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

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DIVORCE
DIVISION OF PROPERTY

WIFE FAILED TO ESTABLISH INSURANCE PROCEEDS FOR BURNED SEPARATE-PROPERTY HOME WERE ALSO SEPARATE PROPERTY.

In re Bradshaw, ___ S.W.3d ___, No. 06-15-00038-CV, 2016 WL 519660 (Tex. App.—Texarkana 2016, no pet. h.) (02-09-16).

Facts: Wife owned a separate-property house in which the parties lived. During the marriage, Husband purchased furniture and other items for the house. When the house burned down, Wife's insurance company compensated her for the total loss of the house and its contents. Wife used the proceeds to pay the remaining balance on the burned house's mortgage and to purchase a new house outright. The trial court granted Wife a divorce on fault grounds and awarded her 80% of the real property. Wife appealed, arguing that because the burned house was separate property, the insurance proceeds and the subsequently purchased house were also separate property.

Holding: Affirmed

Opinion: While it was undisputed that the burned house was purchased by Wife before marriage, there was also evidence that Husband purchased personal items that were in the house when it burned. Further, while Wife traced the purchase of the new house to the insurance proceeds, Husband's name was included on the check from the insurance company, and there was no evidence that a portion of the insurance proceeds was not compensation for Husband's personal property inside the house.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

WIFE ENTITLED TO MONEY JUDGMENT FOR UNDISCLOSED ASSET PURCHASED BY HUSBAND BEFORE DIVORCE AND SUBSEQUENTLY LOST, BUT VALUE HAD TO BE CALCULATED BASED ON DATE OF DIVORCE.

Meyer v. Meyer, No. 05-14-00655-CV, 2016 WL 446895 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-04-16).

Facts: Husband and Wife's divorce decree included provisions that (1) any undisclosed asset was awarded to the party not in possession of the asset; and (2) any unpaid liability not listed in the decree was the sole responsibility of the party who incurred it. Several months after the divorce, Wife learned that Husband had purchased two seat options at the new Dallas Cowboys Stadium for $150,000 apiece. The options were located on the 50-yard line and gave Husband the option of purchasing tickets for Cowboys games and other events at the stadium. Husband borrowed $60,000 from his company for the purchase, and Cowboys Stadium, LP financed the remaining balance over 30 years. Wife believed that under the decree, she was entitled to the seat options free and clear of any debt. Husband offered to give her the options if she would assume the debt, but she refused. Wife filed a petition to enforce the decree, and during the proceedings, Husband forfeited the seat options by missing a regularly scheduled payment. Husband testified that due to the economic conditions in 2008, the value of the seat options had dropped significantly—that people were selling them at a reduced price, but no one was buying them.

Wife offered into evidence a settlement offer letter from Husband to establish the value of the seat options. Husband did not object to the letter itself but explained the letter was written for the purpose of settlement and not intended to be a confession of value. The trial court specifically admitted the settlement offer letter but "not for the truth of the matters asserted therein." Subsequently, Wife's attorney read aloud the contents of the letter.

The trial court awarded Wife a $300,000 judgment as compensatory damages for Husband's failure to disclose and transfer the seat options awarded her by the divorce decree. On appeal, Husband argued the trial court erred in valuing the seat options at their purchase price. Wife argued that because she read the contents of the settlement offer letter into evidence without objection, Husband's stipulated value of $300,000 became substantive evidence.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The seat options were an undisclosed asset purchased by Husband before the divorce, so Wife was entitled to them under the decree. However, the only evidence of their value was Husband's purchase price, not the value at the time of divorce. Further, evidence showed that the value likely decreased significantly during that time. The appellate court remanded the case for a further determination of value.

Due to the trial court's limited admission of the letter, Husband was not obligated to further object when Wife attempted to read the letter into evidence. The letter's contents were not evidence of the value of the seat options.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

WIFE PETITION TO ENFORCE CONTRACTUAL SPOUSAL SUPPORT BY CONTEMPT DISMISSED WITH PREJUDICE.

In re L.R.P., No. 05-14-01590-CV, 2016 WL 514174 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-09-16).

