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

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DIVORCE
Alternative Dispute Resolution

MSA AGREEING TO CONVEY RESIDENCE TO WIFE INSUFFICIENT TO ESTABLISH—IN SUMMARY JUDGMENT PROCEEDING—HUSBAND'S PRESENT INTENT TO FORSAKE THE RESIDENCE AS HIS HOMESTEAD.

***Drake Interiors, Inc. v. Thomas*, ___** S.W.3d ___, No. 14-17-00374-CV, 2018 WL 3927521 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (02-13-18).

Facts: Before marriage, Husband acquired debt from Creditor but, subsequently, only made one payment towards repaying the loan. During the marriage, Husband and Wife purchased a home they claimed as their homestead. Subsequently, Wife purchased another property that was her sole management community property. When the couple separated, Husband moved out of the marital residence and lived with a friend. Wife and the couple's children moved to Wife's other home.

Creditor sued Husband and obtained a judgment for the unpaid debt. After abstracting the judgment, Creditor sought to attach the judgment to what it asserted was an abandoned homestead.

During the couple's divorce proceeding, they signed an MSA that awarded both pieces of real property to Wife and included an agreement that Husband would make some payments on Wife's other home. When the divorce was final, Wife moved back into the marital residence. Wife and Creditor filed cross-motions for summary judgment in Creditor's suit to execute its judgment against the marital residence. The trial court granted Wife's motion and denied Creditor's. Creditor appealed.

Holding: Reversed and Remanded

Opinion: The question in this case is whether a husband and wife abandoned their homestead before they divorced. If the answer is no, then the wife, who was awarded the home in the divorce, took the home free and clear of a judgment lien arising out of the husband's premarital debt. On the other hand, if the answer is yes, then the lien attached during the marriage, and the judgment creditor may now be able to execute against the home.

Because the evidence conclusively established that Husband and Wife did not live in the home at the time of divorce, the only question was whether they intended to forsake the property as their homestead. To defeat Wife's motion, Creditor simply needed to establish some question of fact regarding abandonment; however, to prevail in its own motion, Creditor needed to conclusively establish that both Husband and Wife intended to forsake the property.

Wife was not entitled to summary judgment because Husband signed an MSA agreeing to give Wife the property, and Wife claimed a new home as her homestead on her taxes one year during the divorce proceeding. Thus, a reasonable person could find that both parties intended to forsake the property.

However, the MSA was an agreement to give Wife the property at the time of divorce, not immediately. Further, the parties could have at any time reconciled and non-suited the divorce. Thus, the execution of the MSA did not necessarily manifest a present intent to forsake the residence, and if the presumptive homestead continued on the day of divorce, the decree would have conveyed to Wife the property free and clear of any judgement lien. Accordingly, the Creditor was also not entitled to summary judgment.

DIVORCE
Property Division

TRIAL COURT COULD NOT DIVIDE A MARTIAL ESTATE WHILE A BANKRUPTCY STAY WAS IN PLACE.

***Adeleye v. Driscal*, ___** S.W.3d ___, No. 14-14-00822-CV, 2018 WL 1057482 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (02-27-18).

Facts: Wife testified that she and Husband married in a traditional Nigerian ceremony, even though neither party was present at the ceremony. During the marriage, they had three children. A few years after they married, Husband arranged for Wife to marry Husband's co-worker so that she could get a green card and then later help Husband do the same. That marriage was never consummated, and the co-worker died before Wife obtained a green card.

During the divorce proceedings, Husband argued that he married another woman before marrying Wife, making that marriage an impediment to his marriage to Wife. However, Husband's brother testified that he had never heard of the other wife. Husband also alleged that he could not be married to Wife under Nigerian wife because he had never agreed to marry her.

The trial court held that a valid marriage existed between Husband and Wife and divided the community estate. Subsequently, among many other issues, Husband challenged the factually sufficiency of the trial court's finding that a valid marriage existed between the parties.

After the appellate court affirmed Husband and Wife's final decree of divorce, Husband filed a motion for rehearing alleging that he filed for Chapter 13 bankruptcy before the divorce was filed and that the bankruptcy was not discharged until after the divorce decree was signed. Thus, Husband argued that due to the automatic stay, the trial court lacked jurisdiction to divide the marital estate. The appellate court then remanded the case to the trial court. In its opinion, the trial court set forth law governing automatic stays, including that stays apply automatically, do not require notice, do apply to divorce proceedings, void any actions taken against the debtor or his property, and can be raised at any time, even sua sponte on appeal.

On remand, the trial court found that no notice had been received of the stay and that because of the lack of notice, the stay was lifted after 30 days.

