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

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## DIVORCE
### Procedure and Jurisdiction

**ERROR APPARENT ON THE FACE OF THE RECORD BECAUSE NO REPORTERS' RECORD MADE AT DEFAULT PROVE-UP HEARING.**

*Arbogust v. Graham*, No. 03-17-00800-CV, 2018 WL 3150996 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (06-28-18).

**Facts:** Husband challenged by restricted appeal a default divorce decree obtained by Wife. The only element at issue on appeal was whether error was apparent on the face of the record.

**Holding: Reversed and Remanded**

**Opinion:** Although Husband did not appear at trial the decree reflected that "[t]he making of a record of testimony was waived by the parties with the consent of the Court." Husband could not have agreed if he were not present. The trial court confirmed by letter to the appellate court that no record was made.

## DIVORCE
### Grounds for Divorce

***OBERGEFELL* DID NOT SUPPORT WIFE'S OPPOSITION TO DIVORCE ON RELIGIOUS GROUNDS.**

*Lecuona v. Lecuona*, No. 03-17-00138-CV, 2018 WL 2994587 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (06-15-18).

**Facts:** Husband filed for divorce on the ground of insupportability. Wife opposed the divorce on religious grounds. She asserted that the no-fault ground unconstitutionally infringed on her protected interests in what she viewed as an immutable "blood covenant" among the couple and the Almighty. Wife relied on *Obergefell* and the Due Process and Equal Protection Clauses of the U.S. Constitution to support her claim that Husband could not unilaterally seek to terminate a marriage that she, for religious reasons, desired to continue. The trial court granted the divorce. Wife appealed.

**Holding: Affirmed**

**Opinion:** *Obergefell's* analysis was rooted in the view of personal liberty. It could not be interpreted to compel an unwilling spouse to remain married. At the very least, Wife's theory represented a significant and novel expansion of *Obergefell* not properly undertaken by an intermediate state appellate court.

## DIVORCE
### Property Agreements

**WIFE AWARDED ATTORNEY'S FEES BECAUSE HUSBAND'S CLAIM AGAINST HER SEPARATE PROPERTY WAS BREACH OF PREMARITAL AGREEMENT.**

***In re Marriage of Veldekens*, ___ S.W.3d ___, No. 14-16-00770-CV, 2018 WL 2727837 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (06-07-18).

**Facts:** Husband and Wife executed a premarital agreement that included attachments detailing each party's separate property. The agreement provided that no community property would be acquired and that both parties were estopped from making a claim against the other's separate property in the event of a divorce. During the divorce proceeding, Husband claimed that a certain home was not 100% Wife's separate property because he had paid her for a one-half interest in the property and there was a hand-written note acknowledging his one-half interest. The final decree confirmed the home as Wife's separate property, found that Husband had breached the premarital agreement, and awarded Wife her attorney's fees. Husband appealed.

**Holding: Affirmed**

**Opinion:** In its findings of fact, the court found that the home was acquired by Wife before marriage, that it was identified as Wife's separate property in the premarital agreement, and that the parties did not transfer ownership of the home during the marriage. Husband did not object to the findings or request additional or amended findings. The trial court could have reasonably determined that the funds given to Wife by Husband were a gift and could have believed Wife's claim that she never executed a sales contract for ownership in the home.

Further, because the premarital agreement provided that both parties were estopped and barred from making claims against the other's separate estate, Husband's attempt to claim the home was not 100% Wife's separate property was a breach of the premarital agreement. Thus, the trial court did not err in awarding Wife her attorney's fees.

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**PREMARITAL AGREEMENT UPHELD; WIFE'S CONCLUSORY AFFIDAVIT DID NOT SUPPORT CLAIM OF UNENFORCEABILITY.**

*In re Marriage of Lehman*, No. 14-17-00042-CV, 2018 WL 3151172 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (06-28-18).

**Facts:** The day before their marriage, Husband and Wife signed a prenuptial agreement. Wife was represented by an attorney hired by Husband, and Wife made changes to the agreement before signing it. The agreement provided that no community property would be created during the marriage. Ten years later, when divorce proceedings began, Wife challenged the premarital agreement and attached an affidavit asserting that:

> Before our marriage we lived in the same household and my primary responsibility was to care for our home and [Husband] provided the majority of the financial support. I was marginally employed outside the home and I accepted the positions to improve the environment without our home and to be available for my two young daughters. At the time that I was forced to sign the premarital agreement, I did not have the ability to provide financially for my children by myself. When I was presented with the Marital Agreement I was not able to opt out of signing the agreement. It was not an option I could select and so I signed. Since that time I have done everything I could do to improve the situation but just could not make the grade. I feel the agreement is grossly unfair. I feel it takes advantage of my vulnerable position and will create a major inequity if it is enforced. I am asking the court to find that the agreement was not signed voluntarily and set aside the agreement, and divide the community property in a manner that the Court deems just and right.

Husband obtained summary judgment against Wife's challenge; the agreement was valid and enforceable. After a final decree was signed, Wife appealed.

**Holding: Affirmed**

**Opinion:** Wife's affidavit was conclusory and therefore was insufficient to defeat a traditional motion for summary judgment. Further, neither her affidavit nor her deposition testimony attached to Husband's motion for summary judgment demonstrated duress because Husband had no legal duty to marry Wife.

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## ★★★TEXAS SUPREME COURT ★★★

**WIFE TRIGGERED PREMARITAL AGREEMENTS' FORFEITURE CLAUSE BY CHALLENGING AGREEMENT; WIFE NOT ENTITLED TO LUMP SUM PAYMENT UNDER AGREEMENT.**

***In re Marriage of I.C. and Q.C.*, ___** S.W.3d ___, No. 16-0770, 2018 WL 3190888 (Tex. 2018) (06-29-18).

**Facts:** Husband and Wife entered a premarital agreement, which included a provision that Husband would pay a large lump-sum cash payment to Wife upon the entry of a divorce decree. The agreement further provided that if Wife sought to invalidate some or all of the agreement or sought to recover property in variance with the agreement, she would forfeit the lump-sum payment. During the divorce proceeding, when Husband fell behind on certain periodic payments required by the agreement, Wife filed a counter petition asserting claims for breach of contract, anticipatory breach, and breach of fiduciary duty. Wife additionally pleaded in the alternative that because of Husband's breach, the agreement was "marred with fraud." She asserted that she was entitled to rescission of the agreement as a matter of law. The trial court granted Husband's motion for summary judgment on his defenses to material breach and repudiation. Further, it found that Wife sought to invalidate the agreement, to recover property in variance with the agreement, and forfeited her right to the lump-sum cash payment. The appellate court affirmed, and Wife petitioned the Texas Supreme Court.

**Holding: Affirmed**

**Majority Opinion:** (J. Blacklock,

The premarital agreement explicitly provided that Wife "shall forfeit" her cash payment if she sought to invalidate some or all of the agreement, or if she sought to recover property in a manner in variance with the agreement. By seeking to rescind the agreement, Wife sought what could have been a greater distribution of the marital estate under the Tex. Fam. Code instead of under the terms provided in the agreement. This action was clearly an attempt to recover property in a manner at variance with the agreement.

Despite Wife's assertions, she was not forced to seek rescission after Husband failed to make the scheduled payments pursuant to the agreement. She could have—and did—file a breach of contract suit, petition for enforcement, or motion for temporary orders. Even after successfully getting an order for Husband to pay, she sought rescission of the agreement in spite of the agreed provision against challenging the agreement.

Wife argued that the rescission provision was unconscionable. Parties shall have the utmost liberty in contracting. Contracts entered into freely and voluntarily shall be held sacred and enforced by courts. Further, contrary to Wife's assertions, application of a freely agreed-to and unambiguously worded no-contest clause is not the kind of "forfeiture" Texas law seeks to avoid.

**Concurring Opinion:** (J. Lehrman)

Tex. Fam. Code § 4.006(a) provides the exclusive remedies or defenses for an unenforceable premarital agreement and does not include breach of contract. Wife asserted that she was not attempting to have the agreement declared unenforceable under common law; rather, she sought rescission as a remedy for Husband's material breach. This was a distinction without a practical difference. Rescission is not a separate cause of action; it is an equitable remedy that extinguishes legally valid contracts that must be set aside because of fraud, mistake, or other reasons in order to avoid unjust enrichment. It is typically a substitute for monetary damages when such damages would be inadequate. Thus, a party seeking rescission as a remedy for breach of contract and a party seeking to avoid an unenforceable contract desire the same relief. Accordingly, § 4.006 foreclosed rescission as a remedy altogether with respect to premarital agreements.

## DIVORCE
### PROPERTY DIVISION

**PAROL EVIDENCE COULD NOT BE CONSIDERED TO DETERMINE INTENT OF UNAMBIGUOUS DEEDS.**

*Scott v. Scott*, No. 04-17-00155-CV, 2018 WL 2694817 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (06-06-18).

**Facts:** In their divorce proceeding, Husband and Wife disputed the character of two tracts of land. In a motion for partial summary judgment, Wife claimed that a smaller property was community property despite being both parties being grantees in a gift deed. Additionally, Wife claimed that a larger property was her separate property because she asserted it was gifted her during marriage, despite a recitation that it was conveyed in exchange for consideration of $10. Wife offered evidence that her Mother intended the larger property to be a gift and that WIfe never paid any consideration. The attorney who drafted the deed testified that he understood that conveyance to be a gift. Additionally, Wife testified that despite the gift recital in the deed for the smaller property, she and Husband paid Wife's mother for the property. She testified that her mother used a gift deed solely so that the parties could avoid closing costs. The trial court granted Wife summary judgment on the two pieces of property. After a final trial, Husband appealed.

**Holding: Affirmed in Part; Reversed and Remanded in Part**

**Opinion:** When construing an unambiguous deed, a court's primary duty is to ascertain the intent of the parties from all of the language within the four corners of the deed. If a court can ascertain the parties' intent from the language of the deed, that should end the analysis.

Here, the larger property was deeded to Wife during marriage in exchange for $10 consideration. Any parol evidence that the conveyance was intended to be a gift was improperly considered because the deed was unambiguous. Thus, by the plain language of the deed, it was acquired during marriage and was community property. Further, the smaller property was deeded to both Husband and Wife via a "Gift Deed" in consideration for "love" and "affection." Thus, by the plain language of that deed, it was a gift to the parties, and they each owned a separate property interest in the property. The trial court improperly divested Husband of his separate property interest by awarding the property to Wife.

**ALLEGED NUNC PRO TUNC DIVORCE DECREE VOID BECAUSE IT ATTEMPTED TO ALTER PROPERTY DIVISION AFTER TRIAL COURT LOST PLENARY POWER.**

*Gourley v. Gourley*, No. 02-17-00228-CV, 2018 WL 2976431 (Tex. App.—Fort Worth 2018, no pet. h.) (mem. op.) (06-14-18).

**Facts:** Husband was in the Air Force. When Husband and Wife divorce, the divorce decree divided Husband's retirement benefits equally between the two parties. Two years later, the Department of Defense requested the decree be modified to include certain language relating to the division of Husband's retirement benefits. The trial court granted Husband's request for it to sign a nunc pro tunc decree with the requested language.

