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

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DIVORCE
Procedure and Jurisdiction

ALTHOUGH HUSBAND DESIGNATED TEXAS AS HIS RESIDENCE, NORTH CAROLINA WAS CHILDREN'S HOME STATE AND WAS MORE APPROPRIATE FORUM FOR DIVORCE PROCEEDINGS.

Rust v. Rust, No. 04-17-00674-CV, 2018 WL 4760157 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (10-03-18).

Facts: Husband and Wife married in Texas but soon moved to North Carolina, where their Children were born. Husband was on active duty in the Air Force and designated Texas as his home. Wife filed for legal separation in North Carolina. About a month later, Husband filed an original petition for divorce in Texas. Wife filed a Special Appearance, Plea to the Jurisdiction, Request for Court to Decline Jurisdiction, Objection to Venue, and Original Answer. The trial court found that Texas was not the Children's home state and that Husband did not meet the jurisdictional requirements to maintain a divorce in Texas. The trial court held that North Carolina was a more convenient forum and dismissed Husband's petition. He appealed.

Holding: Reversed in Part; Affirmed in Part

Opinion: A divorce with children is comprised of two actions: a divorce and a custody suit. The appellate court began by addressing the jurisdiction of each separately.

As a member of the military, Husband could designate his U.S. home address. Husband designated Kendall County, Texas. Thus, as a resident of Kendall County, Husband's divorce petition could be maintained in Texas.

Under the UCCJEA, North Carolina was clearly the Children's home state. That was the state they were born in and the only state in which they lived. Husband's residence was irrelevant to the jurisdictional question because the UCCJEA is the exclusive means for addressing jurisdiction of a child-custody proceeding.

A Texas court may retain or decline jurisdiction over a divorce if jurisdiction of a child-custody determination incidental to the divorce is proper in another state. This is a discretionary decision for the trial court. The evidence supported a finding that North Carolina was a more appropriate forum for the proceedings.

DIVORCE
Spousal Maintenance/Alimony

TRIAL COURT ERRED IN TERMINATING HUSBAND'S SPOUSAL SUPPORT OBLIGATION ON THE GROUNDS SPECIFIED IN THE COURT'S ORDER.

Keller v. Keller, No. 02-17-00466-CV, 2018 WL 4782162 (Tex. App.—Fort Worth 2018, no pet. h.) (mem. op.) (10-04-18).

Facts: In their agreed divorce decree, the parties agreed that Wife was entitled to Chapter 8 maintenance and that Husband would pay her a certain amount each month until the death of either party, Wife's remarriage, or further orders of the court. Additionally, the parties agreed that the obligation would be increased by 2% of Husband's gross income every two years. Three years after the decree, Wife filed a motion to enforce because Husband refused to disclose his salary. Husband counter-petitioned to terminate the support obligation because he argued the order was void. Husband asserted that the parties had not been married for at least ten years, there was no finding of family violence, there was no finding that Wife was disabled, and there was no end date for the obligation. The trial court granted Husband's request explicitly on the grounds requested. Wife appealed.

Holding: Reversed and Remanded

Opinion: Jurisdictional errors may render a judgment void. However, non-jurisdictional error in a divorce decree—such as errors resulting from a court's action that is contrary to the Tex. Fam. Code—render a judgment voidable and may only be corrected through a direct appeal.

Here, because the alleged errors were not jurisdictional, they could not serve as grounds for a challenge to the decree in a collateral proceeding.

Without determining whether the obligation was Chapter 8 maintenance or contractual alimony, the appellate court implied that if the obligation were terminated based simply on "further orders of the court" as permitted in the decree, that termination could be permissible.

TRIAL COURT WITH CONTINUING, EXCLUSIVE JURISDICTION OVER THE CHILD COULD NOT COMPEL ARBITRATION FOR CHILD-RELATED MATTERS.

***In re Ron*, ___** S.W.3d ___, No. 14-18-00711-CV, 2018 WL 5071196 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (10-18-18).

