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

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DIVORCE
PROPERTY DIVISION

HUSBAND'S MOTHER'S CONVEYANCE OF PROPERTY NOT A GIFT BECAUSE IT LACKED DONATIVE INTENT.

Knowlton v. Knowlton, No. 04-17-00257-CV, 2018 WL 2222621 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (05-16-18).

Facts: In a divorce proceeding, Husband and Wife disputed the character of property obtained from Husband's mother during the marriage. Husband asserted the property had been gifted to him and was his separate property. Wife asserted it was not a gift and was community property. After a trial, the court determined that the property was community property, ordered that the property be sold and that the net proceeds be divided equally between the parties. Husband appealed.

Holding: Affirmed

Opinion: Because a conveyance of property from a parent to a child is presumed to be a gift, the burden was on Wife to show that the transfer was not a gift. Husband testified that he did not intend to gift the property to Wife, but his intent was irrelevant to the determination of whether his mother intended to gift the property. Wife testified about the facts and circumstances surrounding the execution of the deeds. Husband's mother signed the quitclaim deed for the purpose of Husband and Wife obtaining an equity loan. The quitclaim deed recited that the conveyance was done in exchange for consideration of $10, which indicated the conveyance was not a gift. The quitclaim deed failed to adequately describe the property. Upon learning that the loan could not be obtained with the quitclaim deed, Husband's mother executed a general warranty deed conveying the property to both Husband and Wife in exchange for cash and other valuable consideration. The cumulative evidence supported a finding that Husband's mother lacked the requisite donative intent, and contrary to Husband's assertions, the trial court's decision did not appear to rest on any single piece of evidence.

HUSBAND AWARDED MOST OF THE COMMUNITY'S DEBTS AND WIFE AWARDED MOST OF THE COMMUNITY'S ASSETS TO FULFILL THE REIMBURSEMENT AWARD FROM HUSBAND'S SEPARATE ESTATE TO THE COMMUNITY ESTATE.

In re Marriage of Slagle, No. 14-16-00113-CV, 2018 WL 2306736 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (05-22-18).

Facts: Husband owned a business before marriage that was profitable. During the marriage, circumstances changed, and Husband began losing money. Husband sued the company he believed was responsible for the lost income and spent all of his time and a significant amount of money pursuing the lawsuit. During the marriage, the community estate loaned large sums of money to Husband's business. Wife filed for divorce. In the final decree, the trial court determined the business was Husband's separate property and that Husband's separate property owed the community reimbursement for the loans. Husband appealed the property division, arguing that the trial court abused its discretion in awarding Wife "100% of the community's assets and appoint[ing him] 100% of the community liabilities.

Holding: Affirmed

Opinion: Husband's uncontroverted testimony established that the company was his before marriage, which was sufficient to establish that it was his separate property. The court determined that the community estate was entitled to reimbursement of its loan to Husband's separate property company, which meant Wife was entitled to half of the reimbursement award in the division of the community. The trial court did not abuse its discretion in awarding more assets to Wife and more debt to Husband to effectuate this division.

ATTORNEY'S FEES ONLY ONE FACTOR IN MAKING AN EQUITABLE PROPERTY DIVISION.

Gadekar v. Zankar, No. 12-16-00209-CV, 2018 WL 2440393 (Tex. App.—Tyler 2018, no pet. h.) (mem. op.) (05-31-18).

Facts: Husband and Wife's divorce proceedings lasted four years. After a jury trial, Wife was appointed sole managing conservator of the Child, and Husband was awarded a possession schedule on condition that he attend therapy. Husband had a history of mistreating Wife and the parties' Child. The trial court confirmed Wife's separate property, some of which was located in India, divided the community estate, and awarded Wife her attorney's fees. Husband appealed on a number of grounds, including the court's denial of his motion for a continuance after his fifth attorney withdrew, the exclusion of testimony from the parenting facilitator, and the division of the community estate.

Holding: Affirmed

Opinion: Husband argued that although the trial court claimed to be awarding a roughly equal division of the community estate, it failed to consider the award of Wife's attorney's fees. However, attorney's fees are but a factor to be considered in making an equitable division. Further, the failure to list attorney's fees as "property" is not an indication that they were not considered, only that the award was not considered "property."

DIVORCE
Spousal Maintenance/Alimony

WIFE PRESENTED SUFFICIENT AND PROBATIVE EVIDENCE IN SUPPORT OF HER REQUEST FOR SPOUSAL SUPPORT TO ESTABLISH DISABILITIES THAT PREVENTED HER FROM OBTAINING GAINFUL EMPLOYMENT.

Stewart v. Stewart, No. 09-18-00142-CV, 2018 WL 2343215 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (05-24-18).

Facts: Husband and Wife were married 14 years. Wife suffered from deteriorated discs in her neck and lower back, vertigo, high blood pressure, type-one diabetes, depression, psoriasis, arthritis in her back and hands, and tremors in her right hand. Wife stopped working after receiving back surgery. Her condition prevented her from returning to her job as a bank teller because she could not stand for long periods of time, and pain and spasms prevented her from standing for long periods. Arthritis and tremors limited her ability to write. Wife was 64 years old at the time of the divorce. During the divorce proceeding, Wife sought $2000 a month in spousal maintenance for an indefinite period of time. The trial court awarded her $1200 a month for 60 months. Husband appealed.

