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

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SAPCR
ALTERNATIVE DISPUTE RESOLUTION

TEXAS FAMILY CODE SECTION 153.0071(e) DOES NOT APPLY TO SUITS TO TERMINATE THE PARENT-CHILD RELATIONSHIP.

***In re Morris*, ___** S.W.3d ___, No. 14-16-00227-CV, 2016 WL 3457953 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (06-22-16).

Facts: Mother and Father were named joint managing conservators of their Child. Ten years later, Mother signed a voluntary relinquishment of her parental right to the Child, which waived her right to service and stated that termination was in the Child's best interest. However, the affidavit provided no facts to support that conclusion. Father filed a petition to terminate Mother's parental rights, and the parties signed an MSA that stated, "the terms of settlement are to enter the order of termination as attached." Subsequently, Father filed the MSA and appeared to prove up its terms. Father presented no evidence beyond the parties' agreement that the termination was in the Child's best interest. The trial court refused to enter the judgement pursuant to the MSA because there was no evidence that termination would be in the Child's best interest. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied
Opinion: Tex. Fam. Code § 161.001 permits a trial court to terminate a parent-child relationship if clear and convincing evidence establishes one of the enumerated acts in Subsection (1) and that termination is in the Child's best interest. A voluntary affidavit of relinquishment satisfies the first requirement but does not conclusively establish the second.

Here, Father introduced no evidence to support a best interest finding, and Mother's affidavit merely stated that termination was in the Child's best interest without providing any relevant facts. Further, although Father argued that the parties agreed to render an order, contracting parties cannot agree to "render" an order, as that is the office of the court. Contracting parties can agree to submit a proposed order to a court and request the court to sign the proposed order

Additionally, pursuant to the plain language of Tex. Fam. Code § 153.0071, any suit affecting the parent-child relationship—including a termination suit—can be referred to mediation. However, Section 153.0071(e) (providing that a party meeting certain prerequisites is entitled to a judgment on an MSA) only applies to suits under Chapter 153, or suits for conservatorship, possession, and access. By not including any SAPCR in Section 153.0071(e), the legislature likely considered the finality and irrevocability of terminations as opposed to suits for conservatorship, possession, and access, which can be modified. Another concern is that a termination impacts the fundamental liberty interests of the child, who is typically not a party to the parents' mediated settlement agreement.

SAPCR
MODIFICATION

CIRCUMSTANCES WARRANTED ORDER IN MODIFICATION SUIT FOR MOTHER'S CONTINUED SUPERVISED VISITATION DESPITE APPOINTMENT AS JOINT MANAGING CONSERVATOR.

***In re P.A.C.*, ___** S.W.3d ___, No. 14-14-00799-CV, 2016 WL 3213299 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (06-09-16).

Facts: In their divorce decree, Mother and Father were appointed joint managing conservators of their two Children, and the trial court ordered that Mother's access to the Children be supervised until a set date or until she completed a psychological evaluation, whichever occurred later. Subsequently, Father filed a motion to modify, arguing good cause existed to continue Mother's supervised possession and asked to be appointed sole managing conservator. Mother filed a petition seeking standard possession and the exclusive right to designate the Children's primary residence.

During trial, Mother admitted she had violated the court's orders with respect to her communications with Father and expressed the sentiment that she need not follow the orders if she disagreed with them. Mother had sent emails and text messages to Father accusing him of worshiping Satan and of persecuting God, her, and the Children. She asserted that Father would "get [his] day with the President of the U.S." When asked to explain that statement, she responded "[a]nything is possible." Mother claimed to be engaged to a man whom she had dated for 18 months, but the Children had

never heard of him, Mother could not provide any contact information for him, and she stated that he could not be contacted by telephone because he was out of the country for several months.

A jury found that the parties should continue to be joint managing conservators and that Father should retain the exclusive right to designate the Children's primary residence. The trial court signed a final order incorporating the jury's findings and additionally ordered that Mother's periods of possession continue to be supervised and awarded Father the additional exclusive rights to consent to the Children's marriages and to represent them in legal actions. The order also provided for a "step up" possession schedule for Mother if she complied with court-ordered psychological counseling and did not violate the court's order. Mother appealed, arguing that the order did not conform to Father's pleadings and that the evidence was insufficient to support the judgment.

Holding: Affirmed

Opinion: Although Father did not explicitly request the additional exclusive rights awarded him, Father implicitly did so by asking to be appointed the sole managing conservator. Thus, his request encompassed requests for the two additional rights.