Facts: During their divorce, Husband and Wife, both pro se, agreed to terms of a divorce decree. The decree included the following: "*see Addendum for additional agreements*." The Addendum provided, "[s]pousal support shall continue at $750 per month until the sale of our home. At that point it will be increased to $1800 per month for remainder of 3 years from the date of our divorce."

Wife remarried less than 3 years after the divorce. Husband believed that the remarriage terminated his support obligation and stopped paying. Wife, represented by an attorney, filed a petition for enforcement of spousal maintenance. Husband hired an attorney and filed a response that either the obligation was contractual alimony that could not be enforced by contempt or that it was spousal support that terminated upon Wife's remarriage. After a hearing, the trial court determined that the support was not enforceable by contempt and dismissed Wife's petition with prejudice. Wife appealed.

Holding: Affirmed

Opinion: A provision in a divorce decree ordering payment of support to a former spouse may be enforced as a contractual obligation, but it cannot be enforced by contempt unless it is authorized by statute or constitutional provisions. Contractual alimony cannot be enforced with a withholding order. The mere fact a trial court approves a contractual spousal support agreement and incorporates it into the divorce decree does not transform the obligation into Chapter 8 court-ordered maintenance.

Here, there was no decretal language order Husband to pay support. No reference was made to Chapter 8 of the Texas Family Code, nor was there a reference to the statutory requirements or limits placed on spousal maintenance in the Texas Family Code.

In her petition for enforcement, Wife sought an order finding Husband in contempt and finding him for each "violation," an order authorizing a withholding order, and, if necessary, a "clarifying order" sufficient to allow enforcement by contempt. Wife did not seek to enforce the agreement as a contract and did not seek contractual relief. The trial court had no authority to grant any of Wife's requests.

SAPCR
STANDING AND JURISDICTION

TRIAL COURT'S ORDERS VOID BECAUSE ANOTHER COUNTY RETAINED CONTINUING EXCLUSIVE JURISDICTION.

In re C.G., ___ S.W.3d ___, No. 13-14-00544-CV, 2016 WL 455390 (Tex. App.—Corpus Christi 2016, no pet. h.) (02-04-16).

Facts: Mother and Father were divorced in County 1 (Sherman) and were appointed JMCs of their Child. Mother was granted the exclusive right to designate the Child's primary residence. Mother subsequently moved from County 1 to County 2 (Moore). Subsequently, in County 1, Father filed a motion to modify in with a motion to transfer the SAPCR to County 2, where the Child had lived for the preceding six months. After Father filed his motion to transfer, Mother and

the Child moved to County 3 (Randall) and Father moved to County 4 (Ellis). The County 1 trial court granted Father's motion to transfer and transferred the case to County 2.

Subsequently, Mother and the Child moved to County 5 (Nueces), but 1 hour after arriving, Child was put on a plane for visitation with Father in County 4. During this period of possession in County 4, the Child made an outcry and Father sought and obtained a protective order in County 4. After the Child had been in County 3 for more than six months, Father filed in County 2 a second motion to transfer the case to either of Counties 3 or 4 (Randall or Ellis). However, after a hearing, the County 2 trial court transferred the case to County 5, where Mother had relocated even though the Child had only been in County 5 for 1 hour. Nevertheless, a bench trial was held in County 5. After the County 5 trial court entered a final order, Father asserted that County 5 never acquired subject-matter jurisdiction over the case because County 2 lacked the authority to transfer it continuing, exclusive jurisdiction to any other court. The County 5 trial court agreed, vacated its prior orders, and ordered that the record be forwarded to County 2. Mother appealed.

Holding: Affirmed

Opinion: The continuing, exclusive jurisdiction statutory scheme is "truly jurisdictional," meaning when a court has continuing, exclusive jurisdiction, any order or judgment issued by another court pertaining to the same matter is void. Transfers from courts of continuing, exclusive jurisdiction are governed by Tex. Fam Code §§ 155.201–155.207. While a transfer under Tex. Fam. Code § 155.201(b) [on filing of a divorce…] may be filed at any time, a transfer based on the child's 6-month residency must be "timely" filed. Tex. Fam. Code § 155.204 provides that a timely filed motion is filed at the time the initial pleadings are filed.