Many years later, when Husband retired, Wife argued that the new language requested by the government provided that the retirement would be divided based on the date of retirement, rather than the date of divorce. Husband responded that the second decree was void because it impermissibly altered the first decree's property division and was signed after the trial court's plenary power expired. Wife asserted that the second decree was valid because the first decree contemplated the later filing of a QDRO, leaving the case "pending," and because the parties entered a Rule 11 Agreement to enter the second decree. Wife was not represented by an attorney. Husband, his attorney, and his attorney's paralegal all denied that any agreement occurred. After a hearing, the trial court declared that the second decree was void and that the retirement would be divided as of the date of divorce. Wife appealed.

**Holding: Affirmed**

**Opinion:** The first decree clearly awarded Wife half of Husband's retirement benefits as of the date of divorce. The second decree provided for a substantive change from the first decree and, thus, could not be considered a valid nunc pro tunc judgment. Further, because no party appealed the first decree, it became final, and no case was pending in which a Rule 11 agreement could be reached. Further, to conclude otherwise would allow parties to agree to vest a court with subject-matter jurisdiction where none existed. Finally, regardless of whether either party appealed the second decree, it was subject to collateral attack at any time as a void judgment.

**NO VALID CLAIM FOR REIMBURSEMENT WHEN THE DEBT PAID BY COMMUNITY FUNDS WAS A COMMUNITY DEBT.**

*Dyer v. Dyer*, No. 03-16-00753-CV, 2018 WL 2994439 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (06-15-18).

**Facts:** During the marriage, Husband controlled the income he took home from his businesses. He testified that he earned about $21 million pre-tax, about $13.5 million after tax, during the seven-year marriage. He admitted that during the divorce he took home less pay than he had previously. His businesses were set up as "flow-through entities," meaning that any tax liability was paid at the individual level, not the company. Thus, even though Husband increased the retained earnings within his separate property companies, the IRS still viewed the tax liability on the earnings as one owed by Husband and his spouse. At trial, Wife argued that it was inequitable for Husband to deprive the community estate of the earnings, while imposing a debt owed jointly by the spouses.

During trial, the parties also disputed whether the community estate was entitled to reimbursement for premium payments on key-man life-insurance policies. Husband testified that he had already been reimbursed but offered no evidence to support the assertion. Wife was unable to produce any evidence regarding whether he was reimbursed.

The trial was bifurcated—some issues tried to the bench and others to a jury. The jury determined that the taxes paid on retained earnings—over $800,000—were unfair to the community estate, as were the over $300,000 in political contributions made after the divorce was filed. The trial court found the community was also entitled to reimbursement for the life insurance premiums. The final divorce decree awarded Wife a money judgment of $2.2 million, which was approximately 70% of the community estate. Husband appealed.

**Holding: Reversed and Remanded**

**Opinion:** Where community funds are used to pay a community debt, no right to reimbursement can be asserted. The Tex. Fam. Code provides for a reimbursement claim for inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse. Wife referred to such a claim in her petition, but reference to this right of reimbursement was not included in the jury charge. The jury was only asked whether the community's payment of income taxes benefitted Husband's separate property.

The parties fought throughout the marriage about Husband's political contributions, which significantly increased after the divorce was filed. The jury only found fault with Husband's political contributions made after the divorce was filed. Even if the contributions benefitted Husband's companies during the marriage, the post-filing contributions would have only benefitted Husband's separate estate going forward. Further, because the issue was always a point of contention between the parties, Husband's assertion that Wife implicitly consented to the contributions lacked merit.

Husband testified that he had been reimbursed for the life-insurance premiums by his company. Although he offered no other proof, Wife offered no evidence to controvert Husband's assertions. Because there was no evidence raising a conflict on the issue, the trial court erred in determining the community estate was entitled to reimbursement for the premiums.

While a 70-30 division might not have been unreasonable, because the errors may have affected the trial court's just and right division, the entire property division was remanded for further proceedings.

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**HUSBAND COMMITTED CONSTRUCTIVE FRAUD AGAINST COMMUNITY BECAUSE HE WAS UNABLE TO ACCOUNT FOR VAST EXPENDITURES OF COMMUNITY FUNDS.**

*Miller v. Miller*, No. 14-17-00293-CV, 2018 WL 3151241 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (06-28-18).

**Facts:** Husband and Wife were married nearly fifty years. Husband was a licensed physician. Wife worked at his clinic briefly towards the end of the marriage. The couple also had a number of real estate holdings. Husband had a few clinics, and some of the clinics leased offices from buildings owned by the parties. They also had properties not affiliated with Husband's clinic. In some circumstances, the property was owned 100% by Husband, however, he also had properties that he co-owned with friends. Husband handled all the business dealings with his friends.

Husband suffered a massive stroke and was unable to work for a substantial period of time. He was hospitalized for eight days, after which time Wife was his full-time caregiver. She found this role to be demanding and exhausting. Husband became withdrawn and verbally abusive. Wife filed for divorce.

After a twelve-day jury trial spanning nearly a year, a final divorce decree was signed that found Husband committed constructive fraud against the community estate, reconstituted the community estate, and divided the estate nearly equally between the parties. Husband appealed, arguing there was no evidence to support the judgment.

**Holding: Affirmed**

**Opinion:** Husband argued that the trial court erred in finding fraud on the community because community funds were merely transferred to various entities within the community estate to maintain and preserve the community estate, not to hide or spend down the community estate. However, significant funds were unaccounted for, and even Husband's office manager, who had power of attorney over Husband's clinic after he was unable to work, could not explain many of the discrepancies. Husband continued to trust and do business with his friend even after his friend was indicted for misappropriating funds from a former employer. Husband relied primarily on his own testimony that the funds were used to preserve the community estate, but the trial court was not required to believe Husband's self-serving testimony. Further, the trial court considered the expenses for Husband's medical care when reconstituting the estate and did not include the expenditure of those funds when reconstituting the estate.

Husband argued that because there is no fiduciary duty between divorcing spouses represented by attorneys, he could not have committed fraud on the community. However, Husband did not cite any law to support that position. Such a conclusion would deprive a wronged spouse of the constructive fraud remedy at a time when that spouse's community property interest may be most vulnerable to wrongdoing.

Husband argued that Wife was uniformed by personal choice in the matters of the community estate and that her lack of knowledge or consent was her fault alone. However, Husband cited no authority to support that argument. Moreover, to prove constructive fraud, one must show that a spouse disposed of the other spouse's interest in community property without the other's knowledge *or* consent. There is no diligence requirement on the non-managing spouse, particularly when a relationship of trust and confidence exists between spouses as to that portion of the community property controlled by the managing spouse.

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## ★★★TEXAS SUPREME COURT ★★★

**AWARD TO HUSBAND OF INTEREST IN HOUSE IN WHICH HUSBAND EGREGIOUSLY ABUSED STEPDAUGHTER FOR OVER A YEAR WAS NOT JUST AND RIGHT AS A MATTER OF LAW.**

***Bradshaw v. Bradshaw*, ___ S.W.3d ___, No. 16-0328, 2018 WL 3207123 (Tex. 2018) (06-29-18).**

**Facts:** Husband and Wife were married three years. When they first married, they lived in Wife's separate property home with her two daughters and one of her daughter's sister. When the home was destroyed in a fire, Wife used insurance proceeds to buy a new home.

Shortly after the move, Husband began sexually abusing Wife's 13-year-old daughter. He often abused her daily, sometimes weekly, stopping for a while and then resuming, for more than a year. The two other children talked to each other and discovered that both of them had been abused by Husband. The three children then began talking to each other and reported the behavior to their aunt, who called the police. At trial, the three children testified, and Wife testified that she also had been abused by Husband. Ultimately, Husband was convicted for two or more acts sexual abuse of a victim under the age of 14 for a period of 30 or more days and was sentenced to 60 years' imprisonment.

During the divorce proceeding, Wife failed to introduce sufficient evidence that the second house was her separate property, so it was included in the trial court's just and right division of the community estate. The court awarded each party the property in their possession and awarded Wife an 80% interest in the house, with the other 20% being awarded to Husband. Wife appealed the judgment, arguing that she should have been awarded 100% of the house and that anything less was not just and right. The appellate court affirmed the trial court's judgment, and Wife petitioned the Texas Supreme Court for review.

**Holding: Reversed and Remanded**

**Majority Opinion:** (C.J. Hecht, J. Brown, J. Blacklock)

"Just" means "[l]egally right; lawful; equitable." "Right" means "[t]hat which is proper under law, morality, or ethics." "Due regard" means the "[a]ttention, care, or consideration" that is "[j]ust, proper, regular, and reasonable."

Here, the issue was not whether Husband committed the crime or whether the award of an interest in the house to Husband could be considered punishment. Rather, the question was whether it could be just and right to award Husband an interest in the home he repeatedly used to sexually abuse multiple victims, including his stepdaughters. It is virtually beyond argument that awarding Husband an interest in the very home he used to sexually abuse his stepdaughter, for which he was convicted, and others was unjust and wrong, not as a matter of fact, but as a matter of law.

Arguments relying on Husband's repairs and improvements to the house might be appropriate as to whether the overall property division was appropriate, but those arguments miss the point: Husband should not have been awarded an interest in the house he was convicted of using to sexually assault his stepdaughter.

To the extent Husband argued that it would be error to award 100% of the community estate to Wife, that issue can be addressed by the trial court on remand when it reconsiders the division of the community estate.

The dissent argued that a court must take statutes as it finds them. Texas law requires a division be just and right. As a matter of law, the division here was not just and right.

This decision was limited to narrow circumstances where the behavior involves the use of community property, is as egregious as Husband's, and results in a criminal conviction. Family violence alone is insufficient to deprive a guilty spouse of an interest in all or even a specific part of the community estate. Here, the award to Husband of an interest in the house could not be.

**Concurring Opinion:** (J. Devine, J. Guzman)

The record supported a disproportionate, fault-based award to Wife. The parties testified at length about tracing the insurance proceeds, the value of the house, and Husband's criminal acts. However, no evidence was presented regarding Husband's assets that were burned in the fire. A mere $5400 of community funds were expended on the mortgage. Husband testified that he did some work on the house, but he did not testify as to the value of the work or as to any increased value in the home attributable to that work. Based on the last known value for the house, Husband was awarded perhaps a $25,000 interest in the house. This seemed to be exceedingly generous even before considering Husband's fault or other factors supporting a disproportionate award. Given Husband's reprehensible conduct, it was difficult to imagine a situation where considering fault in the divorce would be more appropriate. Further, the parties' financial obligations and needs were vastly different. Wife would be raising two daughters, while Husband was going to spend the next 60 years in prison and had no need for the house.

Husband argued that his interest in the house was justified by the substantial work he put into repairing and improving the house, which is in the nature of a reimbursement claim. However, the record contained no evidence to support a reimbursement claim.

The parties alluded to other assets, but no evidence of value of any of those assets was presented. No inventory was admitted. Thus, the trial court was presented with insufficient evidence on which to reach a determination of a just and right division.

