

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

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DIVORCE
JURISDICTION AND PROCEDURE

TRIAL COURT LACKED JURISDICTION TO MAINTAIN DIVORCE PROCEEDING BECAUSE WIFE HAD NOT MET RESIDENCY REQUIREMENT AT THE TIME HER PLEADING WAS FILED.

In re Paul, No. 10-16-00359-CV, 2017 WL 1749805 (Tex. App.—Waco 2017, orig. proceeding) (mem. op.) (05-03-17).

Facts: Wife filed a petition for divorce asserting she and Husband had a common-law marriage and that she had met the 90-day residency requirement. In temporary orders, the trial court ordered Husband to pay Wife \$425,000 in interim attorney’s fees. Husband filed a petition for writ of mandamus, which the appellate court—finding Wife had not met the residency requirement—granted. That same day, the trial court held a hearing on Wife’s residency. Wife testified that she had signed a lease agreement for an apartment in Texas 90 days before that hearing. The trial court again awarded Wife the \$425,000 in interim attorney’s fees plus an additional \$331,000 in interim fees. Husband again petitioned for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A suit for divorce may not be maintained if neither the petitioner nor the respondent have been a resident of the county in which the suit is filed for the preceding 90-day period. This requirement is jurisdictional and may not be waived. It is not enough that the ninety days will pass during the pendency of the proceeding. If the requirement is not met at the time the original petition is filed, the petitioner must file an amended petition when the requirement is met to allow the suit to proceed.

Here, Husband lived in Oklahoma and had no intent to move to Texas. At the hearing on Wife’s residency, she testified that she had signed a lease agreement to live in Texas 90 days prior to that hearing but six months after her live pleading was filed. Wife filed no amended petition after that hearing. No evidence in the record showed that Wife might have lived in Texas before she signed the apartment lease.

PROPERTY DIVISION REMANDED BECAUSE NO EVIDENCE TO SUPPORT IT IN DEFAULT DIVORCE DECREE.

Beam v. Beam, No. 07-15-00250-CV, 2017 WL 1953225 (Tex. App.—Amarillo 2017, no pet. h.) (mem. op.) (05-10-17).

Facts: Though duly served, Husband failed to answer Wife’s divorce petition, and Husband did not appear at the final hearing. At the final hearing, Wife testified as to her domicile and residence, that the marriage had become insupportable, that there were no children of the marriage and none were expected, and that she had prepared a divorce decree setting forth what she believed to be a just and right division of the estate. The trial court signed the decree. Subsequently, Husband filed a restricted appeal, asserting error apparent on the face of the record because no evidence supported the property division.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Even when a respondent fails to file an answer to a petition for divorce, the petitioner is required to prove the petition’s allegations at the final hearing. Here, Wife entered no evidence of the extent or value of the marital estate or debts and no evidence regarding the character of the marital property.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

☆☆☆ TEXAS SUPREME COURT ☆☆☆

MSA UNAMBIGUOUSLY DIVIDED ALL FUTURE EARNINGS; WHETHER HUSBAND’S SUBSEQUENT BONUS MAY HAVE BEEN PARTIALLY COMMUNITY PROPERTY IRRELEVANT TO ENFORCEMENT OF MSA.

Loya v. Loya, ___ S.W.3d ___, No. 15-0763, 2017 WL 1968033 (Tex. 2017) (05-12-17).

Facts: During their divorce proceedings, Husband and Wife signed an MSA that provided in part that all future income and earnings from each party would be partitioned to the person who earned it. When the decree was being drafted, the parties disputed the language that reflected this part of the agreement. Wife argued that the MSA awarded Husband future earnings “arising for services after” the MSA was signed. Husband argued that he was awarded all future

earnings after the MSA was signed “period.” The parties attended arbitration, and a decree was entered consistent with Husband’s interpretation. Nearly a year later, Husband earned a bonus of \$4.5 million. Wife filed a petition for post-divorce division of property, arguing that the bonus was community property that had not been divided by the MSA. The trial court granted Husband a motion for summary judgment. Wife appealed, and the appellate court reversed. Husband sought review from the Texas Supreme Court

Holding: Trial Court Affirmed; Court of Appeals Reversed

Opinion: Whether the bonus was community or separate property was not relevant to the interpretation of the MSA. The MSA provided that all future income after the signing of the MSA would belong to the party who earned that income. Thus, the bonus Husband received nearly a year after the parties signed the MSA was Husband’s property pursuant to the MSA, regardless of whether the bonus was for work performed during the marriage. The Texas Supreme Court quoted the dissent in the appellate decision, who stated that even if Husband’s employer “considered work [Husband] performed before [the MSA was signed] in awarding the [subsequent] bonus, none of the bonus came into existence until” well after the MSA was signed.

