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

May 9, 2018

GEORGANNA L. SIMPSON, P.C.

1349 Empire Central Drive
Woodview Tower, Suite 600
DALLAS, TX 75247-4042
PHONE 214-905-3739 • FAX 214-905-3799
EMAIL: georganna@glsimpsonpc.com

BETH M. JOHNSON

ATTORNEY AT LAW
1349 Empire Central Drive
Woodview Tower, Suite 600
DALLAS, TX 75247-4042
Phone: 469-509-6253 • Fax: 214-905-3799
EMAIL: beth@bethmjohnson.com

DIVORCE
Alternative Dispute Resolution

PARTIES EXPLICITLY WAIVED RIGHT TO APPEAL IN BODY OF INFORMAL SETTLEMENT AGREEMENT; IMPLEMENTATION OF AN OWELTY LIEN DID NOT SUPPLY AN ADDITIONAL TERM, IT MERELY EFFECTUATED THE AGREED DIVISION OF THE PROPERTY.

Huber v. Huber, No. 04-17-00326-CV, 2018 WL 1831655 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-18-18).

Facts: After years of litigation, the parties reached an informal settlement agreement in their divorce proceeding. In the agreement, Wife was awarded certain real property, and Husband agreed to pay and indemnify and hold Wife and her property harmless from the payment of two loans secured by the real property awarded to Wife. Subsequently, Wife filed a motion to enter, and Husband filed a motion to clarify. Husband asserted that he believed Wife intended to immediately sell the property and that the sale of the property should relieve him of the obligation to pay the loans secured by the property. The trial court disagreed and imposed an owelty lien to secure Husband's obligation to pay the loans. Husband appealed, arguing that the owelty lien supplied a term not agreed to by the parties. Wife responded that Husband had explicitly waived his right to appeal in the parties' agreement.

Holding: Affirmed

Opinion: The parties' agreement provided in one paragraph that they waived their right to appeal unless there was evidence of extrinsic fraud. In another paragraph, they unconditionally waived their right to appeal. Neither party asserted extrinsic fraud. Thus, by the terms of their agreement, both parties waived their right to appeal.

Further, the implementation of an owelty lien on the homestead did not add an additional term to or modify the agreement; rather, it was simply a means of implementing and effectuating the agreed division of the property.

Finally, the parties agreed to submit disputes to the trial court for resolution, so Husband could not later complain of the trial court's resolutions of those disputes.

DIVORCE
Property Division

CONSIDERATION OF *MURFF* FACTORS WARRANTED 75/25 SPLIT IN WIFE'S FAVOR.

Christensen v. Christensen, No. 01-16-00735-CV, 2018 WL 1747260 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (04-12-18).

Facts: Wife filed for divorce after discovering Husband had been using dating sites. During the marriage, Husband managed most of the couple's finances. At the time of divorce, he produced very little evidence to support his assertion of the current state of the couple's finances. Husband was unable to explain certain discrepancies noticed by Wife. Husband admitted to taking his masseuse on vacation with him but denied any romantic involvement with the woman. Husband spent a large amount of community funds on his new home when the couple separated. After a bench trial, the trial court granted the divorce on the grounds of Husband's adultery and awarded Wife a vastly disproportionate division of the community estate. Husband and Wife disagreed on the percentage of the division—Husband believed it was an 80/20 split, while Wife believed it was a 75/25 split. Husband appealed.

Holding: Affirmed

Opinion: While the evidence was disputed, the trial court found that Husband's testimony was not credible, and the trial court did not abuse its discretion in discrediting Husband's evidence.

The trial court found that: (1) Husband had committed adultery and was at fault for the break-up of the marriage; (2) Husband's annual income was over twice Wife's annual income; and (3) Husband had wasted community assets.

DIVORCE
Spousal Maintenance/Alimony

FINDINGS OF FACT: WHO, WHAT, WHERE, WHEN, WHY, AND HOW.

WIFE NOT ENTITLED TO SPOUSAL MAINTENANCE WITHOUT PRESENTING EVIDENCE OF WHAT CONSTITUTED HER MINIMUM REASONABLE NEEDS.

***Howe v. Howe*, ___ S.W.3d ___, No. 08-16-00070-CV, 2018 WL 1737083 (Tex. App.—El Paso 2018, no pet. h.) (04-11-18).**

Facts: After a contentious divorce proceeding, Husband/Father appealed, raising numerous complaints, including the award to Wife of spousal maintenance and court's failure to award him expanded standard possession despite his request for same.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: Because Husband did not request additional findings, the appellate court presumed that any unrequested findings supported the judgment if the evidence was legally and factually sufficient to support the judgment. Further, although the findings were contained within the judgment—and not in a separate document—neither party complained of that error. Thus, the appellate court accepted the findings within the judgment as the findings of fact for the purposes of appeal.

The trial court found the amount of Husband's net resources but did not make a finding regarding Wife's available resources. Further, the record was devoid of any evidence of what constituted Wife's minimum reasonable needs.