Holding: Affirmed in Part; Reversed and Remanded in Part; Petition for Writ of Mandamus denied as moot.

Majority Opinion: Any action taken in violation of an automatic bankruptcy stay is void, not merely voidable. While a bankruptcy stay may be limited to 30 days in certain circumstances, there was no indication or finding that such circumstances existed in this case. The trial court had no authority to divide the marital estate until the stay was lifted by the bankruptcy court. However, the trial court did have the authority to determine whether a valid marriage existed and grant the dissolution of the marriage.

Husband asserted that the evidence only showed that he and Wife had entered an "engagement" and not a marriage. However, Wife, Husband's brother, and an attorney licensed in Nigeria and New York testified that a wedding in Nigeria is often referred to as an "engagement." There was evidence that the wedding took place, even if the parties did not attend the ceremony. Additionally, the attorney—who testified as an expert on Nigerian weddings—confirmed that "customary law by proxy" marriages occur when the parties are not physically present for the wedding ceremony. Rather, the families of the couple meet and agree on a "bride price," and then family members or personal representatives of both sides must meet along with two witnesses for the marriage to take place. The attorney further testified that such marriages are recognized as valid pursuant to the United States Citizenship and Immigration Service Policy Manual. Wife presented a letter from Husband's brother to her father approving the marriage and letter from friends congratulating her on the "engagement." The couple lived together, moved together, had three children together, and held themselves out as being married. There was no evidence that the marriage had been dissolved.

The divorce decree produced by Husband showing his dissolution of marriage from the other woman included a date of divorce after he and Wife married, but it did not include a date of the other marriage. Thus, the divorce decree alone was insufficient to overcome the presumption that his current marriage to Wife was valid.

Further, Wife testified that her alleged marriage to another man—while she was married to Husband—was a sham marriage to obtain a green card. She met the man once, the marriage was never consummated, and the man died before the current divorce proceeding.

SAPCR
Procedure and Jurisdiction

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WIFE'S CONTINUANCE BECAUSE WIFE FAILED TO SHOW THAT HER ATTORNEY'S WITHDRAWAL WAS NOT CAUSED BY WIFE. ALSO, BY FAILING TO TIMELY APPEAR FOR TRIAL, WIFE WAIVED HER RIGHT TO A JURY TRIAL.

***Harrison v. Harrison*, ___ S.W.3d ___, No. 14-15-00430-CV, 2018 WL 894442 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (02-15-18).**

Facts: In a previous appeal of the divorce on the merits, the court affirmed the divorce decree insofar as to the divorce, but reversed the remainder of the decree and remanded for a new trial. In the first trial, Wife, who is an attorney, represented herself after her attorney withdrew and the trial court refused to grant her a continuance. Since the remand in April 2012, this case has been preferentially set for trial a number of times, and Wife has alternated between periods of self-representation and representation by numerous attorneys, all of whom have withdrawn.

In January 2014, after participating in court-ordered mediation, the parties signed a mediated settlement agreement (the "MSA"). Wife moved to set aside the MSA the following March, asserting that she had been a victim of family violence, which impaired her ability to make decisions, and the MSA was not in the best interest of the Children. The trial court disagreed and, based on a motion by the children's amicus attorney, signed an interim order on parent-child issues incorporating the terms of the MSA on April 10 (the "Interim Order"). Wife failed to fully comply with the trial court's Interim Order, as well as other orders. Thereafter, Husband filed a motion to set aside the MSA or to modify the Interim Order. Subsequently, Wife's attorney was allowed, over Wife's objection, to withdraw after a three-day hearing.

The trial court instructed all parties to appear at 8:30 a.m. on January 20, 2015 to resolve any outstanding pre-trial matters then begin trial. Wife was not represented by counsel and she failed to appear at 8:30 a.m. Husband, his counsel, and the amicus attorney appeared timely. At approximately 9:30 a.m., Husband, the only party who filed a jury demand and paid a jury fee, waived his right to jury trial and requested a bench trial. Wife still was not present. Testimony commenced to the bench. Wife did not arrive in the courtroom until about 10:15 a.m. At that time, Husband was testifying. Wife notified the trial court that she had filed a motion to recuse the trial judge. The trial court denied the motion to recuse, but recessed proceedings until the administrative judge could rule on the motion. After the administrative judge denied the motion to recuse, proceedings recommenced around 1:30 p.m. At that time, Wife objected to proceeding with trial without a jury. The trial court overruled her objection and proceeded with the bench trial.

