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

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GEORGANNA L. SIMPSON, P.C.

ATTORNEY AT LAW
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. HEARN

ATTORNEY AT LAW
555 Republic Drive, Ste. 200
Plano, TX 75074
Phone: 469-509-6253 • Fax: 469-519-4253
EMAIL: beth@bhearnlegal.com

SAPCR
Procedure and Jurisdiction

THIRD-PARTY COULD NOT ESTABLISH STANDING TO INTERVENE IN SAPCR BASED SOLELY ON EVENTS THAT OCCURRED AFTER SUIT WAS FILED.

***In re J.A.T.*,** ___ S.W.3d ___, No. 14-15-00515-CV, 2016 WL 4923450 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (09-15-16).

Facts: Third-Party filed an original SAPCR, asking the court to name her and Father joint managing conservators of the Child. The associate judge entered temporary orders naming Third-Party sole managing conservator. Father filed a counter-petition and requested a de novo hearing, after which the trial court dismissed Third-Party's original petition for lack of standing. Third-Party then filed a motion to intervene in Father's remaining counter-suit. Father responded by non-suiting his counter-petition and filing a motion to deny Third-Party leave to intervene. After the trial court denied Third-Party's motion to intervene, Third-Party appealed, contending that she had standing because—pursuant to the temporary order that appointed her sole managing conservator—she had actual care, control, and possession of the Child for the requisite time, giving her standing to file an original SAPCR.

Holding: Affirmed

Opinion: Tex. Fam. Code § 102.003 provides that in determining the Child's principal residence, the court must consider the relevant time *preceding the date of commencement of suit*. Here, in her attempt to establish standing, Third-Party relied solely on events that occurred after suit was filed. Because she lacked standing to file an original suit at the time she filed her original petition, she could not acquire standing to intervene while the case was pending.

SAPCR
Alternative Dispute Resolution

MSA ENFORCEABLE BECAUSE WIFE DID NOT ESTABLISH SHE WAS COERCED INTO SIGNING MSA.
Araujo v. Araujo, No. 13-15-00345-CV, 2016 WL 4578401 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (09-01-16).

Facts: During the divorce proceedings, Husband and Wife signed an MSA that divided the couple's real property and required Wife to make a cash payment to Husband. After Wife's attorney withdrew, she hired a new attorney who filed a motion to revoke the MSA as unenforceable. Wife testified that she attended school through sixth grade in Mexico, did not speak English, and that no one translated the MSA for her. Wife stated that she only signed the MSA because her first attorney "forced" her to sign by telling her the judge would make her sign. The trial court denied Wife's motion to revoke and signed a final decree incorporating the MSA. Wife appealed, arguing the MSA was invalid because she was coerced to sign it.

Holding: Affirmed

Opinion: Wife did not identify anything in her testimony that constituted a threat or rose to a level that would render her incapable of exercising her free agency or unable to withhold her consent. Further, although uncontroverted, Wife's testimony was also uncorroborated. The trial court did not have to accept Wife's testimony that she signed because she felt "pressured and coerced."

SAPCR
CHILD SUPPORT

NO ABOVE-GUIDELINE SUPPORT BECAUSE MOTHER FAILED TO ESTABLISH PRIVATE SCHOOL WAS A PROVEN NEED OF THE CHILD.

Troiani v. Troiani, No. 13-14-00630-CV, 2016 WL 4702685 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (09-11-16).

Facts: When Mother and Father divorced, Father was ordered to pay the maximum guideline child support for the parties' two Children. Subsequently, Mother filed a petition to increase Father's child support obligation to include private school expenses for one Child. Father testified that he had been paying for the private school, although he was not required by court order to do so. After finding that Father's income exceeded the amount for maximum guideline support, the court signed an order increasing Father's child support obligation. He appealed.

Holding: Reversed and Rendered in Part; Affirmed in Part

Opinion: To impose child support beyond the statutory guidelines, the record must contain evidence of the 'proven needs' of the Child. Here, the record was devoid of any evidence showing something special that made the Child need or especially benefit from some aspect of non-public schooling.

MISCELLANOUS

★★★TEXAS SUPREME COURT ★★★

DISSENT: ACCESS TO SPOUSAL EMPLOYMENT BENEFITS IS NOT A FUNDAMENTAL RIGHT, AND TEXAS HAS A RATIONAL BASIS FOR LIMITING EMPLOYMENT BENEFITS TO ONLY OPPOSITE-SEX MARRIAGES.