**DIVORCE
SPOUSAL MAINTENANCE/ALIMONY**

WIFE NOT ENTITLED TO SPOUSAL MAINTENANCE: WIFE’S TESTIMONY ALONE MAY HAVE BEEN SUFFICIENT TO ESTABLISH DISABILITY, BUT WIFE FAILED TO PROVIDE ANY EVIDENCE THAT HER “DISABILITY” PRECLUDED HER FROM OBTAINING GAINFUL EMPLOYMENT.

Roberts v. Roberts, ___ S.W.3d ___, No. 04-16-00170-CV, 2017 WL 1902591 (Tex. App.—San Antonio 2017, no pet. h.) (05-10-17).

Facts: In a prior appeal, the appellate court remanded the property division because the trial court mischaracterized \$32,000 as Wife’s separate property, which had more than a de minimus effect on the just and right division of the marital estate. On remand, the trial court changed its original ruling of a 60/40 division but declined to affix a percentage to the “new” division and determined that the original final decree “continues to be just.” The trial court found that the final decree would remain the same, which included an award of indefinite spousal maintenance to Wife. Husband appealed, challenging the spousal maintenance and the property division.

Holding: Reversed and Remanded in Part; Affirmed as Modified in Part

Opinion: While testimony of the party seeking spousal maintenance alone may support a finding of disability, this testimony must still be sufficient and probative to establish a disability exists *and* that the disability prevents that party from obtaining gainful employment. Here, Wife testified as to a number of ailments from which she suffered. However, Wife did not testify that any single condition or that her collective “disability” precluded her from obtaining gainful employment. Thus, the appellate court modified the decree to omit the award for spousal maintenance, as it was not supported by the evidence.

After the property division was previously remanded due to the trial court’s mischaracterization of separate property, the trial court failed to reallocate the erroneously awarded balance or in any other way change the property division to account for the error. The trial court, in finding the division “continues to be just” implicitly awarded Wife the separate property in the guise of community property. Accordingly, the appellate court again remanded the decree for a just and right division.

**DIVORCE
PROPERTY DIVISION**

ACCEPTANCE-OF-BENEFITS DOCTRINE DID NOT BAR WIFE’S APPEAL BECAUSE HUSBAND FAILED TO SHOW HE WAS PREJUDICED BY HER ACCEPTANCE.

In re Marriage of Stegall, ___ S.W.3d ___, No. 07-15-00392-CV, 2017 WL 3364875 (Tex. App.—Amarillo 2017, no pet. h.) (05-12-17).

Facts: When Husband and Wife married, Husband had approximately \$140,000 in cash, several motor vehicles and trailers, over 100 head of cattle and calves, hay, forage, saddles and tack, 30 head of horses, a residence, and two other pieces of real property. During the marriage, Husband traded cattle—as he had down his whole life—but did not keep good records. Wife worked sporadically. In the divorce decree, the trial court confirmed the cattle and related in-

ventory as Husband's separate property. Wife appealed, arguing that Husband failed to present clear and convincing evidence sufficient to overcome the community-property presumption.

In reply, Husband asserted that Wife was estopped from appealing the property division because she had accepted its benefits by cashing a tax return check and by having Husband's 401(k) funds transferred to her own 401(k) account. Additionally, Husband argued that by applying the inception-of-title rule and the minimum-sum-balance presumption, the trial court had sufficient evidence to support its finding that the cattle and related inventory was Husband's separate property.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Citing *Kramer v. Kastleman*, 508 S.W.3d 211 (Tex. 2017), the court noted that the acceptance-of-benefits doctrine is an estoppel-based doctrine, and that Husband, as appellee, had the burden to establish that Wife's acceptance of the benefits unfairly prejudiced him. While the court did not hold that Wife's acceptance was based on economic necessity, it did hold that Husband failed to show that the benefits could not be replaced by Wife if she were to succeed on appeal but receive a less favorable property division on remand.