Mother had shown disregard for and violated the trial court's prior orders and admitted that her behavior at times was not in the Children's best interest, her mental health was questionable, and she tended to disparage Father when she was with the Children. Although supervised visitation is rare in a joint managing conservatorship, it may be appropriate when dictated by the circumstances.

MOTHER'S ABUSE OF JUDICIAL PROCESS IN MODIFICATION SUIT WARRANTED AWARD TO FATHER FOR ATTORNEY'S FEES.

***In re E.R.C.*, ___** S.W.3d **___**, No. 06-15-00085-CV, 2016 WL 3355846 (Tex. App.—Texarkana 2016, no pet. h.) (06-14-16).

Facts: Mother, a licensed attorney with a history of autism, represented herself at trial and on appeal.

Father filed a motion to modify the parent-child relationship. After much litigation, the parents were appointed joint managing conservators of their Child with a 50-50 possession schedule. Father was granted exclusive rights regarding the Child's residence, education, medical, and psychological treatment. Mother was ordered to pay monthly child support and Father's attorney's fees. Mother appealed, arguing:

- error in the denial of her motion to recuse the trial court judge because his support of LGBT rights indicated a bias against Christians;
- that the local rule allowing for the random assignment of trial courts was unconstitutional;
- that a temporary order appointing a guardian ad litem violated her due process rights under the United States Constitution; and
- that the cumulative effect of errors—regarding, inter alia, discovery orders, conservatorship, visitation, child support violated, and attorney's fees—violated her due process rights under the United States Constitution.

Holding: Affirmed

Opinion: The majority of Mother's issues were not preserved for appeal, inadequately briefed, or moot. Additionally, the cumulative error doctrine—which "has found little favor with appellate courts"—only applies if errors exist.

While discovery generally must be concluded 30 days before trial, a trial court has discretion to allow additional discovery if new information is discovered after the deadline and the party seeking the information would be unfairly prejudiced if the discovery were not obtained. Here, Mother failed to disclose the existence of her psychiatric evaluation until two weeks before trial and asserted that she would not disclose it without a court order.

Mother failed to rebut the presumption that appointing the parents as joint managing conservators would be in the Child's best interest. Additionally, Mother had more than twice the net monthly resources than Father, which supported an order for her to pay Child support (at less than 8% of her net monthly resources) even though the parents were given a 50-50 possession order.

Finally, Mother did not challenge the trial court's findings that she abused the judicial process by filing numerous and unnecessary pleadings and by filing numerous motions, complaints, and lawsuits against various professionals involved in the case. Thus, the unchallenged finding supported an award for Father's attorney's fees.

SAPCR
CHILD SUPPORT ENFORCEMENT

☆☆☆TEXAS SUPREME COURT ☆☆☆

FATHER'S DIRECT PAYMENTS FOR CHILD'S TUITION CONSTITUTED SUPPORT PAYMENTS; MOTHER NOT ENTITLED TO JUDGMENT FOR PAYMENTS NOT MADE THROUGH REGISTRY. DECISION CONFINED TO FACTS PRESENTED.

¶16-4-__. ***Ochsner v. Ochsner*,** ___ S.W.3d ___, No. 14-0638, 2016 WL 3537255 (Tex. 2016) (06-24-16).

Facts: In their divorce decree, Father was ordered to pay monthly payments of $240 directly to Mother plus tuition payments directly to the Child's then-current daycare. In the event that the Child changed schools, Father was ordered to pay $400 monthly either directly to Mother or through the Child Support Office. When the Child changed schools, although Mother was then obligated to pay the Child's tuition, Father continued to pay Mother $240 a month plus tuition payments directly to various private schools rather than the $400 monthly to Mother through the registry. Over time, Father paid more than $20,000 above the amount contemplated.

Ten years after the Child left her original daycare, Mother filed an enforcement action, arguing that Father was in arrears for failing to make any payments through the state registry as ordered in the final decree. The trial court found in favor of Father. The appellate court reversed, and the trial court again found in favor of Father applying a different legal analysis. The appellate court again reversed, holding that the trial court had impermissibly enforced a private agreement to modify a child-support order. Father appealed to the Texas Supreme Court.

Holding: Appellate Judgment Reversed and Rendered, Trial Court affirmed
Majority Opinion: (J. Willett, C.J. Hecht, J. Green, J. Guzman, J. Lehrman, J. Devine, J. Brown). The interpretive focus of this case was on Tex. Fam. Code § 157.263, which provides that a trial court shall confirm the amount of arrearages and render a cumulative money judgment, which includes the unpaid child support, any balance previously owed, and interest. In confirming the "amount" of arrearages, a trial court must determine the quantity of the child support obligation that the obligor failed to meet.