Facts: Father invested in real estate and created businesses for that purpose. During the marriage, Father and Mother signed a partition agreement and created a trust that was settled with property owned by both spouses. Upon divorce, the trial court divided the parties' estate and made orders for the Child. Mother still had an interest in the trust, which still had some of Father's separate property in it. The parties continued to litigate many issues regarding the trust and the Child. Father moved to compel arbitration, and the trial court granted the Father's request. Mother filed a petition for writ of mandamus arguing that the order was void under the Texas Family Code because the trial court had continuing, exclusive jurisdiction over matters that were compelled to arbitration.

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

Opinion: A court acquires continuing, exclusive jurisdiction over matters provided for under Title 5 of the Texas Family Code on rendition of a final order. The exclusive jurisdiction only affects matters covered by Title 5. Here, the divorce decree included orders for the Child, and thus, the divorce court acquired continuing, exclusive jurisdiction over the Child. The arbitration order compelled arbitration of claims that were covered by Title 5, as well as claims that were not. The trial court abused its discretion to the extent that the trial court compelled arbitration over the child-related claims.

Additionally, the trial court could not compel arbitration for those claims that sought to modify the property division awarded in the divorce decree because the trial court's plenary power over the decree had long since expired.

MSA ENFORCEABLE DESPITE TRIAL COURT'S FAILURE TO RENDER JUDGMENT.

Williams v. Finn, No. 01-17-00476-CV, 2018 WL 5071196 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op. on rehearing) (10-18-18).

Facts: After the parties' divorce, Mother filed a petition to modify the parent-child relationship. Mother and Father signed an MSA in that proceeding. Subsequently, additional agreements were reached. Both entered proposed orders to be signed—which differed from each other—and the trial court signed Father's. While Mother's motion for new trial was pending, the parties attended mediation and signed a new MSA that included an arbitration provision. Mother filed a proposed order that granted Mother a new trial, vacated the prior order, and entered a new order based on the new MSA. However, the trial court never signed the proposed order. Many months later, Mother filed another petition to modify the parent-child relationship, in which she sought enforcement of the second MSA. Father filed a notice of withdrawal of consent to the second MSA. Mother filed a motion to compel arbitration, which was granted. Subsequently, the trial court signed a judgment on the arbitrator's award. Father appealed.

Holding: Affirmed.

Opinion: Father argued that the second MSA lost its irrevocable character once the trial court lost its plenary power in the first modification proceeding to enter a judgment on Mother's motion for new trial. However, nothing in Tex. Fam. Code § 153.0071 requires the court to render judgment; merely, it provides that the parties are entitled to one. Nothing in the agreement prevented the parties from seeking other ways of obtaining judgment. The agreement explicitly provided that it was effective on the day it was signed; that it resolved the parties' issues; and that it was irrevocable.

"In his motion for rehearing, [Father] argue[d] that the reasoning in this holding is inconsistent with the reasoning in [the appellate court's] earlier holding that [Mother] could not have appealed the trial court's failure to rule on her untimely amended motion for new trial. In this opinion, [the appellate court] held that [Mother] or [Father] were still within the time to file a notice of appeal after their mediation and that [Mother] could not have complained about the trial court's failure to sign the untimely amended motion for new trial had she elected to file a notice of appeal. These are not inconsistent."

SAPCR
CHILD SUPPORT

MOTHER AND FATHER COULD NOT OBTAIN JUDGMENT ON PROPOSED AGREED ORDER TO REDUCE FATHER'S CHILD SUPPORT AND ARREARAG, WITHOUT A HEARING AND NOTICE TO OAG BECAUSE OAG WAS A PARTY TO THE SUIT.

In re OAG, No. 13-18-00474-CV, 2018 WL 5274147 (Tex. App.—Corpus Christi 2018, orig. proceeding) (mem. op.) (10-23-18).

