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

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DIVORCE
PROCEDURE AND JURISDICTION

TRIAL COURT EFFECTIVELY DENIED INCARCERATED HUSBAND'S RIGHT TO ACCESS THE COURT BY NOT CONSIDERING ALTERNATIVE MEANS FOR PARTICIPATION.

In re Marriage of Niyonzima and Kazubukeye, No. 07-18-00287-CV, 2019 WL 923829 (Tex. App.—Amarillo 2019, no pet. h.) (mem. op.) (02-25-19).

Facts: Wife filed for divorce, and the suit was consolidated with a SAPCR. At the time, Husband was incarcerated, and he expected to be released in about six months. In addition to a general denial, Husband requested a bench warrant, moved for appointed counsel, moved to have a non-lawyer represent him as a proxy, moved to appear telephonically, moved for a continuance, and requested a jury trial. The trial court denied the motions for bench warrant, appointed counsel, and representation by proxy. The court did not address Husband's other motions. After a trial, at which Husband did not appear, the trial court found that Husband failed to appear and was wholly in default. The trial court granted the divorce, divided the community estate, ordered child support, appointed Wife sole managing conservator of the Children, and denied Husband any visitation. Husband appealed.

Holding: Reversed and Remanded

Opinion: Litigants cannot be denied access to the courts simply because they are inmates. This does not mean an inmate has an absolute right to personally appear. A trial court abuses its discretion when it fails to consider an inmate's request to participate by alternative means. Here, Husband proposed alternative means. Some were denied by the trial court, but others were not addressed. Moreover, the trial court failed to acknowledge Husband's timely request for a jury trial and, despite Husband filing an answer and general denial, found that Husband wholly defaulted.

DIVORCE
INFORMAL MARRIAGE

A SINGLE TAX RETURN INSUFFICIENT TO CHALLENGE TRIAL COURT'S FINDING OF NO INFORMAL MARRIAGE.

In re N.A.F., No. 05-17-00470-CV, 2019 WL 3765405 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.) (02-11-19).

Facts: Girlfriend filed a petition for divorce. Boyfriend responded that no marriage existed. Girlfriend claimed the couple married in 2002 and separated in 2013. The couple had three children, for whom orders had already been rendered in 2012 with the aid of the OAG. During the final hearing on whether a marriage existed, the parties testified to vastly different recollections of the parties' relationship. Both agreed that Boyfriend cohabitated with other women from 2009 to 2013. Boyfriend asserted that Girlfriend never even stayed the night with him after the child support orders were rendered. During their relationship, Boyfriend purchased a house as a single man and admitted Girlfriend lived with him there briefly. Girlfriend introduced the couple's 2012 tax return, in which Boyfriend filed as married, filing jointly. At the hearing's conclusion, the trial court held that Girlfriend failed to establish that the parties represented to others that they were married, and the court later signed an order finding there was no informal marriage. Girlfriend appealed, arguing that the evidence was legally and factually sufficient to support an informal marriage and, specifically, that she and Boyfriend had represented themselves as married to others.

Holding: Affirmed

Opinion: Boyfriend and Girlfriend were the only two witnesses at trial. Boyfriend claimed he never represented to others that the couple was married, while Girlfriend claimed Boyfriend represented to everyone that they were married. The trial court, as sole factfinder, was entitled to resolve this conflict.

Girlfriend relied heavily on the single tax return in which Boyfriend filed as married and claimed Girlfriend as his spouse. However, Boyfriend testified that Girlfriend was not working that year and that she asked Boyfriend to file as married and split the refund with her. Although Girlfriend asserted that the couple had been married for 10 years, this was the only evidence she produced to support this assertion. Girlfriend bore the burden to establish a marriage, and the trial court had the discretion to resolve any factual conflicts.

At the end of the hearing, the trial court stated that it believed sufficient evidence established cohabitation and an agreement to be married but not the holding-out element. However, because the trial court did not issue findings, the appellate court would affirm if any legal basis supported the judgment. Because Girlfriend did not address the "agreed-

to-be-married" element on appeal, the appellate court "must affirm the order because appellant has not challenged an implied finding" that supports the judgment that no informal marriage existed.

DIVORCE
Property Division

ERROR TO VALUE NONGUARANTEED RETIREMENT BENEFITS AT $0 WHEN ALL EVIDENCE ESTABLISHED IT HAD AT LEAST SOME VALUE.

***In re Matter of the Marriage of Hardin*, ___** S.W.3d ___, No. 07-17-00368-CV, 2019 WL 922672 (Tex. App.—Amarillo 2019, no pet. h.) (02-25-19).