WIFE'S TESTIMONY FAILED TO ESTABLISH DILIGENCE IN EARNING SUFFICIENT INCOME TO PROVIDE MINIMUM REASONABLE NEEDS TO SUPPORT AWARD OF SPOUSAL MAINTENANCE.

Quijano v. Amaya, No. 13-16-00485-CV, 2018 WL 1870476 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (04-19-18).

Facts: Husband and Wife were married for over thirty years. Husband was self-employed and operated a pest control business. Wife was not authorized to work in the U.S., but she had a degree in counseling from Mexico. Wife filed for divorce. After a bench trial, the court granted the divorce, divided the marital estate, ordered Husband to pay spousal maintenance for one year, and ordered Husband to pay child support for their minor child. Husband appealed.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: Wife offered no evidence or testimony that she made any attempts to develop the necessary skills to become self-supporting during the period of separation and during the time the suit was pending. She testified that she did not have permission to work in the U.S. She offered no evidence that she sought authorization to do so or to become a legal resident. Further, Wife was wholly unaware of what her monthly expenses were until Husband stopped paying them, and during the proceedings, she paid her expenses with gifts from her father.

WIFE ENTITLED TO SPOUSAL SUPPORT BECAUSE SHE PRESENTED SUFFICIENT EVIDENCE THAT SHE EXERCISED DILIGENCE IN EARNING SUFFICIENT INCOME TO PROVIDE FOR HER MINIMUM REASONABLE NEEDS.

Castillo v. Castillo, No. 13-16-00174-CV, 2018 WL 1960168 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (04-26-18).

Facts: Wife filed for divorce. Three years later, Husband filed for bankruptcy. The bankruptcy court made findings regarding characterization and divided the community estate's assets and debts. The bankruptcy court enjoined the parties from retrying those issues to the family court and directed the parties to try the issue of spousal maintenance to the family court. Neither party appealed the bankruptcy judgment. After a hearing before the trial court, the court granted the divorce and awarded spousal maintenance. On appeal, Husband argued that Wife failed to provide evidence that she exercised diligence in earning sufficient income to provide her minimum reasonable needs during the almost four years since she petitioned for divorce.

Holding: Affirmed

Opinion: Wife had little work experience and did not have any vocational training during the marriage because the parties agreed that it was Wife's job to stay at home with the Children. Wife applied to several jobs with local politicians and worked for a candidate's campaign part-time. She provided the voice for some commercials for a Supreme Court candidate. She was paid a little bit to work as a robocall lady. She worked for Houston Can Academy and was paid for "getting golf teams for their golf tournament." She had an upcoming job with a state representative that would pay $100 a day. Wife intended to serve as an election judge at primary and general elections, which paid $230. Despite efforts to acquire a high-paying job, Wife had been unable to do so possibly because of her lack of experience and training. She had interviewed for several positions. She sought loans to make payments for debts awarded her in the bankruptcy proceeding. Since filing for divorce, she attempted to pursue business opportunities to build her resume in order to support her children.

SAPCR
Procedure and Jurisdiction

TERMINATION ORDER VOID BECAUSE TRIAL COURT LACKED JURISDICTION UNDER UCCJEA.

***In re D.S.*,** ___ S.W.3d ___, No. 05-17-01066-CV, 2018 WL 1835695 (Tex. App.—Dallas 2018, no pet. h.) (04-18-18).

Facts: Mother, who was an attorney, and Father reached an agreement in their divorce proceeding. Mother drafted all the pleadings. Although the parties did not mediate with a mediator, they signed a "mediated settlement agreement" reflecting their agreement. Father signed a voluntary relinquishment of his parental rights and agreed to maintain a life insurance policy with the Child as beneficiary and contribute $3500 a month to a trust account or college savings account for the Child. The trial court signed an order terminating Father's parental rights and a final decree of divorce pursuant to the parties' agreement.

Subsequently, Father filed two petitions for bill of review alleging that both orders were void. Father asserted that Massachusetts was the Child's home state at the time the termination petition was filed, so Texas never had subject matter jurisdiction under the UCCJEA. Further, Father argued that if the termination order was void, then the trial court could not have considered the rights of the Child in the property division, so the property division should be retried.

In its findings of fact and conclusions of law, the trial court found that Massachusetts was the Child's home state at the time of filing. However, the trial court also determined that it could not consider extrinsic evidence when ruling on Father's petition for bill of review and, thus, denied both of his petitions. Father appealed.

Holding: Reversed and Rendered in Part; Affirmed in Part

Opinion: Extrinsic evidence generally may not be used to establish lack of jurisdiction in a collateral attack on a judgment. However, evidence outside the record may be used to collaterally attack a void judgment if the trial court lacked any possible power to act.

The UCCJEA is a subject matter jurisdiction statute. A judgment rendered without subject matter jurisdiction is void. Subject matter jurisdiction cannot be gained through waiver or agreement and must exist at the time a suit is filed. Here, nothing in the record of the termination pleading showed that Texas did not have subject matter jurisdiction under the UCCJEA. Thus, without extrinsic evidence, the trial court would have no basis to grant Father's petition for bill of review.