Under Chapter 154 (Child Support), a trial court has considerable discretion to dictate the manner of payment in a child-support order. While an order for income withholding requires payment through a disbursement unit, nothing in the statute requires that *voluntary* payments be made through a state registry. The quantity of unmet child-support is a factual finding that the trial courts are capable of determining. Thus, upon review of Chapter 157 (Enforcement), the trial court may consider the various payments made by the obligor, regardless of the precise manner specified in the child-support order.

The Texas Supreme Court's precedent forbids private arrangements that allow obligors to shirk their obligations, but that was not the case here. This case involved *made* payments, not *missed* payments. Here, Father paid over $20,000 more than the divorce decree required, all of which contributed directly to the Child's education. Father did not attempt to abdicate his parental responsibility.

Further, the divorce decree required Father to make payments to the Child's original day care, and the method of payment was only to change after the Child no longer attended that day care. After that time, Mother would have been obligated to pay for the Child's education. Thus, Father's payments for the Child's tuition directly satisfied a debt owed by Mother. Accordingly, judgment against Father was not warranted because there were no "arrearages."

The Court noted that the decision in this case should be confined to the facts presented. It should not be read to encourage obligors to make direct payments, bypassing the registry, and, at a minimum, complicating enforcement proceedings. Under the specific facts of this case, Father paid more than, and was not attempting to reduce, the amount he owed.

Concurring Opinion: (J. Guzman, J. Lehrman). Chapter 157 allows a court to consider direct payments in determining whether an arrearage exists. Thus, logically, the trial court had discretion to consider the payments made by Father to the Child's school. Crediting evidence that payments were made directly to the obligee, rather than through a registry is not a modification of the amount of child support owed.

Dissenting Opinion: (J. Johnson, J. Boyd). The majority failed to follow basic principles of construction in enforcing an unambiguous divorce decree. While some provisions of the decree in this case allowed the parties to modify terms by written agreement, the method for making child support payments was not among them. Further, the payments to the Child's original day care were not categorized as child support in the decree. The majority improperly condoned Father's failure to comply with a court order. Additionally, the majority's opinion introduces uncertainty into enforcement actions by stating that a trial court need not, but may, enforce final judgments as they are written.

Dissenting Opinion: (J. Boyd, J. Johnson). Chapter 157 permits motions to enforce *provisions of a child-support order* and never mentions "discretion" or "best interests." The existing order had already been determined to be in the Child's best interest and was controlling to protect the Child's best interest, not the interests of either parent. Substantive provisions—including those concerning the method of payment—may only be changed by way of a proper modification order.

Here, Father failed to make payments in the manner specified by the child-support order. The majority acknowledged that no statutory counterclaims or offsets applied in this case. The trial court was asked to enforce the order, not what the court believed the order should have been. Further, the facts were not in dispute; rather, the question before the trial court was a legal question. A trial court abuses its discretion as to legal matters when it acts without reference to guiding rules. Father could have attempted to controvert the Child Support Office's payment record, but the Family Code did not permit him to controvert the child-support order itself.

The majority has announced a new rule permitting enforcement courts to consider payments not made in the manner specified by the order, which will likely lead to obligors seeking offsets for any payment made for the benefit of the child, ensuring that they never have to pay a penny more than the amount ordered. Whether for good or bad, that is not a rule in the Texas Family Code nor in the Texas Supreme Court's precedent.

MISCELLANOUS

TRIAL COURTS NOT REQUIRED TO ENFORCE LAWS CONTRARY TO PUBLIC POLICY OR VIOLATIVE OF DUE PROCESS RIGHTS.

Tex. Att'y Gen. Op. No. KP-0094, 2016 WL 3383777 (06-15-16).

Issues: Whether a trial court may refuse to enforce:

(1) a foreign judgment;
(2) an arbitration award that applied foreign law or principals of a particular faith;
(3) a foreign law;
(4) a contract provision that applies foreign law;
(5) a contractual forum selection provision providing that a dispute will be resolved by a foreign court;
(9) an adoption order entered by a foreign court or jurisdiction

if doing so violates due process rights or is contrary to Texas's public policy.

(6) Whether a judge may exercise jurisdiction despite a more convenient foreign forum if foreign forum would apply law that violates due process rights or is contrary to Texas's public policy.
(7) Whether a trial court abuses its discretion in permitting the application of a foreign law that violates due process rights or is contrary to Texas's public policy.
(8) Whether a judge may refuse to enforce a provision of a contract that provides for a specific list of provisions, including arranged marriages and allowing a conservator to remove a child to a jurisdiction that permits female genital mutilation.
(10) Whether a judge may refuse to enforce a premarital agreement or partition agreement if the agreement is unconscionable.
(11) To what extent Tex. Civ. Prac. & Rem Code Ch. 36 applies in a family law dispute.