Facts: A 2010 judgment ordered Father to pay child support to Mother through the Texas Child Support Disbursement Unit. In 2018, Father sent a letter to the trial court that enclosed an agreed order signed by Mother and Father in which the parties agreed to reduce Father's child support and medical support arrearages to zero. The OAG did not receive a copy of the letter or the order before the trial court signed it. Father sent a certified copy of the signed order to the OAG. The OAG filed a petition for writ of mandamus, asserting it was void because the order was not supported by pleadings and because the OAG had not been served or given notice.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: The OAG's decision not to challenge Mother and Father's prior agreed order did not waive its right to challenge the 2018 agreement.

A trial court's failure to comply with notice requirements in a contested case deprives a party of the constitutional right to be present at the hearing and to voice its objections in an appropriate manner, which results in a violation of fundamental due process. No order or judgment dismissed the OAG from the case, and the "Register of Actions" indicated that the OAG was a party. While a waiver of notice is possible, such waiver must be made voluntarily, knowingly, and intelligently.

SAPCR
ADOPTION

ICWA VIOLATES EQUAL PROTECTION CLAUSE AND IS UNCONSTITUTIONAL.

***Brackeen v. Zinke*, ___ F.Supp.3d ___, No.4:17-CV-00868-O, 2018 WL4927908 (N.D. Tex. 2018) (10-04-18).**

Facts: A couple in Texas wanted to adopt an Indian child. The biological parents supported the adoption. A year after the couple took possession of the child, the Navajo nation notified the court that it found a potential alternative placement for the child with non-relatives in New Mexico. The Texas couple noted that moving the child to New Mexico would remove it from the only family it had ever known, including its biological parents. The Texas couple was finally able to adopt the child, but the adoption would be subject to collateral attack for 2 years. The couple stated that although they wished to foster children in the future, they were hesitant to take in any more Indian children.

Plaintiffs from Nevada and Minnesota had similar experiences. They, joined by Texas, Louisiana, and Indiana, asserted that ICWA was unconstitutional and moved for summary judgment on their claims. The states asserted that the statute placed significant responsibilities and costs on state agencies to carry out federal directives. Further, the states argued that the statute requires compliance without regard to the best interest of the child.

Holding: Granted in Part; Denied in Part

Opinion: Initially, the parties disputed the appropriate standard of review. The plaintiffs argued the classification distinction was subject to strict scrutiny, while the defendants—the Indian tribes and the federal government—argued that a rational basis review applied.

The specific classification at issue in this case is an impermissible racial classification. It does not rely on actual tribal membership. Rather, it defines an Indian child as one who is a member "of an Indian tribe" as well as those children simply eligible for membership who have a biological Indian parent. By deferring to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, the ICWA's jurisdiction definition of "Indian children" uses ancestry as a proxy for race and therefore must be reviewed under strict scrutiny.

Here, the federal government relied solely on its argument that the statute was subject to a rational basis review and did not offer any compelling government interest for the racial classification or argue that the classification was narrowly tailored to meet a compelling interest.

Additionally, the statute is broader than necessary because it establishes standards that are unrelated to specific tribal interests and applies those standards to potential Indian children. It treats all Indian tribes as an undifferentiated mass.

Further, the statute is unconstitutional because it impermissibly delegates Congressional duties on Indian tribes, which are not a coordinate ranch of government. An Indian tribe, like a private entity, is not part of the federal government at all, which means it cannot exercise governmental power.

Moreover, the statute impermissibly commandeers the states by commanding the states modify existing state law claims. ICWA requires state agencies carry out federal provisions. There is no way to understand mandating state enforcement of ICWA as anything other than a direct command to the States, which is exactly what the anti-commandeering rule disallows.

MISCELLANOUS

ERROR TO ORDER HUSBAND TO PAY COURT COSTS IN LIGHT OF UNCONTESTED AFFIDAVIT OF INDIGENCE.

Avila-Gonzalez v. Avila, No. 03-18-00211-CV, 2018 WL 4869290 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (10-09-18).