Because Husband made no effort to identify or segregate the cattle he brought into the marriage from the calves born during the marriage, Husband failed to overcome the community-property presumption. Additionally, the court noted that "it is doubtful that the minimum-sum-balance presumption can be applied to cattle since cattle, unlike cash, is not fungible."

HUSBAND AND WIFE OBTAINING LOAN FINANCED BY HUSBAND'S SEPARATE PROPERTY AND USE OF WIFE'S NAME OF DEED OF SALE OF THE PROPERTY DID NOT AFFECT SEPARATE CHARACTER OF THE PROPERTY.

Haynes v. Haynes, No. 04-15-00107-CV, 2017 WL 2350970 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (05-31-17).

Facts: In a post-nuptial agreement, Husband and Wife agreed that in the event of a divorce, there would be no community property, neither party would be entitled to reimbursement, and each spouse would indemnify the other if one party's separate property debt was paid by separate funds of the other party.

Husband owned a home before marriage. A few years into the marriage, he refinanced the home, and both Husband and Wife signed the loan documents as borrowers. The check for the proceeds was made payable to both Husband and Wife and was initially deposited into a joint checking account. Subsequently, the funds were used to pay one of Husband's pre-marriage debts. A few years later, Husband sold the house to his family's company. Husband and Wife were both listed as grantors. The sale proceeds were deposited in the parties' joint account and were subsequently used to pay another of Husband's pre-marriage debts.

During the divorce proceedings, Wife asserted that the parties were tenants-in-common of the house and that she was entitled to reimbursement for her separate-property share of the proceeds that were used to pay Husband's separate debts. The trial court signed an order granting Wife the requested reimbursement. Husband appealed, arguing the house remained separate property, and Wife was not entitled to reimbursement.

Holding: Affirmed in Part; Reversed in Part

Opinion: Character of property does not change because both parties sign a note, or because the names of both parties are on the deed of trust. Further, no evidence was presented that Husband executed a deed or made an oral gift of the property to Wife. Thus, while the community estate may have had a claim for reimbursement, which claims were precluded by the post-nuptial agreement, it had no right, title, or interest to the land.

**DIVORCE
ENFORCEMENT OF PROPERTY DIVISION**

DIVORCE COURT DID NOT HAVE EXCLUSIVE JURISDICTION TO HEAR WIFE'S BREACH OF CONTRACT BASED ON HUSBAND'S FAILURE TO COMPLY WITH DECREE; HUSBAND OWED WIFE FIDUCIARY DUTY BECAUSE SHE WAS ASSIGNEE OF HIS INTEREST.

Ishee v. Ishee, No. 09-15-00197-CV, 2017 WL 2293150 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.) (05-25-17).

Facts: In their divorce decree, Wife was assigned a percentage of Husband's percentage interest in a closely held business. Subsequently, Wife filed a petition in a Civil Court for breach of contract and breach of fiduciary duty, asserting that Husband never paid her the money to which she was entitled under the decree. A jury found Husband

breached his fiduciary duty and awarded Wife a judgment for \$361,040 in actual and punitive damages. Husband appealed.

Holding: Reversed and Remanded in Part; Affirmed in Part; Affirmed as Reformed in Part

Opinion: Husband argued that the Family Court that rendered the divorce had exclusive jurisdiction over the decree and that the Civil Court lacked jurisdiction over the dispute. Texas district courts possess jurisdiction over all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction is conferred. Tex. Fam. Code § 9.001 provides that a court that rendered a divorce *may* enforce the decree. Thus, the Civil Court had jurisdiction over the contract dispute.

Husband argued that the evidence was insufficient to support the finding that he breached a fiduciary duty. It appeared that the Family Court intended to divide the marital estate in accord with the requirements of the Tex. Bus. Orgs. Code, which did not create a fiduciary duty between Husband and Wife. However, Tex. Fam. Code § 9.001(b) provides “[t]he subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner.” Thus, the decree created a fiduciary relationship between Husband and Wife with respect to the percentage interest assigned to Wife of Husband’s percentage interest in the closely held business. Further, there was evidence that Husband did not distribute Wife’s rightful percentage to the distributions.

