in the divorce and asserted a claim against Wife for attorney's fees. Wife counterclaimed for fraudulent inducement, breach of fiduciary duty, and violations of the DTPA. The parties' respective attorneys entered into a Rule 11 agreement providing that they would attempt to mediate the dispute, and if mediation was unsuccessful, they would arbitrate "under and subject to the Texas AA rules." Mediation was unsuccessful, and an arbitrator rendered an award in Wife's favor. Wife filed a motion to confirm the award. Attorney filed a motion to vacate it. The trial court heard both motions and confirmed the arbitration award. Attorney appealed.

Holding: Affirmed

Opinion: In his motion to vacate, Attorney only raised one ground for vacatur. Thus, he waived any other grounds for vacatur on appeal. Attorney asserted that because the Rule 11 Agreement did not explicitly provide for "binding" arbitration, the arbitration was non-binding. However, the parties agreed to arbitrate pursuant to the Texas AA, which includes no provisions for non-binding arbitration.

DIVORCE
PROPERTY DIVISION

EVIDENCE INSUFFICIENT TO SUPPORT DEFAULT PROPERTY DIVISION AND CONFIRMATION OF SEPARATE PROPERTY.

***Cohen v. Bar*, ___** S.W.3d ___, No. 01-18-00082-CV, 2018 WL 6613515 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (12-18-18).

Facts: Petitioner filed a petition for divorce. The petition asserted that while Respondent did not currently live in Texas, the last marital residence was in Texas and less than two years had elapsed since the relationship ended. Petitioner served Respondent at his home in Florida and filed a return of service indicating service was completed. Respondent did not appear at trial, and Petitioner obtained a default divorce decree. Subsequently, Respondent filed a restricted appeal, asserting that Texas lacked personal jurisdiction over him, he did not receive service of process, and the trial court abused its discretion in dividing the community estate and in confirming certain property as Petitioner's separate property.

Holding: Reversed and Remanded

Opinion: To succeed on a restricted appeal, the appellant must establish error on the face of the record. When a respondent is a non-Texas resident, the Texas plaintiff bears the initial burden of pleading sufficient facts to bring a defendant within the reach of a Texas long-arm statute. If that burden is met, the burden then shifts to the respondent to negate all bases of personal jurisdiction. Here, while Respondent presented contradictory facts for the first time on appeal, those facts did not appear "on the face of the record" and could not support a restricted appeal. Additionally, Respondent challenged that he did not actually received service. However, the return of service showed that service was completed, and the facts to dispute proper service did not appear on the face of the record.

Despite Respondent's failure to answer or appear, Petitioner still bore the burden of proving the material allegations in his petition regarding the division of the community estate and the confirmation of his separate property. Petitioner's verified inventory and appraisement was conclusory and did not fully identify the assets and property that allegedly formed the community estate. The Inventory did not contain account numbers, statements of accounts, appraisals, or any other evidence identifying and supporting Petitioner's valuation of the parties' assets. Further, Petitioner's evidence regarding his allegedly separate property was sparse and contained inconsistencies. He did not clearly identify which assets were his before the marriage, and he did not trace the relationship between the property allegedly owned before marriage and the property actually confirmed as his separate property.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

BECAUSE DECREE'S LANGUAGE AMBIGUOUS, TRIAL COURT ENTITLED TO REVIEW EXTRINSIC EVIDENCE TO DETERMINE PARTIES' INTENT.

Shearn v. Brinton-Shearn, No. 01-17-00222-CV, 2018 WL 6318450 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (12-04-18).

Facts: A final decree of divorce provided for the sale of the parties' marital residence and the division of the proceeds after the sale. After the house was sold, the parties disputed how the proceeds were to be distributed. During the pendency of the sale, pursuant to the decree, Husband was required to pay 100% of the property taxes, for which he acquired a home equity loan secured by the marital residence to pay. Husband asserted that he was entitled to reimbursement of those property tax payments before the proceeds were divided, which would, in effect, require Wife be responsible for 50% of the property taxes. Wife filed a petition to clarify and enforce the decree, and the disputed funds were placed in the court's registry. After a hearing the trial court agreed with Wife's interpretation. Husband appealed, arguing that the trial court lacked jurisdiction to grant a declaratory judgment; that Wife's motion was an improper collateral attack on the decree and was not a motion to clarify; and that even if it was a motion to clarify, the trial court erred in its interpretation of the decree.

Holding: Affirmed

Opinion: Wife did not seek to amend, modify, alter, or change the property division. Rather, in her petition, she explained the parties each believed the final decree provided for a different distribution of the proceeds of the sale of their marital residence. Her petition sought an order to assist in the implementation of, or to clarify, the parties' agreed divorce decree's property division. Despite the title of her petition, she was not seeking a declaratory judgment, and the trial court had continuing subject-matter jurisdiction to clarify and enforce the decree.

The decree was ambiguous as a matter of law. One provision of the decree provided that Husband would be 100% responsible for paying property taxes; that he would use proceeds from a home equity loan—acquired in his name—to do so; and he would be the only party entitled to a tax deduction related to the property-tax payments. A second provision provided that the net proceeds were defined as the gross sales price less any mortgage or indebtedness. Thus, the first provision provided that Husband was 100% responsible for property taxes, while the second provided that Wife was to indirectly reimburse Husband for 50% of the tax payments. Because the decree was ambiguous as a matter of law, the trial court was entitled to look at parol evidence to determine the parties' intent. The MSA provided that Wife was "to pay 100% of bills associated with the residence…save and except property taxes…(without reimbursement of [Wife's] 50%...)." Thus, the evidence supported judgment dividing the proceeds pursuant to Wife's calculations.

Husband additionally complained of the trial court's failure to issue findings. A trial court's duty to file findings of fact and conclusions of law does not extend to post judgment hearings. A motion to clarify and enforce is a post-judgment hearing. Thus, the trial court was not required to issue findings. Moreover, Husband failed to show how he was harmed by the failure to issue findings because he was able to adequately present his issue on appeal and was not required to guess at the reasons for the trial court's ruling.