However, Texas statutorily withdrew a trial court's jurisdiction to make an initial child custody determination if Texas is not the child's home state. Therefore, the "no possible power to act" exception to the no-extrinsic-evidence rule applied, and the trial court should have permitted Father to present extrinsic evidence that the court lacked jurisdiction to render the termination order. Moreover, because the trial court issued a finding that Texas was not the Child's home state at the time the termination petition was filed, the appellate court rendered the termination order void.

Although conservatorship of a child is a factor that can be considered in the division of marital property, any error on conservatorship does not necessarily render the entire divorce decree void. Here, the property was divided pursuant to the parties' agreement, and Father did not show the divorce decree was void for lack of jurisdiction.

MOTHER COULD NOT BE EXCLUDED FROM POSSESSION OF HER CHILD ABSENT A VERIFIED PLEADING OR SUPPORTING AFFIDAVIT.

In re Barrera, No. 03-18-00271-CV, 2018 WL 1916023 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (04-23-18).

Facts: Mother considered giving her Child up for adoption and allowed Petitioners to take the Child home from the hospital after its birth. Subsequently, Mother changed her mind and asked Petitioners to return the Child, but Petitioners refused. Mother asserted that she never signed an affidavit relinquishing her parental rights, but she did sign an affidavit revoking any relinquishment. Petitioners filed a petition to terminate Mother's parental rights, and the trial court signed a TRO preventing Mother from having access to the Child. She filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Except on a verified pleading or an affidavit in accordance with the Tex. R. Civ. P., an order may not be rendered that excludes a parent from possession or access to a child. Petitioner's pleading was not verified, and their affidavit was filed nearly 3 hours after the TRO was signed, and nearly 5 hours after their petition was filed. Moreover, the affidavit acknowledged that Mother revoked any relinquishment of her rights and included no facts supporting allegations that Mother endangered the Child.

SAPCR
Temporary Orders

TEMPORARY ORDERS FOR ATTORNEY'S FEES NOT SUPPORTED WITHOUT EVIDENCE THAT FEES WERE NECESSARY FOR SAFETY AND WELFARE OF THE CHILDREN.

In re Payne, No. 03-17-00757-CV, 2018 WL 1630933 (Tex. App.—Austin 2018, orig. proceeding) (mem. op.) (04-05-18).

Facts: Mother and Father were joint managing conservators of their Children, with Mother having the exclusive right to designate the Children's primary residence. While Mother worked overseas, Father acted as the primary caregiver. When Mother returned, Father filed a SAPCR seeking to be named as the parent with the exclusive right to designate the Children's primary residence. The trial court signed temporary orders limiting Mother's access to the children. At a subsequent hearing, Father sought interim attorney's fees. The trial court signed an order for fees, including partial fees for an anticipated jury trial. Mother filed a petition for writ of mandamus.

Holding: Writ of mandamus conditionally granted

Opinion: Tex. Fam. Code § 105.001(a)(5) allows for temporary orders for the safety and welfare of the child, including payment of reasonable attorney's fees and expenses. Here, however, Father did not present any evidence that attorney's fees were necessary for the safety and welfare of the children. Moreover, at the time of the hearing on attorney's fees, temporary orders had already been issued that limited Mother's access to the Children, so the safety and welfare of the Children had already been addressed before fees were requested.

SAPCR
Possession

FINDINGS OF FACT: WHO, WHAT, WHERE, WHEN, WHY, AND HOW.

FATHER NOT ENTITLED TO EXPANDED STANDARD POSSESSION BECAUSE HE REQUESTED EXPANDED STANDARD POSSESSION TOO LATE—AFTER RENDITION.

***Howe v. Howe*, ___ S.W.3d ___, No. 08-16-00070-CV, 2018 WL 1737083 (Tex. App.—El Paso 2018, no pet. h.) (04-11-18).**

Facts: After a contentious divorce proceeding, Husband/Father appealed, raising numerous complaints, including the award to Wife of spousal maintenance and court's failure to award him expanded standard possession despite his request for same.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: Because Husband did not request additional findings, the appellate court presumed that any unrequested findings supported the judgment if the evidence was legally and factually sufficient to support the judgment. Further, although the findings were contained within the judgment—and not in a separate document—neither party complained of that error. Thus, the appellate court accepted the findings within the judgment as the findings of fact for the purposes of appeal.

Section 153.317 requires the possessory conservator to make the election for expanded standard possession "*before or at the time* of the rendition of a possession order." Here, the court rendered its possession order on February 17, 2016, but did not sign the final decree until a hearing on March 2, 2016, which included a recitation that the divorce had been judicially pronounced and rendered on February 17, 2016. Because Father did not make his election prior to February 17, 2016 and did not challenge the recitation in the decree by post-judgment motion, he made his election too late.

ORDER GRANTING GRANDMOTHER ACCESS AND POSSESSION NOT SUFFICIENTLY SPECIFIC ENOUGH TO BE ENFORCEABLE BY CONTEMPT.