The dissent asserted that Wife never raised a complaint of the sufficiency of the evidence. However, she expressly asserted that the record was totally silent as to any rationale for awarding Husband an interest in the house.

A just-and-right division need not be equally, but it must be informed.

**Dissenting Opinion:** (J. Lehrmann)

While a trial court may not use a property division to punish a spouse for fault, there was no indication that occurred here. However, the occasional affirmance of more unequal divisions than the one here did not allow the inference that the trial court erred in failing to award Wife more.

**Dissenting Opinion:** (J. Boyd, J. Green, J. Johnson, J. Lehrmann)

The plurality misapplied the abuse-of-discretion standard. The Tex. Fam. Code affords the trial court wide latitude and discretion in dividing the community estate. The plurality suggested that its view could trump the trial court's discretion despite the abuse-of-discretion standard because when "finally interpreting a statute" the Texas Supreme Court's view is all that is relevant. But, there was no statutory interpretation here. No one disputed the meaning of the statute. The issue was the statute's application.

As if enacting a statute, the plurality would declare that it was not just and right as a matter of law, in dividing the community estate, to award an interest in the family home to a spouse convicted of using the home to sexually abuse his stepdaughter. The plurality would limit this new law to narrow circumstances where the behavior involves the use of community property, is as egregious as Husband's, and results in a criminal conviction. But this new law leaves many unanswered questions, including what conduct rises to the requisite level to warrant its application. Moreover, the plurality essentially created a retroactive law in this opinion. Finally, while the plurality asserted that its position is "virtually beyond argument," six Texas Supreme Court justices disagreed. The new principle in the plurality's opinion—because it was not supported by a majority of the court—is not the law.

The trial court explicitly found that the unequal division reflected due regard for the rights of each party. The Tex. Fam. Code does not require the trial court to disproportionately award property or to consider fault. The trial court *may* do these things. Perhaps Texas law should require forfeiture by spouses who abuse their spouse or children or stepchildren, but the exercise of this power is best left to the Legislature, not the court, which must take statutes as it finds them.

The concurrence determined the case should be remanded because the evidence was insufficient to support the division. However, Wife never complained of the sufficiency of the evidence. She argued the evidence was sufficient to support an award of the entire interest in the house to her. Further, the concurrence did not state whether it found the evidence legally or factually insufficient. The Texas Supreme Court is not permitted to review a factual sufficiency complaint—such review is limited to the intermediate courts' review. The Texas Supreme Court may only determine legal sufficiency—whether no evidence supports the trial court's decision. The concurrence noted that the division seemed to be exceedingly generous to Husband, but this concerns the effect of the evidence, not the lack of it. Further, if the evidence was sufficient to allow the concurrence to reach that conclusion, the evidence was sufficient to enable the trial court to divide the property.

The concurrence additionally likened Husband's claim to a reimbursement claim, but Wife no longer disputed the character of the home, so the Texas Supreme Court was required to accept it as community property. To the extent that values of other property was not provided, all of that property was awarded to Wife. The only issue on appeal was the division of the house, and there was sufficient evidence presented as to its value. This court simply had no proper basis on which to hold that the trial court abused its discretion.

## DIVORCE
### Spousal Maintenance/Alimony

**AGREEMENT FOR SPOUSAL MAINTENCANCE NOT SUBJECT TO CHAPTER 8 BECAUSE OBLIGATION EXCEEDED PRESCRIBED LIMITS OF CHAPTER 8 AT TIME DECREE SIGNED; PROVISION ALLOWING TERMINATION OF OBLIGATION ON "FURTHER ORDERS OF THE COURT" ALLOWED HUSBAND TO SEEK MODIFICATION OR TERMINATION OF OBLIGATION.**

***Waldrop v. Waldrop*, ___** S.W.3d ___, No. 02-15-00058-CV, 2018 WL 2728438 (Tex. App.—Fort Worth 2018, no pet. h.) (06-07-18) (reh'g en banc).

**Facts:** Husband and Wife included a provision in their agreed divorce decree for Contractual Maintenance and provided certain circumstances under which the obligation would terminate. Six years later, Husband filed a petition for a de-

claratory judgment to determine whether the provision was for chapter 8 spousal maintenance or contractual alimony. Husband also sought a determination whether he could modify or terminate the obligation for a reason not specifically listed in the decree. Following a bench trial, the court declared that the provision was purely contractual and not subject to chapter 8 and that language that the obligation could be terminated by "further orders of the Court" was limited to the express circumstances listed in the decree. The court further found that even if chapter 8's "material and substantial change" provision applied, Husband failed to prove such change. Husband appealed.

**Holding: Reversed and Remanded**

**Majority Opinion:** (J. Walker, J. Meier, J. Gabriel, J. Kerr, J. Birdwell (in part)). The parties decree, signed in 2007, provided for payments that exceeded the maximum amount and duration allowed under the applicable provisions of Tex. Fam Code Ch. 8 at that time. Thus, mere references to Ch 8 elsewhere in the decree could not impose Ch. 8's terms on the obligation. Further, the decree's use of the word "maintenance" rather than "alimony" was mere nomenclature incapable of altering the substance of the provision. The fact that the provision was included within the decree, rather than in a separate agreement incident to divorce, did not affect the contractual nature of the provision. Additionally, that the parties chose to mirror the Ch. 8 language found in the Texas Family Law Practice Manual did not make the provision spousal maintenance. The parties were free to agree to any language they deemed appropriate to reflect their agreement. Finally, Husband could not rely on subsequent amendments to the Texas Family Code because the contract had to be construed based on the parties' state of mind at the time it was signed.

The provision for the payments terminated if any one of four events occurred, including "further orders of the Court affecting the spousal maintenance obligation, including a finding of cohabitation by [Wife]". Husband argued that the "further orders" provision necessarily gave the court the power to modify the obligation if appropriate. Wife argued that the "further orders" simply gave the court authority to enter orders if one of the other specific events occurred.

Wife's interpretation removed any practical effect of the "further orders" provision. The court could not construe the provision as if that language did not exist. The court noted that it "would be hard pressed to ascribe any independent meaning to this language unless it authorizes the trial court to sign an order modifying [Husband's] maintenance obligation in some respect." Thus, the determination of whether the obligation should be modified or terminated was remanded to the trial court.

**Comment:** (J. Birdwell, who joined in Parts 1-!V, and all of Part V, except for the disposition). The trial court judgment should have been affirmed because Husband did not prove a material and substantial change.

**Concurring Opinion:** (J. Meier)

The appellate court should have provided the trial court with an instruction to only modify the obligation if there had been a material and substantial change in Husband's circumstances warranting such change.

**Dissenting Opinion:** (C.J. Sudderth, J. Pittman, J. Dauphinot)

The provision purporting to allow the contract to be modified upon "further orders" was illusory at its core. Absent agreement as to the circumstances under which any of these persons could modify the contract, there was no agreement as to the essential terms of the modification process. It was merely an agreement to agree, which is no agreement at all.

Further, if the appellate court could not provide guidance as to a standard by which the trial court was to determine whether modification was appropriate, how could the appellate court review whether or not the trial court abused its discretion in granting or denying the requested modification?

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**WIFE ENTITLED TO SPOUSAL MAINTENANCE BECAUSE SHE HAD WORKED AT SAME FULL-TIME JOB FOR 31 YEARS YET WAS UNABLE TO FULLY COVER MONTHLY HOUSING COSTS.**

*Gill v. Gill*, No. 05-17-00826-CV, 2018 WL 3120863 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (06-26-18).

**Facts:** Husband and Wife were married nearly 40 years. In the final decree, the court ordered Husband to pay Wife $650 a month for five years and awarded Wife a 100% interest in the joint survivor's annuity of Husband's retirement pension plan. Husband appealed.

**Holding: Affirmed in Part; Reversed and Remanded in Part**

**Opinion:** Husband limited his argument regarding spousal maintenance to Wife's income and housing costs, so the appellate court did the same. Wife had a steady job with TDPS for 31 years. She was eligible to retire but did not know when she would. Her monthly shortfall was a bit over $600 per month. She looked into getting an apartment, but rental

rates were roughly the same as the mortgage payment on the marital residence, around $1200 per month. Husband did not challenge the trial court's award to Wife of the marital residence. Nor did he present any evidence that she could obtain housing for an amount significantly less than the mortgage. Further, Husband cited no authority supporting a proposition that evidence of a 31-year record of steady full-time employment during the marriage was insufficient to show that Wife exercised due diligence in earning sufficient income.

The trial court awarded Wife a portion of Husband's retirement benefits to be calculated at the time of his retirement. At the time of divorce, Husband was still working and did not know when he would retire. Wife was not entitled to increases to Husband's retirement benefits after the date of divorce, so the case was remanded on that issue.

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**WIFE FAILED TO OFFER SUFFICIENT EVIDENCE TO SUPPORT DEFAULT AWARD OF SPOUSAL MAINTENANCE OR ONE-SIDED INJUNCTION AGAINST FATHER AS TO UNRELATED ADULTS STAYING OVERNIGHT.**

*Schindler v. Schindler*, No. 13-16-00483-CV, 2018 WL 3151857 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (06-28-18).

**Facts:** Wife filed for divorce and served Husband, but he did not respond or participate in the proceedings. Wife obtained temporary orders for the couple's Children, with which Husband abided. Eventually, Wife obtained a default divorce decree. Husband filed a motion for new trial which the trial court denied. Husband appealed, complaining of the denial of a new trial and that the evidence did not support the final decree.

**Holding: Affirmed in Part; Reversed and Remanded in Part**

**Opinion:** Although Husband testified he suffered from depression at the time he was served with the petition and did not understand the import of the service, evidence established that during the pendency of the divorce he exercised his visitation, paid support to Wife as ordered, and was able to work. The court did not abuse its discretion in determining that Husband acted with conscious indifference to the proceedings and did not meet the first *Craddock* element.

A petition may not be taken as confessed if the respondent does not file an answer. While Wife offered sufficient evidence regarding child support, possession and visitation, conservatorship, and community property, she failed to offer sufficient evidence regarding spousal maintenance and her requested permanent injunctions.

Wife offered no testimony as to her expenses and needs that her current income could not meet. She provided no explanation of what type of skills she needed in order to become more gainfully employed, nor did she provide testimony regarding an estimate of how long it would take to acquire new skills. She merely testified that she needed some time to develop additional skills and increase her income.

Additionally, Wife requested that Husband not be permitted to have an unrelated adult remain overnight while he had possession of the Children. The trial court granted the requested injunction but did not impose the same restriction on Wife's periods of possession. Wife's petition and minimal testimony was insufficient to support the one-sided injunction.

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## ★★★TEXAS SUPREME COURT★★★

**QDRO COULD NOT BE USED TO ENFORCE OKLAHOMA JUDGMENT FOR AGREED SPOUSAL SUPPORT; FULL-FAITH-AND-CREDIT CLAUSE REQUIRED TEXAS TO RECOGNIZE JUDGMENT, BUT TEXAS LAW GOVERNED MANNER OF ENFORCEMENT.**

***Dalton v. Dalton***, No. 17-0155, 2018 WL 3207133 (Tex. 2017) (06-29-18).

**Facts:** Husband and Wife separated in Oklahoma and reached a settlement agreement regarding all property and child-related issues. An Oklahoma court rendered an "Order of Separate Maintenance" reflecting the parties' agreement. The order included a spousal support obligation for $1,309,014.00 to be paid at a rate of $6,060.25 per month until paid in full. Subsequently, a Texas court rendered a divorce decree that dissolved the parties' marriage and gave full faith and credit to and incorporated the Oklahoma Order. A month later, the Texas court rendered a wage withholding order for child support and spousal support.