Here, Father filed his second motion to transfer in County 2 almost four months after filing his initial pleadings. Thus, his motion was untimely, and the County 2 trial court lacked authority to transfer the cause pursuant to that motion. Additionally, any orders by the County 5 trial court on the same matter were void.

SAPCR
CONSERVATORSHIP

MOTHER ENTITLED TO NEW TRIAL IN CUSTODY PROCEEDING WHEN FATHER WAS ARRESTED AND SUSPECTED OF DEALING DRUGS A WEEK AFTER AN ORDER AWARDED HIM PRIMARY CUSTODY OF THE CHILDREN.

In re Calzadias, ___ S.W.3d ___, No. 07-16-00002-CV, 2016 WL 383300 (Tex. App.—Amarillo 2016, orig. proceeding) (02-01-16).

Facts: About a week after the trial court entered a custody order granting Father primary custody of the parents' three Children, Father was arrested during a traffic stop for driving with a suspended license, failure to display a vehicle inspection sticker, and money laundering. Although no drugs were found during a search of Father's vehicle, a police canine alerted on the driver's side door and on a large amount of cash held together by a rubber band. Additionally, Father was found in possession of four cell phones and two hotel room keys, and he had previously been arrested for drug-related activity. Although the district attorney opted not to prosecute, Mother filed a motion for new trial in the custody case. After hearing testimony from the involved officer, Father, and Father's brother, the trial court granted Mother a new trial and entered temporary orders awarding Mother primary custody of the Children. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: A new trial in a custody suit is appropriate when new evidence strongly shows that the original order would have a seriously adverse effect on the interest and welfare of the children, and presentation of that evidence at another trial would probably change the result. Due to the relaxed new-trial standard in a child-custody matter, the evidence need not have existed during the previous trial. The ordinary rules restricting the granting of a new trial for newly discovered evidence should not be applied rigidly in child custody proceedings. In such cases the children are the primary parties in interest, and they are rarely represented by counsel. Counsel for the contending parents cannot always be relied upon to protect the interests of the children because the parents often attempt to promote their own interests and vindicate their own asserted rights rather than to protect the children's interests. Consequently, the court's duty to protect the children's interests should not be limited by technical rules. Pertinent facts which may directly affect the interests of the children

should be heard and considered by the trial court regardless of the lack of diligence of the parties in their presentation of information to the court.

Here, the trial court determined that while the evidence against Father was likely insufficient to support a criminal conviction, it was more likely than not that Father was dealing drugs and that such activity would be harmful to the Children.

SAPCR
ADOPTION

TRIAL COURT ERRED IN DETERMINING GRANDPARENT ADOPTION WAS NOT IN CHILD'S BEST INTEREST.

In re C.J.T., No. 04-14-00621-CV, 2016 WL 413262 (Tex. App.—San Antonio 2016, no pet. h.) (mem. op.) (02-03-16).

Facts: When the five-year-old Child's parents died, he went to live with his Maternal Grandparents. The Maternal Grandmother was appointed as the Child's permanent guardian. About 4 years later, the Maternal Grandparents filed a petition to adopt the Child. The Paternal Grandparents intervened and contested the adoption. The Paternal Grandparents stated that they did not object to the adoption but did not want the Child's name changed or to be denied access to the Child. A social worker, who had conducted two social studies, testified that he recommended adoption so long as the Child retained his surname and so long as the Paternal Grandparents had access to the Child. The Maternal Grandparents encouraged the Child to see his Paternal Grandparents, but the Child did not always want to see them. The Maternal Grandparents had no criminal history, but the Paternal Grandmother had been arrested eight times, and there was some evidence that Paternal Grandfather had a "rap sheet" with the FBI.

The trial court found that adoption was not in the Child's best interest and denied the Maternal Grandparents' petition to adopt. The Maternal Grandparents appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 153.434 provides that a biological grandparent may not request possession of or access to a grandchild if the child's biological parents have died and the child is a subject of a pending suit for adoption. The plain language of this statute provides that the Paternal Grandparents could not seek possession or access to the Child during the Maternal Grandparents' suit for adoption. However, the statute did not prevent the trial court from considering whether an adoption would result in the Child's loss of access to family and whether that would be in the Child's best interest.

