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

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GRANDPARENTS NOT REQUIRED TO FILE TEX. FAM. CODE § 153.432 AFFIDAVIT BECAUSE THEY HAD STANDING UNDER § 102.003(a)(9).

In re C.D.M., No. 11-15-00319-CV, 2016 WL 5853261 (Tex. App.—Eastland 2016, no pet. h.) (mem. op.) (10-06-16).

Facts: The Child lived with Grandparents from birth until the age of three. Grandparents filed an original petition to be appointed the Child's joint managing conservator, alleging standing based on Tex. Fam. Code § 102.003(a)(9). Subsequently, Grandparents filed an amended petition that alleged standing under both § 102.003(a)(9) and § 153.432. They attached an affidavit alleging that denial of their possession or access to the Child would significantly impair the Child's physical health or emotional well-being. Father filed a motion to dismiss Grandparents' claims because their affidavit did not contain supporting facts sufficient to satisfy § 153.432. The trial court granted Father's motion and entered an order appointing Mother sole managing conservator. Grandparents appealed, arguing that the trial court erred in dismissing their suit because they had standing under § 102.003(a)(9).

Holding: Reversed and Remanded

Opinion: Grandparents sought standing based on Tex. Fam. Code § 102.003(a)(9)—the time during which they had actual care, control, and possession of the Child—not based on their biological relationship to the Child. Thus, the affidavit requirement of Tex. Fam. Code § 153.432(c) (the grandparent access statute) did not apply.

FATHER'S ORIGINAL COUNTER-PETITION FILED TWELVE DAYS BEFORE TRIAL NOT SURPRISE TO MOTHER BECAUSE ADDED CLAIMS HAD COMMON ELEMENTS WITH MOTHER'S AND REQUIRED SAME EVIDENTIARY PROOF.

In re Rodriguez, No. 13-16-00411-CV, 2016 WL 5846544 (Tex. App.—Corpus Christi 2016, orig. pro) (mem. op.) (10-04-16).

Facts: In an agreed divorce decree based on an MSA, the parents were appointed joint managing conservators, and neither was ordered to pay child support. Mother had the exclusive right to designate the Children's primary residence within a single county. Subsequently, Mother filed a motion to modify, asserting that Father had not been involved in the Children's lives or contributed to them financially. Mother argued that the agreement to no child support was based on a presumption that both parents would be equally involved with the Children and would be able to maintain their relatively equal incomes. Father initially filed a general denial. The trial court entered a docket control order setting the case for trial and stating that the case would be tried by a jury if there are any issues to which a party had the right to a determination by jury.

Three weeks before trial, Mother filed her second amended petition. Ten days later, Father filed a supplemental answer and counter-petition seeking the exclusive right to designate the Children's primary residence and to prevent the Children from contact with Mother's boyfriend. Mother filed a motion to strike Father's counter-petition, asserting he requested his relief "for the first time" "on the eve of trial." The trial court struck Father's pleading on the basis that it served as a surprise. Father filed a petition for writ of mandamus to challenge the striking of his pleading and the trial court's refusal to allow the issue of attorney's fees to be tried to a jury.

Holding: Writ of Mandamus Conditionally Granted; Appeal Dismissed as Moot

Opinion: A trial court has no discretion to refuse an amended pleading unless (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is

prejudicial on its face, and the opposing party objects to the amendment.

Here, the trial court's docket control order contained no restriction regarding amended pleadings, and Father filed his amended pleading more than seven days before trial. No leave of court was necessary under the Texas Rules of Civil Procedure. Further, because Father's counterpetition addressed the same central issue as Mother's petition, she could not claim surprise.

Because a jury determination on attorney's fees is merely advisory, the trial court did not err in refusing Father's request to submit those issues to a jury.

SAPCR
PATERNITY

FATHER NOT A "DONOR" BECAUSE SPERM NOT PROVIDED TO A LICENSED PHYSICIAN FOR ASSISTED REPRODUCTION, SO ENTITLED TO BE APPOINTED A JMC OF THE CHILD.

***In re P.S.*,** ___ S.W.3d ___, No. 02-16-00008-CV, 2016 WL 6277374 (Tex. App.—Fort Worth 2016, no pet. h.) (10-27-16).

Facts: Mother (a gay woman) and Father were friends. Mother wanted to have a child and asked Father if he would provide sperm. Father agreed and provided sperm in a sterile cup directly to Mother. Mother artificially inseminated herself and successfully conceived a child. Father attended doctor's appointments during the pregnancy and was present for the birth. He signed an acknowledgment of paternity and the Child's birth certificate. He was involved in the Child's life for a few months. Father lost contact with Mother when she lost her phone. Mother got married and moved to a new home.