Facts: Wife filed for divorce. In his original answer, Husband, who was incarcerated, did not request a jury. When the trial court sent notice of final trial, Husband was being transferred to another prison and claimed he did not receive the notice. Subsequently, shortly before trial, Husband requested a jury trial. Wife argued that Husband's request was untimely. The trial court reset the final hearing twice to ensure Husband had adequate notice. On the day of trial, Husband refused to appear telephonically, though he was aware that the trial was taking place. The trial court proceeded with trial, appointed Wife sole managing conservator of the parties' children, divided the community estate, granted the divorce, and ordered Husband to pay costs. Husband appealed, challenging the trial court's failure to grant him a jury trial and the order that he pay costs.

Holding: Reversed in Part; Affirmed in Part

Opinion: The trial court reset the final hearing twice out of concerns regarding whether Husband received adequate notice. There was no dispute Husband had notice of the final hearing and chose not to appear. By failing to appear and argue his motion for a jury trial, Husband waived his right to one.

Husband filed an unchallenged affidavit of indigency. An uncontested affidavit of inability to pay is conclusive as a matter of law. It is an abuse of discretion for any judge, including a family law judge, to order costs in spite of an uncontested affidavit of indigence.

DEFENDANT DEBTOR-HUSBAND COULD NOT DEFEAT AN ENFORCEMENT ACTION IN TEXAS OF AN ILLINOIS JUDGMENT UNDER UEFJA ON THE BASIS THAT HE LACKED MINIMUM CONTACTS WITH TEXAS.

***Gesswein v. Gesswein*, ___ S.W.3d ___, No. 13-18-00252-CV, 2018 WL 4903079 (Tex. App.—Corpus Christi 2018, no pet. h.) (10-10-18).**

Facts: An Illinois court granted Wife a judgment against Husband for nearly $40,000 in unpaid spousal maintenance. Subsequently, she filed a petition in Texas to enforce the foreign judgment but had difficulties serving Husband because he thwarted service attempts. Wife served Husband by means of substituted service. Husband filed a special appearance and a notice in the Texas court claiming he lived in California and produced a copy of his California driver's license that was issued about two weeks after his filed notice. The trial court denied Husband's special appearance. Husband appealed, arguing he did not have minimum contacts with Texas. Wife responded that whether Texas established personal jurisdiction over Husband was immaterial.

Holding: Affirmed

Opinion: Enforcement of foreign judgments in Texas is governed by the Uniform Enforcement of Foreign Judgments Act (UEFJA). The filing of the foreign judgment comprises both a plaintiff's original petition and a final Texas judgment. When a judgment creditor files a foreign judgment, a prima facie case for its enforcement is presented, and the burden shifts to the judgment debtor to prove the foreign judgment should not be given full faith and credit. One way to prove this is to show the *rendering* state lacked jurisdiction. Husband introduced no evidence that the Illinois court lacked

personal jurisdiction over him. Husband cited no authority allowing a defendant to avoid a foreign judgment by attacking the defendant's minimum contacts with the *enforcing* state. Once a state court with jurisdiction over the parties renders judgment, there is no problem in the creditor enforcing the judgment in another state, even if the debtor is not subject to personal jurisdiction in that state.

ERRONEOUS LEGAL DESCRIPTION OF REAL PROPERTY WAS A CLERICAL ERROR AND NUNC PRO TUNC JUDGMENT TO CORRECT WAS PROPER.

Mora v. Mora, No. 04-17-00428-CV, 2018 WL 4903079 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (10-10-18).

Facts: At the conclusion of the divorce proceeding, the trial court awarded Wife a judgment of about $200,000 secured by a lien on real property. The decree set forth the terms of the award and lien. Subsequently, Wife filed a motion for a nunc pro tunc judgment to declare the property on which the lien was secured. The legal description referenced lot "P-3E", but should have referenced "P-3F," which was where Husband's physical business was located—lot P-3E was unimproved land. Husband argued the requested correction was a judicial error, not a clerical one and that the trial court was not permitted to grant Wife's request because its plenary power had expired. The trial court granted Wife's motion, and Husband appealed.

Holding: Affirmed

Opinion: A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. It does not result from judicial reasoning or determination. A nunc pro tunc judgment cannot alter a written judgment which precisely reflects the incorrect rendition.
Here, the trial court never used the legal description of the property in the oral rendition but referred to the property on which Husband's business was located. The erroneous legal description was only referenced once in the decree and was immediately followed by the statement "more particularly described as [the mailing address]." Thus, the record established the judicial decision rendered was that the lien to secure the judgment would extend to the property on which Husband's business was located.