The Child was safe and comfortable with the Maternal Grandparents. The Maternal Grandparents wanted to adopt the Child, and the Child wanted to be adopted by them. The Maternal Grandparents allowed the Child's paternal relatives to spend time with the Child. There were only two instances when the Maternal Grandparents prevented the Paternal Grandparents from seeing the Child: once when the Child was out of town; and once when the Paternal Grandfather confronted Maternal Grandmother at her home and called the police on her. The Paternal Grandparents had little contact with the Child over the years until seeking access during the adoption proceeding. The Child did not want to spend time with his Paternal Grandmother, although it was unclear why not.

Considering and weighing all of the evidence, the appellate court determined that finding that adoption by the Maternal Grandparents was so against the great weight and preponderance of the evidence to be clearly wrong and unjust.

SAPCR
MODIFICATION

FATHER ESTABLISHED MATERIAL AND SUBSTANTIAL CHANGE SUFFICIENT TO SUPPORT MODIFICATION OF CONSERVATORSHIP RIGHTS.

Trammell v. Trammell, ___ S.W.3d ___, No. 01-14-00629-CV, 2016 WL 398597 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (02-02-16).

Facts: In their divorce decree, Mother and Father agreed that Father would pay Mother $6000 per month in child support, $8000 per month in spousal support, and 100% of the Children's expenses. Mother was granted the exclusive right to make decisions about the Children's education and the independent right to consent to medical treatment. After the divorce, Father's income decreased significantly—from around $800,000 to around $200,000. Struggling to maintain the financial obligations of the divorce decree, Father took out a line of credit to cover expenses. After exhausting the line of credit and maxing out his credit cards, Father filed a motion to modify the terms of the divorce decree. In addition to seeking to reduce his child support obligation, Father wanted to have input in decisions relating to the Children's education and medical treatments. Mother testified that she understood that Father was strained financially, but she believed that it was in the Children's best interest to "get their money." The trial court reduced Father's child support obligation, required Mother to contribute to the Children's education, and modified the conservatorship rights to have the parents share in decision making regarding the Children's education and medical treatment. Mother appealed, and, in addition to complaining of the child support reduction, Mother argued that the evidence was insufficient to support the modification of the conservatorship rights.

Holding: Affirmed

Opinion: During the pendency of the divorce, Father only had access to the Children for an hour or so on the weekends. At the time of the modification proceeding, Father saw the children every other weekend and every Thursday, and attended the Children's weekend activities when they were in Mother's possession. Father testified that his relationship with the Children was the best it had ever been, and Father had demonstrated a desire and ability to play a more significant role in the decisions affecting the Children's lives. Father explained that because the Children were transitioning into more specialized educational programs, he felt it was important to him to be involved in educational decisions. Additionally, although he had no criticism of any of Mother's decisions, he believed it would be in the Children's best interest if both parents had the incentive to consider the fiscal realities of decisions regarding the Children's educational or other needs; especially given that Father's income had decreased substantially, and he was in danger of declaring bankruptcy.

MISCELLANOUS

WIFE'S APPEAL MOOT UNDER ACCEPTANCE OF BENEFITS DOCTRINE BECAUSE SHE WAS NOT UNQUESTIONABLY ENTITLED TO RECEIVE THE ASSETS OVER WHICH SHE ASSERTED CONTROL AFTER THE DIVORCE.

In re S.B.H., No. 05-14-00585-CV, 2016 WL 462495 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-05-16).

Facts: Husband was an attorney, and Wife was a doctor. Each created an entity through which they practiced their respective professions. Additionally, they created a real estate business (a partnership with a general partner that was an LLC owned by the parties) that was partially community property and mostly Wife's separate property. Both parties used expert appraisers during trial to value the parties' assets. In the final decree, each party was awarded his or her practice. Wife was awarded 100% of the community interest in the real estate business, and Husband was awarded a money judgment as compensation for his community interest in the real estate business. Additionally, the community estate was awarded a reimbursement claim from Wife's separate estate, for which Husband was granted an equitable lien on the real estate business.