During trial, the trial court afforded Husband and Wife equal, but reasonably limited, time to present their evidence and cross-examine witnesses. During the trial, the trial court repeatedly reminded Wife how much time she had used and how much time remained. Despite the trial court's reminders, when Wife's allotted time expired, Wife argued she lacked sufficient time to present all her desired evidence. The court granted Wife an additional hour to present further evidence. At the conclusion of trial, the court appointed Husband sole managing conservator of the Children, limited Wife to supervised possession, and awarded Husband the former marital home. Wife appealed complaining, among other things, that the trial court abused its discretion by permitting her trial counsel to withdraw, over her objection, approximately four weeks before trial and without granting a trial continuance and by denying her the right to a jury trial.

Holding: Affirmed.

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

In exercising its discretion over whether to grant or deny a continuance due to the withdrawal of counsel, a trial court may consider the entire procedural history of a case. Here, the trial court possessed abundant knowledge of this matter's prolonged history bearing upon whether Wife was entitled to a continuance in December 2014. The record reflects that Wife retained upwards of a dozen different attorneys over the course of this case, hiring at least half of them following our remand. Many of these attorneys withdrew—often with Wife's blessing—before trial settings, resulting in a pattern of trial postponements. Wife consented to the withdrawal of her previous counsel in September 2014, when Wife was aware of the January 2015 trial setting. Wife did not retain her last attorney until early December 2014—a little over a month before trial. Less than two weeks into that attorney's representation of Wife, that attorney moved to withdraw based on Wife's actions. On this record, Wife's serial employment of attorneys, continuing unabated following remand, reasonably could be viewed as undertaken for dilatory purposes, which the court could balance against her requested continuance.

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

SAPCR
Alternative Dispute Resolution

SIMPLY CONTENDING THAT CIRCUMSTANCES HAVE ARISEN RENDERING THE MSA CONTRARY TO THE CHILDREN'S BEST INTERESTS IS NOT ENOUGH TO RENDER THE MSA UNENFORCEABLE.

*In re Marriage of Flores***,** No. 07-17-00283-CV, 2018 WL 895032 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (02-14-18).

Facts: Husband and Wife entered into an MSA, which was signed by the parties, their attorneys, and the mediator. The MSA dealt with the division of property, debt, conservatorship of their children, access to the children, and child support. Within two months of its execution, Husband moved the trial court to rescind or modify the document. The motion was denied, and the MSA was incorporated into the final divorce decree. Husband appealed asserting that the trial court erred because the MSA was unenforceable because Wife (1) was the subject of newly discovered 2003 outstanding deportation order, (2) purportedly drove without a license contrary to court order, (3) purportedly had a history of driving while intoxicated, and (4) otherwise endangered the children.

Holding: Affirmed

Opinion: The trial court may "decline to enter a judgment on" an MSA when (1) a party to the agreement was a victim of family violence which impaired the person's ability to make decisions; (2) the agreement permits someone subject to registration under Chapter 62 of the Texas Code of Criminal Procedure or has a history or pattern of engaging in physical or sexual abuse to reside with or have unsupervised access to the child, ***and*** (3) the agreement is not in the child's best interests. That is, before an MSA may be disregarded, the trial court must find not only that either the family violence or Chapter 62/abuse prong exists but also that the best interests of the child warrant rejection of the mediated accord. It lacks authority to reject the contract simply because it concludes that the agreement is not in the child's best interests.

None of the circumstances cited by Husband come within the statutory exceptions to enforcing the MSA. Instead, he repeatedly couched the foregoing circumstances within the framework of best interests. That is, he argued at the hearing held on his motion to rescind or modify the MSA, at the final divorce hearing, and at the hearing on his motion for new trial that those circumstances illustrated the MSA was not in the best interests of the children. Yet, as said by the Supreme Court in *In re Lee*, "it absolutely clear that the Legislature limited the consideration of best interest in the context of entry of judgment on an MSA to cases" falling within the scope of § 153.0071(e-1). *In re Lee*, 411 S.W.3d 445, 453 (Tex. 2013). Simply contending that circumstances have arisen rendering the MSA contrary to the children's best interests is not enough.

UNLESS ONE OF THE TEXAS FAMILY CODE § 153,0071(e-1) EXCEPTION APPLIES, PARTIES CANNOT AGREE TO SET ASIDE AN MSA.

In re Minix**,** ___ S.W.3d ___, No. 14-17-00417-CV, 2018 WL 1069558 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (02-27-18).

Facts: Mother and Father signed an MSA that addressed the issues between them regarding their child. Neither party asked the trial court to enter judgment on the MSA. Subsequently, Father filed a motion to enforce the MSA asserting Mother had failed to comply with it. Mother sought a restraining order against Father.