WIFE'S MOTION FOR ENFORCEMENT OF DIVISION OF TANGIBLE PERSONAL PROPERTY WAS UNTIMELY BECAUSE NOT FILED WITHIN TWO YEARS OF DECREE.

Chakrabarty v. Ganguly, No. 05-17-01195-CV, 2018 WL 6444285 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (12-10-18).

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

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: A suit to enforce a division of tangible personal property must be filed before the second anniversary of the date the decree was signed or became final after appeal, whichever is later, or the suit is barred. An order for distribu-

tion of funds is an order against tangible personal property. Wife brought her suit nearly four years after the divorce decree, so her motion was barred by limitations.

SAPCR
PROCEDURE AND JURISDICTION

GIRLFRIEND LACKED STANDING TO FILE SAPCR AS "INTENDED PARENT" OF CHILD PRODUCED BY ARTIFICIAL INSEMINATION DURING RELATIONSHIP WITH BIOLOGICAL MOTHER.

In re N.M.B., No. 04-18-00111-CV, 2018 WL 6516120 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (12-12-18).

Facts: During their relationship, a Child was produced through artificial insemination. Subsequently, Mother and Girlfriend separated. Subsequently, Girlfriend filed a suit for divorce and a Petition to Adjudicate Parentage. In both filings, Girlfriend sought joint managing conservatorship of the Child. After a hearing, the trial court dismissed both claims. Girlfriend appealed the portion dismissing the SAPCR based on a finding that she lacked standing to bring such a suit.

Holding: Affirmed

Opinion: Tex. Fam. Code § 160.602(a)(8) pertains to a proceeding to adjudicate parentage of an "intended parent." While Girlfriend entitled her petition "Petition to Adjudicate Parentage," the relief she sought was to be appointed joint managing conservator. Section 160.602(a)(8) could not confer standing on Girlfriend to seek conservatorship. Additionally, contrary to Girlfriend's arguments, standing could not be conferred by estoppel, so Mother's representations that they would come to an out-of-court resolution did not excuse Girlfriend's failure to bring suit within 90 days after a six-month period in which she exercised actual care, control, and possession of the Child.

PARENTS' CONSENT TO AUNT'S INTERVENTION 'NOT RELEVANT' BECAUSE NO EVIDENCE OR ASSERTION THAT APPOINTMENT OF PARENTS AS MANAGING CONSERVATORS WOULD SIGNIFICANTLY IMPAIR THE CHILDREN'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

In re A.G., No. 05-18-00725-CV, 2018 WL 6521893 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (12-12-18).

Facts: TDFPS filed a petition seeking termination of Mother's and Father's parental rights and the appointment of TDFPS as permanent managing conservator of the Children if the Children could not be reunified with either parent or placed with a relative or other suitable person. Initially, the Children were placed with Aunt, but they were subsequently removed due to Aunt's history with TDFPS. During the underlying proceedings, Aunt believed that a settlement would be reached in which she would be given custody of the Children. When mediation failed—a week before trial—Aunt filed a petition in intervention, asserting standing under Tex. Fam. Code § 102.004(a)(2) because both parents consented to her intervention. The trial court dismissed her petition in intervention, held a final hearing without Aunt as a party, terminated both parents' parental rights, and named TDFPS permanent managing conservator. Aunt appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 102.004 grants standing to grandparents and to other persons to file original SAPCRs or intervene in pending SAPCRs. Subsection (a) allows a person with permission from both parents to file an original SAPCR. Subsection (b) provides that a person may only intervene if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. Focusing on the Legislature's use of the words "original" in Subsection (a) and "intervene" in Subsection (b), the Court held that Subsection (b) must be satisfied regardless of the parents' permission to intervene. Thus, because Aunt did not attempt to intervene under Subsection (b), the trial court did not abuse its discretion in denying her intervention.

FATHER NOT DENIED DUE PROCESS BY HAVING CHILD SUPPORT ISSUES HEARD ONLY BY ELECTED JUDGE AND NOT FIRST HEARD BY ASSOCIATE JUDGE IN IV-D COURT.

In re L.D.C., No. 13-17-00053-CV, 2018 WL 6546378 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (12-13-18).

Facts: An agreed decree of divorce provided that Father would pay monthly child support, retroactive child support, and a few lump-sum payments as part of the community property division. When Father fell into further arrears, Mother filed a motion for enforcement. The OAG became involved and many pleadings were filed, and hearings were set and reset. Additionally, the case was transferred pursuant to docket control orders. A hearing was held in the IV-D court, but after being advised to complexities in the litigation, the associate judge referred the case back to the elected judge. The trial court found Father owed $111,588.08 in past due child support, ordered monthly payments, sanctions, and attorney's fees. Father raised a number of complaints on appeal, including an argument that his due process rights were violated by not having a final hearing in the IV-D court. Father argued that the statutory scheme involving Title IV-D matters requires an initial trial before the associate judge and then a de novo trial before the referring court, if desired. Father complained that he lost his right to a second trial when the Title IV-D associate judge sent the case back to the referring court, which he argued violated his due process rights.

Holding: Affirmed

Opinion: The de novo procedures were developed to speed the determination of child support and other issues necessary to protect and provide for children pursuant to Title IV-D by using associate judges. The right to a trial de novo before an elected judge was designed to conform the proceedings to the constitutional grant of powers to the judiciary. The government's interest in promptly determining support of children and minimizing unnecessary expenditure of public funds is substantial and supports the use of associate judges to speed the process, but the use of standard judicial procedures in this case did not mean that Father was deprived of due process. When an associate judge has referred a complex case to the referring court, the referring court should not be required to send it back to the associate judge on due process grounds solely to allow a litigant two bites at the apple.