In re Silva, No. 04-18-00112-CV, 2018 WL 1935192 (Tex. App.—San Antonio 2018, orig. proceeding) (mem. op.) (04-25-18).

Facts: An adoption order granting Mother's adoption of three Children referenced an Exhibit A, in which Grandmother was appointed a possessory conservator and was granted a possession schedule. Subsequently, when Mother prevented Grandmother's access to and possession of the Children, Grandmother filed a petition for enforcement by contempt. The trial court assessed a $100 fine for 3 of the violations, confinement in jail for 3 of the violations, and awarded Grandmother her attorney's fees. The trial court suspended commitment and placed Mother on unsupervised community supervision for ten years. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Although it was clear the trial court intended to provide Grandmother with access to and possession of the Grandchildren, Exhibit A never mentioned Mother by name and did not order Mother to take any action or facilitate Grandmother's access or possession. Exhibit A did not specify what consequences applied or what enforcement mechanisms existed if Mother did not comply.

EVIDENCE SUPPORTED ORDER GRANTING FATHER NO VISITATION AND ORDERING HIM TO PAY MONTHLY AND RETROACTIVE CHILD SUPPORT.

***In re J.M.M.*, ___ S.W.3d ___, No. 08-16-00091-CV, 2018 WL 1940558 (Tex. App.—El Paso 2018, no pet. h.) (04-25-18).**

Facts: The OAG filed a petition to adjudicate parentage and to obtain orders for conservatorship of, possession of and access to, and support for the Child. Mother and Father each separate filed counter-petitions. Subsequently, Father's attorney filed a motion to withdraw, which was granted. At a final hearing, Mother and the OAG appeared, but Father did not. After the presentation of evidence, Mother was appointed managing conservator. Father was appointed possessory conservator with no visitation and was ordered to pay monthly and retroactive child support. Some months later, Father filed a restricted appeal challenging the sufficiency of the evidence.

Holding: Affirmed

Opinion: Because the Child was only 18 months old, the presumption that a standard possession order is in a child's best interest did not apply. Mother testified she cared for the Child and provided health insurance, while Father had not provided any support, had not attempted to visit the Child or contact her, and asked his attorney to discuss with Mother's attorney the possible termination of Father's parental rights. This evidence supported the trial court's determination that it was in the Child's best interest to suspend access and possession until Father presented himself to the court.

Mother subpoenaed Father's commissions and records to show that he worked as a real estate agent and earned in excess of $73,000 in 2014 and that amount was approximately what he made regularly. Additionally, Mother testified that Father had another Child that should be considered in calculating his support obligation. Although the information provided was "imprecise," the information was sufficient to support the child support order.

Retroactive child support is presumed reasonable and in the best interest of the Child if it does not exceed the amount that would have been due for the prior four years.

TRIAL COURT'S FAILURE TO ISSUE FINDINGS REGARDING DEVIATION FROM CHILD SUPPORT GUIDELINES WAS HARMLESS ERROR.

In re Q.D.S., No. 04-17-00105-CV, 2018 WL 1831686 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-18-18).

Facts: Mother and Father entered an agreed order providing that no child support was due. However, after two modifications, both initiated by the OAG, Father was ordered to pay monthly child support, and an order was entered finding Father in arrears. Father appealed, arguing in part that the trial court erred in ordering child support retroactive to a date before the initiation of the most recent modification proceeding and that the trial court failed to issue findings pursuant to the Texas Family Code when the award deviated from the guidelines.

Holding: Affirmed

Opinion: Retroactive child support is available in two circumstances. Father correctly asserted that Tex. Fam. Code § 154.009 did not apply because child support had been previously ordered. However, in this case, retroactive child support was available under Tex. Fam. Code § 154.401(b), which allows retroactive support back to the earlier of the date of service or the appearance in the suit to modify. Although the retroactive support was ordered back to April 1, 2015, and the modification petition was not filed until April 23, 2015, the parties had signed an agreement that "[a]ny modification in child support is to be retroactive to April 1, 2015." Accordingly, the trial court did not abuse its discretion in awarding child support retroactive to April 1, 2015.

A trial court must issue findings on a child support award if the award deviates from the guidelines. Thus, although Father's request was untimely, the trial court was still required to issue findings. Nevertheless, the record clearly established the basis for determining Father's income, net resources, and child support obligation. Therefore, Father was not required to guess upon the basis for the award and was not harmed by the trial court's failure to issue findings.

EVIDENCE SUPPORTED AWARDING MOTHER CHILD SUPPORT FOR AN ADULT DISABLED CHILD WHO LIVED AWAY FROM HOME BUT WHO REQUIRED SUBSTANTIAL CARE AND SUPERVISION.

In re C.J.N.-S., No. 13-14-00729-CV, 2018 WL 1870430 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (04-19-18).