Facts: At the time of their divorce, both Husband and Wife were retired. They reached an agreement as to assets and values for nearly everything, but they disputed the values of their retirement plans. Wife received a Teacher Retirement System retirement annuity. She was guaranteed 10 years of monthly payments of $2,590.60 and would receive the same amount monthly thereafter until her death. Both parties' experts agreed Wife was guaranteed $89,925, but they disputed the value of the nonguaranteed portion. Husband's expert used actuarial tables to determine Wife's life expectancy and opined that her retirement account was worth $552,721. Wife's expert was only willing to value the nonguaranteed portion at $2,590.60 times the number of months Wife lived beyond the guaranteed period but would not speculate beyond that. The trial court valued Wife's retirement at $89,925 and found the nonguaranteed portion had no value. In the property division, the court awarded Wife her entire retirement plus $160,000 of Husband's. Husband appealed.

Holding: Reversed and Remanded

Opinion: No evidence supported a finding that the nonguaranteed portion of Wife's retirement plan had no value. A trial court's valuation that does not fall within the range of value supported by the evidence constitutes an abuse of discretion. Here, all evidence established that the nonguaranteed portion of her retirement plan had at least some value. Moreover, if Husband's expert's value was accepted, the nonguaranteed portion was nearly equal to the value of the remaining community estate. Thus, the error substantially affected the just and right division of the community estate.

SAPCR
Procedure and Jurisdiction

COURT'S ORDER WAS VOIDABLE, NOT VOID; FATHER WAIVED OBJECTION TO COURT'S JURISDICTION BY FAILING TO TIMELY RAISE COMPLAINT.

In re N.E.S, No. 05-18-00451-CV, 2019 WL 457602 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.) (02-06-19).

Facts: Shortly after the Child was born, a court entered an order in a SAPCR concerning the Child. About a year later, the parents married, and two years after that Mother filed for divorce pro se. On the form pleading Mother used, she did not check the box claiming that there were no orders concerning the Children. While Mother filed in the same county, the divorce case was not assigned to the same court that had entered the prior SAPCR order. Later, Father filed a SAPCR in Texas, which was heard in the same court that granted the divorce. That court denied Father's requested modification. Father filed a motion for new trial claiming without explanation that the court lacked jurisdiction to enter orders for the Child. After his motion for new trial was overruled by operation of law, Father appealed.

Holding: Affirmed

Opinion: If a final order is rendered in the absence of the filing of the information from the vital statistics unit confirming whether a court has acquired continuing, exclusive jurisdiction over a child, the order is *voidable* on a showing that a court other than the court that rendered the order had continuing, exclusive jurisdiction. The provision does not require any request for information to have been made for an order to be "voidable," so it was not relevant that no one made such a request. Errors that make a judgment voidable are subject to waiver and must be preserved pursuant to Tex. R. App. P. 33.1. Father raised a jurisdictional complaint for the first time in his motion for new trial, but he simply stated that the court lacked jurisdiction without elaboration. By failing to raise a clear and timely objection, Father waived this issue.

GRANDPARENTS LACKED STANDING BECAUSE NO EVIDENCE OF SIGNIFICANT IMPAIRMENT; HOWEVER, DECEASED MOTHER'S FIANCÉ HAD STANDING BASED ON ACTUAL CARE, CONTROL, AND POSSESSION.

In re Clay, No. 02-18-00404-CV, 2019 WL 545722 (Tex. App.—Fort Worth 2019, orig. proceeding) (mem. op.) (02-12-19).

Facts: An order was signed for conservatorship, possession and access, and support of the Child. Mother was the primary parent, and Father exercised visitation as much as he was able. He asserted that the visitation schedule was roughly 50/50, but Maternal Grandparents and Mother's Fiancé described it as "slightly less than an expanded [SPO]." Mother and Fiancé moved in together with the Child, who also spent a significant amount of time with Maternal Grandparents while Mother worked. A few months before Mother's planned wedding, Mother died. A modification was pending at that point to increase Father's child support obligation. Father filed a motion to dismiss the modification. Paternal Grandparents filed a petition to intervene, seeking joint managing conservatorship with Father or a possession order. Fiancé also petitioned to intervene, seeking joint managing conservatorship with Father. Father filed motions to dismiss both interventions for lack of standing. After a hearing, the trial court denied both of Father's motions to strike. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted in Part

Opinion: Tex. Fam. Code § 102.004 grants standing to grandparents or other persons to seek conservatorship. Subsection (a) applies to original petitions, and subsection (b) applies to interventions. To intervene under subsection (b), the party seeking standing must establish substantial past contact and introduce satisfactory proof that conservatorship is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development.

Maternal Grandmother testified that she played an important role in the Child's life and that Father was "chipping away" at their time with the Child. She feared Father would move with the Child to be closer to Father's extended family. She testified that the Child's clothes appeared too small. Additionally, she was concerned because the Child was becoming withdrawn and sad, was losing her self-confidence, and was having nightmares. However, Paternal Grandmother admitted she never alleged Father was not fit to be a joint managing conservator and had not cut off her access completely. In sum, Maternal Grandparents did not proffer satisfactory proof of the Child's significant impairment and, thus, did not meet their burden to establish standing.