TEXAS COURT NOT REQUIRED TO EXTEND COMITY TO BRAZILIAN COURT'S HAGUE CONVENTION ORDER THAT CLEARLY MISINTERPRETED THE HAGUE CONVENTION, CONTRAVENED THE CONVENTION'S FUNDAMENTAL PREMISES OR OBJECTIVES, OR FAILED TO MEET A MINIMUM STANDARD OF REASONABLENESS.

***DISSENT FROM DENIAL OF EN BANC RECONSIDERATION*: MOTHER ESTABLISHED STATUTORY EXCEPTIONS TO PREVENT RETURN OF THE CHILD TO THE U.S.; TEXAS SHOULD HAVE EXTENDED COMITY TO BRAZILIAN'S COURT'S JUDGMENT REFUSING TO RETURN CHILD TO FATHER.**

Guimaraes v. Brann, ___ S.W.3d ___, No. 01-16-00093-CV, 2018 WL 6696769 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (12-20-18).

Facts: Mother filed for divorce in Harris County on the grounds of insupportability and cruelty and sought sole managing conservatorship of the parties' Child. Temporary orders appointed her and Father joint managing conservators of the Child, with Mother having the exclusive right to designate the Child's primary residence. Subsequently, the parents entered into a Rule 11 Agreement giving Mother permission to take the Child to Brazil for a wedding. Mother was to return by a certain date to return the Child to Father; however, she failed to return. Rather, she sought sanctuary in Brazil for domestic violence and for the safety and welfare of the Child, who had witnessed the violence. While in Brazil, Mother enrolled the Child in school and initiated judicial proceedings in Brazil. The Brazilian state court issued an "interlocutory decision," noting that under the Hague, the parent's rights who has been breached must file an action for the return of the child, whereas here, Mother was seeking to legalize an already existing situation. Moreover, Mother intended to have the court determine Father's visitation rights. The Brazilian state court determined it had jurisdiction to "review and decide on this, at least at this stage," and granted Mother temporary custody of the Child. Father filed a petition in Brazilian federal court pursuant to the Hague Convention, but the court held that the Child should remain in Brazil. The court found that Father was "psychologically unstable, lacking self-control, violent and suffering from a psychiatric disease that renders him incapable of being with [the Child] without supervision, since he surrenders to his [pornography] addiction at the expense of other tasks or social situations" and "admits that he does not control his violence and breaks chairs, tables, televisions and even destroys walls, given the dimension of his attacks." The court concluded there was an evident risk of the Child being subjected to physical or psychological harm if he returned to the

U.S. and started living under Father's custody away form Mother. Mother then filed the Brazilian order in Texas and argued that because of the Brazilian Court's order, Texas lost subject-matter jurisdiction. The Texas court disagreed with Mother and ultimately rendered the parties divorced, appointed Father sole-managing conservator, and divided the parties' assets. Mother appealed, arguing in part that the Texas court lacked subject-matter jurisdiction. While the appeal was pending, the Regional Federal Court of the First Region in Brazil issued a "Report" and "Collective Vote" affirming the denial of Father's request to return the Child to the U.S. The court held that Mother's removal of the Child was wrongful; however, exceptions under the Hague applied, which required the court to deny Father's request.

Holding: Affirmed; En Banc Reconsideration Denied

July 2018 Panel's Opinion: (C.J. Radack, J. Jennings, and J. Lloyd)

Contrary to Wife's assertion, the Texas trial court clearly had subject matter jurisdiction, and the Hague order could not revoke that jurisdiction. Thus, the question was not whether Texas lost jurisdiction but whether Texas should have extended comity to the Brazilian court's resolution of Father's Hague Convention Petition. Although the court found that Wife waived this issue for appellate review, it sua sponte discussed the issue of international comity.

A comity analysis begins with an inclination to afford deference to a foreign court's decision of a related Hague petition. However, a court may decline to extend comity if the foreign court "clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness."

Once a petitioner seeking the return of a child establishes the retention or removal of a child was in violation of the petitioner's rights, the court must order the child's return to the country of habitual residence unless the respondent demonstrates one of the Hague Convention's four narrow exceptions apply. Two of the defenses are: (1) the "well-settled" defense; and (2) the "grave-harm" defense.

The "well-settled" defense only applies if the child has been in the new country for at least a year before the petitioner seeks relief and if the child has become "well-settled" in his new environment. Here, the Hague Court Order applied the "well-settled" exception even though it acknowledged the Child had not been in Brazil a year. Thus, the application of the exception was a clear misinterpretation of the Convention, and the Texas trial court did not abuse its discretion in refusing to extend comity on that exception.

To establish the applicability of the "grave-risk" exception, there must be a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. While there is no clear definition of what constitutes a "grave risk," the risk must be more than "merely serious" and must be greater than that normally expected when taking a child away from one parent and passing the child to another parent. The exception is not license for a court to speculate about where the child would be happiest. Only severe potential harm will trigger the exception. Here, the Hague Convention Order found that separating the Child from his mother would cause the Child harm and that Mother would be a more attentive parent than Father. The Brazilian Court's analysis engaged in exactly the sort of best-interest review the Hague Convention is designed to prohibit. Thus, the Texas trial court did not abuse its discretion in refusing to extend comity based on the "grave risk" exception.

Dissent from Denial of En Banc Reconsideration: (J. Keyes)
(En Banc Court: C.J. Radack, J. Jennings, J. Keyes, J. Higley, J. Brown, and J. Lloyd; Not Participating: J. Bland, J. Massengale, and J. Caughey)

The appellate court had a right and duty to consider facts necessary to the Harris County court's exercise of jurisdiction. Matters of public record, such as the Brazilian court records, brought to the appellate court's attention by Mother, are subject to mandatory judicial notice of Tex. R. Evid. 201.

Congress implemented the Hague through ICARA, which provides that U.S. courts have concurrent original jurisdiction of actions arising under the Hague. A petitioner seeking the return of a child is required to establish by a preponderance of the evidence that the child was wrongfully removed. Once established, the respondent has the burden of proving either by clear and convincing evidence that an exception in article 13b or 20 of the Hague applies or by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Hague applies, which includes the "well-settled" and "grave risk" exceptions.