When Husband failed to comply with the orders, Wife moved for enforcement and sought judgments for arrearages and contempt. Additionally, Wife filed a petition for a QDRO regarding the full amount of spousal support not covered by the withholding order, along with all judgments for unpaid child support, spousal support, and attorney's fees. The court granted Wife's requested relief. Husband appealed, arguing that the court erred by rendering a QDRO that altered the terms of the divorce decree. Additionally, Husband contended that wage garnishment was not an available

remedy to enforce the contractual alimony. After the appellate court affirmed the judgment, Husband petitioned the Texas Supreme Court.

**Holding: Reversed and Remanded**

**Majority Opinion:** (J. Boyd, C.J. Hecht, J. Green, J. Johnson, J. Guzman, J. Devine, J. Brown, J. Blacklock)

A foreign judgment filed in a Texas court is entitled to full faith and credit in this state. However, when it comes to enforcement procedures, Texas law provides that the order has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying a judgment as a judgment of the court in which the foreign judgement is filed. While Chapter 8 spousal maintenance can be enforced by wage garnishment, contractual alimony may only be enforced as a debt. Wife testified that neither party asserted to the Oklahoma court that the agreement was ever intended to satisfy Texas law, much less Chapter 8 of the Texas Family Code. Further, nothing in the record supported an assertion that the obligation satisfied the requirements of Chapter 8.

ERISA preempts any Texas law relating to employee benefit plans, but here, no applicable Texas law existed to be preempted. ERISA includes an anti-alienation clause that generally prohibits any assignment of retirement benefits, but that prohibition does not apply to QDROs. The anit-alienation and preemption clauses do not grant a state court authority to issue an order that the state's law does not authorize.

Chapter 9, subchapter A (suits to enforce the decree) allows courts to enter orders to enforce a divorce decree, so long as the substantive property division is not altered. Thus, subchapter A did not permit the QDRO to enforce the arrearages because the arrearages were not part of the property division.

Subchapter B (post-decree QDROs) allows a party to sue to enforce "a decree of divorce or annulment providing for a division of property" by "an enforceable [QDRO] or similar order…." But a suit seeking a QDRO under subchapter B applies only "to a previously divided pension, retirement plan, or other employee benefit." The court may enter a post-decree QDRO if the court did not enter a QDRO when it entered the "final decree of divorce or annulment or another final order *dividing property*." Reading the two subchapters together, a QDRO cannot change the substantive property division made in an original decree. Thus, the QDRO rendered here was void.

A divorce decree may divide a spouse's retirement benefits as a means to award child support or alimony, but a court may not later enter a QDRO that amends the division announced in the divorce decree. The concurrence finds support for its contrary proposition in decisions of other states, but each of those decisions recognizes the source of power as state law authorizing assignment of benefits. No Texas statute grants the trial court such authority.

**Concurring Opinion:** (J. Lehrmann)

No evidence supported a claim that Husband's obligation was for Chapter 8 spousal maintenance, so the arrearages could only be enforceable as a debt.

Justice Lehrmann wrote separate to clarify her views on a spouse's ability to enforce spousal maintenance to the extent it would qualify as such under chapter 8 of the Texas Family Code.

A "court may not order that income be withheld…to the extent that any provision of an agreed order for maintenance exceeds the amount of periodic support the court could have ordered under [chapter 8] or for any period of maintenance beyond the period of maintenance the court could have ordered under this chapter." Implicit in this language is the directive that courts *may* order that income be withheld "to the extent" that the agreed spousal maintenance could have qualified under chapter 8.

Thus, upon proof at an enforcement hearing that a party was qualified for spousal maintenance under chapter 8 at the time of divorce, a judgment for arrearages on a maintenance agreement is enforceable by income withholding or contempt "to the extent" that the agreement does not exceed what could have been ordered under that chapter.

Relying on non-Texas opinions and articles by Charla H. Bradshaw and John F. Elder, Justice Lehrmann concluded that a QDRO is a mechanism that could be used to ensure satisfaction of a legal duty already owed. A conclusion to the contrary ignores Texas's treatment of such obligations in comparison to traditional debts and interferes with Texas policy favoring their enforcement. Subchapter B contains no language limiting the authority a court may otherwise have to enter an order permitting attachment of retirement benefits. Garnishment of retirement benefits does nothing to the decree's division of property. A court does not re-divide marital property by enforcing a judgment for delinquent child support of spousal maintenance against the payee spouse's retirement benefits.

## DIVORCE
### ENFORCEMENT OF PROPERTY DIVISION

**HUSBAND WAIVED CHALLENGE TO LEGALITY OF AGREED DIVISION OF RETIREMENT BENEFITS BY FAILING TO APPEAL DECREE AT TIME OF DIVORCE.**

*Rudolph v. Jamieson*, No. 03-17-00693-CV, 2018 WL 2648514 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (06-05-18).

**Facts:** Husband and Wife's agreed divorce decree awarded each party a portion of the other's retirement. Both parties were in the Army. Specifically, Wife was awarded a portion of Husband's "disposable retired pay." Additionally, the decree provided that Wife was awarded:

(a) all amounts of "retired pay" that Husband "actually or constructively waives or forfeits in any manner and for any reason or purpose," as well as

(b) "any sum taken by [him] in addition to or in lieu of retirement benefits . . . including any form of compensation attributable to separation from military service instead of or in addition to payment of the military benefits normally payable to a retired member."

The decree provided that the term "disposable retired pay" was defined by federal statute and that "retired pay" was dependent on the number of years of creditable service in the military.

Due to injuries during combat, Husband was determined to be disabled and placed on the Army's Permanent Disability Retired List. He retired. Because the Army paid Husband disability retirement, he did not receive the retirement he would have received based on his years of service.

Wife filed a petition for enforcement because Husband had not paid her any portion of his retirement. Husband filed a general denial and a counter-petition asserting Wife also had not paid him any portion of her retirement as provided in the decree. After a hearing, the trial court calculated the amounts that the parties owed each other, credited Wife's obligation to Husband against his obligation to her, and signed a clarification order ordering Husband to pay what was owed to Wife. Husband appealed. Husband argued that the clarification order modified the divorce decree's property division by awarding Wife a portion of his "gross retired pay" (i.e., his disability retired pay) rather than the same percentage of his "disposable retired pay" (which Husband asserted was zero).

**Holding: Affirmed**

**Opinion:** Husband's argument ignored the plain language of the award to Wife of military benefits. Even if his receipt of disability retirement payments instead of regular retirement benefits was at the Army's election rather than his own, he still constructively waived or forfeited his earned years-of-service retirement, entitling Wife to payments under the agreed decree.

Further, although Husband cited authority to support a contention that the division violated federal law by dividing a military retiree's retirement pay waived in order to receive veteran's disability benefits, which complaint should have been made via an appeal of the divorce decree, which Husband did not do. He could not collaterally attack the division after the appellate deadlines passed, even if the division was allegedly unlawful.

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**WIFE ENTITLED TO HALF HUSBAND'S RETIREMENT UNDER RESIDUARY CLAUSE IN DECREE, DESPITE FAILURE TO OBTAIN QDRO "SIMULTANEOUSLY" WITH DECREE.**

*Helm v. Hauser*, No. 04-17-00232-CV, 2018 WL 2943823 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (06-13-18).

**Facts:** Husband and Wife entered into an MSA during their divorce proceeding. The MSA provided that Husband's retirement benefit ("FERS") would be divided 50/50 between the parties. A divorce decree was entered incorporating the MSA's terms. Two years later, Husband retired. He began collecting retirement, but no funds were distributed to Wife, despite her application to the office managing the FERS benefits. About five years after Husband's retirement, Wife filed an original petition for a domestic relations order. She additionally sought enforcement of the decree and asserted Husband breached the MSA. After a bench trial, the court granted Wife a money judgment for the unpaid benefits and signed an order directing the FERS managing office to pay Wife her share of the benefits. Husband appealed, arguing the decree did not explicitly divide the FERS benefits, so the trial court lacked jurisdiction to enforce such a division. Husband additionally argued that Wife was barred by the two-year limitations period of Tex. Fam. Code § 9.003(b).

**Holding: Affirmed**

**Opinion:** Although the final decree did not explicitly reference "FERS", it contained a residuary clause awarding Wife 50% of Husband's retirement benefits "existing by reason of [Husband's] past and present employment as of [date] as specifically set out in the [QDRO] entered simultaneously herewith." Husband argued that because no QDRO was entered simultaneously, the decree did not divide his FERS benefits. However, the plain language of the decree clearly awarded those benefits. The decree, read as a whole, contained no conflicting language, and Husband's proposed construction would render the award to Wife of his only retirement benefits meaningless.

Although there is a two-year limitation (starting when the right matures) on filing suit to enforce the division of future property not in existence at the time of the original decree, there is a four-year limitation on a breach of contract claim. Because Wife filed suit for breach of the MSA, her suit was timely. Further, without findings of fact, Husband was unable to show that the trial court awarded Wife more than 4-years of her unpaid retirement benefits.

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**DECREE'S PROVISION THAT ESTATES WERE "ENTITLED" TO REIMBURSEMENT "CLAIMS" WAS RECITAL LANGUAGE INDICATING CLAIMS WERE CONSIDERED IN THE EQUALIZATION JUDGMENT.**

*Moseley v. Gandee*, No. 02-18-00123-CV, 2018 WL 3060335 (Tex. App.—Fort Worth 2018, no pet. h.) (mem. op.) (06-21-18).

**Facts:** Wife filed a motion to enforce her divorce decree's equalization judgment. Husband filed a response contending the decree was ambiguous with respect to potential awards for reimbursement and equalization and requested a clarifying order. The trial court granted Wife's motion and denied Husband's. Husband appealed.

**Holding: Affirmed**

**Opinion:** Factual recitations or reasons preceding the decretal portion of a judgment form no part of the judgment itself. Where there appears to be a discrepancy between the judgment's recital and decretal paragraphs, the decretal provisions control.

In multiple paragraphs, the trial court "ordered and decreed" that Husband, Wife, and the community estate were each "entitled" to different reimbursement claims. In a subsequent paragraph, it "awarded" wife an equalization judgment. "Entitle" can mean either "to grant a legal right to" or "to qualify for." It could be interpreted that the decree used the words entitle and award interchangeably, but the decree also could have meant that a party or estate merely "qualified for" reimbursement. Thus, the decree was ambiguous, requiring an interpretation of the decree as a whole.