JUDGE PRESIDING OVER COUNTY COURT AT LAW IS NOT A "REFERRING" OR "ASSOCIATE" JUDGE.

***Townsend v. Vasquez*, ___** S.W.3d ___, No. 01-17-00436-CV, 2018 WL 5074529 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (10-18-18).

Facts: Mother and Father divorced and were appointed joint managing conservators of their Child. Mother was granted the exclusive right to designate the primary residence of the Child. Subsequently, Father filed a suit to modify seeking the exclusive right to designate the Child's primary residence. After the trial court granted Father's requested modifications, Mother appealed, raising a number of complaints, including a complaint that it was error to have the County Court at Law judge preside over the final trial because she had objected to having final trial before an associate judge.

Holding: Affirmed

Opinion: Associate judges are not elected. Their "employment" is terminable "at the will of" or "by a majority vote of" the judge or judges that the associate judge serves. In contrast, the County Court at Law was created by statute, and a person obtains this judgeship either by election or by appointment in the event of a vacancy. The County Court judge may be "removed from office" only under certain conditions and through certain procedures. Further, the County Court exercises the jurisdiction conferred upon it, which includes jurisdiction over family-law cases. The County Court judge was not a referring to judge. Thus, Mother's pre-trial objection to an associate judge did not preclude the County Court judge from presiding over the trial on the merits.

HUSBAND WAIVED COMPLAINT REGARDING EXCLUSION OF EVIDENCE BY FAILING TO MAKE OFFER OF PROOF OR BILL OF EXCEPTION.

Jennings v. Martinez, No. 01-17-00553-CV, 2018 WL 5071031 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (10-18-18).

Facts: Husband was granted the marital residence in the divorce on condition that he pay expenses associated with the home. If he did not do so, or if he no longer lived in the residence, the house was to be sold with the proceeds being divided between the parties. Some years later, Wife filed a motion to enforce and sell the house because Husband failed to pay expenses and was no longer living in the home. Husband presented no defense at trial, and the trial court granted Wife's motion. Husband moved for a new trial asserting that certain statements made during trial had been "misstatements," and he wanted to present evidence that he had in fact made the payments as required. The trial court noted that during the final trial, it had asked Husband repeatedly if he had any evidence to present, and he responded that he did not. The trial court denied Husband's motion for new trial. Husband appealed, complaining that the trial court erred in refusing to consider his evidence, which he attached to his appellate brief.

Holding: Affirmed

Opinion: A proponent of evidence must preserve the evidence in the record—by way of offer of proof or bill of exception—in order to complain of its exclusion on appeal. Here, Husband failed to offer the complained-of evidence and testimony in the trial court. Documents attached to an appellate brief that are not part of the record in the trial court may not be considered on appeal.

CONTEMNOR UNLAWFULLY RESTRAINED BECAUSE "ORDER OF COMMITMENT" DID NOT ORDER CONTEMNOR BE DETAINED.

In re Cook, No. 07-18-00348-CV, 2018 WL 5624705 (Tex. App.—Amarillo 2018, orig. proceeding) (mem. op.) (10-30-18).

Facts: Contemnor was ordered to place in the registry of the court $27,000 cash by a date certain. When she did not do so, she was held in contempt and confined. There was no dispute that the order for the placement of the cash was clear and specific, that Contemnor had the financial means to obey the order, that she did not comply, or that she received adequate notice of the court's intent to enforce the order of contempt. Contemnor challenged her confinement on the ground that the trial court failed to enter a written judgment of contempt and order of commitment.

Holding: Writ of Habeas Corpus Granted

Opinion: Neither the judgment of contempt nor the purported order of commitment included an order directing Contemnor to be detained. Further, the purported order of commitment did not clearly state in what respect a prior order of the court had been violated, nor did it state how, if at all, Contemnor might purge herself of contempt.