Father later filed a petition to set aside the MSA. Subsequently, the parties appeared in court before the district judge and advised the court that they had agreed to set aside the MSA. Mother later testified that she did not recall being present at that hearing. No record was made, the docket did not reflect that the MSA had been set aside, and no order was entered setting aside the MSA. However, the following day at a hearing before the AJ, the parties informed the AJ that the MSA had been orally set aside pursuant to the parties' stipulation. Thus, the AJ entered temporary orders that were inconsistent with the MSA. Later, the district judge signed an agreed order for psychological evaluations of the parties. Another temporary order was signed that was very similar to the MSA except that Father's child support obligation was higher.

After retaining new counsel, more than nine months after the MSA had purportedly been set aside pursuant to the parties' stipulation, Mother filed a motion for judgment on the MSA and requested that all subsequent orders and Rule 11 agreements be vacated. The trial court denied Mother's motion, and she sought mandamus relief.

Holding: Writ of Mandamus Conditionally Granted

Majority Opinion: (J. Jamison, J. Busby)

The MSA complied with the Tex. Fam. Code, and the parties were entitled to a judgment consistent with the MSA. Nothing in the Tex. Fam. Code explicitly permits the parties to agree to set aside a statutorily compliant MSA.

The invited-error doctrine did not apply because Mother appealed the denial of her motion for entry, not the setting aside of the MSA or the granting of TROs.

Concurring Opinion: (J. Busby)

The dissent's reliance on equity ignores the mandatory nature of the statute at issue. The dissent's suggestion is "a recipe for anarchy." An undocumented oral argument is not enforceable. An agreement in open court is only enforceable after the parties receive a judgment describing the agreement. Here, there was no ruling setting aside the MSA.

Further, a modification based on a material and substantial change is not necessarily inconsistent with a prior MSA. A trial court does not run afoul of Tex. Fam. Code § 153.0071 if it alters the terms of an order incorporating an MSA based on subsequent events that meet the statutory requirements for modification. The court should hesitate to discourage a parent from acting to protect the safety and welfare of a child by forcing that parent to make an all-or-nothing choice between seeking modification and preserving the bargain struck in an MSA.

Dissenting Opinion: (C.J. Frost)

The court of appeals should not have reached the merits of Wife's petition because she was not entitled to relief pursuant to the doctrines of quasi-estoppel and invited error. Equity steps in to bar relief that mandamus might otherwise afford.

Mother—through her attorney—agreed on the record to set aside the MSA. Mother's attorney later asserted to another judge that the parties had stipulated to setting aside the MSA. Subsequently, the parties and the trial court then acted as though the MSA were set aside. Mother benefitted from the subsequent temporary orders, and Father was disadvantaged by the increased costs of litigation that would not have been incurred if the MSA had not been set aside. The majority too narrowly framed the invited-error doctrine to exclude Mother's actions. If the majority's interpretation were accepted, a party could dodge the consequences of inviting error simply by asking the trial court to rule on an issue, obtaining the requested ruling, filing a motion to reconsider, and then appealing the denial of the motion to reconsider. Mother engaged in gamesmanship, and her petition should not have been heard by the appellate court.

Editor's comment: This one deserves a Wow! In fact, this one deserves an OH WOW! We often speak about MSA's as contractual agreements first and foremost and there is plenty of case law that speaks to their interpretation under contract principles. There is likewise support in the idea that a court cannot modify the terms of a contract which is fully consistent with *In re Lee* which prevents a court from modifying terms of an MSA simply because it does not feel those terms are in a child's best interest. This principle supports the notion that parents must be allowed to make their own agreements and the court cannot just step in and do something different simply because the court believes it knows better. Clearly under contract law parties may jointly revoke their agreements, but this decision effectively says they cannot when that contract is an MSA under TFC 153.0071. Simply put, TFC 153.0071 provides that parents have every right to decide what is in their children's best interest and the court is powerless to disagree (in most cases) but if those same parents decide that the agreement is no longer in the child's best interest, they are then powerless to change their mind and they are powerless to stop the trial court from enforcing the agreement they no longer support. There is some suggestion within these opinions that it was unclear whether the parties intended the MSA to address only temporary orders or a final settlement. Let me say that as long as this Opinion remains on the books, you better be sure that if an MSA is intended to address temporary orders only, it expressly states that in the MSA itself. Since parole evidence of intent is inadmissible when a contract is unambiguous, if your MSA does not say one way or the other and there is a dispute on that issue, you might have a problem putting on evidence of intent. In that case, the parties may be stuck with an MSA on a final basis that they never intended be final. And of course, that's the result under this case because they ARE NOT ALLOWED TO TAKE IT BACK even if they want to. Creatively, what could be suggested IF both parties want to set aside an MSA before judgment is requested or rendered? (1) Could they agree to set it aside and further agree that neither party would request entry of judgment? Perhaps this would work because it seems that a party's entitlement to judgment notwithstanding a Rule 11 Agreement is what triggered the problem in this case. If you could reach such an agreement, should you build in liquidated damages if a party breaches the agreement and requests entry of judgment? (2) Could parties go back to mediation and secure another MSA that sets aside the first one? (3) Could you non-suit the case so that the MSA in that specific suit is no longer valid? What if judgment must be entered on the MSA even though both parties desire to revoke the MSA? Could the trial court grant a MNT in the interest of justice based on the agreement of the parties with a waiver of appeal? Just be aware of this case and make sure that when you client signs that MSA they are really, really certain it is the right thing to do.