Husband argued that the evidence was insufficient to support the \$111,520 judgment. The bulk of the jury’s award consisted of income received by Husband in return for services provided. Thus, the award was excessive because Wife was not entitled to half of all benefits Husband received without regard to whether such benefits were allocated to him on the basis of his ownership interest.

**SAPCR
PROCEDURE AND JURISDICTION**

SPERM-DONOR FATHER HAD STANDING TO SEEK POSSESSION OF CHILD DUE TO MOTHERS’ SUBSEQUENT AGREEMENT TO GIVE FATHER LIMITED POSSESSION.

¶17-3-18. *In re B.N.L.-B.*, ___ S.W.3d ___, No. 05-16-00025-CV, 2017 WL 1908623 (Tex. App.—Dallas 2017, no pet. h.) (05-10-17).

Facts: First Mother and Second Mother were in a committed relationship and wanted to have a Child. Father agreed to be a sperm donor, and the parties signed a donor agreement providing that Father would not be a parent to the Child, that the Mothers would be the Child’s parents, and that the Mothers would not seek child support from Father. Additionally, the agreement provided that if Father sought any legal relationship with the Child, he would indemnify the Mothers for all costs of defending the action. First Mother was impregnated, and the Child was born in 2002. Second Mother adopted the Child in 2003.

For a while, Father was allowed limited possession of the Child by informal agreement. Father filed a suit in Virginia, where the Child was then living, to put the possession agreement in writing.

Subsequently, the Mothers and the Child moved to Texas, but the Mothers separated and refused to allow Father to exercise his visitation. Father registered the Virginia order in Texas and filed a motion for clarification and modification, which the trial court granted over the Mothers’ objections.

Some years later, First Mother filed a SAPCR asking to be named sole managing conservator and an order for Second Mother to pay child support. Second Mother filed a similar suit. Father filed a petition in intervention asking to be named joint managing conservator with the Mothers and, in the alternative, asked for a standard possession order. Second Mother challenged Father’s standing to intervene. The Mothers reached a settlement agreement with each other that the Mothers would be joint managing conservators and that, if the trial court granted Father possession, the Mothers would alternate from which Mother’s time Father’s possession would be taken. After the trial court denied Second Mother’s plea to the jurisdiction and held that Father had standing, the Mothers reached a settlement agreement with Father giving him periodic possession of the Child. The trial court signed a final order that incorporated the agreement and required Father to pay the Mothers’ attorney’s fees.

About five years later, Father filed another motion to modify. Second Mother filed another plea to the jurisdiction plus a breach of contract action, asserting Father breached the donor agreement. The trial court denied Second Mother’s motions, granted Father’s requests in part, and ordered Second Mother to pay Father’s attorney’s Fees. Second Mother appealed, arguing the trial court erred in denying her plea to the jurisdiction, denying her breach of contract claim, and failing to order Father to pay her attorney’s fees. Mother argued that Father lacked standing to seek conservatorship under the original order registered in Texas and, thus, the first Texas order was void. Therefore, Mother argued that Father did not have standing in the subsequent actions as a person affected by a prior order. Father argued that he was not required to pay attorney’s fees pursuant to the donor agreement because the subsequent agreements and agreed orders constituted a novation of the donor agreement.

Holding: Affirmed

Opinion: The appellate court opted not to address the parties' issues regarding the initial intervention because, regardless of whether Father had standing to bring that petition in intervention, the Mothers had standing as parents of the child to bring their SAPCR concerning conservatorship and possession of the Child. The final order in that SAPCR was an agreed order, and, thus, the trial court had authority to enter that order because it was entered pursuant to an agreed parenting plan. Further, because that order was an agreed order giving Father possession of the Child, he had standing to file a petition in intervention in the subsequent SAPCR as a person affected by the prior order.

Contrary to Second Mother's contention, *Troxel* did not preclude Father from seeking possession of the Child in the modification suit because there is no parental presumption in modification proceedings.

A party asserting the defense of novation in response to a breach of contract claim must establish (1) a previous, valid obligation, (2) a mutual agreement of the parties to the acceptance of a new contract, (3) the extinguishment of the old contract, and (4) the validity of the new contract. Here, the agreed possession order constituted a novation of the donor agreement, so Second Mother could not prevail on a breach of contract claim, and Father was not required to pay her attorney's fees pursuant to the obsolete donor agreement.