ICARA further provides that full faith and credit shall be accorded to courts of the States denying return of a child under the Hague. However, as noted by the Panel, U.S. federal courts have determined that the "full faith and credit" clause in ICARA only applies to U.S. federal and state courts and not foreign judgments. Instead, the enforceability of foreign judgments is a matter of comity. Yet, ICARA further provides that remedies established by the Hague are not exclusive but "shall be in addition to remedies available under other laws or international agreements." This includes the UCCJEA, which treats foreign countries as "states."

The Panel determined that the well-settled exception could not apply when Father's application was filed less than a year after removal. But such a strict construction of this exception conflicts with several principles governing construction of the Hague Convention. When interpreting any treaty, the opinions of our sister signatories are entitled to

considerable weight. Here, the Panel accorded the Brazilian courts' opinions no weight. Further, the one-year "rule" can lead to unintended consequences, such as when a parent files an application 364 or 366 days after the removal. The "rule" ignores the requirement that the respondent parent must prove by a preponderance of the evidence that the child is well-settled and that return of the child is not automatic. The Panel gave no deference to the Brazilian court's determination that the exception requires a best interest of the child inquiry.

Moreover, even if the well-settled exception did not apply, ample evidence supported the grave-risk exception. The Panel ignored voluminous evidence of domestic abuse, physical violence (including breaking furniture and smashing in a wall), and psychological abuse directed at Mother by Father, sometimes in the Child's presence, which was admitted to by Father and supported by expert witness reports. The Panel ignored Father's pathological addiction to pornography, which was admitted to by Father and had resulted in several unsuccessful attempts at rehabilitation—also substantiated by expert reports on the psychological effects such behavior would have on a young child. It ignored the Brazilian courts' conclusion that the babysitter with which Father intended to leave the Child had not appeared credible in her deposition testimony against Mother. And it ignored the fact that Mother was not allowed to present her case in Harris County by any means.

The Panel failed to acknowledge or enforce the provisions of the UCCJEA that govern enforcement of foreign judgments. It ignored that Father had been able to exercise visitation in Brazil, while Mother was threatened with arrest if she returned to the U.S. yet could not present her case to the U.S. court. The Panel blatantly violated Mother's constitutional rights as a fit parent involved in a custody dispute in contravention of *Troxel*. Thus, it was not the Brazilian courts' custody determinations, but the Harris County court's judgment regarding visitation and custody that violated fundamental human rights.

The Panel ignored Texas's public policy to assure children have frequent and continuing contact with parents who act in their children's best interest and to provide children with a safe, stable, and nonviolent environment. The Panel ignored the Texas Family Code's mandate that the best interest of the child shall always be the court's primary consideration. Moreover, the Panel ignored that the Harris County court appointed Father a managing conservator despite voluminous evidence of family violence, contrary to the Texas Family Code's explicit prohibition against such appointments.

When courts consider whether to extend comity to foreign Hague Convention judgments, they should look closely at the merits of the foreign court's decision in determining whether comity could properly be extended to the judgment. Here, the Panel's decision not to extend comity was unsupportable and was clearly contrary to the plain meaning and intent of the Hague Convention.

GREAT-AUNT AND GREAT-UNCLE LACKED STANDING TO INTERVENE IN SAPCR.

In re Schick, No. 04-18-00839-CV, 2018 WL 6624380 (Tex. App.—San Antonio 2018, orig. proceeding) (mem. op.) (12-19-18).

Facts: TDFPS filed suit to terminate mother's and father's parental rights to the Child when the Child was seven days old. Temporary orders granted TDFPS managing conservatorship, and TDFPS placed the Child with Relators for the next fifteen months. Just before the Child's first birthday, Great-Aunt and Great-Uncle met with the Child for the first time. Mother and father stated they wanted the Child placed with Great-Aunt and Great-Uncle, but they also waivered in that desire and sometimes stated they wanted reunification and sometimes stated they wanted the Child placed with foster parents. Over the next five months, Great-Aunt and Great-Uncle saw the Child three times and attempted weekly Skype calls. Witnesses gave differing opinions on whether Skyping with an infant was useful. A week before trial, Great-Aunt and Great-Uncle filed a petition in intervention. Relators and TDFPS moved to strike the intervention, asserting Great-Aunt and Great-Uncle lacked standing. The trial court heard Great-Aunt and Great-Uncle's case regarding standing, and before the other parties could put on their cases, the trial court sua sponte entered emergency temporary orders appointing Great-Aunt and Great-Uncle managing conservators of the Child and ordering Relators to immediately turn over the Child to them. Relators filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Texas Family Code § 102.004(a) grants standing to grandparents and other relatives within the third degree of consanguinity to file original suits. Great-Uncle was not within the third degree of consanguinity, so Subsection (a) did not apply.

Before the date Great-Uncle and Great Aunt filed their intervention, they had only met with the Child three times, each time lasting an hour to an hour and a half. They additionally had weekly thirty-minute Skype calls for about four months. This was insufficient to establish "substantial past contact," so they could not establish standing under Subsection (b).

BECAUSE AGREED DIVORCE DECREE PERMITTED MOTHER'S MOVE TO NORTH CAROLINA AND CHILDREN HAD ESTABLISHED HOME THERE, TEXAS DECLINED JURISDICTION OVER FATHER'S MODIFICATION.

In re K.T.P., No. 05-17-00922-CV, 2018 WL 6716934 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (12-21-18).

