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

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DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TC ABUSED ITS DISCRETION BY REMOVING ARBITRATOR & APPOINTING NEW ARBITRATOR CONTRARY TO PARTIES' ARBITRATION AGREEMENT.

In re M.W.M.**,** ___ S.W.3d ___, No. 05-16-00797-CV, 2017 WL 1245422 (Tex. App.—Dallas 2017, orig. proceeding) (04-05-17).

Facts: The parties' final divorce decree including an agreement to mediate and, if necessary, arbitrate future disputes regarding child custody. After M was arrested for assaulting her new husband, F sought an emergency hearing before the named arbitrator. Subsequently, the arbitrator signed an "Arbitration Order" temporarily suspending M's rights to visitation and possession. More than 2 years later, M filed a motion in the trial court to remove the arbitrator. The court found that the arbitrator had exceeded his authority, removed him as arbitrator, and appointed a new arbitrator. F filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: TFC's arbitration provisions operate alongside the arbitration regime in the Texas General Arbitration Act ("TGAA"). Once parties have consented to arbitrate, they are bound by their agreement except insofar as the agreement is subject to review under the TGAA or other controlling law. Under the TGAA, a court is authorized to appoint an arbitrator if a party requests an appointment *and* (1) the agreement does not specify a method of appointment; (2) the agreed method fails or cannot be followed; or (3) an appointed arbitrator fails or is unable to act and a successor has not been appointed by the parties.

Here, the parties' agreement appointed a specific arbitrator, and he was not unable to act as arbitrator. Thus, the provisions for appointment by the court pursuant to the TGAA did not apply. Whether the arbitrator exceeded his authority was not relevant to whether the court had authority to appoint a new arbitrator.

DIVORCE
PROPERTY DIVISION

THIRD-PARTY DEFENDANTS IN DIVORCE NOT ENTITLED TO ATTORNEY'S FEES AS PART OF JUST-AND-RIGHT DIVISION OF COMMUNITY ESTATE.

Brown v. Wokocha**,** ___ S.W.3d ___, No. 01-15-00759-CV, 2017 WL 1326076 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (04-11-17).

Facts: In an amended counter-petition for divorce, H added claims for fraudulent transfer, IIED, and civil conspiracy and added Wife's three adult daughters from a previous marriage and W's business entities as co-respondents. Subsequently, the trial court granted the daughters a summary judgment, and the remaining issues were tried to the bench. After a final decree was entered, Wife appealed. Among other complaints regarding the property division, Wife argued that the trial court erred in failing to award attorney's fees to the attorney who represented her daughters and business entities.

Holding: Affirmed

Opinion: Without FOF and COL establishing the values attributed to the community estate or reimbursement claims, the appellate court had no way to determine whether TC abused its discretion in dividing the community estate. Additionally, even if the trial court erred in mischaracterizing Wife's separate property, Wife failed to show that such error had more than a de minimus effect on the just and right division.

W cited no authority to support her assertion that third-party defendants in a divorce action are entitled to an attorney's fee award as part of the just and right division of the marital estate.

FIDUCIARY DUTY EXISTED BETWEEN H & W DESPITE LACK OF COMMUNITY PROPERTY.

Hughes v. Hughes, No. 13-15-00496-CV, 2017 WL 1455088 (Tex. App.—Corpus Christi 2017, no pet. h.) (mem. op.) (04-20-17).

Facts: H, 86-years old, & W, 57-years old, had both been married twice before. Before they wed each other, they signed a prenuptial agreement, which they ratified after the marriage. They agreed that no community property would be created during the marriage, and that if any property was jointly obtained, each spouse would own an undivided interest in the jointly acquired asset in an amount equal to the percentage of his or her respective contribution.

Subsequently, H attempted to conduct estate planning, but he & W disagreed about the character of certain assets. H filed for a declaratory judgment to interpret the prenuptial agreement. Shortly after, both parties filed for divorce, and the declaratory action and divorce proceeding were consolidated and tried to a jury.

Evidence showed that, during the marriage, W regularly transferred large sums from H's separate accounts into her own. At trial, H's expert testified about his tracing of the parties' purchases during the marriage. The jury made findings regarding each parties' interest in certain disputed assets and found that Wife committed fraud and breached her fiduciary duty to H, for which H was entitled to damages.