The word "entitled" only appeared in the reimbursement section, whereas "awarded" was used everywhere else. The reimbursement section was entitled "claims," whereas the equalization section was entitled "judgment." In its findings, the court concluded that it awarded the equalization judgment after "applying the requisite reimbursement claims." At the hearing on Husband's motion to reconsider, the court stated that it had considered all offsets when awarding the equalization judgment. Considering the decree as a whole, the reimbursement section was a recital portion of the decree, and the equalization award was a decretal portion. Thus, the reimbursement claims and equalization judgment were not separate awards, and only the equalization judgment was required to be paid.

## SAPCR
## Procedure and Jurisdiction

**GRANDMOTHER'S SUPPORTING AFFIDAVIT INSUFFICIENT TO ESTABLISH THAT DENYING HER ACCESS WOULD SIGNIFICANTLY IMPAIR THE CHILDREN'S PHYSICAL HEALTH OR EMOTIONAL WELL-BEING.**

***In re J.M.G.*, ___ S.W.3d ___, No. 08-18-00024-CV, 2018 WL 2949354 (Tex. App.—El Paso 2018, orig. proceeding) (06-13-18).**

**Facts:** Father was jailed awaiting charges of indecency with one of his Children. Grandmother filed a petition seeking grandparent access and possession; however, she failed to attach a supporting affidavit to her petition. Mother filed a plea to the jurisdiction asserting Grandmother's petition should be dismissed for the failure to include an affidavit. Grandmother amended her petition and attached a supporting affidavit. At a hearing on Mother's plea, Grandmother argued that Mother could not raise a claim that the affidavit was insufficient because Mother's plea only challenged the absence of the affidavit, not the substance of the later-filed affidavit. Grandmother and Mother each testified. Mother expressed concern that Grandmother did not believe the allegations against Father and seemed more focused on get-

ting the charges against Father dropped than on the welfare of the Children. The trial court denied Mother's plea and issued temporary orders granting Grandmother supervised visitation. Mother filed a petition for writ of mandamus.

**Holding: Writ of Mandamus Conditionally Granted**

**Opinion:** A party can raise a standing argument for the first time on appeal. Thus, a party can raise a standing claim for the first time at a hearing on a plea to the jurisdiction. Mother did not waive her complaint by failing to amend her plea.

Grandmother asserted that she had a close relationship with the Children, she saw them often in the years leading up to the suit, she attended school activities and other events, and the Children missed her and wanted visitation with her. Assuming these facts were true, they did not rebut the presumption that Mother was acting in the Children's best interest and did not support a conclusion that denial of Grandmother's access or possession would significantly impair the Children's physical health or emotional well-being.

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## ★★★TEXAS SUPREME COURT ★★★

**COA SPLIT RESOLVED: "ACTUAL CARE, CONTROL, AND POSSESSION" ESTABLISHED WHEN A NONPARENTS SHARED A RESIDENCE WITH THE CHILD, CARED FOR THE CHILD, AND EXERCISED ACTUAL CONTROL TYPICALLY EXERCISED BY PARENTS; NONPARENTS' STANDING NOT CONDITIONED ON PARENTS ABDICATING LEGAL CONTROL OF THE CHILDREN.**

***In re H.S.*,** ___ S.W.3d ___, No. 16-0715, 2018 WL 2993873 (Tex. 2018) (06-15-18).

**Facts:** Immediately upon the Child's birth, Mother and the Child moved in with mother's parents ("Grandparents"). Mother and Father, who were never married, were appointed joint managing conservators. Mother struggled with alcohol addiction and moved to a sober-living facility. Mother, Father, and Grandparents agreed that the Child would continue living with Grandparents while Mother was in recovery. Mother anticipated her recovery would take no longer than three months. While in recovery, she went to Grandmother's home in the evenings to see the Child, bathe her, and put her to bed. Mother sometimes picked up the Child from day care. Father did not initially exercise his possession, but after a few months, he took possession of the Child approximately every other weekend. Father agreed that Grandparents were the Child's primary caregivers.

Six months after Mother entered the sober-living facility, Grandparents filed a suit seeking managing conservatorship of the Child. Father filed a counterpetition and a plea to the jurisdiction. The trial court appointed Father "primary" conservator, granted Mother supervised visitation, granted Father's plea to the jurisdiction, and dismissed Grandparents' petition. Grandparents appealed, and the Fort Worth Court of Appeals affirmed the dismissal. Grandparents petitioned the Texas Supreme Court for review.

**Holding: Reversed and Remanded**

**Majority Opinion:** (J. Lehrman, C.J. Hecht, J. Green, J. Boyd, J. Devine). Because Grandparents sought standing under Tex. Fam. Code 102.003(a)(9), the fact they were the Child's grandparents was irrelevant to the question of standing.

The Texas Family Code instructs that when computing the time necessary for standing, courts shall consider the child's principal residence during the relevant time. Thus, applying plain meanings to the words of the statute, it excludes nonparents who do not share a principal residence with a child for the statutory time period from establishing standing, regardless of how extensively they participate in the caring of the Child.

When drafting the statute, the Legislature did not use the phrase "legal custody," "legal control," "constructive control" or any other language indicating that it intended formal legal authority over the child to be a condition for standing. Nor did the Legislature require the nonparent's care and control of the child to be exclusive. By conditioning standing on a parent's abdication to the nonparent, the trial court and court of appeals effectively added an exclusivity requirement not reflected in the statute's plain language.

The fact that "actual care" and "actual control" are often exercised together does not make either term superfluous. The dissent's narrow reading of "control" to encompass only the "important" decisions to be made about a child's life is supported neither by the statute nor the term's ordinary meaning.

While the dissent focuses its analysis on the parent's conduct, the statute by its plain terms focuses on the nonparent's role in the child's life.

*A nonparent has "actual care, control, and possession of the child" under Texas Family Code 102.003(a)(9) if, for the requisite six-month time period, the nonparent served in a parent-like role by:*

*(1) sharing a principal residence with the child;*
*(2) providing for the child's daily physical and psychological needs; and*
*(3) exercising guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children.*

The statute does not require the nonparent to have ultimate legal authority to control the child, nor does it require the parents to have wholly ceded or relinquished their own parental rights and responsibilities.

Here, Grandparents' home was the Child's principal residence. The Child spent approximately every other weekend with Father but, otherwise, lived at Grandparents' home. Grandparents were the Child's primary caregivers and provided for her everyday physical and emotional needs. They paid for her food, clothes, and daycare. They managed and directed her day-to-day activities. They took her to urgent care when necessary, made some of her doctor's appointments, and took her to the doctor, even when Mother scheduled the appointments. It would be difficult to imagine what more "care" and "control" Grandparents could have exercised.

Whether Parents intended the situation to be temporary was irrelevant. They could have revoked the arrangement, but they did not. The Child was in Grandparents' care, control, and possession for the requisite time period.

*Troxel* is inapplicable to the facts at hand. In *Troxell*, the statute in question permitted "[a]ny person" to petition for rights "at any time." Here, the statute in question limits standing to nonparents who have exercised "actual care, control, and possession" of a child for at least six months. Thus, the standing requirement here is much higher and narrower than the one rejected in *Troxel*. This was not a "grandparent" case that involved grandparents who had never lived with the child or played a parent-like role in the child's life.

**Dissenting Opinion:** (J. Guzman). Because the jurisdictional inquiry is intertwined with the merits of the case, the court should not be required to take as true all evidence favorable to the party seeking standing or to indulge every reasonable inference in that party's favor. Here, the majority gave deference to the trial court's findings because they were unchallenged. The dissent did so because the findings were supported by legally sufficient evidence. The dissent's construction was the appropriate standard.

**Dissenting Opinion:** (J. Blacklock, J. Johnson, J. Guzman, J. Brown). The result of the majority's decision is that parents who remain in control of their children's lives can be forced into visitation and custody fights over their own children by any non-parent whose relationship with the child triggers the Court's malleable "parent-like role" standard. However, no one can fully stand in a parent's shoes unless the parent first steps out of those shoes and walks away.

The majority fails to adequately differentiate "care" from "control." Parents' exclusive, ultimate legal control over their children is no mere lawyerly construct. Actual control remains fused with the parents' legal control of the child unless the parents relinquish their ultimate decision-making responsibility for the child to someone else. "Control" must mean something more than "care" or "possession." Understanding "actual control" as the factual responsibility to make the kind of decisions normally associated with legal control of the child gives "actual control" independent meaning based on its commonly understood definition. This does not add a requirement to the statute. It gives life to the "actual control" requirement already contained in the statutory text. Actual control and legal control usually exist coextensively in the parents. When the parents relinquish their responsibilities, actual and legal control diverge, and someone else takes up actual control of the child even though the absent parents retain their legal status.

*Troxel* held that a "special weight" must be afforded to a fit parent's decision whether "an intergenerational relationship would be beneficial" to the child. Troxel does not tell us exactly where the line is between constitutional and unconstitutional government interference with the rights of fit parents. The Court should not assume that placing additional burdens on those rights has no constitutional significance just because the *Troxel* plurality opinion does not prohibit it.

Once standing is established, regardless of the parental presumption afforded by the Texas Family Code, the final decision about the child's future will be made by a judge or jury, not the child's parents. Fit parents should be able to make the final call as to control of their children.

Here, because Parents did not relinquish actual control to Grandparents and because Grandparents care of the Children was always intended to be temporary, the trial court correctly determined that Grandparents lacked standing to seek court-ordered conservatorship and possession of the Children.

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**FATHER NOT REQUIRED TO OBTAIN CITATION AND SERVE MOTHER WITH COUNTERPETITION AFTER SHE NONSUITED BECAUSE SHE HAD ALREADY APPEARED.**

*In re D.P.B.*, No. 05-17-00185-CV, 2018 WL 3014628 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (06-15-18).

**Facts:** Mother and Father were joint managing conservators of their Children, and Father provided health insurance for the Children through his employment. Mother filed a modification suit. Father filed a counter-petition. Mother nonsuited her claims. At a final hearing, the trial court denied Mother's oral motion for a continuance. At the hearing's conclusion,

the court found there had been a material and substantial change in circumstances and ordered Mother to reimburse Father for the Children's health insurance premiums. Mother appealed.

**Holding: Affirmed as Modified**

**Opinion:** Mother's oral motion for continuance did not conform with the requirements of Tex. R. Civ. P. 251 because the request was not "supported by affidavit." Thus, the trial court did not abuse its discretion in denying it.

Although Mother eventually nonsuited her claims, Father's counter-petition was filed when Mother's petition had been pending for a year. Numerous motions for temporary orders had been filed and heard. Father's counter-petition recited that no services was necessary as Mother had already made an appearance. Because Mother had already "appeared" in the case, Father was not required to personally serve Mother with citation.

Father offered no evidence of a material and substantial change, so the appellate court modified the trial court's order to delete the provisions requiring Mother to pay cash medical support as reimbursement for the Children's health insurance premiums.

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**TEXAS WAS THE CHILD'S HABITUAL RESIDENCE; MOTHER DID NOT VIOLATE THE HAGUE BY REFUSING TO RETURN TO SWEDEN AT FATHER'S REQUEST.**

*In re E.S.E.*, No. 06-18-00001-CV, 2018 WL 3040326 (Tex. App.—Texarkana 2018, no pet. h.) (mem. op.) (06-20-18).