SAPCR
CONSERVATORSHIP

ABSENT EVIDENCE SHOWING THAT IT HAS HAD A MATERIAL, ADVERSE EFFECT ON THE ABILITY TO PARENT, IMMIGRATION STATUS SHOULD NOT BE USED AS A BASIS TO DENY JOINT MANAGING CONSERVATORSHIP.

Turrubiartes *v. Olvera*, ___ S.W.3d ___, No. 01-16-00322-CV, 2018 WL 708547 (Tex. App.—Houston [1st Dist.] no. pet. h.) (mem. op.) (02-06-17).

Facts: Mother and Father have 3 children, who were born before their marriage. The couple married in February 2013 and separated in October or November 2014, after Mother and a neighbor had an altercation. The altercation arose when Father told the neighbor that the neighbor's husband and Mother were having an extramarital affair. After the altercation with her neighbor, Mother left with the children.

The trial court heard mostly conflicting testimony from Mother and Father as to conservatorship. No other witnesses testified and the parties introduced little documentary evidence. The trial court heard non-conflicting testimony from both Mother and Father about her immigration status. While Father is a United States citizen, Mother is an undocumented immigrant. Mother drives without a driver's license, which she cannot obtain as an undocumented immigrant. She testified that she intends to apply for legal status in the country. But Mother conceded that she had not yet applied for that status.

The trial court divided the property as requested by Father, and appointed him as sole managing conservator and Mother as possessory conservator. The trial court also ordered Mother to have a licensed driver pick up and return the children during the periods when they were to be in her custody.

Mother filed a motion for new trial contending that the trial court refused to appoint her as a joint managing conservator based on her national origin and immigration status. The trial court denied her motion. The trial court made two dozen fact findings; nine refer to Mother's immigration status. Among other things, the court concluded that Mother lacked stability "due to her immigration status." It also noted that Father, by contrast, is a United States citizen.

Holding: Reversed and Remanded

Opinion: Immigration status, standing alone, is not probative of Mother's fitness to be a parent to her children so as to deny her joint managing conservatorship. The trial court heard no evidence in this case regarding any detention or immigration-related charge, any pending removal proceeding, or that Mother was a subject of any criminal prosecution. The trial court expressly found that there was no evidence that Mother "has been detained by immigration authorities since coming to this country in 2006, or that she is the subject of any removal proceedings against her." The trial court's orders otherwise protected the children by requiring that they travel with a licensed driver and by designating Father as the parent to determine the children's residence and school.

Given that the court granted primary possession of the children to Father and ordered Mother to have a licensed driver pick up and return the children in connection with her periods of possession, her immigration status was collateral to the children's best interest. Absent evidence showing that it has had a material, adverse effect on the ability to parent, immigration status should not be used as a basis to deny joint managing conservatorship.

SAPCR
CHILD SUPPORT

★★★TEXAS SUPREME COURT ★★★

MOTHER HAD STANDING TO SEEK ADULT DISABLED CHILD SUPPORT FROM FATHER EVEN THOUGH MOTHER DID NOT LIVE WITH THE CHILD.

In re C.J.N.-S.**,** ___ S.W.3d ___, No. 16-0909, 2018 WL 1022598 (Tex. 2018) (02-23-18).