Holding: Affirmed

Opinion: A spouse's evidence must rise above a mere assertion that unsubstantiated symptoms collectively amount to an incapacitating disability. Here, Wife testified as to her conditions and offered her doctor's notes, which included test results.

SAPCR
Procedure and Jurisdiction

GRANDMOTHER WAS A NECESSARY PARTY TO MOTHER'S SUIT TO REMOVE GRANDMOTHER'S PREVIOUSLY-ORDERED VISITATION.

In re T.R.H., No. 09-17-00001-CV, 2018 WL 2246545 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (05-17-18).

Facts: In an agreed order, Mother and Father awarded Grandmother an annual 2-week visitation period with the Child provided that she gave timely notice to Mother. Grandmother was also awarded the first right of refusal if Mother desired to place the Child in daycare. Subsequently, an order appointed Mother and Grandmother joint managing conservators. Because Mother failed to comply with the order, Grandmother was forced to file a motion to enforce her right to visitation with the Child.

A few years later, Grandmother filed a motion to grant visitation, and Mother filed a motion to dismiss for lack of standing. Despite the prior orders, the trial court did not view Grandmother as a party affected by the order and dismissed Grandmother's pleadings. Mother then filed her own motion to modify to remove Grandmother's right to possession and served Grandmother with citation. Grandmother filed a motion for reconsideration of her prior pleadings. Without allowing Grandmother to present any evidence, the trial court denied Grandmother's pleadings, finding she

lacked standing. After a bench trial, in which Grandmother was not allowed to participate, the trial court signed an order removing Grandmother's right to possession. Grandmother appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code 156.002(a) gives standing to initiate a modification proceeding to parties affected by an order. Grandmother was named in a prior order and successfully brought a motion to enforce. When Mother filed her motion to modify, she named Grandmother as a party and had Grandmother served with citation. The prior order granted Grandmother with visitation and possession of the Child, and she had substantial contact with the Child.

SAPCR
Amicus attorneys/Ad Litems/
Parenting Facilitators & Coordinators

PARENTING FACILITATORS STATUTORILY PROHIBITED FROM MAKING RECOMMENDATIONS REGARDING CONSERVATORSHIP OF AND POSSESSION AND ACCESS TO CHILD.

Gadekar v. Zankar, No. 12-16-00209-CV, 2018 WL 2440393 (Tex. App.—Tyler 2018, no pet. h.) (mem. op.) (05-31-18).

Facts: Husband and Wife's divorce proceedings lasted four years. After a jury trial, Wife was appointed sole managing conservator of the Child, and Husband was awarded a possession schedule on condition that he attend therapy. Husband had a history of mistreating Wife and the parties' Child. The trial court confirmed Wife's separate property, some of which was located in India, divided the community estate, and awarded Wife her attorney's fees. Husband appealed on a number of grounds, including the court's denial of his motion for a continuance after his fifth attorney withdrew, the exclusion of testimony from the parenting facilitator, and the division of the community estate.

Holding: Affirmed

Opinion: A parenting facilitator is statutorily prohibited from making recommendations as to the conservatorship or possession or access to the Child. Husband's arguments regarding the trial court's exclusion of the parenting facilitator's testimony all related to his complaint that the trial court erred in its rulings regarding conservatorship and possession. Thus, the trial court did not abuse its discretion in excluding the testimony.

SAPCR
Alternative Dispute Resolution

MOTHER COULD NOT REVOKE CONSENT TO AGREEMENT AFTER COURT ORALLY RENDERED FULL AND FINAL JUDGMENT; ATTORNEY'S FEES NOT ASSOCIATED WITH CHILD SUPPORT ENFORCEMENT COULD NOT BE AWARDED AS CHILD SUPPORT.

In re R.F., No. 09-16-00240-CV, 2018 WL 2054930 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (05-03-18).

Facts: During a suit to modify the parent-child relationship, the parents entered a Rule 11 agreement that resolved the parties' issues. The agreement was read into the record, and the trial court orally rendered judgment. Nearly two months later, the trial court signed an order prepared by Father's attorney. Mother appealed, arguing in part that she had revoked her consent to the agreement before it was finalized and that the trial court erred in ordering Mother to pay the attorney's fees for the attorney that she hired to represent the Child (the attorney ad litem), as child support. Mother asserted that at the hearing at which the Rule 11 agreement was read into the record she told her attorney she no longer consented and that the judgment could not be entered because she revoked her consent before the written order was signed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: At the hearing's conclusion, the judge orally rendered a full and final judgment. Further, the judge's language and the subsequent findings of fact and conclusions of law indicated the present intent to render judgment on the date of that hearing. Thus, even if Mother revoked her consent after the oral rendition but before the written order was signed, any revocation was ineffective. Additionally, even if Mother commented to her attorney during the hearing that she no longer agreed to the Rule 11, those comments were ineffective to revoke consent because they were not made known to the trial court. Finally, during the hearing, Mother testified that no one influenced or forced her agreement, the agreement was in the Child's best interest, and Mother wanted an order based on the agreement.