Facts: An agreed decree of divorce was signed and authorized Mother to move to North Carolina with the Children. Forty-eight days later, Father filed a petition to modify to attempt to stop Mother from moving. The trial court denied Father's motion for temporary orders, and Mother moved to North Carolina. Ten months later, Father filed a motion for a discovery control plan and to obtain a trial setting. Mother responded with a motion for the Texas court to decline jurisdiction. After a hearing and supplemental briefing, the trial court granted Mother's motion, stating North Carolina was a more appropriate forum. The trial court additionally awarded Mother $14,294.29 in attorney's fees. Father appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Father failed to preserve his evidentiary complaints for appellate review. Although his counsel at one point during the hearing stated that "argument isn't evidence," at no point did he object to the court's consideration of the facts set out in Mother's verified motion on the basis that her submitted information was not proper evidence.

The parties agreed that Mother and the Children could move to North Carolina, where they had resided for approximately ten months at the time of the hearing. Father earned between $400,000 and $500,000 per year and regularly travelled to North Carolina. Mother's income was only $60,000 per year, and she was the Children's primary caretaker. The Children were enrolled in school and daycare in North Carolina and had established relationships with primary-care physicians in North Carolina. Mother lived approximately sixteen hours by car, or three hours by plane, from the Texas courthouse. All witnesses—with the exception of Father—lived in North Carolina. The county in which Mother lived had eight specialized family courts with local rules, burdens of proof, and discovery deadlines similar to those in Texas. Considering the evidence, the court could have reasonably determined North Carolina was a more appropriate forum.

Contrary to Mother's assertion, Father did not waive his complaint regarding attorney's fees by first raising the issue in his motion for new trial. Practically speaking, his first opportunity to object to the affidavit presented at the end of trial was the motion for new trial.

The affidavit to support Mother's attorney's fees award referenced reasonable "hourly rates" of attorneys, paralegals, and legal assistants but failed to include evidence of the work performed, who performed it and at what hourly rate, when the work was performed, and how much time the work required. Thus, the affidavit was insufficient to support the award.

SAPCR
Alternative Dispute Resolution

WIFE FAILED TO PROVIDE ANY REASON TO SET ASIDE MSA THAT WAS COMPLIANT WITH THE TEXAS FAMILY CODE.

In re Marriage of Atherton, No. 14-17-00601-CV, 2018 WL 6217624 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (11-29-18).

Facts: Husband and Wife signed an MSA to settle the claims in their divorce. Subsequently, Wife allegedly learned that Husband failed to disclose the values of certain assets. Additionally, Wife claimed Husband had failed to comply with the terms of the agreement. Wife asked the trial court to set aside the MSA and grant a new trial. Husband filed a motion to enter judgment on the MSA. The trial court heard both party's motions, denied Wife's, and signed a judgment incorporating the MSA. Wife appealed.

Holding: Affirmed

Opinion: Parties represented by counsel in a divorce proceeding have no fiduciary duty to one another, and the parties' MSA did not include a clause requiring disclosure. Wife did not introduce any evidence to support her claims that Husband committed fraud or that the MSA was ambiguous. She did not attach an affidavit to her motion, and she offered no evidence or offer of proof at the hearing on her motion. Further, upon review of the MSA, the appellate court found no ambiguities in the MSA.

SAPCR
CONSERVATORSHIP

BECAUSE FATHER PRESENTED A PRIMA FACIE CASE HE WAS ENTITLED TO ORDERS FOR CONSERVATORSHIP, MOTHER NOT ENTITLED TO DISMISSAL UNDER TCPA.

Smith v. Malone, No. 05-18-00216-CV, 2018 WL 6187639 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (11-27-18).

Facts: Father filed a petition for orders for the Child and asserted that no prior orders existed. Mother filed an answer, a counter-petition, and a motion to dismiss under the Texas Citizens Participation Act ("TCPA"). Mother asserted that Father's petition was filed in retaliation of her "right to petition" the office of the attorney general for child support, and she introduced text messages between her and Father to support this claim. Father did not respond to her motion to dismiss and instead argued the TCPA did not apply. The trial court denied Mother's motion to dismiss. Mother filed an interlocutory appeal.

Holding: Affirmed

Opinion: To obtain a dismissal under the TCPA, Mother was required to show by a preponderance of the evidence that Father's original petition was based on, related to, or was in response to Mother's exercise of the right to petition. If Mother succeeded, in doing so, the burden shifted to Father to establish by clear and specific evidence [which is not the same as 'clear and convincing'] of a prima facie case for each essential *element* of his claim.

Without determining whether the TCPA applied to Father's petition, the court determined that Father nevertheless presented a prima facie case for his request for orders for the child. Mother seemed to assert Father was required to present evidence that the custody arrangement he sought was in the best interest of the Child to avoid dismissal under the TCPA. However, "best interest of the child" is not an *element* of a conservatorship pleading but is the appropriate standard of review for deciding issues of conservatorship. The Texas Family Code presumes that appointing the parents joint managing conservators is in the best interest of the Child. Father, as a parent of the Child, was entitled to seek orders for conservatorship. Mother judicially admitted in her counterpetition that Father was the Child's father and that he should have some access to and possession of the Child.

SAPCR
POSSESSION

NO GEOGRAPHIC RESTRICTION ON MOTHER'S EXCLUSIVE RIGHT TO DESIGNATE PRIMARY RESIDENCE GIVEN WILLINGNESS TO FACILITATE LONG-DISTANCE RELATIONSHIP BETWEEN CHILD AND FATHER.

Cruz v. Cruz, No. 04-17-00594-CV, 2018 WL 6793847 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (12-27-18).

Facts: Mother and Father were married and had one Child. Mother filed for divorce on the grounds of adultery, which the trial court granted. Additionally, the court appointed the parents joint managing conservators of the Child and gave Mother the exclusive right to designate the Child's primary residence without regard to the Child's geographic restriction.

During trial, Mother testified that Father moved out of the family home when the Child was an infant. She discovered Father had been unfaithful during the marriage and had fathered a child with another woman, with whom he was living at the time of divorce. Father took no interest in the Child until the Child was three years old and never exercised possession during summer, spring break, or holidays. Father testified he was not aware he had the right to the additional possession periods and only exercised overnight possession two weekends a month. Mother testified that she intended to move to Colorado because her boyfriend was expecting to be stationed there, but because her family still resided in Texas, she planned to return to Texas at least twice a year. Additionally, she stated that she would pay to transport the Child to Texas at Thanksgiving and during the summer to see Father.