W appealed the judgment, arguing that the evidence did not support the verdict because assets found to be H's separate property were, W contended, gifts to her. W additionally argued that the evidence was legally insufficient to support the jury's finding that she and H owed each other a fiduciary duty because no community property was created during the marriage.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: W failed to establish that any of the disputed assets were gifts. Additionally, of all the assets disputed on appeal by W, only a diamond necklace could be traced to a purchase from an account which the jury found to be her separate property. Thus, TC erred in granting H a directed verdict with regard to the necklace.

Recognizing that a fiduciary duty exists between spouses with regard to their community estate, the appellate court chose not "to read those cases so narrowly as to foreclose that spouses do not owe other fiduciary duties to one another by virtue of the marital relationship." Accordingly, despite the lack of any community property, the evidence was legally sufficient to support the jury's finding that W breached her fiduciary duty to H.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

ARBITRATOR'S AWARD SHOULD HAVE BEEN CORRECTED BY TRIAL COURT BY REMOVING PORTION THAT EXCEEDED ARBITRATOR'S AUTHORITY.

In re S.M.H., ___ S.W.3d ___, No. 14-16-00566-CV, 2017 WL 1366801 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.) (04-13-17).

Facts: M&F's divorce decree incorporated an agreement incident to divorce. The parties later disputed terms relating to F's support obligation. M filed a petition to clarify and enforce F's obligations. F filed a counter-petition asking to modify the long-distance provisions for visitation because he intended to move to another city. The parties agreed to submit their dispute to arbitration. The agreement provided that each party would submit a proposal regarding CS, and the arbitrator would select one without making any changes to the proposal selected. The parties further agreed that the arbitrator, after meeting with the children, would submit a proposal for possession. The arbitrator accepted M's proposal and signed an award that provided for both support and possession. Finding the arbitrator exceeded her authority, the TC vacated the arbitrator's award and held a trial on the merits. After the trial court signed a final judgment, M appealed, arguing that the TC should have confirmed the support portion of the arbitrator's award. F responded, arguing that the appeal was untimely because, he argued, M's notice of appeal should have been filed within 20 days.

Holding: Reversed and Remanded

Opinion: M had a right under the Texas Arbitration Act ("TAA") to bring an interlocutory appeal, but she was not required to do so. M's failure to bring an interlocutory appeal did not mean that her appeal from the final judgment had to be treated as accelerated. Accordingly, M was not required to file her notice of appeal within 20 days, and her notice filed 30 days after the judgment was timely.

Upon review of the arbitrator's award, the court held that the portion of the arbitrator's award that exceeded her authority was clearly severable from the portion that was within her authority. Thus, the award should have been corrected by the TC to remove the portion relating to possession and to retain the portion relating to support.

SAPCR
Temporary Orders

TFC CH. 156 DOES NOT APPLY TO THE MODIFICATION OF TEMPORARY ORDERS IN ORIGINAL CUSTODY PROCEEDINGS.

In re McPeak**,** ___ S.W.3d ___, No. 14-17-00104-CV, 2017 WL 1366672 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (04-13-17).

Facts: M, pro se, & F, represented by an attorney, signed agreed temporary orders during the divorce proceedings, which provided for conservatorship, possession of and access to, and support for the Children. After M hired an attorney, she moved to modify the temporary orders. The TC declined to consider M's motion because she did not file an affidavit that complied with TFC § 156.102. The TC further declined to confer with the 13-year-old Child in chambers. M filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A motion to modify temporary orders in an original custody dispute is not governed by TFC Chap. 156. Thus, when M sought to modify the temporary orders, she was not required to file an affidavit that complied with § 156.102. M was only required to establish that the modification was necessary for the safety and welfare of the children. *See* TFC § 105.001(a).

Additionally, pursuant to TFC § 153.009(a) the TC was required to confer with the 13-year-old Child in chambers on Mother's request.

SAPCR
Parentage

***OBERGEFELL* DID NOT CONFER STANDING UPON WIFE TO MAINTAIN A PARENTAGE CLAIM AS TO CHILD BORN TO OTHER-SPOUSE DURING SAME-SEX MARRIAGE.**

In re A.E., No. 09-16-00019-CV, 2017 WL 1535101 (Tex. App.—Beaumont 2017, no pet. h.) (mem. op.) (04-27-17).