Attorney's fees can only be awarded as child support when incurred in conjunction with an enforcement proceeding. This was not an enforcement proceeding, so the trial court could not award fees as child support, and the order of withholding was improper.

SAPCR
Paternity

MOTHER'S CROSS-CLAIMS IN HER CHILDREN'S SUIT TO DETERMINE BOYFRIEND'S PATERNITY BARRED BY COLLATERAL ESTOPPEL BECAUSE MOTHER PARTICIPATED IN TWO PRIOR SUITS ADJUDICATING HUSBAND AS FATHER.

In re J.A.C., No. 05-17-00768-CV, 2018 WL 2191604 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-14-18).

Facts: Mother and Husband married and divorced in North Carolina. Subsequently, they remarried and divorced in Georgia. In both cases, Husband was adjudicated—in agreed orders—the father of Mother's four children "of the marriage," including her Twins. Before marrying Husband and during the marriage, Mother maintained a sexual relationship with Boyfriend. When the Twins were 13-years-old (one year after Mother and Boyfriend broke up), the Twins filed suit through Mother seeking to adjudicate Boyfriend to be their father and to terminate Husband's parent-child relationship with them. Boyfriend challenged the Twins' standing, but the court of appeals held that the Twins had standing to seek an adjudication of parentage. On remand, Mother filed a cross-claim asking that if the trial court terminated Husband's parental rights that it name her the sole managing conservator and enter appropriate orders regarding conservatorship, possession, and support. Boyfriend filed a motion for summary judgment, asserting Mother's cross-claims were barred by collateral estoppel and res judicata. The trial court granted Boyfriend a summary judgment as to all of Mother's claims. After a bench trial and genetic testing, the court adjudicated Boyfriend to be the Twins' father and ordered their birth certificates be amended. Mother appealed, challenging the summary judgment and the trial court's failure to terminate Husband's parental rights.

Holding: Affirmed

Opinion: Mother was a party to the two prior divorces that adjudicated Husband to be the Twins' father. Mother sought to litigate the same issues of child support, conservatorship, and custody that had been litigated in the prior cases. These issues were essential to the two prior judgments. Finally, when evoking collateral estoppel, it is only necessary that the party *against whom* the doctrine is asserted was a party or in privity with a party in the first action. Because Mother was a party in the prior action, it was not relevant that Boyfriend was not.

Additionally, because Mother did not establish how she was personally aggrieved by the trial court not terminating Husband's parental rights, Mother lacked standing to raise the issue on appeal.

SAPCR
Possession

LACK OF GEOGRAPHIC RESTRICTION ON CHILDREN'S RESIDENCE DID NOT INDICATE THAT MOTHER ANTICIPATED MOVING IN THE FUTURE.

In re C.F.M., No. 05-17-00141-CV, 2018 WL 2276351 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-18-18).

Facts: When the parties divorced, Mother was granted the exclusive right to designate the Children's primary residence without regard to any geographic restriction. Father was awarded supervised possession at FLP. Father never exercised his possession. Subsequently, Mother moved to Kansas. She filed a petition to modify the parent-child relationship to move Father's possession to a facility in Kansas. Father filed a motion to enforce his visitation in Dallas. Father argued that Mother's move to Kansas was anticipated at the time of divorce and, thus, could not constitute a material and substantial change in circumstances.

Holding: Affirmed

Opinion: The fact that no geographic restriction was placed on Mother's right to designate the Children's primary residence did not indicate that she anticipated a move to Kansas at the time of the divorce.

MOTHER FAILED TO PRODUCE EVIDENCE TO SUPPORT MODIFICATION OF CHILD SUPPORT OR THAT CHILD REQUIRED ADDITIONAL FINANCIAL SUPPORT BECAUSE OF A DISABILITY.

Dobyanski v. Breshears, No. 01-17-00407-CV, 2018 WL 2049345 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (05-03-18).

Facts: Shortly after the Child's birth, Mother and Father signed an MSA that was incorporated into a final order for conservatorship, possession, and support of the Child. Five years later, Mother sought to modify the order. Father was served but did not appear. Mother provided evidence that the Child had been diagnosed with vaccination delay, oppositional defiance disorder, ADHD, developmental language disorder, and autism. She testified that the Child saw a psychiatrist every two weeks and had been prescribed Abilify. Mother believed the Child's disability would prevent her from getting a full-time job. Mother provided the trial court with a cause number of a case in which Father had been ordered to pay child support for another child. Although Mother did not offer any orders or other documents from that case, she testified as to what his gross monthly resources were in that case. She requested an amount that exceeded guidelines based on that number because that would account for any increases in Father's income since the prior case. Mother believed that Father was making more money because he frequently cancelled his visitations with the Child because he was working. Additionally, Mother believed additional child support was necessary given the Child's disability. The trial court granted Mother a default judgment and ordered Father's child-support obligation be set at the amount requested by Mother and that the obligation would continue after the Child's eighteenth birthday. Subsequently, Father filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: Mother admitted that even based on highest income she adduced of Father's income, the requested child support was beyond the statutory guidelines. Further, Mother offered evidence of Father's income in an intervening year, not the year of the prior order or the year of the current modification suit. Thus, the court had no basis to find a material and substantial change in circumstances. While Mother testified that the Child had a number of diagnoses and that the Child required substantial supervision, she did not offer any evidence of the severity of the Child's conditions or offer any specificity of the type or cost of care she provided.