**Facts:** Mother, Father, and the Child lived in Sweden. Mother and the Child moved to Texas, where Mother obtained a student visa and enrolled in college. Father, an orthopedic surgeon, remained in Sweden while attempting to get a license to work in the U.S. When Father determined that he would not be able to get a license, he asked Mother to return to Sweden with the Child. Mother refused. She filed a SAPCR seeking to be the parent with the exclusive right to designate the Child's primary residence. Father filed for divorce in Sweden. Father acquiesced to the Texas trial court hearing and ruling on the child-related issues. The parties initially reached agreements regarding support and visitation; however, when Father stopped paying support, Mother filed a motion to enforce. Father responded that Mother had not followed the visitation agreement. Mother learned that despite acquiescing to Texas's jurisdiction, Father subsequently filed suit in Sweden seeking sole conservatorship of the Child. However, the Swiss court dismissed the case for lack of jurisdiction. Ultimately, the trial court appointed the parents joint managing conservators, and ordered that all of Father's visitation with the Child occur in the U.S. Father appealed.

**Holding: Affirmed**

**Opinion:** The question of habitual residence is a mixed question of law and fact and is reviewed for an abuse of discretion. While not defined by statute, the courts have determined that habitual residence refers to a "child's customary residence before his or her removal or retention." The question is determined on a case-by-case basis. The first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind.

Here, it was undisputed that when Mother and the Child came to Texas, Mother and Father both intended to move permanently to the U.S. Father acquiesced to Texas's authority to determine the Child-related issues, and he entered into the agreed parenting plan and Rule 11 agreement to allow Mother to establish the Child's primary residence in Texas. Sufficient evidence was entered to support a finding that the Child had established a permanent residence in Texas Father failed to establish that Mother's retention of the Child in Texas was made in breach of his rights to custody.

Additionally, sufficient evidence existed that it was in the Child's best interest for Father's visitation to occur in the U.S. Some evidence supported Mother's fear that the Child might not be returned to the U.S. if relinquished to Father in Sweden.

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**GRANDPARENTS LACKED STANDING TO CHALLENGE CONSTITUTIONALITY OF PROCESS TO APPOINT AD LITEM ATTORNEY FOR UNSERVED FATHER.**

***In re K.L.*, ___ S.W.3d ___, No. 14-16-01022-CV, 2018 WL 3061105 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (06-21-18).

**Facts:** Grandparents filed a suit for conservatorship of their two grandchildren. One Child's father was unknown and was, thus, served by publication. Following the process outlined in Tex. Gov't Code ch. 37, the trial court appointed an ad litem attorney to represent the unknown father. Grandparents challenged the constitutionality of the provisions, arguing it violated the separation-of-powers doctrine. The OAG was notified but did not respond or appear. The trial court

signed an order ruling that the statute was unconstitutional, and the ad litem was dismissed. A new ad litem was not appointed because the actual Father was identified, appeared, and was adjudicated as the Child's father. After a final trial, the court entered orders for conservatorship of, possession of, and support for the Child. Subsequently, the OAG appealed the portion of the order finding the ad litem statute was unconstitutional.

**Holding: Vacated in Part and Affirmed as Modified**

**Opinion:** Grandparents did not allege a sufficient interest in the representation of an opposing party in the litigation to give them standing to contest how that representation was accomplished. The fact that they could have been ordered to pay attorney's fees did not create standing because they could have been ordered to pay fees regardless of the process of the ad litem's appointment. Further, while the best interests of the child are of paramount importance, the duty of the ad litem is to represent the unserved party, not the child. Thus, Grandparents concern for the Child did not grant them standing to complain of the process for appointment of the unserved Father's ad litem attorney.

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**DEFAULT ORDER DETERMINING FATHER'S PARENTAGE AND ORDERING CHILD SUPPORT VOID BECAUSE RETURN CITATION DID NOT INCLUDE SERVICE ADDRESS.**

*In re L.R.M.*, No. 04-17-00503-CV, 2018 WL 3129447 (Tex. App.—San Antonio 2018, no pet. h.)(mem. op.)(06-27-18).

**Facts:** The OAG filed a petition to establish the parent-child relationship and alleged Father was the Child's father. Initial attempts to serve Father were unsuccessful, but a deputy eventually filed a return of service. However, the return did not include the address at which Father was served. After a hearing at which Mother and the OAG appeared, the trial court determined Father was the Child's father and ordered him to pay child support. Upon learning of the judgment, Father filed a restricted appeal.

**Holding: Reversed and Remanded**

**Opinion:** Strict compliance with rules governing service is required for a default judgment to stand. Here, the service address was not included in the return. Thus, service was defective, and the order was void.

## SAPCR
## Alternative Dispute Resolution

**TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WIFE'S CONTINUANCE BECAUSE WIFE FAILED TO SHOW THAT HER ATTORNEY'S WITHDRAWAL WAS NOT CAUSED BY WIFE. ALSO, BY FAILING TO TIMELY APPEAR FOR TRIAL, WIFE WAIVED HER RIGHT TO A JURY TRIAL; MATERIAL AND SUBSTANTIAL CHANGES AFTER SIGNING OF MSA WARRANTED MODIFICATION OF CONSERVATORSHIP IN DIVORCE DECREE.**

***Harrison v. Harrison*, ___ S.W.3d ___, No. 14-15-00430-CV, 2018 WL 2926268 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (06-12-18).

**Facts:** In a previous appeal of the divorce on the merits, the court affirmed the divorce decree insofar as to the divorce but reversed the remainder of the decree and remanded for a new trial. In the first trial, Wife, who is an attorney, represented herself after her attorney withdrew and the trial court refused to grant her a continuance. Since the remand, the case had been reset a number of times, and Wife had numerous attorneys, each of whom withdrew. At some points during the proceedings, Wife appeared pro se.

The parties signed an MSA. Wife moved to set it aside, but her reasons for setting aside the MSA were inconsistent. The trial court denied her motion and signed an interim order on parent-child issues incorporating the terms of the MSA. Wife filed a petition for writ of mandamus alleging the order did not comport with the MSA, but her petition was denied. Thereafter, because Wife failed to comply with the order, Husband filed a motion to set aside the MSA or to modify the Interim Order.

The trial court instructed all parties to appear at 8:30 a.m. to resolve any outstanding pre-trial matters before the trial. Wife was not represented by counsel and she failed to appear at 8:30 a.m. Husband, his counsel, and the amicus attorney appeared timely. At approximately 9:30 a.m., Husband, requested a bench trial, despite having previously requested a jury trial and paid the requisite fee. At about 10:15 a.m., during the bench trial, in the middle of Husband's testimony, Wife appeared. Wife notified the trial court that she had filed a motion to recuse the trial judge. The trial court recessed proceedings until the administrative judge could rule on the motion. After the denial of Wife's recusal

motion, proceedings recommenced. At that time, Wife objected to proceeding with trial without a jury, although she had never requested a jury trial. The trial court overruled her objection and proceeded with the bench trial.

During trial, the court afforded Husband and Wife equal, but reasonably limited, time to present their evidence and cross-examine witnesses. The trial court repeatedly reminded Wife how much time she had used and how much time remained. Despite the reminders, when Wife's allotted time expired, she argued she lacked sufficient time to present all her desired evidence. The court granted Wife an additional hour to present further evidence. At the trial's conclusion, the court made orders for the Children and divided the community estate. The court's orders for the Children varied from the terms agreed to in the MSA because the court found a material and substantial change had occurred since the MSA had been signed.

Wife appealed complaining, among other things, that the trial court abused its discretion by permitting her trial counsel to withdraw, over her objection, approximately four weeks before trial and without granting a trial continuance and by denying her the right to a jury trial.

**Holding: Affirmed.**

**Opinion:** Wife's attorney explained that her continued representation of Wife would have caused the attorney to violate the disciplinary rules by compromising her fiduciary duties to Wife. Under such circumstances, the attorney was required to withdraw as Wife's counsel. Although it would have been preferable to have obtained a more detailed explanation through an in-camera conference or other means that would have preserved attorney-client privilege, Wife's attorney's explanation was sufficient to support good cause to withdraw.

Relying partially on the 2018 opinion in *In re Minix*, Wife argued that the trial court had no authority to set aside the child-related provisions of the MSA when entering the final decree of divorce. However, here, unlike in *Minix*, the parties did not agree to set aside the MSA; rather, the new orders were based on a material and substantial change in circumstances. The court likened the situation to those in which parties obtained judgment on an MSA prior to a divorce, but, based on allegations and evidence of a material or substantial change in circumstances, modification of conservatorship becomes necessary to protect the child's best interest after the divorce.

In exercising its discretion over whether to grant or deny a continuance due to the withdrawal of counsel, a trial court may consider the entire procedural history of a case. Here, the trial court possessed abundant knowledge of the matter's prolonged history. The record reflected that Wife retained upwards of a dozen different attorneys over the course of this case, hiring at least half of them following the remand. Many of these attorneys withdrew—often with Wife's blessing—before trial settings, resulting in a pattern of trial postponements. Wife consented to the withdrawal of her previous counsel four months before the trial. Wife did not retain her last attorney until a little over a month before trial. Less than two weeks into that attorney's representation of Wife, that attorney moved to withdraw based on Wife's actions.

Wife also complained that she had been denied her right to a jury trial. A right to jury trial may be waived by a party's untimely appearance. Here, Wife repeatedly proved herself unable or unwilling to manage her schedule or affairs in such a way as to ensure compliance with the court's orders, including orders to appear timely in court. The court was entitled to take Wife's dilatory history into account in exercising its discretion whether—and if so, for how long—to wait for Wife to appear for trial. The trial court has authority to impose consequences for a party's failure to appear timely for trial. The judge, not the litigant, controls the trial court docket.

## SAPCR
## CHANGE OF CHILD'S NAME

**TRIAL COURT ERRED IN CONSIDERING FATHER'S REQUEST TO CHANGE THE CHILD'S LAST NAME BECAUSE REQUEST FILED ONLY 26 DAYS BEFORE TRIAL AND PETITION NOT VERIFIED.**

*In re L.M.*, No. 02-17-00173-CV, 2018 WL 3154187 (Tex. App.—Fort Worth 2018, no pet. h.) (mem. op.) (06-28-18).

**Facts:** Mother and Father were not married and lived together in Florida only briefly before and after the Child was born. After Mother moved out, the Child lived with Mother, and Father visited the Child regularly. Without notice to Father, Mother and the Child moved to Texas. Subsequently, a Florida court ordered Father to pay child support. After a few years, Father filed a SAPCR seeking to be named a joint managing conservator, to obtain a standard visitation order, and to lower his monthly child support obligation. Shortly before trial, Father filed an amended petition, in which he asked to change the Child's last name. Mother objected to the late-filed pleading. The parties agreed to be named joint managing conservators and that Father would have standard visitation. The court denied Mother's request that a parent or family member escort the Child on any flight to or from Florida and ordered that Mother pay half of the travel costs. Additionally, the trial court signed an order reducing Father's child support obligation and changing the Child's name to a hyphenation of the parent's two last names. Mother appealed.