**SAPCR
CHILD SUPPORT ENFORCEMENT**

TRIAL COURT PERMITTED TO CONSIDER DIRECT PAYMENTS TO MOTHER WHEN CALCULATING CHILD-SUPPORT ARREARAGE.

Bruce v. Bruce, No. 03-16-00581-CV, 2017 WL 2333298 (Tex. App.—Austin 2017, no pet. h.) (mem. op.) (05-26-17).

Facts: Father filed a petition seeking reimbursement for overpayment of child support. Mother filed a counter-petition, asserting that Father had not made payments through the child-support registry, as ordered in the final decree, and asked the trial court to enter a judgment for enforcement and for arrearages. The trial court entered a judgment for arrearages but offset the award based on direct payments made by Father to Mother. Mother appealed, arguing the court erred in considering the direct payments and in failing to award her attorney's fees.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Relying on *Ochsner v. Ochsner*, ___ S.W.3d ___, No. 14-0638, 2016 WL 3537255 (Tex. 2016), the appellate court held that the trial court had discretion to consider direct payments either to the other parent or to a third party in directing whether an arrearage exists, even when the final decree requires payment of child support through a child-support registry. Additionally, the court held that *Ochsner* did not require "regular and periodic payments" and that the trial court was entitled to consider Father's five unequal payments over a period of 13 months when determining Father's arrearage.

However, even after factoring in the direct payments, Father still owed Mother approximately \$4,000 arrearage. Thus, pursuant to Tex. Fam. Code § 157.167, Mother was entitled to attorney's fees for her child-support enforcement action, and the trial court erred in ordering that each party would be responsible for his or her own fees.

HUSBAND FOUND IN CONTEMPT AND CONFINED FOR FAILING TO PRODUCE PROOF OF LIFE-INSURANCE POLICY TO SECURE CHILD SUPPORT PURSUANT TO DIVORCE DECREE.

In re Richardson, ___ S.W.3d ___, No. 08-16-00310-CV, 2017 WL 2302607 (Tex. App.—El Paso 2017, no pet. h.) (05-26-17).

Facts: The parties' divorce decree ordered Husband to obtain a life-insurance policy through his employer, with Wife as the named beneficiary, which was to remain in effect until the youngest Child turned 18 and awarded Wife a reimbursement claim and attorney's fees. A couple years later, Wife filed a motion for enforcement of the decree. After a hearing, the trial court held Husband in civil contempt for 9 separate violations and ordered him confined until he purged himself of contempt pursuant to the contempt order. Husband filed a petition for writ of habeas corpus, in which he raised 21 issues to support his claim that the contempt order was void.

Holding: Writ of Habeas Corpus Denied

Opinion: A person may not be imprisoned for a debt. Thus, the portions of the contempt order imprisoning Husband for his failure to pay the money judgment for the reimbursement award and attorney's fees (which were not for the enforcement of child support) were void.

However, the provision of the decree requiring Husband to obtain a life-insurance policy was unambiguous and enforceable by civil contempt. Further, contrary to Husband's contention that the court found him in contempt for failing to do something which was not previously ordered, he had not been found in contempt for a failure to produce proof of unemployment. That provision was merely an additional means by which he could purge himself of contempt because doing so would excuse his failure to get a life-insurance policy.

**SAPCR
ENFORCEMENT OF POSSESSION**

CONTEMPT ORDER VOID BECAUSE MOTHER NOT ADMONISHED OF HER RIGHT TO COUNSEL.

In re Rivas-Luna, ___ S.W.3d ___, No. 08-16-00312-CV, 2017 WL 2351347 (Tex. App.—El Paso 2017, orig. proceeding) (05-31-17).

Facts: The parties' divorce decree named them joint managing conservators. Father filed a petition for enforcement, alleging Mother denied his access to the Children on 25 occasions. In an amended petition, Father asked that Mother be jailed for 18 months and placed on community supervision for 2 years following her release. Mother attended the enforcement hearing without counsel. The court asked Mother if she would be representing herself. She replied that she couldn't afford an attorney and aimed to do the best she could. The court admonished her that she would not be treated differently than a lawyer would be. Mother indicated she understood. Subsequently, the court signed an order finding Mother in contempt, ordered her confined for 30 days but suspended the sentence. Mother was placed on community supervision until she paid attorney's fees awarded to Father in the contempt order. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Pursuant to Tex. Fam. Code § 157.163, if there is a possibility of incarceration, a court *shall* inform a pro se respondent of the right to be represented by an attorney. The subsequent suspension of the commitment order did not relieve the court of the duty to inform Mother she was entitled to counsel. Further, because the contempt order was void, Father was required to return any attorney's fees received from Mother pursuant to the void order.