Opinion: With respect to issues one through five, under Texas law, a court is not required in family law disputes to enforce a foreign law if enforcement would be contrary to Texas public policy or if it would violate a party's basic right to due process. Similarly, a court must consider certain factors, including whether the parties will be deprived of all remedies or treated unfairly, when determining whether an alternative forum would be appropriate. Further, a trial court is without discretion to apply foreign law in a circumstance where doing so violates a party's right to due process or a clearly established public policy of this state. The Attorney General did not address the specific list of provisions presented by

the questioner but rather, stated that to the extent any contract term violates Texas's public policy, a court may refuse to enforce it. The Attorney General noted that issue nine is specifically addressed by Tex. Fam. Code Section 162.023(a), which provides that a foreign adoption need not be enforced if "the adoption law or process of the foreign country violates the fundamental principles of human rights or the law or public policy of this state." Additionally, whether any specific agreement is unconscionable must be determined after analyzing the relevant facts. Finally, Tex. Civ. Prac. & Rem. Code Ch. 36 applies to foreign money judgments and, thus, would have limited application to family law disputes. However, to the extent it is applicable, a court need not recognize the judgment if the defendant did not receive adequate notice of the proceedings or if the cause of action is repugnant to Texas's public policy.

★★★UNITED STATES SUPREME COURT ★★★

THE FEDERAL BAN ON FIREARMS POSSESSION APPLIES TO ANY PERSON WITH A PRIOR MISDEMEANOR CONVICTION FOR THE "USE…OF PHYSICAL FORCE," INCLUDING ACTS OF FORCE UNDERTAKEN RECKLESSLY.

Voisine v. United States**,** 579 U.S. ____, No. 14-10154, 2016 WL 3461559 (2016) (06-27-16).

Facts: Two petitioners found in possession of firearms were charged with violating the federal ban on firearms for those with prior convictions for misdemeanor domestic assault. Petitioners argued that they were not subject to the firearm prohibition because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct. The District Court rejected the claim, and the Circuit Court affirmed. The U.S. Supreme Court granted certiorari to resolve a split over whether a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun under 18 U.S.C. § 922(g)(9).

Holding: Affirmed
Majority Opinion: (J. Kagan, C.J. Roberts, J. Ginsburg, J. Breyer, J. Alito) The majority's analysis focused on the word "use," which it defined as the "act of employing" something. To commit an assault recklessly is to act with conscious disregard of a substantial risk that one's conduct will cause harm. The force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. While the federal provision excludes "merely accidental" conduct, there is no exclusion for acts undertaken with awareness of the substantial risk of causing injury.

For example, if a husband with soapy hands loses his grip on a plate, which then shatters and cuts his wife, he has not "used" physical force. However, if he throws the plate in anger against the wall near where his wife is standing, that throw would be considered a qualifying "use of force" even if he did not know for certain, but only recognized a substantial risk, that a shard from the plate could injure his wife.

Similarly, if a person lets slip a door he is trying to hold for his girlfriend, he has not actively employed force, even if the result is her injury. But if he slams the door shut with his girlfriend following close behind, then he had actively employed force, regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb.

Dissenting Opinion: (J. Thomas, J. Sotomayor) Use of physical force requires intentional conduct—more than neglect or mere accidental conduct. Thus, "use of physical force" is narrower than most state assault statutes, which punish anyone who recklessly causes physical injury. The offenses for which Petitioners were convicted could be committed "intentionally, knowingly, or recklessly" as a single indivisible offense. Thus, the assault convictions did not necessarily include as an element the "use of physical force" against a family member.

The majority's definition of "use of physical force" is overbroad. Applying the majority's approach could lead to a permanent firearm ban for a father who recklessly caused a car accident—and injury to his son—by texting while driving. The "force" of the car crash and the resulting harm were reckless, but the father did not intentionally use violence against property. The "use of physical force" should be limited to persons who intentionally use force with a practical certainty that the action will cause injury.

The majority's examples of "nonvolitional" acts do not follow the traditional legal definition of the word. For the plate and door examples not to be volitional acts, they would need to be unwilled muscular movements, such as a person

who drops the plate because of a seizure. The majority seeks to expand an already broad rule to any reckless physical injury or nonconsensual touch, which extends the statute into constitutionally problematic territory.