WITHOUT CONTROVERTING AFFIDAVIT, TRIAL COURT HAD MINISTERIAL DUTY TO TRANSFER SAPCR; FATHER'S ALLEGATIONS INSUFFICIENT TO SUPPORT TEMPORARY ORDERS CHANGING THE PERSON WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILDREN'S PRIMARY RESIDENCE.

In re Rusch, No. 03-18-00163-CV, 2018 WL 2123384 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (05-09-18).

Facts: A final divorce decree appointed the parents joint managing conservators, and Mother had the exclusive right to designate the Children's primary residence. Subsequently, Father filed a petition to modify, seeking the exclusive right to designate the Children's primary residence. Mother filed an answer and motion to transfer, to which she attached an affidavit stating that she and the Children had lived in a different county for nearly nine years. Father filed a response to Mother's motion to transfer, to which he attached an affidavit that did not dispute the Children's residence but raised concerns about Mother's ability to care for the Children. Nine days after Mother filed her motion to transfer, the trial court held a hearing. Father argued that the trial court could not hear Mother's motion because he was not afforded ten-days' notice. The court stated that it would not consider any transfer. After the presentation of evidence, the court signed temporary orders changing the person with the exclusive right to designate the Children's primary residence from Mother to Father. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Although Father filed a document entitled "Controverting Affidavit," it did not actually contain any facts controverting Mother's assertion that the Children had lived in a different county for at least six months. Thus, Father was not entitled to a hearing, and the trial court had a ministerial duty to transfer the case.

Despite the ministerial duty to transfer, the trial court had jurisdiction to enter temporary orders. However, even if the facts asserted by Father were true, they did not rise to the level of serious acts or omissions from which the court could imply the necessary findings that the Children's present circumstances would significantly impair their physical health or emotional development. Father's evidence predated the prior order, was based on allegations that had been ruled out by CPS, or did not relate to the Children's *present* circumstances.

FATHER NOT ENTITLED TO SUSPENSION OF ENFORCEMENT OF JUDGMENT PENDING APPEAL.

Nixon v. OAG, No. 05-17-01080-CV, 2018 WL 2126823 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-08-18).

Facts: After appealing a judgment finding Father in child support and medical support arrearages, Father asked the trial court to suspend enforcement of the judgment pending appeal. The trial court denied Father's request. Father filed a motion in the appellate court asking the court to set a supersedeas bond or, in the alternative, suspend enforcement of the judgment without requiring security.
Holding: Affirmed

Opinion: While Father asserted that he would suffer irrevocable harm and hardship without a suspension of the judgment, he did not elaborate on the claim. Additionally, Father had a combined arrearage of $86,822.02 and had begun consistently paying $385 a month toward the arrearage. Given Father's history of noncompliance, the trial court did not abuse its discretion in denying Father's request. Further, Father failed to present the appellate court with any circumstances to support suspending enforcement pending appeal.

MOTHER FAILED TO MEET CONDITION PRECEDENT TO ESTABLISH HER ENTITLEMENT TO UNINSURED MEDICAL REIMBURSEMENT.

In re C.P.K., No. 07-17-00287-CV, 2018 WL 2170821 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (05-10-18).

Facts: Mother sought to modify pick-up and drop-off times for the Child because the timing was inconvenient for her and her other child. Additionally, Mother asserted that applying the guidelines to Father's income over a 9-month period required an increase in child support. Mother further claimed that she was entitled to uninsured medical reimbursement. The trial court denied the medical reimbursement and Mother's request to change the pick-up and drop-off times. The court increased Father's child support but for a lesser amount than requested by Mother. Mother appealed.

Holding: Affirmed

Opinion: Mother argued that the modification of pick-up and drop-off times would be more convenient for herself and her other child and that Father's schedule was flexible enough to accommodate her. However, little evidence was offered as to how the change would be in the best interest of the Child the subject of the suit.

When Mother calculated her estimate for what Father's child support obligation allegedly should have been, she based her calculation on Father's deposits over a nine-month period. The Texas Family Code provides that the calculation should be based on *annual* basis, so Mother's initial premise was based on too short a period. Additionally, Mother did not account for the fact Father was self-employed. While his tax returns alone were not determinative, they did indicate that Father had many business expenses for which Mother failed to account in her calculations.

Finally, although Wife alleged she was entitled to some medical reimbursement, under the order, she was required to produce to Father evidence of her actual expenses. Rather than produce evidence of her expense, she produced summary-of-benefits information from the insurance company, which did not appear to correlate to Mother's actual out-of-pocket costs.

PAYMENT OF ATTORNEY'S FEES AWARD IMPROPERLY INCLUDED AS REQUIREMENT FOR FATHER TO BE PURGED OF CIVIL CONTEMPT.

In re O'Keeffe, No. 05-18-00371-CV, 2018 WL 2296495 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (05-21-18).