MISCELLANEOUS

TRIAL COURT'S JUDGMENT FINAL AND ENFORCEABLE DESPITE LACK OF MOTHER-HUBBARD CLAUSE BECAUSE IT ADDRESSED ALL CONTESTED ISSUES BETWEEN THE PARTIES.

Bergholtz v. Eskenazi, ___ S.W.3d ___, No. 08-15-00144-CV, 2017 WL 1684729 (Tex. App.—El Paso 2017, no pet. h.) (05-03-17).

Facts: Husband and Wife signed an AID dividing their marital estate, which provided that Husband would pay money to Wife in installment payments. Subsequently, disputes arose, and the parties entered a settlement agreement. The trial court granted Wife's motion to reduce the agreement to judgment. When Husband failed to comply, the trial court granted Wife's request for the appointment of a receiver for turnover relief.

Husband challenged the receivership order, arguing;

- Wife's motion to declare him a vexatious litigant triggered a stay pursuant to Tex. Civ. Prac. & Rem. Code 11.052, and thus, the trial court's receivership order entered during the stay was void;
- the agreement was unenforceable because Wife failed to raise a claim for breach of contract; and
- the judgment was unenforceable because it was not a final judgment because it lacked a Mother-Hubbard clause.

Additionally, in supplemental briefs, Husband argued that:

- the receivership order was void because the appointed receiver was representing him in the appeal, which created a conflict under Chapter 64 of the Tex. Civ. Prac. & Rem. Code; and
- Wife allegedly non-suited all claims against him.

Holding: Affirmed

Opinion: This case was transferred to El Paso from Dallas.

Husband failed to raise at trial any complaint regarding a stay. Further, he and Wife both sought affirmative relief during the pendency of the stay.

Settlement agreements are governed by contract law. A trial court cannot render a consent judgment based on a Rule 11 agreement if a party revokes consent before judgment is rendered. At trial, Husband argued that the trial court lacked jurisdiction to render orders based on pending appeals and a bill of review, but he did not withdraw his consent to the settlement agreement before judgment was rendered.

Although the judgment did not contain a Mother Hubbard clause, it clearly addressed all the contested issues between the parties. Thus, the final judgment was final and enforceable.

The Dallas appellate court has previously held that Tex. Civ. Prac. & Rem. Chapter 64 does not apply in a post-judgment turnover proceeding. Further, even if it did, the appointment of a receiver is only void if a person is disqualified under § 64.021—if the person is not a Texas citizen and qualified voter.

Finally, the record did not support Husband's contention that Wife nonsuited all of her claims against him.

☆☆☆ TEXAS SUPREME COURT ☆☆☆

SUCCESSOR JUDGE WHO REPLACED PREDECESSOR JUDGE AFTER PREDECESSOR JUDGE LOST AN ELECTION COULD NOT ENTER FINDINGS OF FACT (OR RULE ON ANY UNDISPOSED MOTIONS) FOR TRIAL OVER WHICH SUCCESSOR JUDGE DID NOT PRESIDE.

Ad Villarai, et al. v. Pak, ___ S.W.3d ___, No. 16-0373, 2017 WL 1968035 (Tex. 2017) (05-15-17).

Facts: Predecessor Judge presided over the trial but failed to issue findings of fact before leaving the bench. Defendant timely filed a notice of past-due findings on the last day Predecessor Judge was the presiding judge of that court. Soon after taking the bench, Successor Judge issued findings of fact, and Defendant appealed.

Holding: **Reversed and Remanded**

Opinion: Successor Judge—who had replaced Predecessor Judge after an election—had no authority to issue findings. While Texas Rule of Civil Procedure 18 gives some authority to successor judges when the predecessor judge dies, resigns, or becomes disabled, Rule 18 does not apply when a predecessor judge has been replaced through an election. Accordingly, the Court held Successor Judge had no authority to issue findings, the findings were void, and Defendant was not required to raise the specific issue to the trial court to preserve it for appeal.