Wife appealed the final decree, arguing that the trial court erred divesting her of her separate property and in miscalculating the reimbursement claim. Wife also asserted that the trial court erred in failing to grant her a divorce on the ground of adultery because Husband admitted to committing adultery. Husband responded, arguing that Wife had accepted the benefits of the judgment which precluded her appeal.

Wife did not dispute that after the divorce, she sold her medical practice in return for the forgiveness of a debt, and she encumbered the real estate business to secure promissory notes for money borrowed from her sisters. However, Wife argued that the acceptance of benefits doctrine did not apply in this case because reversal of the judgment could not possibly affect her right to the benefits she accepted under the judgment. Wife contended that Husband could not be awarded the medical practice because he was not a doctor. Additionally, if the appellate court granted Mother's appeal and reversed the case, Mother would necessarily be entitled to a larger portion of the community. Husband had already been awarded a money judgment to compensate him for his interest in the real estate business, and there were sufficient other assets to compensate him for that interest.

Holding: Dismissed as Moot in part; Affirmed in part

Opinion: Despite the fact that Wife's business was a medical practice, the trial court could have entered orders regarding the operations of the business as long as all matters concerning the practice of medicine were handled by a licensed physician. Additionally, Husband could have been awarded cash assets of the medical practice. Thus, Wife was not unquestionably entitled to receive 100% of the medical practice, yet her sale of the practice precluded the trial court from making any disposition of it on remand.

With respect to the real estate business, because a portion of the business was community property, even if Wife prevailed on her claims regarding the mischaracterization of her separate property, the trial court would not be required to award her the same benefits she accepted under the prior decree.

Under the Texas Family Code, a trial court "may" grant a divorce for insupportability or for adultery. Wife asked for a divorce on both grounds, but Husband only asked for a divorce on the ground of insupportability. While Husband admitted to committing adultery, the evidence supported a finding of insupportability. The trial court was entitled to choose the ground on which to grant the divorce.

MOTHER FAILED TO PRESERVE LEGAL AND FACTUAL SUFFICIENCY COMPLAINTS AFTER JURY TERMINATED HER PARENTAL RIGHTS.

In re A.L., ___ S.W.3d ___, No. 06-15-00097-CV, 2016 WL 519715 (Tex. App.—Texarkana 2016, no pet. h.) (02-10-16).

Facts: Following a jury trial, Mother's parental rights to her Child were terminated. Mother appealed, complaining the evidence was legally and factually insufficient to support the jury's finding that termination was in the Child's best interest.

Holding: Affirmed

Opinion: In a jury trial of a parental-rights termination proceeding, a parent must preserve a legal sufficiency challenge through a motion for instructed verdict; a motion JNOV; an objection to the jury question; a motion to disregard the jury's answer to a vital fact question, or a motion for new trial. Further, a motion for new trial is a prerequisite to present an appellate complaint regarding factual insufficiency.

MOTHER WAIVED RIGHT TO MANDAMUS RELIEF THROUGH UNJUSTIFIED DELAY IN SEEKING RELIEF FROM TRIAL COURT OR BY WAY OF MANDAMUS.

In re Abney, ___ S.W.3d ___, No. 07-15-00456-CV, 2016 WL 642129 (Tex. App.—Amarillo 2016, orig. proceeding) (02-17-16).

Facts: Mother and Father never married and had one Child. The parents were appointed joint managing conservators, and Mother was granted the exclusive right to designate the Child's primary residence without geographical restriction. Subsequently, Mother and the Child moved to Florida without providing the required written notice to Father. Father initiated a SAPCR seeking the exclusive right to designate the Child's primary residence. After a hearing, the trial court ordered that the Child's primary residence be in Texas until further orders of the court. About five months later, after Mother had returned to Texas, the trial court held a hearing on Mother's motion to modify the temporary orders. After

her motion was denied, Mother filed a petition for writ of mandamus, arguing that the trial court impermissibly changed the person with the exclusive right to designate the Child's primary residence.

Holding: Writ of Mandamus Denied

Opinion: Almost six months passed between the time of the offending order and Mother's petition for writ of mandamus. During that time, Mother made no suggestion to the trial court that its order violated Tex. Fam. Code § 156.006(b).