Facts: Father was held in contempt for failing to pay child support, medical support, and uninsured medical expenses. He was sentenced to six months' confinement for criminal contempt and an additional six months' confinement for civil contempt. To purge himself of the civil contempt, Father would have to pay the full arrearages plus the attorney's fees award against him for fees and costs incurred in the enforcement proceeding. After serving his criminal sentence, Father filed a petition for writ of habeas corpus arguing that (1) the civil contempt order was void because he had no apparent means to pay the arrearage, and therefore, confining him until he pays the arrearages violates his due proceed; and (2) the payment of fees and costs as a condition to purge contempt was improper.

Holding: Writ of Habeas Corpus Granted in Part and Denied in Part

Opinion: A contempt order imposing a coercive restraint is void and subject to collateral attack by habeas corpus if the condition for purging the contempt is impossible of performance. A person who is obligated to pay child support may plead, as an affirmative defense to an allegation of contempt, that he: (1) lacked the ability to provide support in the amount ordered; (2) lacked property that could be sold, mortgaged, or otherwise pledged to raise the needed funds; (3) attempted unsuccessfully to borrow the needed funds; and (4) knew of no source from which the money could be borrowed or legally obtained. The contemnor must establish all four elements of the defense. Contrary to Father's assertion, the standard for establishing indigency for appointment of counsel is different from the standard for establishing an inability to pay arrears. The inability-to-pay threshold is necessarily higher than the indigence threshold. Thus, Father being approved for indigency status and appointment of an attorney, alone, was insufficient to establish his affirmative defense of inability to pay.

The portion of the order including the fees and costs award as part of the amount required for Father to purge himself of contempt was void because Father was not held in contempt for failing to pay those costs and fees. Additionally, the fees and costs were not due until approximately 30 days after Father would be released, and a party may not be confined for failure to pay a judgment that is not yet due.

SAPCR
Family Violence/Protective Orders

TESTIMONY OF MOTHER'S HUSBAND'S EX-GIRLFRIEND REGARDING HUSBAND'S PAST ACTS OF VIOLENCE RELEVANT TO MOTHER'S ACCESS TO CHILDREN.

¶18-3-43. *in re E.J.P.*, No. 07-17-00304-CV, 2018 WL 2325564 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (05-22-18).

Facts: Father filed a motion to modify the parent-child relationship because Mother's new husband was threatening and mistreating the Children. At trial, over Mother's objection, her husband's ex-girlfriend testified about the husband's past. The trial court entered an order barring Mother from exposing the Children to her husband until he successfully completed a parenting class and a Batterers Intervention Prevention Program. Mother appealed.

Holding: Affirmed

Opinion: Past conduct of a parent can be indicative of how a parent will act in the future. Additionally, the individuals with whom the parent associates and to whom the child is exposed can hardly be ignored. Just as a parent's history is relevant in deciding matters of custody, the history of those with whom the parent associates and to whom the child is exposed also has relevance.

MISCELLANOUS

ATTORNEY'S INTERVENTION, MOTION FOR SANCTIONS, AND MOTION TO ENFORCE PRIOR FEES ORDERS WERE COLLATERAL MATTERS AND COULD BE CONSIDERED AFTER HUSBAND AND WIFE FILED NONSUIT.

In re Bagheri, No. 05-18-00110-CV, 2018 WL 2126825 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (05-09-18).

Facts: During Husband and Wife's divorce proceeding, they agreed to reconcile. Wife's counsel advised against signing an agreed motion to nonsuit and informed Wife that if she chose to move forward with the nonsuit, her counsel would withdraw. Before her counsel could withdraw, Husband's attorney filed a joint motion to nonsuit signed by Husband and Wife. Wife's counsel filed a petition in intervention seeking fees pursuant to its agreement with Wife, to enforce prior orders for Husband to pay attorney's fees directly to Wife's counsel, and seeking sanctions against Husband and his attorney. Husband argued that Wife's counsel could not intervene after the motion for nonsuit was filed. The trial court refused to sign an order of dismissal. Husband filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: Although plaintiffs have a right to nonsuit their claims, and the trial court has no choice but to grant the nonsuit, plaintiffs do not have the absolute right to nonsuit someone else's claims they are trying to avoid. Further, a court retains jurisdiction after a nonsuit and may delay signing an order of dismissal to address collateral matters, such as

motions for sanctions, even when such motions are filed after the nonsuit. Wife's counsel's intervention was not an attempt to assert itself into the personal matters of a reconciled couple; rather, the firm sought to recover fees awarded before the nonsuit.

ATTORNEY'S FEES AS CHILD SUPPORT IMPROPER WHERE NO FINDING THAT ENFORCEMENT OF POSSESSION NECESSARY TO ENSURE CHILD'S PHYSICAL OR EMOTIONAL HEALTH OR WELFARE.

In re C.A.C., No. 05-17-00602-CV, 2018 WL 2126811 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-09-18).

Facts: Father filed a motion to enforce possession or access and a motion to modify the parent-child relationship. Mother filed a counter-petition to modify. After a final hearing, Father's attorney sent a proposed order memorializing the court's rulings to Mother's attorney for review. Instead of sending Father's attorney her objections or revisions, Mother's attorney obtained the court's signature on a different proposed order. Father's attorney filed a motion to set aside the order on the grounds that it contained a number of errors. The trial court set aside the order, entered a new order, and awarded Father his attorney's fees as child support. Mother appealed the attorney's fees award, arguing Father's attorney presented no documentary evidence to support the attorney's fee award and that the fees could not have been awarded as child support.