For the similar reasons, Maternal Grandparents did not establish standing to seek possession under Tex. Fam. Code § 153.433 because they did not show significant impairment by a preponderance of the evidence.

Fiancé asserted standing under Tex. Fam. Code § 102.003(a)(9) or (11). Father argued that because the possession order was "closer to 50/50" (which was disputed by Maternal Grandparents and Fiancé), and because the Child only lived with Fiancé for about 10 months, she did not live with him for "180-days" (six months). However, the six-month period need not be continuous or uninterrupted. Considering the evidence as a whole, the Child's primary residence was with Mother and Fiancé. Moreover, sufficient evidence established that Fiancé acted as a parent to the Child during that time period. Because Fiancé filed his petition in intervention less than 90 days after Mother's death, he had standing to intervene.

Father argued that allowing Fiancé to have standing under § 102.003 violated his constitutional right to parent the Child because Fiancé was not required to prove substantial impairment. However, the Texas Supreme Court has held that while parental rights are fundamental, they are not plenary and unchecked. Section 102.003 allows a narrow class of nonparents, who have served in a parent-like role to a child over an extended period of time to seek to preserve that relationship over a parent's objections.

GRANDPARENTS HAD STANDING TO REQUEST ACCESS AND POSSESSION EVEN THOUGH THEIR AFFIDAVIT FAILED TO SUPPORT GRANTING RELIEF UNDER SECTION 153.433.

Murphy v. Renteria, No. 03-18-00014-CV, 2019 WL 578576 (Tex. App.—Austin 2019, no pet. h.) (mem. op.) (02-13-19).

Facts: After Mother gave birth to the Child, the Child spent most of his time with Grandparents. The Grandparents filed suit for managing conservatorship of the Child, alleging abuse and neglect. After the case had been pending for over a year, Mother sought sole managing conservatorship. Genetic testing determined that Mother's boyfriend was not the Child's father as previously thought, and the actual Father was identified. The Grandparents withdrew their request for managing conservatorship and instead sought possessory conservatorship. Father did not object to Grandparents' access, but Mother did. After a hearing, the trial court appointed the parents joint managing conservators and denied the Grandparents' requested relief. The order also included an agreed permanent injunction against allowing Mother's boyfriend access to the Child. Grandparents appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 153.432(c) provides:

> In a[n original suit by a grandparent for or possession or access] the person filing the suit must execute and attach an affidavit on knowledge or belief that contains, along with supporting facts, the allegation that denial of possession of or access to the child by the petitioner would significantly impair the child's physical health or emotional well-being. The court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized under Section 153.433[, the "grandparent statute"].

Mother argued that the trial court was required to dismiss Grandparents suit if the facts alleged in their affidavit, taken as true, did not support granting relief under Section 153.433. The appellate court here held that the trial court would have abused its discretion if it accepted Mother's argument "because Section 153.432 confers standing based on a person's status as a grandparent rather than the strength of their affidavit."

Although Grandparents feared Mother would allow her boyfriend to be around the Children, Mother testified that she agreed it was not in the Child's best interest to see him, and she consented to an injunction against allowing her boyfriend to contact the Child. Additionally, while Grandparents complained that disallowing them access to the Child would result in emotional harm, the evidence showed that Father had no intention of keeping the Child away from Grandparents.

TRIAL COURT DID NOT ACQUIRE CONTINUING, EXCLUSIVE JURISDICTION BECAUSE SAPCR WAS NONSUITED AND DISMISSED WITHOUT PREJUDICE.

Ramirez v. LaCombe, No. 01-17-00977-CV, 2019 WL 922058 (Tex. App.—Houston [1st Dist.] 2019, no pet. h.) (mem. op.) (02-26-19).

Facts: Mother was incarcerated when the Child was two. Father asked the Child's aunt to care for the Child. The aunt, in turn, sought the aid of friends at church to help her with the Child. At some point, Father signed a power of attorney allowing the Church Friends to make medical decisions for the Child, and the Child then began living with the Church Friends. About five months later, the Church Friends filed suit in Montgomery County seeking managing conservatorship. Many months later, Father filed a writ of habeas corpus to have the Child returned to him, and the Montgomery suit was nonsuited because the Child had not lived with the Church Friends six months at the time the petition was filed. However, by the time the habeas was granted the Child had lived with the Church Friends for over a year. After the nonsuit, the Church Friends filed a petition seeking conservatorship in Harris County. After a final hearing, the trial court appointed the Church Friends managing conservators and appointed Mother and Father possessory conservators. Father appealed.