***Pidgeon v. Turner*, ___ S.W.3d ___, No. 15-0688, 2016 WL 4938006 (Tex. 2016) (09-02-16).**

Facts: Prior to *Obergefell*, Houston began offering benefits such as health insurance to same-sex partners of city employees if they had been legally married in a state allowing same-sex marriage. Two Houston taxpayers sued, seeking a permanent injunction to prevent the city from providing the benefits. The trial court granted a temporary injunction, and the city filed an interlocutory appeal. While the appeal was pending, *Obergefell* was decided. The appellate court reversed and remanded the suit, in light of *Obergefell*, announcing that there was "no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the grounds of its same-sex character." The taxpayers petitioned the Texas Supreme Court for review.

Holding: Petition for Review Denied

Dissenting Opinion: (J. Devine) *Obergefell* concerned access to marriage and was not an equal protection challenge to the allocation of employment benefits. Marriage—not access to spousal employment benefits—is a fundamental right, and laws limiting access to a fundamental right are entitled to stricter scrutiny. A restriction to spousal employment benefits should only be reviewed for a rational basis. The *Obergefell* majority's general assumption that states would extend all opposite-sex benefits to same-sex couples did not constitute a legal holding. Texas's concerns about procreation are sufficient to meet the rational-basis standard. To allow the courts—as opposed to democracy—to make this decision undermines precedent and the limited role of courts in our nation.

HUSBAND'S APPEAL DISMISSED FOR FAILURE TO COMPLY WITH TRIAL COURT'S TEMPORARY ORDERS PENDING APPEAL.

***Rodriguez v. Borrego*, ___ S.W.3d ___, No. 08-15-00340-CV, 2016 WL 5335424 (Tex. App.—El Paso 2016, no pet. h.) (09-23-16).

Facts: After a final divorce decree was signed, Husband requested findings of fact and conclusions of law. Wife then filed a motion requesting temporary orders in the event Husband perfected an appeal. After Husband perfected his appeal, the trial court granted Wife's motion and ordered Husband to pay temporary spousal support and Wife's attorney's fees. More than six months later, Wife filed a motion to dismiss Husband's appeal because he had not paid her any spousal support or attorney's fees pursuant to the temporary orders. The appellate court granted Husband's request to abate the appeal to give him time to comply with the temporary orders. Subsequently, Husband stated that he needed additional time to obtain funds from a Thrift Savings Plan. After the appellate court had granted three extensions, Husband filed a motion asking the appellate court to reconsider its order that his appeal would be dismissed if he failed to comply with the temporary orders.

Holding: Dismissed

Opinion: The appellate court was patient with Husband and gave him multiple opportunities to comply with the temporary orders, but he failed to do so. Contrary to Husband's contention, he was not required by the temporary orders to use the Thrift Savings Plan to make the required payments. Husband had other assets that he could have used to make the payments. However, he made no payments for ten months, and he made no attempt to negotiate with the plan administrator until more than six months after the first payment was due—until after Wife filed her motion to dismiss. Husband was not permitted to ignore a temporary order simply because he disagreed with it and intended to appeal it.

RESTRICTED APPEAL REQUIRES ERROR ON THE FACE OF THE RECORD THAT IS *APPARENT*, NOT ERROR THAT MAY BE *INFERRED.*

***In re R.S.T.*, ___ S.W.3d ___, No. 14-15-00925-CV, 2016 WL 5573733 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (09-29-16).

Facts: In 2001, a Louisiana state district court issued a judgment adjudicating Patrick as R.S.T.'s biological father and ordering him to pay $152.00 in child support each month. The record indicates that a notice of registration of this Louisiana order was filed in the Texas trial court in 2011. The notice stated that Patrick had accrued $18,394.84 in child-support arrearages under the Louisiana order. OAG filed a motion to confirm the support arrearages. The trial court granted OAG's motion and issued its order confirming support arrearages.

Patrick filed a motion for new trial, requesting that the trial court set aside the arrearages judgment against him. In his motion, he stated that he had asked for DNA testing in the matter because he did not believe that he was R.S.T.'s father. The trial court granted Patrick's motion for new trial. OAG subsequently filed a notice of nonsuit concerning its previous motion to confirm support arrearages.

Over 2 years later, Patrick filed a motion to modify child support deductions alleging the following:

1. Material/substantial change, so payments for child support from his paycheck should be stopped.
2. the Motion to Confirm Arrearages was non-suited in 2012, after Patrick found **not** to be the biological father of the child.
3. Despite the non-suit of the case and Patrick being not adjudicated as father, OAG continued to deduct child support payments from Patrick's paychecks.