Additionally, contrary to the court of appeals decision, because Predecessor Judge's term expired during the period prescribed for filing the requested findings, he was permitted to file the findings even after his term expired.

FATHER'S ATTORNEYS ENTITLED TO IMMUNITY FROM SUIT BY MOTHER FOR CONDUCT DURING SAPCR BECAUSE ACTIONS FELL WITHIN SCOPE OF REPRESENTATION.

Diaz v. Monnig, No. 04-15-00670-CV, 2017 WL 2351095 (Tex. App.—San Antonio 2017, no pet. h.) (mem. op.) (05-31-17).

Facts: In a Mexican divorce decree, Father was awarded custody and possession of the Child. Subsequently, a Mexican court awarded custody to Mother. Mother and the Child moved to San Antonio. Father filed a petition for enforcement under the Hague Convention on the Civil Aspects of International Child Abduction. Father alleged in the Texas court that he was entitled to custody and that Mother had no rights to the Child. The divorce decree and other documents were translated and entered into evidence. After an ex parte emergency hearing, the trial court granted Father a warrant to take physical custody of the Child. Father, with the Child, and Mother were ordered to appear at a hearing on Father's petition. The morning of the hearing, Father's attorneys, at Father's direction via voicemail, announced the intent to nonsuit. It was later discovered that Father had left the country with the Child. Mother filed a motion for sanctions and a motion to set aside the nonsuit, both of which were denied. Mother filed suit against Father's Attorneys alleging interference with possessory right of child, abuse of process, negligent/fraudulent misrepresentation, and civil conspiracy. Father's Attorneys filed hybrid no-evidence and traditional motions for summary judgment, which were granted. Mother appealed, arguing in part that the Father's Attorneys were not entitled to the attorney immunity defense.

Holding: Affirmed

Opinion: Attorney immunity is an affirmative defense, and to prevail, the Attorneys were required to establish their alleged conduct was within the scope of their legal representation of Father. The purpose of attorney immunity is to ensure loyal, faithful, and aggressive advocacy. Even wrongful or fraudulent conduct may fall within the scope of client representation. This is not to say attorneys are not otherwise answerable for any misconduct. Other mechanisms, such as sanctions, contempt, and attorney disciplinary proceedings are in place to discourage and remedy wrongful conduct.

MOTHER TOOK NOTHING ON BREACH OF CONTRACT CLAIM BECAUSE PHRASE “TAKE CARE OF LIKE [FAMILY]” TOO INDEFINITE AS A MATTER OF LAW TO DEFINE FATHER’S OBLIGATIONS.

Shipley v. Vasquez, ___ S.W.3d ___, No. 04-16-00295-CV, 2017 WL 2351352 (Tex. App.—San Antonio 2017, no pet. h.) (05-31-17).

Facts: Father (the president of Shipley Do-Nut Flour & Supply, Co.) and Mother had a long, on-again-off-again relationship but never married. The couple broke up after Mother became pregnant, got back together after her miscarriage, and broke up again when she had the Child. Shortly after the Child was born, Mother was imprisoned for ten years after pleading no contest to intoxication manslaughter. During that period, Mother’s parents raised the Child. When Mother was released from prison, Father had married and had two children with his wife. Father told Mother that she should move out of her parents’ house and get a home for the Child and herself. Mother told Father she could not afford the home she picked out, but he told her to get the house and to make sure the Child was “taken care of like a Shipley would be taken care of.” Father helped Mother pay the down payment on her home and delivered furniture and household items when she moved in. Father also agreed to above-guideline child support. About a year later, Mother arranged for the Child to meet Father for the first time. The meeting did not go well, and the Child ran off crying. Litigation commenced soon after. Subsequently, Father and his company sued Mother seeking injunctive relief for unauthorized use of Father’s name. Mother replied with a counterclaim, in which she alleged that Father breached the agreement to “take care of” the Child “like a Shipley” and that Father breached his fiduciary duty to Mother. A jury found Father breached his oral agreement and awarded Mother damages. It further found that Father breached his fiduciary duty but awarded no damages. Father appealed, arguing that the oral agreement was too indefinite to be enforceable.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. Although not all terms in a parties’ agreement are essential, the terms “take care of” and “like a Shipley” in this agreement were vitally important elements of the bargain. There was no evidence, direct or circumstantial, that made those two terms reasonable, definite, and certain.