Holding: Affirmed

Opinion: Contrary to Father's assertion, the Montgomery County suit was not pending when the Harris County suit was filed. The Montgomery County suit was nonsuited about 2 months before the Harris County petition was filed. Further, when a court nonsuits a SAPCR, it does not acquire continuing, exclusive jurisdiction. Finally, even if Harris County were not the proper venue, Husband failed to timely file a motion to transfer venue.

MATERNAL GRANDPARENTS ESTABLISHED STANDING TO SEEK CONSERVATORSHIP BECAUSE MOTHER AND THE CHILD LIVED WITH THEM FOR THE REQUISITE PERIOD AND MATERNAL GRANDPARENTS ACTED AS PARENTS TO THE CHILD.

In re Foshee, No. 10-17-00321-CV, 2019 WL 962307 (Tex. App.—Waco 2019, orig. proceeding) (mem. op.) (02-27-19).

Facts: Mother and Father divorced, and Mother was granted the exclusive right to designate the Child's primary residence. A few years later, Maternal Grandparents filed suit for conservatorship. Mother tested positive for drugs and agreed to temporary orders giving Maternal Grandparents managing conservatorship. However, after hiring a new attorney, Mother filed a plea to the jurisdiction, which was denied. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: Mother and the Child lived with Maternal Grandparents for more than six months ending not more than 90 days before Maternal Grandparents filed their petition. Additionally, Mother did not dispute that Maternal Grandparents had a parental role in relation to the Child. Because they satisfied the standing requirement of Tex. Fam. Code § 102.003, the appellate court did not address § 102.004.

SAPCR
Alternative Dispute Resolution

MOTHER ENTITLED TO CORRECTED JUDGMENT BECAUSE DECREE VARIED FROM TERMS OF MSA.

In re S.G.E., No. 05-18-00577-CV, 2019 WL 967336 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.) (02-28-19).

Facts: Mother and Father entered into an MSA in their divorce proceedings. The MSA provided that Father would provide health insurance for the Children at his expense so long as the coverage was the same as what Mother's insurance provided. Otherwise, Mother would continue to maintain health insurance for the Children, and Father would reimburse Mother an agreed amount for the premium. After a hearing on cross motions to enter, the trial court signed a decree that simply stated that Father would continue to maintain health insurance for the Children. Mother filed a motion to correct the judgment because the health-insurance terms varied from the MSA. Subsequently, Mother filed an amended motion and added a complaint that the decree failed to include an agreement that Father would reimburse her for certain home repair expenses. The trial court denied Mother's motion, and she appealed.

Holding: Affirmed in Part; Reversed and Rendered

Opinion: The provisions regarding the Children's health insurance improperly varied from the MSA. Moreover, evidence showed that the insurance provided by Father was significantly different from the insurance provided by Mother. Father agreed to the MSA's requirement, and his convenience was not among the criteria in finding a policy.
A 329b(b) motion to modify, correct, or reform a judgment can be filed within 30 days. While her original motion was timely, Mother's amended motion adding her complaint regarding reimbursement was filed 39 days after the judgment. Thus, regardless of whether those terms varied from the MSA, Mother waived her complaint.

SAPCR
Conservatorship

EVIDENCE SUPPORTED GEOGRAPHIC RESTRICTION ON CHILD'S RESIDENCE; REQUESTS FOR EXCLUSIVE RIGHT TO DESIGNATE RESIDENCE GAVE COURT AUTHORITY TO IMPOSE GEOGRAPHIC RESTRICTION.

***In re Marriage of Christenden*, ___** S.W.3d ___, No. 06-18-00070-CV, 2019 WL 453652 (Tex. App.—Texarkana 2019, no pet. h.) (02-06-19).

Facts: Mother and Father, who had one Child together, filed cross-petitions for divorce. Mother had been working at a medical center while completing her bachelor's in nursing. During a hearing, Mother testified that she was planning to move about 60 miles away from Bowie County, the county in which they had been residing, because she found a job that paid about $20k more than what she had been making. Mother testified that she needed more money because she was struggling monthly with finances, and Father was not consistently paying child support. Father testified that he exercised visitation whenever possible, but if Mother moved, he would not be able to see the Child on weekdays. The trial court granted the divorce, appointed the parties joint managing conservators, and granted Mother the exclusive right to designate the Child's primary residence in Bowie County. Mother appealed the geographic restriction, arguing there was insufficient evidence to support the restriction and that the trial court erred in imposing one when neither party requested a restriction in their pleadings.

Holding: Affirmed

Opinion: Mother had asked the court to designate the Child's primary residence as either Bowie County or Red River County, thereby conceding that Bowie County was an acceptable choice. The Child had been attending and excelling in school in Bowie County and had new friends his age. He had family in Bowie County, including some half-siblings. Father testified that he would not be able to exercise weekday visitation if Mother relocated with the Child. Mother testified that her commute would be shorter if she could move closer to her work, but that fact is not determinative of the Child's best interest.