Facts: Two women were married in Connecticut in 2011. One of the women, "Mother," got impregnated through assisted reproduction, but before the Child was born, the couple separated. Subsequently, the other spouse, "Wife," filed petition for divorce and a SAPCR with respect to the Child. Mother filed a motion to dismiss, alleging Wife lacked standing to file a SAPCR. After a hearing, the trial court granted the motion to dismiss and severed the SAPCR from the divorce. Wife appealed, arguing that after *Obergefell*, the Texas statutes regarding parentage should be read gender-neutrally because the fundamental right to marry encompasses the unified whole of rights that inherently emanate from the marital relationship.

Holding: Affirmed

Opinion: When construing statutes, the courts must give effect to the Legislature's intent and not look to extraneous matters. Wife did not meet any of the statutory definitions of "parent." She had not given birth to the Child, and she was not a man. Further, when construing the statutes regarding artificial reproduction, the substitution of the word "spouse" for the words "husband" and "wife" would amount to legislating from the bench.

MISCELLANOUS

MOTHER-HUBBARD CLAUSE IN PLAINLY INTERLOCUTORY ORDER DID NOT CONSTITUTE FINAL ORDER; TEX. R. CIV. P. 199.5 ONLY PERMITS SUSPENSION OF DEPOSITION BASED ON ACTIONS DURING DEPOSITION.

***Wilson v. S&N, LLP*, ___ S.W.3d ___, No. 05-15-01448-CV, 2017 WL 1360204 (Tex. App.—Dallas 2017, no pet. h.) (04-13-17).**

Facts: Shamoun & Norman ("S&N") represented Father in his divorce proceedings but withdrew from the case and was succeeded by Goranson Bain ("GB"). S&N filed a petition in intervention in the divorce seeking unpaid fees from Father. Subsequently, S&N nonsuited the case and refiled in a civil district court. Father filed an answer and a motion to transfer the case back to the family court. The civil court denied the motion to transfer, holding:

> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that [Father's] Motion to Transfer is hereby DENIED, in its entirety.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all relief requested in this case and not expressly granted herein is DENIED.

A few months later, S&N served a deposition notice on Father. GB responded with a request that S&N suspend the deposition, and if S&N would not stipulate to a suspension, GB would suspend the deposition immediately after Father was sworn in. GB asserted that the Denial of Transfer Order constituted a final judgment, and the civil court had lost plenary power over the case a month prior. S&N did not agree to the suspension, and GB suspended the deposition immediately after Father was sworn in. S&N filed a motion to compel and for sanctions, which the civil court heard and granted. The court found that GB was liable for abusing the discovery process and the noncompliance was not justified. GB appealed.

Holding: Affirmed

Opinion: A judgment issued without a conventional trial is final only if it either actually disposes of all claims and parties, or it states with unmistakable clarity that it is a final judgment. A mother-hubbard clause in a plainly interlocutory order is inapt for determining finality where there has not been a trial. Here, the Denial of Transfer Order lacked any clear indication that the trial court intended the order to completely dispose of the entire case. The only issue considered in the hearing was the motion to transfer. The claim for unpaid attorney's fees was still unaddressed. Thus, the order was not final, and the trial court's power had not expired.

Tex. R. Civ. P. 199.5 permits the suspension of a deposition based on events that happen *during* a deposition. Thus, GB could not rely on Rule 199.5 to unilaterally suspend the deposition based on its belief that the civil court lacked plenary power. GB could have filed a motion to quash before the deposition, but it opted not to do so. Rather, GB chose to appear at the date and time of the deposition only to immediately suspend the deposition, causing S&N to incur travel expenses and preparation costs.

Further, unlike sanctions pursuant to Tex. R. Civ. P. 13 or Tex. Civ. Prac. & Rem. Code Chs. 9 and 10, sanctions pursuant to Tex. R. Civ. P. 215.2(b) do not necessarily require a finding of bad faith, unless a trial court imposes death penalty sanctions. That does not mean an extreme monetary sanction would not need to be supported by a bad faith finding, but here, GB did not allege that the $1,837.50 sanction was so sever as to require reversal on that basis.

Finally, there was a direct relationship between the improper conduct and the sanction, because the sanction order set out line item amounts for the specific costs incurred by S&N for GB's failure to quash the deposition.