After a hearing in which OAG did not participate, the trial court granted Patrick's requested modification because Patrick was never properly served with citation in regards to the claim for child support registration in Texas of the Louisiana child support order and ordered that all withholding for child support arrearages from his paychecks be stopped. Eleven weeks after the court issued its order, OAG filed a notice of restricted appeal.

Holding: Affirmed.

Opinion: In order to succeed on a restricted appeal, an appellant must establish that: (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any post judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent from the face of the record.

OAG's primary argument is that the trial court did not have jurisdiction to issue an order modifying a registered foreign support order from Louisiana. However, it is not apparent from the record before us that the trial court's order was intended to modify that particular order. Because the motion to modify and the court's order granting the motion differ, it is not clear which support order the trial court asserted its jurisdiction over, much less whether that jurisdiction was erroneously asserted. OAG asks this court to infer from the conflicting motion and order not only that the trial court modified the Louisiana support order, but also that it erred in doing so. However, "a restricted appeal requires error that is *apparent*, not error that may be *inferred*."

Concurring Opinion. OAG also asserted that Patrick failed to use the remedies available under Family Code section 158.506 to contest an administrative writ of withholding. This Court must give effect to the substance rather than the form or title of Patrick's "Motion to Modify" and the trial court's order granting it. The record reflects that the substance of the trial court's order was an order that all income withholding regarding Patrick's child-support arrearages stop rather than a modification of the Child Support Order. Because the trial court did not modify the Child Support Order, it is not apparent from the face of the record that the trial court erroneously modified this order. Under Family Code §158.506, "[e]xcept as provided by Section 158.502(c), an obligor receiving the notice under Section 158.505 may request a review by the Title IV-D agency to resolve any issue in dispute regarding the identity of the obligor or the existence or amount of arrearages." The record reflects that the trial court issued a judicial order for income withholding in its December 2011 order confirming a child-support arrearage. The record does not reflect that Patrick received notice under Texas Family Code section 158.505 of an administrative writ of withholding. Error is not apparent from the face of the record based on Patrick's failure to use the remedies available under Family Code section 158.506.7

HUSBAND'S MOTION FOR CONTINUANCE DID NOT CONTAIN THE SIGNATURE OF A NOTARY OR MEET THE REQUIREMENST OF TCPRC § 132.001 FOR AN UNSWORN DECLARATION.

***Hardwick v. Hardwick*, ___** S.W.3d ___, No. 02-15-00325-CV, 2016 WL 5442772 (Tex. App.—Fort Worth 2016, no pet. h.) (09-29-16).

Facts: Wife filed for divorce in May 2014, and Husband filed a counterpetition. Both were initially represented by counsel, but both Wife's counsel withdrew in January 2015, and Husband's counsel withdrew in March 2015, after which both parties continued pro se for a while. On June 24, 2015, Wife's former attorney served Husband with a notice of appearance. On June 29, 2015, it was filed with the court. On July 1, 2015, Wife appeared at trial with her attorney, and Husband appeared pro se. That morning at 8:12 a.m. Husband filed an unverified motion for continuance asking for time to retain an attorney, which the trial court denied. Following a bench trial, the trial court entered a final decree of divorce.

Holding: Affirmed.

Opinion: A motion for continuance must be in writing, state the specific facts supporting the motion, and be verified or supported by an affidavit. If a motion for continuance is not verified or supported by affidavit, it is presumed the trial court did not abuse its discretion in denying the motion.

Here, Husband's motion for continuance contained a "Verification" page that included the following statement: "I, the undersigned, swear under oath that the above Motion for Continuance is true and correct." Husband's signature immediately followed that statement. While the "Verification" page contained a place for a notary's signature and seal, the space for the notary was left blank. Thus, Husband's motion for continuance was not verified or supported by affidavit.

Although the parties did not address the issue, the court of appeals also considered whether Husband's statement on the "Verification" page qualifies as an unsworn declaration Under Texas Civil Practice and Remedies Code § 132.001, which provides, with the exception of certain situations that do not apply here, "an un-

sworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law." An unsworn declaration, however, must be "in writing" and "subscribed by the person making the declaration as true under penalty of perjury." Here, Husband's signed statement on the "Verification" page was not made under penalty of perjury, and as such, it does not cure the fact that his motion for continuance was not verified or supported by affidavit.