Although neither party explicitly pleaded for a geographic restriction, because both parents asked the court to designate them as the parent with the exclusive right to designate the Child's primary residence, they instilled the trial court with decretal powers of the Child's geographic residence.

FATHER COULD NOT RAISE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CONSERVATORSHIP HEARING; INSUFFICIENT EVIDENCE TO SUPPORT PROTECTIVE ORDER AGAINST FATHER.

S.N. v. TDFPS, No. 03-18-00539-CV, 2019 WL 471069 (Tex. App.—Austin 2019, no pet. h.) (mem. op.) (02-07-19).

Facts: After Father's girlfriend attacked him while the Children were in Father's care, TDFPS removed the Children from Father's care and placed them with Mother. Father and his girlfriend tested positive for drugs, though Father claimed the test was wrong. Initially, TDFPS sought to terminate Father's parental rights but later sought only to appoint Mother as sole managing conservator and Father as possessory. After a hearing, at which neither Father nor his attorney appeared, the trial court signed an order appointing Mother sole managing conservatorship, enjoined Father from contact with the Children, and ordered Father to pay child support. Additionally, the court signed a final protective order against Father for the benefit of Mother and the Children. Father appealed, claiming ineffective assistance of counsel and that the evidence was insufficient to support the final protective order.

Holding: Affirmed in Part; Reversed and Vacated in Part

Opinion: By the time of the final hearing, TDFPS had withdrawn its request to terminate Father's parental rights. Father could not raise a claim of ineffective assistance of counsel in a proceeding only addressing conservatorship matters and not termination.

While a parent's use of drugs could rise to the level of abuse sufficient to support a protective order if the parent harms a child, here, there was no evidence of how Father's drug use affected his Children. Further, the only evidence of violence was a one-time altercation in which Father was not the aggressor. There was no evidence that Father was violent at any other time.

SAPCR
CHILD SUPPORT

INSUFFICIENT EVIDENCE OF MOTHER'S NET RESOURCES; REMANDED FOR FURTHER PROCEEDINGS TO SET CHILD SUPPORT RATHER THAN RENDERING BASED ON MINIMUM WAGE.

In re Marriage of Hall and Oller, No. 12-18-00109-CV, 2019 WL 968527 (Tex. App.—Tyler 2019, no pet. h.) (mem. op.) (02-28-19).

Facts: At the time of the divorce trial, Mother was an assistant store director and had just completed training at Brookshire Brothers. At the end of the next quarter, she would be told where she would be working, and her expected salary would be $38,500. The trial court used that figure to determine Mother's child support obligation. Mother appealed, arguing there was insufficient evidence of her current net monthly resources, and because of that, the trial court should have based her obligation on a 40-hour work week at minimum wage.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The evidence established that Mother "would be making $38,500" once she started her new assignment. However, that assignment was undetermined at the time of the hearing. No evidence was offered as to Mother's *current* resources, without which, there was insufficient evidence to support a finding that her net resources were $2,598.50 per month.

Calculating net resources is only one step in assessing an obligor's amount of monthly child support. The court must also determine the number of children before it, the percentage of an obligor's net resources to be applied, and any other factors that would justify varying from the guidelines. Thus, the appellate court remanded the issue for further determination by the trial court.

SAPCR
Possession

TRIAL COURT COULD NOT AWARD VISITATION TO NON-PARENT NON-PARTY.

In re Marriage of D.E.L., No. 14-17-00216-CV, 2019 WL 545911 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.) (mem. op.) (02-12-19).

Facts: Father was incarcerated and was serving a life sentence without parole. Mother filed a petition for divorce, which included a SAPCR. She asked to be named sole managing conservator, to change the Children's last name to her maiden name, and to deny Father contact with the Children. After a trial, at which Father appeared telephonically, the trial court orally granted the divorce, appointed Mother managing conservator and Father possessory conservator, changed the Children's last name, granted Father's sister some visitation, and limited Father's contact with the Children to letter correspondence only. Mother filed a motion for reconsideration challenging the portion of the order granting Father's sister visitation. An associate judge heard Mother's motion for reconsideration, but the district judge signed an order granting reconsideration. The trial court signed a final order that incorporated its oral ruling except no visitation was awarded to Father's sister. Father appealed, arguing that the associate judge lacked authority to grant Mother's motion to reconsider and that insufficient evidence supported the name change and limitations on his contact with the Children.

Holding: Affirmed

Opinion: Father argued the associate judge lacked authority to consider Mother's motion in the absence of an order assigning the matter to him. However, even if the associate judge lacked authority to rule on Wife's motion to reconsider, the district judge granted the same relief before the trial court's plenary power expired. Moreover, in the absence of a non-parent's intervention, the trial court has no authority to award any non-party visitation. Thus, the trial court correctly applied the law regarding the issue raised in Mother's motion for reconsideration.