Mother rescinded the acknowledgement of paternity and mailed Father a form requesting that he voluntarily relinquish his parental rights. Father sought assistance from the OAG to adjudicate his paternity. At trial, Father testified that Mother knew he wanted children but did not anticipate that he would ever marry. Father asserted that he and Mother agreed that he would be a father to the Child. Mother testified that Father agreed to be a sperm donor. Mother's new wife asked the trial court to find that Father was a "donor," so she could adopt the Child. The trial court appointed Mother and Father joint managing conservators, ordered Father to pay child support, and entered a possession order. Mother appealed, arguing that a "donor" is not a "parent."

Holding: Affirmed

Opinion: The Texas Family Code defines a "donor" as one who provides sperm to a licensed physician to be used for assisted reproduction. Here, the sperm was provided directly to Mother and not to a licensed physician, so Father did not meet the definition of a donor and was not prohibited from being named the Child's parent.

SAPCR
POSSESSION

FATHER'S HISTORY OF VIOLENCE SUPPORTED RESTRICTED POSSESSION ORDER.

***In re N.P.M.*,** ___ S.W.3d ___, No. 08-15-00172-CV, 2016 WL 5812640 (Tex. App.—El Paso 2016, no pet. h.) (10-05-16).

Facts: Mother and Father had one Child together. Father had five other children. During a SAPCR proceeding regarding the Child, the trial court heard testimony regarding Father's history of aggression with his other children, which resulted in Father's arrest for assault. Father had also been physically, mentally, and sexually abusive towards Mother in the presence of the children. Father's oldest daughter had a habit of running away, and Father showed a lack of interest in her whereabouts. Additionally, the Child was regularly returned to Mother looking dirty and neglected. The trial court appointed the parents as joint managing conservators and gave Father a restricted possession schedule. Father appealed arguing that there was no evidence to support deviating from the standard possession order.

Holding: Affirm

Opinion: The evidence supported restricting Father's visitation because of his history or pattern of family violence and a history or pattern of past or present child neglect, emotion, and physical abuse directed toward his children and specifically the Child.

SAPCR
MODIFICATION

REGARDLESS OF FATHER'S VIOLATION OF THE GEOGRAPHIC RESTRICTION ON THE CHILD'S RESIDENCE, EVIDENCE SUPPORTED MODIFICATION TO GRANT MOTHER THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S PRIMARY RESIDENCE.

In re R.H.C., No. 09-15-00429-CV, 2016 WL 6128055 (Tex. App.—Beaumont 2016, no pet. h.) (mem. op.) (10-20-16).

Facts: Mother and Father had been appointed joint managing conservators, and Father had the exclusive right to designate the Child's primary residence within a specific county and counties contiguous to that county. Mother was granted a possession order that was modified to accommodate her 24-hour shifts as a paramedic.

About two years later, Father filed a petition to modify and attached an affidavit stating that he and the Child had already moved outside the geographic restricted area due to his employment. Mother filed a counter-petition.

Father testified that after moving, the Child had access to a better education, a stable home, and a regular routine. The Child was able to spend more time with him and extended family. The Child was not exposed to Mother's ex-boyfriend's coming and going from the home, and Mother had access to the Child and was able to visit the Child at school. Father admitted that Mother and the Child had a close relationship and that the Child wanted Mother to attend school functions and other events. However, Father did not believe that moving 250 miles away from Mother posed any problems.

Mother testified that her new work schedule allowed her to care for the Child full time. She expressed concerns about the Child's hygiene, diet, and her physical and emotional health while with Father. Mother stated that the Child's demeanor had changed since the move and described the Child as clingy, sad, and withdrawn. Mother wanted to enroll the Child in counseling, but Father refused. Mother further testified that the move had sometimes prevented her from exercising her possession of the Child.

The trial court expressed concerns for the Child's emotional well-being before granting Mother the exclusive right to designate the Child's primary residence under the existing geographic restriction. Father appealed, asserting the evidence did not support a finding that the modification was in the Child's best interest.

Holding: Affirmed

Opinion: Applying the *Holley* and *Lenz* factors, the trial court made a reasonable decision considering the evidence presented. Contrary to Father's contention, no evidence suggested that the trial court's order was based solely on Father's violation of the prior order.

MISCELLANOUS

MOTHER NOT ENTITLED TO RESTRICTED APPEAL—ABSENCE OF NOTICE FROM CLERK'S RECORD OF TRIAL SETTING NOT PROOF OF LACK OF NOTICE.

Richardson v. Sims, No. 01-15-01115-CV, 2016 WL 5787291 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (mem. op.) (10-04-16).