Facts: Before turning 18, the Child had a disability that interfered with her ability to work. After turning 18, the Child began living alone, but because the Child's condition worsened, Mother paid the Child's living and medical expenses and visited the Child regularly to help with chores. Mother sought from Father adult disabled child support. The trial court granted Mother's petition, and Father appealed. The Court of Appeals agreed with Father that Mother lacked standing to file her petition. The relevant Family Code Section stated who had standing to bring suit but included no punctuation:

Father's interpretation:

> (a parent of the child or another person) (having physical custody or guardianship of the child under a court order)

Mother's interpretation:

> (a parent of the child) or (another person having physical custody or guardianship of the child under a court order)

Holding: Reversed and Remanded to the Court of Appeals

Opinion: To interpret the statute as suggested by Father rendered meaningless the clause "a parent of the child" because it required both parents and other persons to have physical custody or guardianship of the child, without regard to parentage. The Texas Supreme Court remanded the case to the appellate court to consider Father's challenges to the sufficiency of the evidence.

AN ANTICIPATED CIRCUMSTANCE CANNOT BE EVIDENCE OF A MATERIAL OR SUBSTANTIAL CHANGE OF CIRCUMSTANCES.

***Smith v. Karanja*, ___ S.W.3d ___, No. 01-16-01004-CV, 2018 WL 761905 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (02-08-18).**

Facts: Mother sought to modify the decree to allow for an international travel provision so that she could travel abroad with the Child to the Child's birthplace, Kenya, Africa, to attend a memorial service for the Child's grandfather. Father wanted the court to deny all international travel until the Child turned 16 because Kenya is not a signatory to the Hague Convention on the Civil Aspects of Child Abduction. Father asserted in his response that Mother "remained in the US as an illegal resident for 7 years. And now, 16 years later, she is petitioning ... to secure [the Child]'s passport with the intent to permanently resettle to her homeland."

After a hearing, the trial court signed the Order Modifying the Divorce Decree in which the court found that "the material allegations in [Mother]'s Motion to Modify are true and the modifications made by this order are in the best interest of [the Child]," and ordered as follows: (1) either parent may apply for a passport for the Child, but must notify the other parent within 5 days; (2) Mother has the right to maintain possession of the passport; (3) either parent must deliver the passport to the requesting parent within 10 days of notice of intent to have the Child travel abroad; (4) either parent must provide written notice to the other parent of plans to travel internationally within 21 days of the date of departure, and of certain information describing the travel (such as date, time, location, means of transportation) and (5) either parent must properly execute a written consent form to travel abroad and any other required form. The trial court further found that "credible evidence has been presented to the court indicating a potential risk of the international abduction of a child by a parent of the child," and so ordered that Mother take certain protective measures, including posting a $75,000 bond and following detailed procedures for notification to the U.S. Department of State's Office of Children's Issues and to the relevant foreign consulate or embassy, before traveling abroad with the Child. Father appealed and, without providing a reporter's record, challenged the trial court's modification without the imposition of adequate international abduction prevention measures.

Holding: Reversed and rendered, modification order vacated.

Opinion: If a circumstance was sufficiently contemplated at the time of an original agreement, its eventuality is not a changed circumstance, but instead an anticipated circumstance that cannot be evidence of a material or substantial change of circumstances.

Here, Mother's desire for the Child to be able to visit family abroad as she had done in the past cannot be considered a change from the state of affairs 3 months earlier when the parties' divorce decree was entered. As Mother stated in her petition, the Child "has traveled to Kenya on several occasions before with no issues"; thus, travel to visit family in Kenya was an eventuality which was anticipated before the parties' divorce. Critically, while the divorce was pending—and a year before Mother filed her motion to modify—Father filed a motion addressing the need to determine whether Mother should be permitted to travel abroad with the Child and requesting that the Child's passport "be placed in [t]rust with the Court pending the outcome of the divorce proceedings." These facts show that the Child's international travel issue was not a changed circumstance, but rather an issue of some contention between the parties which they neglected to address in their divorce decree. This paired with the trial court's express finding in the modification order that Mother is a flight risk renders the trial court's modification order arbitrary and capricious and an abuse of discretion.

The trial court's modification order did not limit Mother's use of the Child's passport to allow travel to attend the memorial service; it granted Mother possession of the Child's passport and the unrestricted ability to travel internationally with the Child, assuming compliance with the protective measures outlined in the order. Such carte blanche permission to Mother to control the Child's international travel is contrary to the statutory requirement that a modification order be based upon a material and substantial change in circumstances. The changed circumstances here were the death of the Child's grandfather; that change does not open the door to other international travel that could have been anticipated at the time of the divorce. In other words, the relief the trial court may grant must be somehow connected to the changed circumstance. For example, a remarriage may require some changes but does not mean that the trial court may now modify other provisions in the original divorce decree unrelated to the remarriage.