COURT APPROVED ATTORNEY'S HOURLY RATE WHEN APPOINTING ATTORNEY AS TURNOVER RECEIVER.

Blunck v. Blunck, No. 03-15-00128-CV, 2016 WL 690669 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (02-18-16).

Facts: A final decree of divorce granted Wife a judgment for over $200,000. Subsequently, Wife filed a motion for a post-judgment receivership, alleging Husband had not paid the judgment awarded her in the decree. After a hearing, the trial court signed an order appointing a receiver, approving the receiver's fee of $300.00 per hour, and finding that rate to be the customary and usual fee for a turnover receiver. Among other complaints, Husband contested the court-appointed receiver's approved hourly rate. Husband argued the trial court failed to consider that the receiver was an attorney and that the attorney would be performing non-attorney functions in the role of receiver.

Holding: Affirmed

Opinion: The trial court found the rate to be "customary and usual" for a turnover receiver and had previously approved the same receiver at the hourly rate of $300.00 per hour. Further, even though the court already approved the hourly rate, the receiver would still have to submit a request and obtain approval of any request for fees prior to payment.

DEFAULT JUDGMENT REVERSED FOR FAILURE TO STRICTLY COMPLY WITH RULES REGARDING SERVICE.

In re T.J.T., ___ S.W.3d ___, No. 06-15-00096-CV, 2016 WL 748348 (Tex. App.—Texarkana 2016, no pet. h.) (02-26-16).

Facts: Maternal Great-Grandparents were the Child's managing conservators. They filed suit to terminate Father's parental rights to the Child. Father was personally served in a drug treatment facility, but the citation failed to include language informing Father that he needed to file an answer or that a default judgment could be entered against him for a failure to answer. Subsequently, the trial court held a final hearing and rendered a default judgment against Father, who had neither filed an answer nor appeared. After receiving notice of the default judgment Father appealed.

Holding: Reversed and Remanded

Opinion: A default judgment is improper against a defendant who has not been served in strict compliance with the law, even if he has actual knowledge of the lawsuit. Here, the citation served on Father failed to inform him that an answer was required or that he would risk a default judgment if he failed to answer.

★★★TEXAS SUPREME COURT ★★★

MOTHER ENTITLED TO RELIEF DESPITE INCORRECT DESIGNATION OF PLEADING.

In re J.Z.P., ___ S.W.3d ___, No. 14-1072, 2016 WL 766654 (Tex. 2016) (02-26-16).

Facts: Mother and Father divorced and were appointed joint managing conservators with Mother having the exclusive right to designate the Children's primary residence. Subsequently, Mother moved, and Father filed a motion to modify, seeking the exclusive right to designate the Children's primary residence and to reduce his child support obligation. After unsuccessful attempts to serve Mother, Father obtained an order for alternative service. The citation was left on the front door of Mother's ole residence. Two days later, Father obtained a default judgment against Mother, granting Father the exclusive right to designate the Children's primary residence, terminating his child support obligation, and ordering Mother to pay child support. Fifty-seven days later, Mother filed a 'Motion to Reopen and to Vacate Order," alleging that neither Mother nor her attorney had received notice of Father's motion or the trial court's order until a few days prior to filing her motion. In a supporting affidavit, Mother averred that Father knew that Mother did not live at the address where service was attempted and that Father knew her current address. Father did not dispute either assertion but claimed that Mother was at fault for failing to notify the trial court of her new address. The trial court denied Mother's motion, and the appellate court dismissed Mother's appeal for want of jurisdiction, both reasoning that Mother's motion did not extend the trial court's plenary jurisdiction because her motion was not captioned a motion under TRCP 306a. Mother petitioned the Texas Supreme Court for relief.

Holding: Reversed and Remanded

Opinion: Courts should acknowledge the substance of the relief sought despite the formal styling of the pleading. Mother plainly requested relief on the ground that she had not been served and had not learned of the trial court's order until a few days before her motion was filed. Justice plainly required the trial court and the court of appeals to treat Mother's motion as extending post-judgment deadlines.