Facts: Father initiated an original SAPCR. Mother and Father both appeared at a temporary orders hearing, after which, the trial court granted Mother the exclusive right to designate the Child's primary residence and ordered Father to pay child support. Subsequently, Mother violated the temporary orders and failed to appear

at a hearing regarding the violations. The trial court modified the temporary orders to give Father the exclusive right to designate the Child's primary residence and suspended Father's child support obligation. A few months later, the case was called to trial. Mother failed to appear, and Father was granted a default judgment, which stated that Mother had made a general appearance, was notified of trial, and failed to appear. Mother filed a notice of restricted appeal.

Holding: Affirmed

Opinion: To be entitled to a restricted appeal, error must be apparent on the face of the record. The law presumes that a trial court hears a case only after proper notice to the parties. If the record is silent as to whether notice of a trial setting was given, no error appears on the face of the record. Further, here, the judgement included a recitation that due notice was given.

WIFE TIMELY FILED MOTION FOR TEMPORARY ORDERS PENDING APPEAL; WIFE PRESENTED NO EVIDENCE TO SUPPORT AWARD OF TEMPORARY SPOUSAL SUPPORT OR TEMPORARY ATTORNEY'S FEES.

***In re Fuentes*, ___ S.W.3d ___, No. 01-16-00366-CV, 2016 WL 5851890 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (10-06-16) (reh'g den.).**

(Note: The appellate court conditionally granted Husband's petition and subsequently denied Wife's motion for rehearing and, in doing so, withdrew and replaced its prior opinion. The only revision made was to vacate the trial court's temporary order—rather than remand—and to order the trial court to enter a new order consistent with the appellate court's opinion.)

Facts: Wife filed for divorce and listed several companies as co-respondents, which she alleged were Husband's alter egos. Additionally, she alleged that Husband had assets under his control with a value in excess of one-billion dollars. Husband did not participate in the trial, and Wife obtained a default judgment that awarded her half the marital estate, $537 million in fraud-on-the-community damages, real and personal property, and shares and interests in the businesses found to be Husband's alter egos. Husband filed a motion for new trial. About the same time, several intervenors from the various businesses filed notices of appeal. More than two months later, the trial court denied Husband's motion for new trial, and Husband timely filed his own notice of appeal. Ten days later, Wife filed in the trial court a motion for temporary orders pending appeal. Husband filed a motion to dismiss Wife's motion, arguing that hers was untimely under the Tex. R. App. P. because it was filed more than 30 days after the intervenors perfected their appeals. The trial court denied Husband's motion and granted Wife's. The court ordered Husband to pay Wife $300,000 per month for spousal support and $50,000 per month for attorney's fees—half of Wife's requested $700,000.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The 30-day deadline to file a motion for temporary orders pending appeal began running with the perfection of Husband's appeal, not with the other parties'. Wife had no reason to seek temporary orders for spousal support until Husband appealed the divorce decree. Thus, her motion for temporary orders pending appeal was timely filed.

Additionally, the order for temporary support was effective immediately and not contingent upon the outcome of the appeal. Thus, Husband lacked an adequate remedy by appeal and was entitled to mandamus relief.

Among other expenses listed in her financial information statement, Wife requested $120,000 a month for security guards but testified that she never felt threatened so as to need security guards; she had no documentation to support her requests for $50,000 for clothing or $200,000 for travel; she requested $30,000 a month for water, lights, telephone, and groceries but admitted she did not personally pay those expenses; she requested $80,000 for medical expenses and loan repayments but had no idea what, if any, debts she owed. Wife admitted she had no personal knowledge of her bills and expenses. Thus, her testimony alone was insufficient to support her claimed monthly expenses. Additionally, there was no evidence that Wife would incur $50,000 a month in attorney's fees or that such an amount was reasonable and necessary.

TEXAS COURTS LACK AUTHORITY TO GRANT GENDER CHANGE ORDERS.

In re McReynolds**,** ___ S.W.3d ___, No. 05-15-01254-CV, 2016 WL 5920779 (Tex. App.—Dallas 2016, no pet. h.) (10-11-16).

Facts: Appellant filed an original petition seeking to change his gender designation from female to male. Appellant asserted that Tex. Fam. Code § 2.005(b)(8) authorized the court authority to grant his requested relief. The trial court held that it lacked authority to change gender identity markers. Appellant appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 2.005(b)(8) provides that an order granting a sex change can be used as proof of identity to acquire a marriage license. That section does not indicate that an order granting a sex change could or would be issued from a Texas court. In the Texas Family Code, while there is a chapter providing procedures for a change of name, there is no similar chapter for a change of gender.

ATTORNEY'S FEES ADEQUATELY SEGREGATED BY USING COLORED HIGHLIGHTERS TO IDENTIFY ON WHICH CASE FEES WERE INCURRED.

In re Marriage of Mobley**,** ___ S.W.3d ___, No. 06-15-00057-CV, 2016 WL 6247009 (Tex. App.—Texarkana 2016, no pet. h.) (10-26-16).