Facts: The Child moved out at the age of 20 but had medical problems that started several years before age 18. She had a job caring for children, but she lost her job when she was diagnosed with gastroparesis, which required daily medication and the use of a feeding tube. Mother assisted the Child three days a week with chores and household tasks. Mother transported the Child to and paid for at least 23 medical appointments. Mother asked Father for financial assistance, but he refused. Mother filed a petition for adult disabled child and medical support. Father asserted that Mother lacked standing because she was not the Child's court-ordered guardian. The trial court found Mother had standing and awarded her support. Father appealed, and the court of appeals agreed with Father that Mother lacked standing and dismissed the case. Mother petitioned to the Texas Supreme Court, which determined Mother—as the Child's parent—had standing to seek support. On remand, the appellate court was asked to address Father's issues regarding the sufficiency of the evidence to support the support order.

Holding: Affirmed

Opinion: Although the Child lived away from her parents and had a job for eight months, she was living with a boyfriend at that time. She lost her job when her employer learned of her diagnosis. Mother spent 16–20 hours a week assisting the Child with chores, and Mother drove the Child to appointments because the Child was unable to drive. Father cited no authority to support his assertion that Mother needed to show that the Child needed care 24 hours a day, 7 days a week.

When determining adult disabled child support the court should consider:

- any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
- whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;

- the financial resources available to both parents for the support, care, and supervision of the adult child; and
- any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.

Here, Father did not provide any care for the Child and only paid a little over $1000 towards a health savings account, while the outstanding medical debts exceeded $70,000. Mother had lost her job due to the amount of time she had spent caring for the Child. Additionally, Mother had attempted to obtain government benefits for the Child but was never approved.

EVIDENCE SUPPORTED ORDER GRANTING FATHER NO VISITATION AND ORDERING HIM TO PAY MONTHLY AND RETROACTIVE CHILD SUPPORT.

***In re J.M.M.*, ___ S.W.3d ___, No. 08-16-00091-CV, 2018 WL 1940558 (Tex. App.—El Paso 2018, no pet. h.) (04-25-18).**

Facts: The OAG filed a petition to adjudicate parentage and to obtain orders for conservatorship of, possession of and access to, and support for the Child. Mother and Father each separate filed counter-petitions. Subsequently, Father's attorney filed a motion to withdraw, which was granted. At a final hearing, Mother and the OAG appeared, but Father did not. After the presentation of evidence, Mother was appointed managing conservator. Father was appointed possessory conservator with no visitation and was ordered to pay monthly and retroactive child support. Some months later, Father filed a restricted appeal challenging the sufficiency of the evidence.

Holding: Affirmed

Opinion: Because the Child was only 18 months old, the presumption that a standard possession order is in a child's best interest did not apply. Mother testified she cared for the Child and provided health insurance, while Father had not provided any support, had not attempted to visit the Child or contact her, and asked his attorney to discuss with Mother's attorney the possible termination of Father's parental rights. This evidence supported the trial court's determination that it was in the Child's best interest to suspend access and possession until Father presented himself to the court.

Mother subpoenaed Father's commissions and records to show that he worked as a real estate agent and earned in excess of $73,000 in 2014 and that amount was approximately what he made regularly. Additionally, Mother testified that Father had another Child that should be considered in calculating his support obligation. Although the information provided was "imprecise," the information was sufficient to support the child support order.

Retroactive child support is presumed reasonable and in the best interest of the Child if it does not exceed the amount that would have been due for the prior four years.

SAPCR
MODIFICATION

TRANSFER OF CHILD SUPPORT PORTION OF FATHER'S MODIFICATION PROCEEDING TO ILLINOIS NOT PERMISSIBLE UNDER UIFSA.

***In re Meekins*, ___ S.W.3d ___, No. 01-17-00696-CV, 2018 WL 1801321 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (04-17-18).**

Facts: Mother, who lived in Texas, travelled frequently for work and met Father in Illinois, where he lived. The couple had a Child who lived in both Texas and Illinois. At some point, a Texas court signed orders adjudicating Father as the father, appointing the parents joint managing conservators, awarding Mother the exclusive right to designate the Child's primary residence, granting Father a possession schedule, and ordering Father to pay child support. Despite the orders, the Child continued to spend a large portion of her time in Illinois, though the parents disputed the amount of time spent in each state. Father filed a modification suit and a motion to transfer the case to Illinois, asserting that the Child's primary residence was in Illinois. Over Mother's objections, the trial court transferred the entire case. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted in Part; Denied in Part

Opinion: While there was conflicting evidence as to whether Texas was an inconvenient forum, the trial court had discretion to believe Father's evidence and to transfer the custody issues to Illinois under UCCJEA. However, under UIFSA, once a Texas Court that has jurisdiction enters a support decree, that court is the only court entitled to modify

the decree as long as it retains continuing, exclusive jurisdiction. A court of another state may enforce the Texas support decree, but that court has no authority to modify the support decree so long as one of the parties remains in Texas, the issuing state. UIFSA, unlike the UCCJEA, provides no mechanism for the issuing tribunal of a support order to decline to exercise continuing exclusive jurisdiction and transfer jurisdiction to modify a support order to a court in another state.

COUNSELOR'S AFFIDAVIT SUFFICIENT TO SUPPORT ORDER EXCLUDING PARENT FROM HAVING ACCESS TO THE CHILD.