FATHER FAILED TO PRESENT SUFFICIENT EVIDENCE THAT CIRCUMSTANCES HAD CHANGED BETWEEN THE DATE THE PRIOR ORDER WAS SIGNED AND HIS NEW PETITION TO MODIFY.

In re K.M., No. 12-18-00012-CV, 2018 WL 991570 (Tex. App.—Tyler 2018, orig. proceeding) (mem. op.) (02-21-18).

Facts: Father filed an original SAPCR and, in a supporting affidavit, asserted that Mother was addicted to prescription drugs. The parties attended mediation and signed an MSA that appointed the parents joint managing conservators and gave Father the exclusive right to designate the Child's primary residence.

About a week after a final order was signed, Father initiated another SAPCR seeking to modify the existing order. Father asserted that circumstances had materially and substantially changed because the Child had tested positive for marijuana. Mother filed a counter-petition, to which she attached an affidavit averring that Father liked to have sex with little girls, that he probably drugged the Child to help his case, and that he fed drugs to the Child because of his "sick sexual fetish." The trial court, noting that Mother did not raise such accusations in the prior proceeding, advised Mother that she reconsider her affidavit or have "really, really good proof" that her accusations were true. The trial court signed a temporary order giving Mother supervised access to the Child in a therapeutic setting. Mother filed a petition for writ of mandamus asserting that Father offered no evidence to change custody on a temporary basis and that Father's assertions were based on conduct that predated the settlement agreement.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The drug test reflected a six-month period before the test. Given the length of time covered by the test, the trial court could not have pin pointed when the exposure occurred or identified the source of the exposure. Thus, the trial court had insufficient information on which to determine whether circumstances had materially and substantially changed in the nine-day period between the signing of the prior order and Father's filing of his new petition. Further, Father submitted the Child's hair for drug testing before he signed the MSA. Thus, he at least contemplated the possibility that the Child may have been exposed to some medication or other substance at the time the MSA was signed.

SAPCR
CHILD SUPPORT ENFORCEMENT

BEFORE FATHER CAN BE HELD IN CONTEMPT, HE IS ENTITLED TO 10-DAYS NOTICE OF CONTEMPT HEARING AND AN ADMONISHMENT AS TO HIS RIGHT TO COUNSEL.

In re Chambers, No. 05-18-00031-CV, 2018 WL 833392 (Tex. App.—Dallas 2018, orig. proceeding) (02-12-18).

Facts: In a March 17, 2017 Agreed Order in Suit to Modify Parent-Child Relationship, Father was required to pay child support arrearages and unpaid medical expenses through monthly payments of $1,200.00. On November 13, 2017, Mother filed a motion for enforcement of the modification order. She alleged that Father had failed to pay the required amounts from April 1, 2017 to September 1, 2017. She requested criminal and civil contempt against relator. Father was served with notice on December 28, 2017 of a January 2, 2018 hearing on the motion for enforcement and contempt. Father appeared pro se at the January 2 hearing. Following the hearing, the trial court signed its "Order Holding Respondent in Contempt for Failure to Pay Child Support and Arrearages, Granting Judgment, and for Commitment to County Jail" and held relator in criminal and civil contempt. The criminal contempt order requires Father to pay a $500 fine and be confined in the county jail for a period of 180 days for each violation, with the confinement to be served concurrently. The civil contempt order required Father to be confined in the county for either a period not to exceed 18 months, including time served for criminal contempt, or until relator pays $37,518.60 in arrearages and $1,835.23 in fees, whichever occurs first. Father was taken into custody on January 2, 2018. Father sought a petition for writ of habeas corpus.

Holding: Writ granted, January 2, 2018 Order vacated.

Opinion: Order void because Father (1) did not receive the statutorily-required 10-days' notice of the hearing, and (2) was not admonished of his right to counsel and did not waive his right to counsel.

SAPCR
ADOPTION

BIOLOGICAL FATHER NOT ENTITLED TO NOTICE OF TERMINATION PROCEEDING BECAUSE HE FAILED TO REGISTER IN THE PATERNITY REGISTRY; TRIAL COURT ABUSED DISCRETION IN GRANTING BIOLOGICAL FATHER BILL OF REVIEW SETTING ASIDE TERMINATION AND ADOPTION WHEN FATHER PRESENTED NO EVIDENCE OF MERITORIOUS DEFENSE AND FAILED TO SERVE ALL NECESSARY PARTIES.

In re T.D.B., No. 05-17-01137-CV, 2018 WL 947905 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (02-20-18).