Holding: Affirmed as Modified

Opinion: Father's attorney was not required to present documentary evidence because he proved up his fees under the "traditional method" with evidence in the form of testimony. The traditional method requires evidence of:

(i) the time, labor and skill required to properly perform the legal service;
(ii) the novelty and difficulty of the questions involved;
(iii) the customary fees charged in the local legal community for similar legal services;
(iv) the amount involved and the results obtained;
(v) the nature and length of the professional relationship with the client; and
(vi) the experience, reputation and ability of the lawyer performing the services.

In an enforcement of possession suit, a court may only award attorney's fees as child support if the court finds "that the enforcement of the order with which the respondent failed to comply was necessary to ensure the child's physical or emotional health or welfare." Here, the trial court made no such finding, and Father's attorney made no effort to segregate fees incurred in the modification suit from those incurred in the enforcement suit.

COMPLAINT REGARDING EXCLUSION OF EVIDENCE WAS NOT PRESERVED FOR APPELLATE REVIEW BECAUSE THERE WAS NO OFFER OF PROOF MADE AT TRIAL.

Jacob v. Jacob, No. 01-16-00835-CV, 2018 WL 2141976 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (05-10-18).

Facts: Mother was obligated to pay child support for the Child. Subsequently, she had another child and filed a motion to modify her obligation. She asserted in her pleading and response to a request for disclosure that there had been a material and substantial change—in that she had a new baby—and that her obligation should be reduced by 2.5%. At trial, Mother attempted to testify as to increased expenses related to the new child, but Father objected on the grounds that neither her pleadings nor her discovery responses referenced increased expenses. The trial court sustained Father's objections. After the trial court denied Mother's requested relief, she filed a motion for new trial that was overruled by operation of law. Mother subsequently appealed.

Holding: Affirmed

Opinion: Mother failed to preserve her issue for appeal. To preserve a complaint about excluded evidence, the offering party must include the evidence in the record through an offer of proof or a bill of exception. Mother did not introduce an offer of proof that showed any increased costs in comparison to her net resources. Further, a motion for new trial alone cannot preserve error related to the admission or exclusion of evidence.

NO FIDUCIARY RELATIONSHIP BETWEEN HUSBAND AND GIRLFRIEND.

Markl v. Leake, No. 05-17-00174-CV, 2018 WL 2191433 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-14-18).

Facts: During Husband and Wife's marriage, Husband met Girlfriend, with whom Husband began an affair that lasted nearly ten years. During that time, Husband and Girlfriend tried to conceive a child, discussed buying property together, traveled together, and shared intimate details of their lives. Girlfriend made Husband a beneficiary in her will, and they each took out life-insurance policies for the benefit of the other. Husband made significant upgrades to Girlfriend's house and another house she inherited. Husband acknowledged that Girlfriend did not pay him for his work on her homes but asserted that she knew that if they separated, he would get back his investment. Husband told Girlfriend he wanted to leave Wife for Girlfriend. He moved in with Girlfriend once, but after Girlfriend presented him with an ultimatum, Husband felt guilty and returned to Wife. Girlfriend threatened that if Husband broke up with her, she would tell Wife about the relationship.

Girlfriend accused Husband of assault when he broke into her house one evening. He claimed that he was preventing her from committing suicide. After returning home, Husband briefly explained to Wife what happened and later pleaded guilty for burglary with intent to commit assault.

Husband and Wife sued Girlfriend for breach of fiduciary duty, fraud, conversion, and promissory estoppel. Husband and Wife sought reimbursement for the expenses Husband made for Girlfriend's benefit. Girlfriend denied the allegations, raised affirmative defenses, and counterclaimed for assault, negligence, and IIED.

After Husband and Wife presented their claims to the jury, Girlfriend was granted a directed verdict as to the breach of fiduciary duty claim. The court held there was no authority that somebody in an extramarital relationship could have a valid claim for breach of fiduciary duty. The jury found that Husband committed assault but awarded Girlfriend no damages. Husband and Wife appealed.

Holding: Affirmed

Opinion: Despite evidence that Husband and Girlfriend's relationship was similar to a marriage, there was no evidence that Husband was accustomed to being guided by Girlfriend's advice, that Girlfriend ever gave Husband financial advice, or that Girlfriend had otherwise assumed the role of a fiduciary towards Husband. If Husband wanted out of the relationship with Girlfriend, Girlfriend would tell Wife, and Husband would lose both women. If Girlfriend wanted out of the relationship, she had to "settle up on the property." Thus, each was acting in his or her own interest, not the others'. Moreover, recognizing Husband and Girlfriend's relationship as fiduciary in character, under the circumstances here, would make light of the very notion of concepts of trust and confidence associated with a fiduciary relationship between actual spouses.

EX-SPOUSES DO NOT OWE A FIDUCIARY DUTY TO ONE ANOTHER.