In re K.M., No. 12-18-00044-CV, 2018 WL 1837029 (Tex. App.—Tyler 2018, orig. proceeding) (mem. op.) (04-18-18).

Facts: A final order based on an MSA appointed the parents joint managing conservators. Subsequently, Father filed a petition to modify and requested an ex parte TRO. He attached an affidavit of an LPC, who averred that she observed Mother's interactions with the Child and that Mother projected herself as a victim of Father and his family, discussed Father with the Child in an inappropriate manner, was unable to discern what was appropriate behavior for a mother figure, had very blurred boundaries, and showed a clear desire for revenge against Father for which she manipulated the Child to achieve. The trial court granted the TRO, and Mother filed a petition for writ of mandamus.

Holding: Writ Denied

Opinion: An order excluding a parent from possession or access to a child must be supported by a verified pleading or supporting affidavit. Here, the petition was filed with an affidavit from a licensed professional counselor that included sufficient facts to support the temporary order.

SAPCR
Child Support Enforcement

FATHER CONFINED TO COUNTY JAIL FOR FAILING TO PAY CHILD SUPPORT ENTITLED TO BE CONSIDERED FOR GOOD-CONDUCT CREDIT.

In re Harris, No. 06-18-00015-CV, 2018 WL 1734294 (Tex. App.—Texarkana 2018, orig. proceeding) (mem. op.) (04-11-18).

Facts: Father was found in contempt for failing to pay child support and sentenced to confinement. Father argued that he had served 130 days of his 180-day sentence and was being denied equal protection under the law because the sheriff denied good-time credit on his sentence.

Holding: Writ of Habeas Corpus denied

Opinion: Tex. Code Crim. Proc. art. 42.032 § 2 allows a county sheriff to adopt a policy affording good-conduct time credit to those in ordinary jail. However, even though Father was entitled to be considered for good-time credit, he failed to present a record to support this claim for relief.

SAPCR
Family Violence/Protective Orders

REGARDLESS OF PROTECTIVE ORDER AGAINST MOTHER, COURT ENTITLED TO RECEIVE FATHER'S PHYSICAL ADDRESS IN CAMERA

In re OAG, No. 05-18-00086-CV, 2018 WL 1725069 (Tex. App.—Dallas 2018, orig. proceeding) (mem. op.) (04-10-18).

Facts: Mother and Father agreed to a protective order against her. The parties additionally agreed that Mother's possession of the Children would be supervised. Mother was ordered to pay child support, but because she did not do so, the parties agreed to a judgment for arrearages. Over the next few years, both parents sought modifications. In a motion, Mother complained that she had not seen the Children in two years and that, although Father had been instructed to work towards reunification, he had not done so. During a hearing, at which Father did not appear, the trial court asked if anyone knew where the Children were. Neither Mother nor the OAG knew. The judge expressed concern with continuing a child support obligation for someone who had "disappeared" and "where we don't even know where the children are or if they're alive." The court noted that the "last thing we heard" was one child was suicidal and was or-

dered to undergo a psychological evaluation. Thus, the trial court signed an order requiring the OAG produce Father's address and phone number to the court in camera. The OAG appealed, arguing that due to the protective order, it was prohibited from releasing Father's contact information.

Holding: Wirt of Mandamus denied in part and conditionally granted in part

Opinion: The Texas Family Code provides that a Title IV-D agency may release privileged or confidential information to administer child support. However, the Code also prohibits releasing information of a person's physical location if a protective order has been entered with respect to the person and if there is reason to believe that the release of the information may result in harm. No one disputed that Mother was not entitled to receive the information. The record showed that the trial court was concerned about the health and safety of the children, given that no one before the court knew the children's location or welfare. The statute's purpose is to protect the Children and Father from the release of information to Mother, not to protect the children and Father from the release of the information to the court with continuing, exclusive jurisdiction.

PROTECTIVE ORDER SUPPORTED BY IMPLIED FINDING THAT FAMILY VIOLENCE WAS LIKELY TO OCCUR IN THE FUTURE.

In re M.I.W., No. 04-17-00207-CV, 2018 WL 1831678 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-18-18).

Facts: During a temporary orders hearing, evidence established Father had used methamphetamines, abused Mother, and attempted to kill Mother. The trial court signed a protective order in favor of both Mother and the Child. Father appealed, arguing in part that the trial court erred in failing to make an express finding that family violence was likely to occur in the future and that the written order conflicted with the oral pronouncement.

Holding: Affirmed

Opinion: Although the Tex. Fam. Code requires a finding that family violence is likely to occur in the future, there is no requirement that finding be express. Further, Father did not properly request findings of fact and conclusions of law. Moreover, the evidence supported an implied finding that family violence was likely to occur in the future.

The trial court orally granted a protective order in favor of Mother. The written order granted a protective order in favor of both Mother and the Child. The written order did not "conflict" with the oral pronouncement, and even if there was a conflict, a written order prevails over a conflicting oral pronouncement.

MISCELLANOUS

FATHER FAILED TO ESTABLISH ERROR IN THE ADMISSION OR EXCLUSION OF EVIDENCE DURING JURY TRIAL.