Wife testified that Father's last name had negative associations given his conviction for a gang-related murder. She was concerned the name would make the Children an easy target to be bullied and could cause problems with future employers. Additionally, she testified that she did not intend to change the Children's names again. Further, Father did not object to Wife's request until after it was granted by the trial court.

Finally, the Children were only one- and three-years old when Father committed his crime. The Children did not know Father or that he was incarcerated. The evidence as a whole supported the trial court's determination that Father's contact with the Children should be limited to letter correspondence.

SAPCR
Modification

FATHER NOT REQUIRED TO ATTACH TEX. FAM. CODE § 156.102 AFFIDAVIT TO PLEADING BECAUSE PRIOR ORDER—THOUGH LESS THAN YEAR OLD—ONLY MODIFIED CHILD SUPPORT, NOT CONSERVATORSHIP.

In re K.K.R., No. 04-18-00250-CV, 2019 WL 451761 (Tex. App.—San Antonio 2019, no pet. h.) (mem. op.) (02-06-19).

Facts: In 2011, when the Child was about a year old, the court signed an order establishing Father's paternity and providing orders for conservatorship, possession and access, and child support. In 2015, an order was signed that modified Father's child support obligation. In 2016, Father filed a petition to modify and asked to be named the person with the exclusive right to designate the Child's primary residence. After a hearing, the trial court granted Father's request. Mother appealed, and for the first time on appeal, complained that the trial court lacked jurisdiction because Father failed to attach an affidavit that complied with the statute governing suits to change the person with the exclusive right to designate the child's primary residence less than one year since the prior order.

Holding: Affirmed

Opinion: Although Father stated in his petition that he sought to modify the 2015 order, that order only modified child support. The prior order that designated the person with the exclusive right to designate the Child's primary residence was rendered in 2011. Mother understood the 2011 order to be the order being modified and acknowledged that the 2015 order affected only child support, not conservatorship. Father was not required to attach a Tex. Fam. Code § 156.102 affidavit to his petition.

TRIAL COURT COULD NOT SUA SPONTE VACATE PROTECTIVE ORDER WHEN RULE 11 AGREEMENT EXTENDED ORDER UNTIL THE COURT COULD HEAR EVIDENCE.

In re Goddard, No. 12-18-00355-CV, 2019 WL 456866 (Tex. App.—Tyler 2019, orig. proceeding) (mem. op.) (02-06-19).

Facts: In a divorce with children, Wife obtained a temporary ex parte restraining order against Husband. On the date of the scheduled hearing on the TRO, the parties signed a Rule 11 Agreement that allowed the TRO to remain in force until the court was able to hear the evidence. The court then signed an order incorporating the Rule 11 Agreement. Although subsequent hearings took place, the protective order was not addressed. The day after a status hearing, the court sua sponte vacated the TRO and sent the parties an email explaining why:

> I have recently received numerous questions from law enforcement regarding a protective order in the above matter. I have taken the liberty to copy them as they have been forced to endure numerous illicit telephone calls and complaints regarding same to be certain that all persons involved or affected by this conduct have a clear understanding of the position taken by the Court in this matter. In researching this problem, I find that in August 2016 a Temporary Ex Parte Protective Order was signed that was only valid for twenty days. In November of 2016, another Ex Parte Protective Order was issued. Since that time, **no actual protective order has ever issued** and there have been five (5) more hearings/opportunities to present evidence regarding this subject. It appears that the most recent extension requested and signed in February 2017 was drafted by counsel that allowed the Temporary Ex Parte Protective Order to remain in effect "…*until the Court is able to hear the evidence*…". This runs counter to Texas law and common sense. Attorneys cannot draft and agree to orders that do not comply with Texas law under Rule 11 of the Texas Rules of Civil Procedure. Even if the order had actually been issued based on credible evidence, Protective Orders are only good for two years without extenuating circumstances that certainly do not exist in this case. It has become **glaringly apparent** that the feckless Temporary Ex Parte Protective Order has been weaponized by Ms. Goddard in her effort to have Mr. Goddard incarcerated for violation of the order. Ms. Goddard has contacted the WCSO countless times and has even recently complained to the Texas Rangers that the WCSO had failed to enforce the order. Ms. Goddard even has called law enforcement *twice this week* notwithstanding the fact that the most recent hearing in this case was yesterday. There were at least seven opportunities for the Court to "hear the evidence" and no evidence of the need for a Protective Order *has ever been produced*. I have attached an order issued sua sponte that VACATES the most recent Temporary Ex Parte Protective Order that was signed *almost two years ago*. Plainly put, THERE IS NO PROTECTIVE ORDER IN THIS CASE. Further abuse of the rules and weaponization of the law pertaining to the application for protective orders without valid evidence properly presented will result in very uncomfortable consequences.