***Robbins v. Robbins*, ___ S.W.3d ___, No. 02-16-00285-CV, 2018 WL 2248561 (Tex. App.—Fort Worth 2018, no pet. h.) (05-17-18).**

Facts: The divorce decree included provisions for the sale of the marital residence, including a provision that the parties would each receive 50% of the net sale proceeds. The parties subsequently agreed not to sell the residence until all their Children had finished high school. Twelve years after the divorce, Wife filed a motion for enforcement, claiming Husband failed to comply with the provisions for the sale of the marital residence. Wife also brought a breach-of-fiduciary-duty claim and requested attorney's fees, expenses, costs, and interest.

Wife asserted that at some point the house sustained fire damage, but Husband kept the insurance funds for himself and that, rather than repairing the house, he used the money to buy drugs. The house was condemned by the city, and Wife had to pay for demolition and removal expenses. Husband responded that he had addressed the repairs, that the city approved the rebuilding of the house, and that the house was torn down while he was in jail. He asserted that his accounts were frozen and that he did not have access to his records while he was in jail.

The trial court held that Husband had a fiduciary duty to protect Wife's 50% interest in the net proceeds. The court ordered that the property be sold and that 100% of the proceeds be awarded to Wife as damages. Additionally, the court ordered Husband to pay Wife's attorney's fees. Husband appealed.

Holding: Reversed and Rendered

Opinion: While spouses owe fiduciary duties to one another, ex-spouses generally do not. Further, no evidence in the record indicated that the parties had an informal fiduciary duty to each other. Additionally, attorney's fees are not available for a breach-of-fiduciary-duty claim.

DEFAULT JUDGMENT IMPROPER WHEN SERVICE DID NOT STRICTLY COMPLY WITH ORDER FOR SUBSTITUTED SERVICE.

***Creaven v. Creaven*, ___ S.W.3d ___, No. 14-17-00128-CV, 2018 WL 2306922 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (05-22-18).**

Facts: Daughter sued Mother for improperly withdrawing funds from Daughter's college fund. An affidavit attached to Daughter's motion for substitute service stated that she had attempted to serve Mother at an address on "Cambrian Park Court." In the order granting substituted service, the court authorized service to an address on "Cambrian Park." In the return of service, the process server averred that he served Mother at an address on "Cambrian Court." Daughter then obtained a default judgment against Mother. Mother appealed.

Holding: Reversed and Remanded

Opinion: There are no presumptions in favor of valid issuance, service, or return of citation. Substituted service must strictly comply with the order granting it.

Daughter asked the appellate court to take judicial notice of the fact that no other street in Houston was named "Cambrian." The court declined because that evidence was not presented to the trial court. Further, appellate courts are reluctant to take judicial notice of matters that go to the merits of a dispute.

Presuming Daughter actually complied with the order, it was her responsibility to correct any errors in the return of service, which she did not do.

PREMATURE POST-JUDGMENT MOTION EXTENDED APPELLATE DEADLINES BECAUSE REQUESTED RELIEF WAS DENIED.

In re D.V.D., No. 05-17-00268-CV, 2018 WL 2316014 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-22-18).

Facts: After a contentious divorce, Wife appealed a number of issues related to the characterization of property and the just and right division of the community estate. Husband responded that Wife's notice of appeal was untimely filed.

Holding: Affirmed

Opinion: A premature post-judgment motion is effective to extend appellate deadlines if the subsequent judgment does not grant all the relief requested in the premature motion. Here, the trial court issued a memorandum ruling. Wife filed a motion to reconsider, which was denied. Subsequently, the trial court signed a final decree. Nearly three months later, Wife filed her notice of appeal. Because the trial court denied Wife's premature motion to reconsider, the appellate deadlines were extended, and Wife's notice of appeal was timely.

Wife offered no evidence—just mere speculation—to challenge Husband's tracing evidence that his separate funds were used to purchase a home during the marriage. Thus, the trial court did not err in finding the home was Husband's separate property. However, with respect to disputed airline miles, the only evidence offered was the parties' respective inventories. Husband listed the miles as separate, and Wife listed the miles as community. Without more, because the evidence was controverted, Husband did not meet his burden to establish the miles were separate. However, because there was no evidence of the value of the miles, the appellate court could not determine whether the error was harmful.

MOTHER FOUND IN CONTEMPT FOR FAILING TO TRANSPORT CHILD TO MONTHLY COUNSELING SESSION PURSUANT TO AGREED ORDER.

In re White, No. 01-18-00073-CV, 2018 WL 2305524 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (mem. op.) (05-22-18).

Facts: Mother and Father signed an MSA in a prior SAPCR. Father filed a motion to enforce because Mother had not been transporting the Child regularly to counseling sessions related to a reunification plan. The trial court found Mother in contempt for cancelling a counseling session without rescheduling it and for failing to take the Child to counseling at least once a month. The court assessed punishment for each violation of confinement in jail but suspended commitment and placed Mother under community supervision for one year. Mother filed a petition for writ of habeas corpus, or in the alternative, writ of mandamus.

Holding: Writ of Habeas Corpus Granted in Part; Denied in Part

Opinion: Father argued that Mother was not entitled to habeas relief because she was not confined. However, Mother's probation required that she appear for compliance hearings and report monthly to a community supervision office, which constituted a sufficient restraint on liberty to permit habeas relief.