Among many other issues on appeal, Father complained the trial court abused its discretion in not placing a geographical restriction on Mother's right to designate the Child's primary residence.

Holding: Affirmed

Opinion: No evidence showed a bad-faith motive on Mother's part for desiring to leave Texas. She testified that Texas was still her home state and that she intended to return annually. Both Mother and Father provided love and care to the Child and were willing to work together to meet the Child's needs. Mother testified that she would do what was necessary to facilitate a long-distance relationship between Father and the Child, including allowing for electronic communication like Skype.

SAPCR
CHILD SUPPORT

EVIDENCE SUPPORTED FINDING FATHER WAS INTENTIONALLY UNDEREMPLOYED.

Udobong v. Udobong, No. 14-16-00856-CV, 2018 WL 6424677 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (12-06-18).

Facts: Mother and Father divorced, and Father was ordered to pay child support. Subsequently, Father filed a petition for bill of review because he alleged the evidence regarding his income was inaccurate, and he had since had his income tax returns corrected. The trial court granted his bill of review and held a hearing solely to determine child support.

Father presented evidence of check stubs showing his earnings as a security guard for the seven months leading up to the hearing and tax returns for three years leading up to the hearing showing an annual income of $15,350. Mother maintained that in the three years leading up to the divorce, the parties' health care business produced an income in excess of $1,000,000. Father testified that he made about $23,000 in those three years. Mother additionally testified that Father was awarded property in the divorce for which he had previously rented out for $1000 a month. The Children had reported to her that Father had additional income-producing properties since the divorce. Father testified that he had no income from properties since the divorce. Father had a master's degree in "business and education," another master's in "education," and a Ph.D. in "higher education management." However, he asserted that because Mother had him put on the "Misconduct Register," he could not obtain employment. Father did not testify as to any specific potential employer that had refused him employment.

The trial court found Father was intentionally underemployed and rendered a child support order accordingly. Father appealed.

Holding: Affirmed

Opinion: Father did not attempt to justify his low earnings on the basis of some "laudable intentions" or "other objectives." His only rebuttal argument was that his ability to gain more lucrative employment resulted from Mother causing his name to be placed on the "Misconduct Register." Additionally, Father's trustworthiness was questionable. Although the Children had always lived with Mother, and although the divorce decree provided that Mother was entitled to the dependent tax credit, Father had claimed that credit in 2014 and 2015, indicating to the IRS that the Children resided with him for twelve months of those years. Father admitted the statements were false. Thus, the trial court may have credited as true Mother's testimony that Father had significant earning potential and disregarded Father's testimony.

SAPCR
MODIFICATION

MOTHER FAILED TO SHOW REQUEST FOR INCREASED CHILD SUPPORT BASED ON "PROVEN NEEDS" OF THE CHILDREN.

In re K.F., No. 02-18-00187-CV, 2018 WL 6816119 (Tex. App.—Fort Worth 2018, no pet. h.) (mem. op.) (12-27-18).

Facts: After entering into an MSA, an Agreed Order allowed Mother to move to Virginia and required Father to pay $1000 in monthly child support for the couple's three Children. The less-than-guideline amount was agreed to as an offset to Father's travel expenses to exercise possession. After moving, Mother remarried and moved into her new spouse's house, which had a $6000 a month mortgage. A Virginia Court signed a consent order which simultaneously decreased Father's days of possession and increased his travel costs because he was awarded more but shorter visits with the Children. Subsequently, Mother filed a petition to modify child support asking the court to increase Father's child support obligation from $1000 a month to $9,150. Mother's income had decreased from six figures to $80,000 because she had chosen to work fewer hours at the hospital. Father's income had increased from about $120,000 to about $550,000 gross a year. However, he explained that after offsetting business expenses, his net income was about

$350,000. Mother asserted that the Children's monthly expenses were $9,150, that Father should pay 100% of those expenses, and that she did not intend to give Father any say in those expenses. After a final hearing, the trial court found that the Children's proven needs were $9,150 and ordered Father to pay $4,865 a month. Father appealed.

Holding: Reversed and Remanded

Opinion: Father argued the evidence was insufficient to support a material and substantial change in circumstances. However, it was undisputed that Father's income increased significantly from the prior order, which, by itself, constituted a material and substantial change in circumstances to support modification.

Mother's assertion that the Children's "needs" increased $3,798.75 since the prior order was conclusory. Her spreadsheet to support her testimony detailed the Children's expenses, but monthly expenses and proven needs are not the same thing. Further, Mother offered no testimony that the needs of the Children had actually changed. Rather, the testimony focused on Father's increased income. Additionally, Mother's requested increase appeared to be tied to her lifestyles change associated with the new marriage and upgraded housing. But "[c]hild support awarded out of an obligor spouse's net monthly resources that exceeds the statutory guideline amount must be based solely on the needs of the child, and the trial court may not consider a parent's ability to pay or the lifestyle of the obligee."

SAPCR
Enforcement of Possession Order

NO VALID BASIS FOR DISMISSING FATHER'S MOTION FOR CLARIFICATION AS ALTERNATIVE RELIEF TO HIS REQUEST TO HOLD MOTHER IN CONTEMPT.

In re A.C.P., No. 14-17-00896-CV, 2018 WL 6053503 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (11-20-18).

Facts: Father filed a motion asking the trial court to hold Mother in contempt for failing to abide by visitation provisions or, in the alternative, to enter a clarification order if the divorce decree was not specific enough to be enforced by contempt. At a hearing, Mother asserted that she could not be held in contempt because certain conditions precedent had not been met and the decree was not clear on its face. The trial court then stated that Father's motion was dismissed and that no hearing would be had. Father appealed.