Facts: Two years after their divorce based on an MSA, Wife filed a lawsuit against Husband and his divorce attorneys alleging they breached their fiduciary duty by obtaining information from the IRS without her consent. During discovery for the breach of fiduciary duty case, Wife allegedly uncovered evidence that Husband fraudulently concealed information relevant to the property division. Wife argued that Husband failed to disclose the details of a sale of certain companies during the divorce proceeding. Wife filed a bill of review seeking to set aside the divorce decree. In response to the bill of review, Husband filed a motion to dismiss and a request for attorney's fees. Husband asserted that the companies sold were his separate property and that Wife had no interest in the sale. The trial court granted Husband's motion to dismiss and awarded attorney's fees. Wife appealed.

Holding: Affirmed

Opinion: Wife acknowledged in the MSA that the companies were Husband's separate property, and thus, she had no interest in the transaction. Moreover, Wife received a memo regarding the sale before it was completed and chose not to conduct additional investigation through discovery during the divorce proceeding. Thus, there was no evidence of extrinsic fraud, and Wife was not entitled to a bill of review.

A party who successfully defends a bill of review is entitled to recover attorney's fees in the bill of review proceeding if attorney fees are authorized in the prosecution of the underlying case. Additionally, contrary to Wife's assertion, Husband adequately segregated the fees incurred in the bill of review from those incurred in the breach of fiduciary duty case. In the invoices for fees, work performed in the breach of fiduciary duty case was highlighted in blue, work in the bill of review was highlighted in green, work in both cases was highlighted in pink and then halved, and costs were highlighted in yellow.

WIFE'S APPEAL MOOT BECAUSE SHE VOLUNTARILY NONSUITED CLAIMS AFTER PARTIAL SUMMARY JUDGMENT GRANTED TO HUSBAND.

***Mobley v. Mobley*, ___ S.W.3d ___, No. 06-15-00058-CV, 2016 WL 6247010 (Tex. App.—Texarkana 2016, no pet. h.) (10-26-16).**

Facts: Two years after their divorce based on an MSA, Wife filed a lawsuit against Husband and his divorce attorneys alleging they breached their fiduciary duty by obtaining information from the IRS without her consent. Husband filed a motion for partial summary judgment, which was granted along with an award for his attorney's fees. Subsequently, Wife voluntarily filed a nonsuit, stating "Plaintiff no longer desires to prosecute her claims asserted in this lawsuit" yet also appealed the partial summary judgement and award of attorney's fees.

Holding: Reversed in Part; Affirmed in Part

Opinion: Because a nonsuit effectively moots the merits of the underlying case, nothing remained to be resolved on appeal, and because the nonsuit occurred after the partial summary judgment was entered, the dismissal foreclosed any right Wife may have had to refile those claims later. Thus, while her nonsuit did not dispose of Husband's counterclaims for fees, costs, and sanctions, Wife had nothing left to appeal regarding the partial summary judgment.

The trial court's order awarding sanctions failed to include the basis for attorney's fees as sanctions. Moreover, there was no evidence presented that Wife's claims were brought for an improper purpose, that there were no grounds for the legal arguments advanced, or that the factual allegations lacked evidentiary support. The court noted, "That is not to say that such evidence did not exist—but it was not presented to the trial court."

FATHER ENTITLED TO DE NOVO HEARING BECAUSE TIMELY REQUESTED AND NO WAIVER MADE BEFORE ASSOCIATE JUDGE HEARING.

***In re J.A.P.*, ___ S.W.3d ___, No. 04-16-00271-CV, 2016 WL 6407324 (Tex. App.—San Antonio 2016, no pet. h.) (10-31-16).**

Facts: TDFPS sought to terminate Father's parental rights to one child and to discharge him as managing conservator of another child. An associate judge heard the matter and rendered an order granting TDFPS's requested relief. Father timely filed a request for a de novo hearing. At a hearing on Father's request, TDFPS argued that Father had waived his right to a de novo hearing because his attorney signed the associate judge's order, which provided in pertinent part:

> The Court finds that all parties have waived any objections to the hearing by an Associate Judge, and do hereby waive their right to de novo review pursuant to Section 201.015 of the Texas Family Code.

TDFPS explained that the language was included in all termination orders. The trial court denied Father's request for a de novo hearing, and he appealed.

Holding: Reversed and Remanded

Opinion: A waiver of a de novo hearing must be made before the start of a hearing by an associate judge. Nothing in the record indicated that a waiver was discussed before or during the hearing. Additionally, Father's waiver of any objections to an associate judge hearing the case on the merits did not constitute of a waiver of a de novo hearing. Finally, even if the right to object to a de novo hearing could be waived after a hearing, Father's attorney only signed the order as "approved as to form," which was insufficient to establish a consent decree.