In re C.F.M., No. 05-16-002865-CV, 2018 WL 1704202 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (04-09-18).

Facts: Father filed for divorce in 2009. Father had a narcissistic personality disorder with antisocial traits. He and Mother had two Daughters. One of the Daughters made an outcry of sexual abuse against Father, but the Daughter later recanted. The trial court rendered temporary orders that Father's access to the Daughters be supervised. Asserting that supervised possession was hard on the Daughters, Father failed to consistently exercise his access. By the time of trial, he had gone over two years without seeing the Daughters as provided in the court order. Despite the orders, Father saw one of the Daughters at least twice unsupervised by showing up at sporting events. Over the course of the proceedings, Father failed to comply with many of the court's orders and was subjected to discovery sanctions. Father was twice jailed for contempt but was released after petitioning for writs of habeas corpus. After a jury trial, Mother was appointed managing conservator, Father was appointed a possessory conservator with supervised possession, and Father was found to have committed fraud with damages to Mother of approximately $1.1 million.

Holding: Affirmed

Opinion: Father argued that the trial court erred in excluding his therapists as an expert witness as a discovery sanction. However, Father did not challenge any of the findings issued by the trial court supporting the exclusion.

Father argued the trial court erred by admitting evidence that he assaulted a fellow student at SMU 25 years before the trial. However, Mother's attorney asked Father about the alleged assault, and Father denied it. Questions asked by attorneys are not evidence, and Father did not object to the question on the ground it had no basis in fact and was unfairly prejudiced. Father objected only on relevance grounds.

Father complained of the admission of evidence that he was arrested and charged with criminal fraud. However, his objection to documentary evidence supporting the claim was sustained, and no testimony addressed an arrest or charges. Father admitted without objection that he switched tags on a shirt in a department store. Further, the evidence was relevant to the issues of his narcissistic and antisocial tendencies.

Father complained of the admission of a 911 call from his attorney's office about him exhibiting rage. Father asserted the evidence was "rank hearsay" but cited no authority to support that assertion. He further offered no evidence why it was not admissible under the public records exception to hearsay.

Father complained of the admission of evidence of a civil suit against him because the judgment against him was reversed on appeal. However, Father cited no authority to support why the reversal would make the evidence inadmissible. Moreover, Father had claimed that the judgment was the basis for his failure to pay child support and, thus, was relevant to the issues at trial.

Father complained of the admission of evidence of a lawsuit in which he was accused of "fraud" because the claims were "immediately dismissed." Father cited no authority to support why the dismissal would make the evidence inadmissible. Further, the evidence was used as impeachment evidence; the claims included appropriating embezzled funds, conversion, conspiracy, unjust enrichment, and money had and received, not fraud, and evidence showed the case was pending for four to sixteen months and was not immediately dismissed.

Father complained of the admission of evidence that he shoulder checked two women in his gated community. However, when the issue was first addressed, Father's objections were sustained. The second time the issue came up, testimony of the court-appointed psychiatrist was entered without objection. Thus, the issue was not preserved for appeal.

Father complained of the admission of evidence of his prior bad acts, asserting that the evidence was inadmissible character evidence under TRE 404(b). However, the evidence was used to support Mother's position that Father had a narcissistic personality disorder and antisocial traits. Additionally, although on appeal Father complained the evidence was inadmissible under TRE 608 and 609, he failed to raise those objections to the trial court.

Father complained that certain prior court orders should not have been admitted because they included court findings and, thus, were judicial testimony. However, the Texas Supreme Court has held that findings are not testimony but are comments on the weight of the evidence. While such statements should have been redacted, Father failed to raise that complaint to the trial court, and thus the issue was not preserved for appeal.

Father complained of the exclusion of Mother's bankruptcy plan in his bankruptcy pleading for the purpose of showing characterization of assets. He asserted that Mother's plan was an admission by party opponent and that Mother opened the door to the evidence by addressing the bankruptcy in her case in chief. Father failed to raise the party-opponent-admission argument to the trial court, so that argument was not preserved. Additionally, Mother relied on the bankruptcy documents solely to establish Father's untruthfulness because the assets included in his bankruptcy schedules did not match the assets disclosed in his inventory and appraisement in the divorce proceeding. Therefore, Mother did not open the door to use the evidence for characterization purposes. Moreover, the bankruptcy schedules did not include any tracing of Father's alleged separate property and, thus, could not be considered clear and convincing evidence to support his separate property claims.

Father complained that the trial court erred in allowing the amicus attorney to participate in the trial beyond the limits of the Family Code. However, contrary to Father's assertion, the amicus did not testify, rather the amicus offered a recommendation at the end of the trial. Moreover, the trial judge instructed the jury that argument of attorneys was not evidence and that only testimony given in the witness stand was to be construed as evidence.

Father further complained that the trial court erred in admitting emails from the amicus attorney as evidence because the emails constituted improper testimony. Father only preserved error as to one email that was admitted. Even if the trial court erred in admitting that email, Father failed to show how the admission of that email probably caused the rendition of an improper judgment.