Holding: Reversed and Remanded

Opinion: A dismissal of a motion for contempt is not reviewable by direct appeal; however, a request for a clarification order is distinct from a request to hold a party in contempt and is reviewable by direct appeal.

Mother presented no grounds for dismissing Father's motion for clarification. Rather, Mother represented the divorce decree was "not clear on its face."

SAPCR
Child Support Enforcement

TRIAL COURT LACKED AUTHORITY TO ISSUE MANDATORY INJUNCTION AGAINST OAG.

In re J.G., No. 04-17-00755-CV, 2018 WL 6624509 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (12-19-18).

Facts: Mother obtained a judgment against Father for child support arrears. The OAG, a party to the suit, notified the Secretary of the Treasury to withhold the past-due child support from Father's income tax refund. Subsequently, over the OAG's objection, the trial court signed an agreed order indicating that Mother and Father agreed to Father's voluntary payment of child support and that the refund would not be held by the State but would instead be deposited into the registry of the court. The OAG appealed.

Holding: Order Vacated and Cause Remanded

Opinion: Only the Texas Supreme Court has authority to issue a writ of mandamus or injunction against the OAG. A trial court's order that compels the OAG to act is a mandatory injunction, is barred by statute, and is void. Here, the trial court ordered the tax refunds "shall not be withheld by the state" and that the OAG "shall deposit said funds into the registry." Those portions of the order compelled performance in direct contravention of the statute.

Additionally, the OAG was a party to the underlying suit and explicitly did not agree to the orders signed by the trial court. The trial court could not sign "agreed" orders to which not all the parties had agreed.

MISCELLANOUS

HUSBAND ENTITLED TO NEW TRIAL BECAUSE SERVICE NOT COMPLETED IN STRICT COMPLIANCE WITH TEX. R. CIV. P.

McCoy v. McCoy, No. 02-17-00275-CV, 2018 WL 5993547 (Tex. App.—Texarkana 2018, no pet. h.) (mem. op.) (11-15-18).

Facts: Wife filed for divorce and purportedly served Husband with citation. Husband did not appear, and Wife obtained a default judgment.

Husband filed a bill of review, in which he acknowledged receiving the petition but claimed he did not know he needed to answer and that he presumed he would be notified of a final trial. Additionally, Husband did not receive a copy of the decree until more than 30 days after it was signed because the last known address provided by Wife was incorrect. The trial court denied Husband a bill of review. He filed a restricted appeal. Subsequently, Wife moved to file an amended citation, which the trial court granted. Wife filed a new return of service, which—unlike the original return—was verified.

Holding: Reversed and Remanded

Opinion: Contrary to Wife's assertion, Husband's Petition for Bill of Review was not a post-judgment motion. A bill of review is an independent, separate cause of action filed under a different cause number and, thus, did not preclude Husband from subsequently seeking a restricted appeal.

The original return of service did not comply with the Texas Rules of Civil Procedure because it was not notarized and did not include a clause stating that it was "signed under penalty of perjury." Further, Wife's motion to amend citation was filed months after the trial court's plenary power expired. Thus, the amended citation was of no effect.

WIFE NOT ENTITLED TO CONTINUANCE AFTER DISMISSAL OF HER ATTORNEY.

In re R.R.G., No. 05-17-00722-CV, 2018 WL 6075218 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (11-21-18).

Facts: Wife's second attorney moved for, and obtained, three continuances of the final trial. Subsequently, the parties agreed to a final trial date. Later, Wife's second attorney filed a motion to withdraw because Wife engaged in conduct that made it unreasonably difficult for her attorney to carry out employment. The motion was granted, and the trial court additionally granted Wife another continuance with the admonition that no further continuances would be given as a result of the withdrawal of counsel. When trial commenced as agreed, Wife moved for another continuance, which was denied. However, the trial court recessed trial for 90 days to allow the parties to prepare. The trial court emphasized that discovery was completed, and trial had begun; trial was merely recessed. Wife hired another attorney who filed a notice of limited scope for the sole purpose of requesting a continuance, which was denied. After representing herself at trial, Wife appealed, complaining in part of the trial court's denial of her motions for continuance.

Holding: Affirmed

Opinion: Wife did not challenge the trial court's finding that "good cause exist[ed]" for her second attorney's "mandatory withdrawal." Further, the trial was recessed for 90 days to allow Wife to retain new counsel or to prepare to represent herself. Although Wife complained about the process for obtaining interim fees, the withdrawal was not for the nonpayment of fees, and Wife had sufficient resources to pay her own fees. All discovery had been completed. Wife's prior attorneys had hired experts for her, and the experts had been paid. Wife was not deprived of counsel. She simply failed to secure representation within the time provided.

MOTHER NOT ENTITLED TO MANDAMUS RELIEF WITHOUT SIGNED WRITTEN ORDER FROM WHICH TO REQUEST REVIEW.

In re Shullaw, No. 13-18-00549-CV, 2018 WL 6217573 (Tex. App.—Corpus Christi 2018, orig. proceeding) (mem. op.) (11-28-18).

Facts: After a jury trial, the trial court orally rendered a judgment regarding possession. Mother requested a written order but did not receive one. Mother filed a petition for mandamus relief arguing the trial court's oral rendition was in contravention of the jury's verdict, denied her right to establish the Child's primary residence, and was not in the best interest of the Child.

Holding: Writ of Mandamus Denied

Majority Opinion: (J. Rodriguez, J. Contreras) Without a signed written order, the record was not complete, and Mother failed to meet her burden to obtain mandamus relief. The oral ruling was not specific, certain, and final.

Dissenting Opinion: (J. Benavides) Although a party's right to mandamus relief generally requires a predicate request for some action and a refusal of that request, on rare occasions the courts have relaxed this predicate when the circumstances confirm that the request would be futile and the refusal little more than a formality.