Wife filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A TRO is valid for up to 20 days, but on request of the parties or on the court's own motion it may be extended for additional 20-day intervals. Here, the parties signed and filed a valid Rule 11 Agreement that was accepted by the court, and the Agreement was to extend the TRO until the evidence could be heard by the court. The trial court had no basis for setting aside the TRO without granting the parties notice and a hearing.

Moreover, neither party requested the order be vacated. Further, while the best interest of the child should have been the court's primary consideration, the court's email clearly showed that his decision was based on other considerations.

TRIAL COURT'S ORDER FAILED TO CONFORM TO PLEADINGS.

Rivera v. Figueroa, No. 04-18-00256-CV, 2019 WL 691502 (Tex. App.—San Antonio 2019, no pet. h.) (mem. op.) (02-20-19).

Facts: Mother filed an application for a family violence protective order to protect her and the Child from Father. In the alternative, Mother requested a permanent injunction against Father. Father had no live pleading. After a hearing, the trial court denied Mother's request for a protective order, appointed the parents joint managing conservators of the

Child with a 50/50 possession schedule, ordered Father to pay child support, and entered a mutual permanent injunction as to both parties. Mother appealed, arguing that no pleadings supported the injunction against her and that the trial court had no jurisdiction to enter orders for conservatorship, possession, and child support.

Holding: Reversed and Rendered

Opinion: Tex. Fam. Code § 85.021 authorizes a court to include provisions in a protective order that address possession, access, and child support. Thus, if the court had granted a protective order, it could have entered such orders. However, because the court denied the protective order, there were no pleadings on file which would permit the court to do so.
Additionally, because Mother had pleaded in the alternative for a permanent injunction against Father, the court had authority to enjoin Father. However, neither party requested an injunction against Mother, so the order granting one was improper.

MISCELLANEOUS

HUSBAND NOT ENTITLED TO BILL OF REVIEW BECAUSE FAILURE TO RAISE MERITORIOUS CLAIM WAS IN PART DUE TO HIS OWN FAULT OR NEGLIGENCE.

Zielinski v. Zielinski, No. 03-18-00063-CV, 2019 WL 491913 (Tex. App.—Austin 2019, no pet. h.) (mem. op.) (02-08-19).

Facts: When Husband and Wife married, she claimed to be 27, though she was actually 37. Husband was 22. Upon marriage, Husband helped Wife and her 10-year-old daughter obtain permanent residency in the U.S. After 14 years of marriage, the couple divorced amicably. The agreed divorce decree required Husband to pay Wife monthly support for five years, which he did. Husband's next wife became suspicious of Wife and encouraged Husband to hire a private investigator. In doing so, Husband learned that Wife was 10 years older than she claimed, so he filed a petition for bill of review to set aside the divorce, obtain an annulment, and seek damages. Husband, who had wanted children of his own, claimed he would not have married Wife if he had known how old she was. He blamed her age for the couple's failure to conceive a child. After a hearing, the trial court denied Husband's petition for bill of review. He appealed.

Holding: Affirmed

Opinion: Even if Husband had been able to establish fraud in a trial on the merits, he could not show that his failure to raise a meritorious claim was not due in part on his own fault or negligence. Wife testified that Husband knew or should have known her age prior to the divorce. All of the evidence relied on by Husband in his petition for bill of review was available to him during the marriage in an unlocked file cabinet or on a shared hard drive. Additionally, Wife suffered conditions commonly suffered by women her actual age and not usually suffered by women ten years younger, which should have caused Husband to ask questions.

SCHOOL DISTRICT HAD STANDING TO SEEK INJUNCTION TO PREVENT FATHER FROM SENDING NUMEROUS HARASSING EMAILS.

In re S.V., No. 05-18-00037-CV, 2019 WL 516730 (Tex. App.—Dallas 2019, no pet. h.) (mem. op.) (02-11-19).

Facts: Father, an extremely litigious individual, had been enjoined in a SAPCR modification order from contacting his Children's school except through the Assistant Superintendent of Coppell ISD. While Father was appealing that order on various grounds, Coppell ISD filed a Petition in Intervention seeking to modify or reform the injunction to curtail Father's repeated and abusive use of communications with the Superintendent under the guise of the prior order. After a hearing, during which Coppell ISD introduced 240 pages of emails between Father and the school district, the trial court expanded on its prior injunction to only allow one contact per work week. The order defined "Contact," "Work-Week," "Family Emergency," "Non-Contact," and "Regular School Day." Father appealed.

Holding: Affirmed

Opinion: Contrary to Father's assertion, the trial court with continuing exclusive jurisdiction maintains that jurisdiction notwithstanding a pending appeal of a prior order. The trial court did not lose "plenary jurisdiction" while Father's appeal was pending.

An original suit may be filed at any time by a government entity. Further, a party affected by a SAPCR order may file a suit for modification of that order with the court of continuing exclusive jurisdiction. Because Coppell ISD was

named in the prior order and because it is a government entity, it had standing to file suit. Further, since the prior order, Father sent numerous emails to Coppell ISD of varying length, tone, and timing. His requests made the staff feel uncomfortable, and Father threatened litigation several times. Father ignored instructions that his actions were inappropriate. Father's behavior constituted a material and substantial change and warranted a more detailed injunction.