The underlying order required Mother to abide by the counselor's recommendations for frequency of the Child's sessions. Mother's cancellation of a single appointment did not constitute a contemptuous violation of that requirement.

The underlying order also required Mother to transport the Child to counseling sessions at least monthly. However, Mother admitted that over a period of nine months, she only took the Child to four sessions. This was a direct violation of the action required by the order.

Finally, Mother's assertion that she was unable to force a 17-year-old, 6-foot-tall football player to attend counseling sessions against his will was without merit. The only individuals that testified about this conflict were Mother and the Child, who were both interested witnesses. Thus, the trial court was not bound by their testimony if the court disbelieved it.

DESPITE ERRORS ON FACE OF RECORD, PROCEDURAL RULES PREVENTED APPELLATE COURT FROM CONSIDERING MOTHER'S LATE-FILED APPEAL.

***In re E.D.*, ___ S.W.3d ___, No. 02-16-00448-CV, 2018 WL 2343439 (Tex. App.—Fort Worth 2018, no pet. h.) (05-24-18).**

Facts: Mother and Father had joint managing conservatorship of the Child, and Mother had the exclusive right to designate the Child's primary residence. Father was granted no access to the Child after the court made a family violence finding against him.

Subsequently, Father sought to modify the prior order but had difficulty serving Mother. After obtaining a promise from Mother's father to deliver to her the petition, Father obtained an order for substituted service and served Mother's father. Mother did not answer or appear. In a nunc pro tunc judgment that corrected substantive errors, rather than clerical errors—which is an inappropriate use of a nunc pro tunc—the trial court appointed Father sole managing conservator and restricted Mother's access to six supervised hours of visitation each month.

More than three months after the default judgment and two months after the nunc pro tunc judgment, Mother filed a motion to set aside the default judgment. The trial court agreed with Father that Mother's motion was untimely. Mother then appealed.

Holding: Dismissed

Opinion: The appellate court noted that "the trial court record before us is replete with errors," but Mother's appeal was untimely and had to be dismissed.

Because Mother had actual knowledge of the judgment 12 days after it was signed, she could not utilize TRCP 306a to extend the deadline to file a notice of appeal.

Mother argued that the order for substituted service extended her deadline to appeal. If substituted service is authorized by publication (TRCP 109a), the responding party has two years—rather than the usual thirty days. Here, Father requested substituted service, so he could leave the petition with Mother's father. Father's motion referenced

TRCP 106(b), and the trial court's order referenced Father's motion. Nothing in the appellate record referenced TRCP 109a. Thus, contrary to Mother's assertions, service was not authorized by publication, she was not afforded two years to raise her appeal, and her appeal was untimely filed more than thirty days after the challenged order.

HUSBAND NOT ENTITLED TO CONTINUANCE BECAUSE HIS FAILURE TO BE REPRESENTED AT TRIAL WAS DUE TO HIS OWN FAULT OR NEGLIGENCE.

Gadekar v. Zankar, No. 12-16-00209-CV, 2018 WL 2440393 (Tex. App.—Tyler 2018, no pet. h.) (mem. op.) (05-31-18).

Facts: Husband and Wife's divorce proceedings lasted four years. After a jury trial, Wife was appointed sole managing conservator of the Child, and Husband was awarded a possession schedule on condition that he attend therapy. Husband had a history of mistreating Wife and the parties' Child. The trial court confirmed Wife's separate property, some of which was located in India, divided the community estate, and awarded Wife her attorney's fees. Husband appealed on a number of grounds, including the court's denial of his motion for a continuance after his fifth attorney withdrew, the exclusion of testimony from the parenting facilitator, and the division of the community estate.

Holding: Affirmed

Opinion: Husband had five attorneys over a four-year period. The first attorney withdrew after two and a half months. The second after a year and four and a half months. The third, fourth, and fifth, after 28, 32, and 38 days respectively. The third and fourth withdrew because Husband did not cooperate. The fifth because the attorney was unable to effectively communicate with Husband. Husband had already received one continuance. The cummulative evidence supported a finding that Husband's failure to be represented by counsel was due to his own fault or negligence. Thus, the trial court did not abuse its discretion in denying Husband's second motion for continuance.

TRIAL COURT ERRED IN REFUSING TO ALLOW MOTHER TO FULLY PRESENT HER CASE AT HEARING ON MOTION FOR NEW TRIAL.

In re J.L.W., No. 05-17-00485-CV, 2018 WL 2749626 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (05-31-18).

Facts: When the Child was 5, Mother sought appointment as sole managing conservator. The trial court appointed the parents as joint managing conservators. Mother filed a motion for new trial, to which she attached an affidavit averring that she became pregnant by Father when she was 14 and he was 18. At the hearing on her motion for new trial, the court refused to allow Mother to testify and denied her motion. Mother appealed.

Holding: Reversed and Remanded

Opinion: A trial court may not appoint a parent as joint managing conservator if the trial court receives credible evidence that the parent has committed a sexual assault in violation of penal code section 22.001 resulting in the other parent becoming pregnant with the child.

When a motion presented a question of fact upon which evidence must be heard, the trial court is obligated to hear such evidence when the Motion for New Trial alleges facts, which, if true, would entitle the movant to a new trial and when a hearing for such is properly requested.