Here, a jury determined that Mother should have the exclusive right to designate the primary residence within the state of Texas of the 18-month-old Child. The jury was aware of Mother's intent to relocate to Houston or Austin. Mother explained to the trial court that a week-on/week-off visitation schedule would be highly burdensome and suggested alternatives. Regardless, the trial court granted Father's request for a week-on/week-off schedule. The trial court did not sign a judgment even though one was requested. The trial court signed findings of fact and conclusions of law but still did not sign a judgment. Without a written order, Mother lacked an adequate remedy by appeal and should have been entitled to mandamus review.

WIFE'S ATTORNEY COULD NOT USE TEX. FAM. CODE CH. 9 AS VEHICLE FOR ENFORCING DIVORCE DECREE PROVISION FOR FEES.

Wyde and Assoc., LLC v. Francesconi, No. 05-17-00587-CV, 2018 WL 6273409 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (11-30-18).

Facts: At the conclusion of a divorce trial, the trial court orally rendered that Husband and Wife would each pay half of Wife's attorney's fees, which were stated to be about $40,000. The final divorce decree included a provision requiring Husband to pay Wife's attorney's fees, but rather than including any amount, the decree only had blank spaces were the dollar amount was to go. No one appealed the decree.

More than two months later, Wife's attorney filed a petition for mandamus seeking to set aside the decree and have a hearing on attorney's fees. Mandamus relief was denied. Subsequently, although no post-judgment motions had been filed to extend the appellate deadlines, Wife's attorney filed a notice of appeal. The appeal was dismissed for lack of jurisdiction. Then, Wife's attorney filed a motion to enforce under Chapter 9 of the Texas Family Code. The trial court denied Wife's Attorney's requested relief but allowed him to put forward an offer of proof. On appeal, Wife's attorney complained that the trial court erred in denying his motion for enforcement of the divorce decree.

Holding: Affirmed

Opinion: Texas Family Code Chapter 9 allows parties to seek enforcement of a divorce decree. Its purpose is to clarify and enforce marital property divisions. An attorney's claim for fees under a decree is not such an issue. Wife's attorney filed his motion long after the trial court's plenary power expired, and his complaint was outside the trial court's jurisdiction.

JUDGE PRESIDING OVER COUNTY COURT AT LAW IS NOT A "REFERRING" OR "ASSOCIATE" JUDGE.

***Townsend v. Vasquez*,** ___ S.W.3d ___, No. 01-17-00436-CV, 2018 WL 6696566 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (on reh'g) (12-20-18).

Facts: Mother and Father divorced and were appointed joint managing conservators of their Child. Mother was granted the exclusive right to designate the primary residence of the Child. Subsequently, Father filed a suit to modify seeking the exclusive right to designate the Child's primary residence. After the trial court granted Father's requested modifications, Mother appealed, raising a number of complaints, including a complaint that it was error to have the County Court at Law judge preside over the final trial because she had objected to having final trial before an associate judge.

Holding: Affirmed

Opinion: In part based on an opinion released after the court's initial opinion in this case but before this opinion on rehearing, the appellate court on its own motion, requested briefing from the parties and addressed whether it had jurisdiction to consider the appeal.

The rules of practice and procedure allow judges to exchange courts and transfer cases from one court to another. They also permit one judge to hear part of a case and another judge to complete the case. A narrow exception exists when one judge presides over the entire bench trial and another judge, who hears no evidence, renders the final judgment in a case based on disputed facts. In such an instance, the judgment rendered by the judge who heard no evidence is void, and an appellate court asked to review that judgment is without jurisdiction to decide the merits of the appeal. A rendition of judgment occurs when the judge's decision is officially announced, either orally in open court or by signed memorandum filed with the clerk. After the court has rendered judgment, the subsequent reduction of the rendered judgment to a writing signed by the court is a purely ministerial act and does not result in a void judgment that would deprive the appellate court of jurisdiction.

Here, at the trial's conclusion, the presiding judge read his ruling into the record, which addressed all the issues of conservatorship, visitation, access, and support. No issues of fact remained to be addressed. The subsequent judgment, though signed by a different judge, was purely a ministerial act that did not alter the oral rendition. Thus, the signed judgment was not void, and the appellate court had jurisdiction to address the merits of the appeal.

Associate judges are not elected. Their "employment" is terminable "at the will of" or "by a majority vote of" the judge or judges that the associate judge serves. In contrast, the County Court at Law was created by statute, and a person obtains this judgeship either by election or by appointment in the event of a vacancy. The County Court judge may be "removed from office" only under certain conditions and through certain procedures. Further, the County Court exercises the jurisdiction conferred upon it, which includes jurisdiction over family-law cases. The County Court judge was not a referring to judge. Thus, Mother's pre-trial objection to an associate judge did not preclude the County Court judge from presiding over the trial on the merits.

MOTHER'S CLAIMS OF FATHER'S PERJURY INSUFFICIENT TO SUPPORT BILL OF REVIEW.

Stokes v. Corsbie, No. 03-17-00469-CV, 2018 WL 2030455 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (12-28-18).

Facts: After contentious litigation and a bench trial, the court appointed Mother and Father joint managing conservators of the Child, with Father having the exclusive right to designate the Child's primary residence. Mother appealed the ruling, the appellate court affirmed, and the Texas Supreme Court and U.S. Supreme Court each denied review. Almost a year after the modification, Mother filed a petition for bill of review alleging the modification was rendered as a result of fraud or official mistake. Mother asserted that she had recently discovered new evidence that Father and his family committed perjury and concealed evidence of his mental health, his family's mental health history, and threats of violence against Mother and the Child by Father's mentally-ill California-based uncle. Mother moved for summary judgment, which the trial court denied. After a *Baker* hearing, the trial court dismissed Mother's petition for bill of review because she failed to produce a meritorious defense to the prior modification order. Mother appealed.

Holding: Affirmed

Opinion: Although alleged perjury and mental health and mental-health history may be factors in determining a child's best interest, they are not the only factors in such a determination. Thus, even if the trial court did consider the matters alleged by Mother, those matters would not necessarily be dispositive of the custody determination on retrial.