ABUSE OF DISCRETION TO AWARD ALL COSTS, FEES, AND EXPENSES INCURRED BY WIFE IN THE FUTURE ENFORCEMENT AND COLLECTION OF JUDGMENT WHEN NO EVIDENCE SUPPORTED SUCH REQUEST.

Riley v. Riley, No. 05-17-00385-CV, 2018 WL 1790067 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (04-16-18).

Facts: The parties' divorce decree required Husband to pay attorneys' fees to Wife's attorneys, but he failed to do so. Wife filed a motion for enforcement by contempt. The trial court granted Wife a judgment for the fees, pre- and post-judgment interest, reasonable attorney's fees incurred in the enforcement proceeding, and "all costs, fees, and expenses, including reasonable and necessary attorneys' fees incurred by [Wife] in the enforcement and collection of this Judgment." Husband raised a number of complaints on appeal, including a complaint that the evidence did not support an award of future costs and fees. Wife responded that because Husband failed to raise that complaint to the trial court, it was waived for appeal.

Holding: Reversed and Rendered in Part; Affirmed in Part

Opinion: In a civil nonjury case, a complaint regarding the legal or factual insufficiency may be made for the first time on appeal. Wife presented no evidence respecting future costs, fees, and expenses.

MOTHER'S NOTICE OF RESTRICTED APPEAL FILED 6 CALENDAR MONTHS AFTER THE ORDER WAS TIMELY.

In re A.B.S., No. 04-17-00642-CV, 2018 WL 1935508 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-25-18).

Facts: Father filed a SAPCR and obtained a default order. Six months later, Mother filed a notice of restricted appeal. Father argued that Mother notice of restricted appeal was untimely because it was filed more than 180 days (6 months x 30 days) after the order was signed.

Holding: Reversed and Remanded

Opinion: A restricted appeal must be filed within 6 months of the order from which it complains. The Tex. Gov't Code defines a "month" as a calendar month. Thus, because the order was signed on April 4, Mother's notice of appeal filed on October 4 was timely.

Although Father asserted Mother was personally served, the only documentary evidence regarding service was a docket sheet entry that showed a return of service months after the order was signed. A failure to strictly comply with rules of service is an error apparent on the face of the record.

NEW TRIAL GRANTED BECAUSE HUSBAND FAILED TO PRESENT VALUES OF COMMUNITY ESTATE'S ASSETS WHEN OBTAINING DEFAULT DECREE.

Chapa v. Chapa, No. 04-17-00345-CV, 2018 WL 1934240 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (04-25-18).

Facts: Husband filed for divorce and served Wife with the petition, but Wife did not file an answer. Subsequently, Husband obtained a default divorce decree. Three months later, Wife filed notice of a restricted appeal.

Holding: Reversed and Remanded

Opinion: In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer. Husband presented evidence of which assets were to be awarded to which party, but he presented no evidence as to the value of any of those assets. Thus, error was apparent on the face of the record.

EVIDENCE OF LACK OF CURRICULUM AND ISOLATION OF CHILD SUPPORTED ORDER THAT CHILD ATTEND PUBLIC SCHOOL RATHER THAN BEING HOMESCHOOLED BY MOTHER.

In re M.C.K., No. 14-17-00289-CV, 2018 WL 1955065 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (04-26-18).

Facts: When the Child was an infant, orders were entered that gave Mother the exclusive right to make educational decisions for the Child. When the Child was four years old, Father filed a motion to enforce visitation. Mother responded with a petition to modify, seeking supervised visitation for Father. About a year later, the parties attended mediation and were able to resolve many of their issues, but they could not agree on an unpleaded issue: who would make decisions regarding the child's education. Mother wanted to homeschool the Child, but Father wanted the Child to go to public school. The parties agreed that the issue would be tried to the court. At a hearing, Father sought to present the education issue, but Mother argued that Father had no affirmative pleading on file. The trial court granted Father's oral motion for a trial amendment.

Mother admitted that she followed no curriculum when homeschooling her older children and that she simply looked for used textbooks online or in secondhand stores. Mother could not name any child with whom the Child was friends. When Father asked the Child about what she was learning, the Child "clammed up" and would not say anything.

The trial court determined that the Child should attend public school unless the parents could agree otherwise. Mother appealed.

Holding: Affirmed

Opinion: While Father never filed a petition to modify, he did file a motion for enforcement. In the family law context, Father's motion constituted a pleading that could be amended to include his request for the right to make decisions regarding the Child's education. Father was permitted to amend his pleading so long as it would not prejudice Mother. Mother admitted that there was no surprise related to the requested amendment. Her only concern was that Father would be required to establish a material and substantial change. Further, although the amendment was not reduced to writing, Mother failed to raise this objection to the trial court.

Although a change in age alone is insufficient to establish a material and substantial change, Father showed that the parties had never made a plan regarding the Child's education and that the Child's needs were not being met. Additionally, Mother was not adhering to any curriculum, and the choice to homeschool was isolating the Child.