**Holding: Affirmed in Part; Reversed and Remanded in Part**

**Opinion:** Father filed his request for a name-change only twenty-six days before trial. The request failed to comply with the Tex. Fam. Code's requirements that the petition be verified. Father only stated that the request was in the Child's best interest but offered no supporting details for the conclusory assertion. The request was not based on recently discovered matters, and Mother testified that she did not have time to obtain the evidence she needed.

In considering the costs of travel, the incomes of the parties, and that Mother moved the Child to Texas without notice to Father, the court did not abuse its discretion in requiring Mother to contribute to the Child's travel expenses for Father's periods of visitation.

The only evidence regarding whether the Child was able to fly alone was the parties' subjective opinions on the matter. The trial court was free to determine that the eight-year-old Child was able to fly with the aid of a flight attendant and did not need a family member to accompany her.

## SAPCR
## FAMILY VIOLENCE/PROTECTIVE ORDERS

**MOTHER'S BOYFRIEND'S FAMILY VIOLENCE AGAINST CHILD DID NOT PRECLUDE MOTHER FROM BEING APPOINTED JOINT MANAGING CONSERVATOR.**

*In re N.J.T.*, No. 04-18-00068-CV, 2018 WL 2943772 (Tex. App.—San Antonio 2018, no pet. h.)(mem. op.) (06-13-18).

**Facts:** While the Children were living with Mother, her boyfriend threatened one of the Children with a gun. He pointed the gun at the Child, went outside and fired the gun, and then returned and pointed the gun at the Child again. The Child reported the incident to a school counselor, who reported the incident to TDFPS.

The Children were removed from Mother's possession. After a brief trial at which Father did not appear, Mother and Father were appointed joint managing conservators, with Father—who lived in California—having the exclusive right to designate the Children's primary residence. Mother was granted standard visitation to occur in California, and her boyfriend was ordered to have no contact with the Children.

Father appealed, arguing that the appointment of Mother as a joint managing conservator violated the Tex. Fam. Code because she had committed family violence.

**Holding: Affirmed**

**Opinion:** A court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child. Here, there was no evidence that Mother committed or was an accomplice to family violence.

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**NO PROTECTIVE ORDER GRANTED BECAUSE WIFE FAILED TO ESTABLISH VIOLENCE LIKELY TO OCCUR IN THE FUTURE.**

*Hassan v. Hassan*, No. 14-17-00179-CV, 2018 WL 3061320 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (06-21-18).

**Facts:** Wife sought a protective order against Husband and attached an affidavit to her application detailing past violent acts by Husband. At a hearing to the bench, Wife testified that Husband had abused her in the past, that the couple had been divorced and remarried and separated again, and that she was fearful of Husband. She introduced a photograph of injuries. Wife testified that she had seen Husband twice recently, during which no violence or threats occurred. Upon the close of Wife's case in chief, Husband moved for directed verdict. The trial court granted Husband's motion. Wife appealed.

**Holding: Affirmed**

**Opinion:** When a defendant moves for a directed verdict in a bench trial, the defendant is actually requesting that the trial court render judgment because there is no jury to direct. This distinction is important because the appellate court reviews a judgment pursuant to a motion for judgment differently than a directed or instructed verdict.

Evidence that a person has engaged in violence can permit an inference that violence will continue. However, the court is not required to make such an inference. Here, Wife presented sufficient evidence that violence occurred in the past. But, while she testified that Husband had in the past made threats of future violence and that she was still fearful

of Husband, she admitted that she had seen him twice recently, and no violence occurred. She testified that she lived about 12–13 miles from Husband and that she's free to go where and when she wants. The trial court, as the sole judge of Wife's credibility and the weight to give her evidence, did not abuse its discretion in finding that she did not establish that violence was likely to occur in the future.

## MISCELLANOUS

**FATHER COULD NOT SET ASIDE CHILD SUPPORT JUDGMENT WHEN NO TIMELY COMPLAINT RAISED AFTER LEARNING OF THE ORDER.**

*In re L.C.R.*, No. 05-17-00085-CV, 2018 WL 2676467 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (06-05-18).

**Facts:** In 1991, the trial court issued an order establishing Father's paternity of the Child and ordering Father to pay child support. When the suit was initiated, the OAG had difficulty serving Father, but it obtained an order for substituted service and served Father's father at Father's home address. Father defaulted. In 2005, the OAG began withholding child support from Father's income. In 2013, Father sought to terminate the withholding order because the Child was no longer a minor. The trial court found Father in arrears and allowed the withholding to continue for the sole purpose of collecting arrearages. In 2016, Father sought to set aside the original 1991 order, asserting that it was void for lack of proper service. The trial court denied Father's request. He appealed.

**Holding: Affirmed**

**Opinion:** A litigant may attack a void judgment directly or collaterally. A direct attack is an attempt to correct, amend, modify, or vacate a judgment. A collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific relief against which the judgment currently stands as a bar.

Father acknowledged that the OAG began withholding funds for the 1991 order in 2005. Thus, Father knew or should have known of the child support order no later than 2005. By waiting another seven years before challenging the order, Father failed to raise any timely direct attack on the judgment.

Even if Father's complaint was construed as a collateral attack on the judgment, Father's complaint failed. Father argued that the trial court lacked personal jurisdiction over him. However, because he filed the 2013 suit seeking to terminate the withholding order, he sought affirmative relief from the court, thereby making an appearance in the case and waiving any later complaint to a lack of personal jurisdiction.

**MOTHER NOT REQUIRED TO SEGREGATE ATTORNEY'S FEES BECAUSE HER ENFORCEMENT MOTION AND FATHER'S MOTION TO RECOVER OVERPAID CHILD SUPPORT WERE INEXTRICABLY INTERTWINED.**

*Bruce v. Bruce*, No. 03-17-00672-CV, 2018 WL 2653550 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (06-05-18).

**Facts:** Father was ordered to pay child support and medical support for the child. Father asked Mother to provide him with the actual amount of the premium for the child's health insurance, but Mother refused. Mother additionally refused to credit Father for child support payments made directly to her rather than through the child support disbursement office. Father stopped paying support, filed an affidavit claiming that he had overpaid, and filed a motion to recover his overpayment. Mother filed a counter petition for recovery of arrearages. After a trial, the court signed a judgment ordering Father to pay arrearages. Mother appealed, arguing the trial court erred in failing to award her attorney's fees. The appellate court reversed and remanded with an instruction to either award Mother her attorney's fees or make a finding for good cause not to award her attorney's fees. On remand, the trial court awarded Mother all of her requested fees, and Father appealed. Father argued that he established good cause to not award her fees and, in the alternative, that Mother failed to segregate her enforcement fees from the defense of his suit to recover overpayment.

**Holding: Affirmed**

**Opinion:** The Tex. Fam. Code allows a court to waive the requirement to award attorney's fees in a child support enforcement suit upon a finding of good cause. The court is not required to do so. Thus, even if Father could show good cause for his decision to stop making child support payments, the court was still authorized to award Mother her attorney's fees.

Mother's attorney testified as to the reasonableness of her rate, the complexity of the case, her total time spent, and the total fees incurred, and she entered invoices into evidence. Further, she testified that the prosecution of Moth-

er's enforcement was inextricably intertwined with the defense of Father's motion to recover for overpayment. Mother would have been unable to recover any fees without also defending Father's motion.

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**NO EVIDENCE SUPPORTED WIFE'S MOTION TO REMOVE RECEIVER.**

*Ugwa v. Ugwa*, No. 05-17-00633-CV, 2018 WL 2715437 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (06-06-18).

**Facts:** A divorce decree divided a business between Husband and Wife and ordered that Wife either buy out Husband's interest or that the business be sold and the proceeds divided accordingly. Subsequently, a receiver was appointed to manage the business pending Wife's appeal of the divorce decree. Wife filed a motion to remove the receiver because she allegedly discovered the receiver was a friend of Husband. The trial court denied her motion, and she filed a separate, interlocutory appeal.

**Holding: Affirmed**

**Opinion:** To support her appellate complaints, Wife relied on documents attached to her motion and on her counsel's assertions during the hearing. Documents attached to pleadings are not evidence unless they are offered and admitted as evidence by the trial court. Additionally, an attorney's statements must be made under oath to be considered evidence, and this requirement was not waived by opposing counsel. Finally, while the trial court sustained objections to Wife's counsel testifying, no evidence supported her assertion that the trial court prevented her from offering evidence. Wife never called a witness and never tendered anything to the court.

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## ★★★TEXAS SUPREME COURT ★★★

**TEXAS FAMILY CODE PROHIBITED APPELLATE COURT FROM ORDERING MOTHER TO PAY COSTS OF FATHER'S APPEAL OF CHILD-SUPPORT MODIFICATION ORDER IN WHICH THE OAG WAS A PARTY.**

***In re C.Y.K.S.*, ___ S.W.3d ___, No. 17-0214, 2018 WL 2749800 (Tex. 2018) (06-08-18).**

**Facts:** After a child-support modification proceeding involving the Attorney General's Office, Father appealed. After granting Father's appeal, the appellate court ordered Mother to pay all costs incurred in the appeal. Mother and the OAG petitioned the Texas Supreme Court for review, raising the sole issue that the order for appellate costs violated the Texas Family Code.

**Holding: Rehearing Denied**

**Opinion:** As the state's Title IV-D agency, the OAG has broad statutory standing to file child support actions, which includes appellate actions. Thus, the OAG, as a party in the underlying proceeding, had standing to appeal the assessment of fees against Mother even though the OAG was not directly affected by the order.

Tex. Fam. Code § 231.211(a) prohibits assessment of attorney's fees at the conclusion of the Title IV-D case against a party to whom a Title IV-D agency has provided services. If conclusion meant the one true and final end to all proceedings on a matter—as urged by Father and as determined by the appellate court—a case would conclude only after all post-judgment motions and appeals had been exhausted—by which time the courts would have missed the chance to assess fees and costs anyway. The word "conclusion" must, then, refer to the end of proceedings at each stage of the case in a particular court. This interpretation of the provision comports with the legislature's clear intent to assess fees and costs except against the OAG and certain other parties.

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## ★★★TEXAS SUPREME COURT ★★★

**EVIDENCE INSUFFICIENT TO SUPPORT A CLAIM THAT GRANDPARENTS INTERFERED WITH FATHER'S VISITATION OR THAT GRANDFATHER'S FALSE STATEMENTS TO TDFPS ABOUT FATHER WERE THE PROXIMATE CAUSE OF FATHER'S INJURIES.**

***Bos v. Smith*, ___** S.W.3d ___, No. 16-0341, 2018 WL 2749714 (Tex. 2018) (06-08-18).

**Facts:** Mother had one child from a prior relationship, and Father had two children from a prior relationship. During the marriage, the couple had two more Children, who were both under the age of three at the time of divorce. The final decree provided that until the Children turned three, Father's visitation would be by agreement. After the Children turned three, Father would have a standard visitation schedule.