Facts: After Mother gave birth to the Child, she relinquished her parental rights to an adoption agency. The adoption agency conducted a diligent search of the paternity registry and found no notice of intent to claim paternity of the Child. The Child's Adoptive Parents filed a petition to adopt the Child. The trial court signed a decree terminating the parental rights of Mother and of "any unknown, unnamed, and/or unidentified biological father." Before the adoption was finalized, Biological Father notified the adoption agency that he was the Child's father, but Biological Father did not file anything in the paternity registry. Six months after the termination order, and two weeks after the adoption was finalized, Biological Father filed a petition for a bill of review. Only one of the two Adoptive Parents was served with Biological Father's petition. The adoption agency, the served Adoptive Parent, and Biological Father appeared at was supposed to be a pretrial status conference. After hearing argument of counsel, the trial court granted Biological Father's bill of review and set aside the termination and adoption orders. All three parties expressed surprise at the trial court's ruling. The Adoptive Parents, who had expected an opportunity to file a motion for summary judgment before the trial court ruled on the merits, filed a petition for writ of mandamus.

Subsequently, the trial court appointed Biological Father a temporary managing conservator and removed the Child from the adoptive parents' home. Nine days later, Biological Father tested positive for cocaine, codeine, oxycodone, hydrocodone, and marijuana. The trial court then placed the Child with his paternal grandmother and gave the Adoptive Parents limited weekend visits.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Biological Father did not register with the paternity registry, there was no evidence that a father-child relationship had been legally established, and Biological Father did not commence a proceeding to adjudicate his paternity before the trial court terminated his parental rights. Thus, Biological Father was not entitled to notice of the termination proceeding and was required to prove all elements for his petition for bill of review. Because Biological Father presented no evidence of a meritorious defense, the trial court abused its discretion in granting the bill of review. Additionally, the trial court abused its discretion in granting the bill of review without notice to all necessary parties.

MISCELLANOUS

BECAUSE MOTHER AND FATHER OFFERED CONTRADICTORY TESTIMONY, TRIAL COURT DID NOT ABUSE DISCRETION IN BELIEVING FATHER'S TESTIMONY THAT CHANGING THE CHILD'S NAME WAS IN THE CHILD'S BEST INTEREST.

***Werthwein v. Workman*, ___** S.W.3d ___, No. 01-16-00889-CV, 2018 WL 910934 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (02-15-18).

Facts: Mother and Father were married when Mother became pregnant. At some point during the pregnancy, Father denied his paternity of the Child and left. Mother filed for divorce. Father was not present at the Child's birth. Mother listed Father as the Child's father but gave the Child her last name, which she had used throughout the marriage both socially and professionally. A paternity test confirmed the Child was Father's, but he did not amend his divorce counter-petition to request the Child's name be changed. The Child was nine months old when the divorce decree was signed. More than a year later, Father filed a SAPCR, and in an amended petition, he asked the trial court to change the Child's name to Father's. After hearing testimony from the parties, the trial court granted Father's requested name change. Mother appealed.

Holding: Affirmed

Majority Opinion: (J. Brown, J. Bland)

The factfinder is the sole judge of a witness's credibility and the weight to be given each witness's testimony.

Mother testified that Father showed little interest in developing a relationship with the Child until six months before the hearing. Father testified that Mother had refused him access to the Child. Mother testified that they had been trying to get pregnant and were happy about the pregnancy, when Father suddenly denied he was the father and left. Father testified that Mother announced to him that the Child was not his and would be a different race from him.

Because both parents testified as to the relevant factors relating to the name change, the trial court did not abuse its discretion in resolving inconsistencies in Father's favor. Further, contrary to Mother's contentions:

- there was no evidence that the trial court placed a heightened burden on Mother;
- there was no evidence that the trial court's decision was based on tradition; and
- Father was not required to establish that the Child's current name would be detrimental to the Child.

Dissenting Opinion: (J. Jennings)

An opinion is conclusory if no basis for the opinion is offered, or the basis offered provides no support for the opinion. Opinion testimony that amounts to mere conjecture, guess, or speculation is not sufficient. A witness must explain the basis of his statements to link his conclusions to the facts.

Father offered no real evidence that changing the Child's name would help the Child better bond with Father. Just because a name change would not necessarily disrupt the Child's life does not mean it is in the Child's best interest to rename him. Father's assertion that changing the Child's last name would facilitate a father-son bond constituted nothing more than speculative opinion unsupported by a specific factual basis. Father's assertion that changing the Child's name would benefit the development of a relationship between the Child and his paternal family ignored the converse that it could impede the Child's development of a relationship with his maternal family. Father's conclusory and speculative opinion testimony did not tend to make the existence of a material fact more or less probable and was neither relevant nor competent evidence.