ALTHOUGH ATTORNEYS IMMUNE FROM FRAUDULENT LIEN CLAIMS FOR ATTEMPTING TO COLLECT JUDGMENT FROM NON-OBLIGOR, ATTORNEYS COULD BE LIABLE FOR SANCTIONS.

Turner v. Williams, No. 01-17-00494-CV, 2019 WL 922057 (Tex. App.—Houston [1st Dist.] 2019, no pet. h.) (mem. op.) (02-26-19).

Facts: Mother and Father had a child, and Mother obtained an order for child support arrearages amounting to $117,622.32. At that time, Father was married to Ex-Wife. A turnover order was ordered that entitled Mother to "issue child support liens and levies in the name of" both Father and Ex-Wife. After receiving notice of the order, Father and Ex-Wife's credit union attached liens to all of their non-exempt property. Ex-Wife moved for the immediate release of her bank account because she was not the obligor. Her motion was denied, and the following month she and Father divorced.

Nearly six years later, Ex-Wife's bank was served with a notice of child-support lien and a notice of child support levy, which identified Father and Ex-Wife as obligors. The notices also informed Ex-Wife that she had ten days to dispute the arrearage and levy, but only two days later (according to Ex-Wife), Ex-Wife's bank deducted the entire balance of her account, which she shared with her daughter. Ex-Wife and her daughter filed suit against Mother and Mother's Attorneys, seeking release of the liens, a judgment that Ex-Wife was not the obligor, a judgment that the liens and levies against her were void, and a request for a permanent injunction. She also raised claims for filing fraudulent liens and for sanctions against Mother's Attorneys.

The parties went to mediation and entered a Rule 11 Agreement providing that they would attempt to agree on undisputed facts and legal questions by a date certain, which they would submit to the court before attempting further mediation. If they could not do so by the date certain, they would file competing motions for summary judgment. They additionally agreed to work in good faith to resolve the dispute and to comply with the deadlines in the agreement. Shortly after the Rule 11 Agreement was signed, Attorneys filed a request for a protective order for discovery requests, a motion to strike Ex-Wife's pleading, and special exceptions. The court held a hearing, granted Attorneys' requests and dismissed with prejudice all of Ex-Wife's claims. Ex-Wife appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Ex-Wife argued that the trial court should not have considered Attorneys' special exceptions or motion to dismiss because they violated the Rule 11 Agreement. The parties' Rule 11 Agreement provided agreed steps to work towards a resolution, but it did not purport to be the exclusive course of action. Thus, the Attorneys did not violate the Rule 11 by filing a motion to dismiss not considered by the Rule 11 Agreement.

Ex-Wife argued the trial court erred in granting the special exceptions. Unlike a motion for summary judgment, which relies on evidence or the absence of evidence, a special exception cannot inject factual allegations that do not appear in the pleadings. Special exceptions cannot rely on evidence extrinsic to the pleadings. Thus, the trial court abused its discretion by sustaining the special exceptions based on res judicata, collateral estoppel, and waiver because those assertions could not be determined without looking at prior pleadings.

Additionally, special exceptions must point out intelligibly and with particularly the defect, omission, obscurity, duplicity, generality, or other insufficient in the allegations. A statement that the plaintiffs failed to state a claim is not a proper special exception—it is a prohibited general demurrer. Thus, the trial court erred in granting Attorneys special exception that Ex-Wife failed to state a claim.

In their special exceptions, Attorneys claimed that acts and statements upon which Ex-Wife relied were privileged. However, they did not identify any special privilege and, thus, did not state the special exception intelligibly and with particularity.

When the trial court sustains special exceptions, it must give the pleader an opportunity to amend the pleading, unless the pleading defect is of a type that an amendment cannot cure. Lawyers are immune from civil liability to nonclients for actions taken in connection with representing a client in litigation. Because collecting a judgment is the kind of conduct an attorney engages in when discharging his duties to a client, the Attorneys here were immune from suit and liability for most of the claims against them. However, this conclusion did not apply with equal force to the motion for sanctions. Attorney sanctions specifically provide for the punishment of attorneys. Because sanctions are meant to punish lawyers, it might have been possible for Ex-Wife to plead some factual basis for the imposition of sanctions. Thus, the trial court erred by dismissing the sanctions claim without giving Ex-Wife a chance to replead.

Further, the trial court erred in granting the Attorneys a protective order against discovery when there was no pending discovery request that could have caused the Attorneys a "particular, specific, and demonstrable injury." Final-

ly, because the award of Attorneys' legal fees was based on the improperly awarded discovery protective order, there was no basis for awarding the fees.