Mother was stingy with visitation when the Children were under three. When the older of the two Children turned three, Father attempted to exercise visitation as ordered by picking up the Child from Grandmother. However, Father was informed that the Child was not there because Mother had forgotten about a birthday party to which the Child was invited and had instructed Grandmother to take the Child there. Father returned home without insisting that the Child be presented then or later. The next day, Mother brought the two Children to Father's home, but the visit lasted only a couple of hours because Mother called the police to report that Father's older children had sexually abused the younger Children. As the police were at Father's home investigating the claim, Mother and Grandmother watched Father's home from across the street until being instructed to leave by the police. The investigation produced no evidence of abuse.

In the following week, TDFPS conducted interviews. Father learned Mother had changed her claim to assert that Father had abused the Children, and a new investigation was opened. Grandparents helped care for the Children during the investigation, but because the duties had become burdensome, Grandfather pressured TDFPS to reach a resolution. He told TDFPS that Mother was a perfect mother; Father was a nut with poor parenting skills; and Father used to abuse his older children. Years later, Grandfather stated he said these things to facilitate termination of the monitoring situation and that Father was actually "a stand-up guy."

While the investigations were on-going, Mother began dating a doctor of psychology, who acted as a TDFPS consultant. The Children began calling the Doctor "dad" two months into the relationship. The Doctor supported Mother's false allegations against Father. Eventually, all the allegations were ruled out.

At a hearing in the divorce proceeding, the trial court held Mother in contempt and imposed jail time for violating the possession order. In an attempt to avoid jail time, Mother agreed to terminate her parental rights.

Subsequently, Father, individually and on behalf of his older children, sued Grandparents, asserting they violated Tex. Fam. Code Ch. 42 by interfering with visitation; breached their ordinary-care and fiduciary duties to the Children; and defamed Father and his older children. Father did not sue Mother, but Grandparents joined her as a responsible third party.

After a bench trial, the court awarded:

- Father $3.2 million in economic and mental-anguish damages based on the Ch. 42 claim;
- the Children $4 million on the negligence and breach-of-fiduciary duty claims;
- the older children $1.5 million for defamation; and
- Father $2 million for defamation.

The court held Grandparents and the Doctor jointly and severally liable for all damages. Grandparents appealed, but the Doctor did not.

The appellate court affirmed the Ch. 42, negligence, and fiduciary claims, but reversed the defamation claim. The court suggested a remittitur of a small portion of the Ch. 42 damages, which Father accepted.

Grandparents and Father filed cross petitions to the Texas Supreme Court.

**Holding: Appellate judgment Affirmed in Part; Reversed and Rendered in Part**

**Opinion:** Liability under Fam. Code Ch. 42 can arise in two ways: interfering with a possessory right and aiding the one who interferes with a possessory right. During trial, Father focused primarily on Mother's schemes to deny him possession rather than specific occurrences of denied possession. Additionally, Father never produced evidence that the Grandparents had actual knowledge of the contents of the possession order. After the birthday party incident—the one specific incident identified in the trial court's findings—Father did not contact Grandmother to find the Child's whereabouts or ask that the Child be produced. The trial court found that Grandparents' participation in that violation "snowballed into the catastrophe" underlying the litigation. However, even if Grandparents were liable for one violation, that would not give rise to perpetual liability for all Mother's future violations.

Mother's outrageous and unprecedented conduct was unforeseeable. Thus, Grandparents could not be liable under fiduciary duty or negligence claims. Mother was diagnosed with a variety of mental illnesses after she started mak-

ing the false accusations; however, there was no evidence that the illnesses were known to anyone beforehand. Mother previously made false accusations against her ex-boyfriend; however, those accusations were not similar to the accusations against Father, and there was no evidence Grandparents knew of the accusations. While it was true that Grandparents sought custody of Mother's older child—to whom Mother gave birth while a teenager—the evidence indicated this was to facilitate processes such as signing medical and school paperwork rather than any misconduct by Mother. Further, the fact that the divorce court appointed Mother a joint managing conservator indicated to objective observers that Mother was a fit parent who could properly care for her children.

Father's pleadings did not support an award for the defamation claim for the false accusations against Father's older children. While a prior pleading did include the claim, that allegation had been removed from a subsequent amended pleading, which superseded any prior pleadings. Father additionally asserted that the issue was tried by consent because evidence of the statement had been entered into evidence. However, there was no evidence the issue was actually "tried."

With respect to the statements about Father, he failed to produce any evidence of causation of damages. To show that Grandfather's statements were the proximate cause of the harm sustained by Father, he had to show that the statements were a "substantial factor" of his injuries. However, the statements were but a small part in the plethora of negative accusations against him by Mother and her Doctor boyfriend.

Because the evidence and pleadings were insufficient to support the trial court's judgment, the Texas Supreme Court reversed and rendered a take-nothing judgment.

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## ★★★UNITED STATES SUPREME COURT ★★★

**RULES OF FEDERAL PROCEDURE ALLOW COURTS TO CONSIDER ANY RELEVANT SOURCE TO DETERMINE FOREIGN LAW.**

***Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, ___** S.Ct. ___, No. 16-1220, 2018 WL 2973745 (2018) (06-14-18).

**Facts:** This lawsuit stemmed from a contract for a U.S.-based company to purchase vitamin C from a Chinese corporation. The U.S. company alleged that the Chinese sellers agreed to fix the price and quantity of the vitamin C exported in violation of the Sherman Act. The Chinese corporation asserted that it was required by Chinese law to fix the price and quantity. The Ministry of Commerce of the People's Republic of China ("Ministry") filed an amicus curiae brief in support of the Chinese corporation's position. However, the U.S. purchasers asserted that the Ministry did not identify any written law or regulation to support its position. Additionally, the U.S. purchasers highlighted an announcement in China that manufactures would be able to reach self-regulated agreements without government intervention. The Chinese corporation filed a motion to dismiss on the ground that it was required under Chinese law to fix the price and quantity. The trial court denied the motion, acknowledging that while the Ministry's brief was entitled to substantial deference, the brief was not conclusive. The appellate court found that the trial court erred in denying the dismissal because the Ministry's account was reasonable and was entitled to a highly differential treatment. In reaching its conclusion that dismissal was proper, the appellate court relied exclusively on the Ministry's account and the sources cited in its brief.

**Holding: Court of appeals' judgment Vacated and Remanded to trial court**

**Opinion:** Fed. R. Civ. P. 44.1 provides that a determination of foreign law "must be treated as a ruling on a question of law," rather than a finding of fact. Further, federal courts are not limited to materials submitted by the parties to determine foreign law; instead, they "may consider any relevant material or source…whether or not…admissible under the Federal Rules of Evidence." When a foreign government's views are presented, the court may consider:

- the statement's clarity, thoroughness, and support;
- its context and purpose;
- the transparency of the foreign legal system;
- the role and authority of the entity or official offering the statement; and
- the statement's consistency with the foreign government's past positions.

Thus, by relying solely on the Chinese Ministry's submission and not considering all relevant materials, the appellate court erred in reversing the trial court's decision.

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**EXCLUSION OF EVIDENCE UNDER TEX. R. CIV. P. 193.6 NOT "DEATH-PENALTY" SANCTION BECAUSE SUCH EXCLUSION IS AUTOMATIC UNDER RULE, NOT DISCRETIONARY.**

*Amudo v. Amudo*, No. 01-17-00318-CV, 2018 WL 3059729 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (06-21-18).

**Facts:** Father filed a motion to reduce his child support obligation. Mother did not initially hire an attorney. When she did, the attorney served Father with discovery requests. Father responded to each request with an objection that the request was improper because it was made too close to trial. Subsequently, trial was reset twice, but Father never supplemented his discovery responses. At the final trial, Mother objected to evidence that should have been produced in discovery, and the trial court sustained her objections. The trial court asked Father if he had any other evidence to support a claim that circumstances had materially and substantially changed, to which Father responded that he did not. Mother moved for, and obtained, a judgment because Father failed to prove he was entitled to relief. Father appealed, arguing in part that the trial court erred in excluding his evidence and by excluding the evidence, the court effectively imposed death-penalty sanctions upon him.
**Holding: Affirmed**
**Opinion:** Father failed to make an offer of proof for the excluded evidence, so the issue was not preserved for appeal. Further, the exclusion was not an improper death-penalty sanction because the exclusion of evidence under Tex. R. Civ. P. 193.6 is a matter of admissibility rather than a sanction for discovery abuse. The exclusion of evidence under Rule 193.6 is automatic, not discretionary.

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**WIFE NOT ENTITLED TO ATTORNEY'S FEES BECAUSE COURT DENIED HER CLAIM HUSBAND VIOLATED MSA, AND NO OTHER AWARD FOR DAMAGES WAS SUPPORTED BY LAW OR THE PLEADINGS.**

*Van Gilder v. Van Gilder*, No. 03-18-00258-CV, 2018 WL 3151000 (Tex. App.—City 2018, no pet. h.) (mem. op.) (06-28-18).

**Facts:** In their divorce proceeding, Husband and Wife entered into an MSA, which included a confidentiality agreement, and the non-confidential portion was filed with the trial court. The court approved the MSA and signed a final decree. Subsequently, both parties filed motions to enforce the MSA. Wife asserted that Husband violated certain provisions by "stalking" and "harassing" her. Husband sought Rule 13 sanctions against Wife. A hearing was held on Wife's third-amended motion. Wife presented all of her case except attorney's fees. When the court prepared to recess, Wife asked to put on evidence of attorney's fees. The court advised her she could do so when the hearing reconvened. Subsequently, Wife filed a fourth amended petition raising new claims. When the court reconvened, Husband argued that Wife abandoned her prior claim by failing to include it in the fourth amended petition. The trial court decided to proceed and allowed Wife to put on evidence of her attorney's fees. The trial court awarded Wife actual damages and attorney's fees for several instances of unwanted attention rising to the level of harassment but expressly declined to rule on whether Husband violated the MSA. The court denied all relief not expressly granted and awarded Husband sanctions for Wife's frivolous pleadings. Husband appealed.
**Holding: Reversed and Rendered in Part; Affirmed in Part**
**Opinion:** Based on the content of Wife's fourth amended motion, rather than its title, the court did not abuse its discretion in treating the motion as a supplemental motion and in completing the hearing on the claim raised in her third amended motion.

The trial court declined to rule on the one claim raised in her third amended motion and denied all relief requested but not granted. Thus, regardless of whether the evidence may have supported Wife's claim that Husband violated the MSA, the trial court did not make that determination. Wife did not appeal the denial of that claim. Additionally, the trial court sanctioned Wife for filing a frivolous claim. Although it did not identify what claim was frivolous, because Wife only filed one claim, presumably, the frivolous claim was that Husband violated the MSA. Thus, it was error for the trial court to award Wife actual damages for her claim of breach of the MSA.

Although the trial court "carved out" of Wife's pleadings a claim for harassment, Texas does not recognize a separate and independent cause of action for harassment. Although she alleged Husband harassed her, she did so in the context that his action violated the MSA. Although she claimed Husband violated the MSA by stalking her, she did not allege the elements of stalking as defined in the Tex. Civ. Prac. & Rem. Code. Thus, the record did not support an award of damages for harassment.

Because Wife failed on her only claim, she was not entitled to attorney's fees. Without an actual-damages recover, a party is not entitled to an attorney's fee recovery.