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

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DIVORCE
PROPERTY DIVISION

HUSBAND FAILED TO REBUT COMMUNITY PROPERTY PRESUMPTION.

***Attaguile v. Attaguile*, ___** S.W.3d ___, No. 08-16-00222-CV, 2018 WL 4659580 (Tex. App.—El Paso 2018, no pet. h.) (09-28-18).

Facts: After a bench trial in the parties' divorce, the court confirmed the parties' separate property, divided the marital estate, and made orders for the parties' child. In one of her issues on appeal, Wife complained that the trial court erred in confirming a certain house as Husband's separate property.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The disputed property was purchased during marriage. Even if a portion of the payment on the note on the property was made with Husband's separate funds, the uncontroverted evidence showed that some of the payment was made with community funds. Additionally, a later deed conveying the property to a third party listed Husband and Wife as grantors. Husband did not present evidence to rebut the community property presumption. While he may have been entitled to a reimbursement claim, he did not plead for reimbursement. Further, based on the evidence presented at trial, Husband was already awarded a disproportionate share of the community estate and the house amounted to 18% of the community. Thus, the error was harmful and was remanded to the trial court for a new property division.

SAPCR
PROCEDURE AND JURISDICTION

MOTHER GRANTED RESTRICTED APPEAL BECAUSE SUBSTITUTE SERVICE BASED ON LEGALLY INSUFFICIENT AFFIDAVIT.

***In re M.M.M.A.*, ___** S.W.3d ___, No. 08-16-00020-CV, 2018 WL 4659577 (Tex. App.—El Paso 2018, no pet. h.) (09-28-18).

Facts: In the initial orders for the Child, the parents were appointed joint managing conservators. Subsequently, after a modification suit, Mother obtained an order appointing her as the Child's sole managing conservator. Later, Father filed a motion to enforce possession and to have himself named sole managing conservator. After failed attempts to serve Mother, Father filed a motion for substituted service. The trial court granted the motion and issued an order allowing service by posting citation on Mother's door. Mother did not answer, and Father obtained a default judgment. Subsequently, Mother filed a restricted appeal, alleging service was improper.

Holding: Reversed and Remanded

Opinion: The process server's affidavit, on which the order for substitute service relied, failed to state that the facts stated within were based upon the process server's personal knowledge. Thus, the affidavit was legally insufficient, and the trial court erred in granting the motion for substitute service.

SAPCR
CHILD SUPPORT

TRIAL COURT NOT AUTHORIZED ON REMAND TO MAKE RECALCULATED CHILD SUPPORT RETROACTIVE TO THE TEMPORARY ORDERS, ONLY TO THE FINAL JUDGMENT FROM WHICH FATHER APPEALED.

In re D.S.H., No. 09-17-00426-CV, 2018 WL 4623402 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (on reh'g) (09-27-18).

Facts: The trial court entered temporary orders for child support during a modification proceeding. Subsequently, a final order was entered. Father appealed and argued that the trial court failed to account for disability payments received by the Child due to Father's disability. The record indicated that the trial court was unaware of the disability payments. The appellate court remanded the case to recalculate Father's child support obligation. On remand, the trial

court modified the child support retroactively to the final judgment. Father appealed again, arguing that the recalculated child support should have been retroactive to the temporary orders.

Holding: Affirmed

Opinion: The Texas Family Code limits the extent to which a court may order retroactive support. The trial court's order on remand was consistent with Tex. Fam. Code § 156.401(b). The Family Code did not authorize an order retroactive back to the date of the temporary orders, which Father did not mandamus.

SAPCR
Modification

MOTHER'S SOBRIETY AND NEW MARRIAGE SUFFICIENT TO SHOW MATERIAL AND SUBSTANTIAL CHANGE.

Ceniseros v. Rychlik, No. 03-17-00532-CV, 2018 WL 4265679 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (09-07-18).

Facts: An order for the Children was entered when Mother and Father separated. Subsequently, the court modified that order to change the person with the exclusive right to designate the primary residence of the Children from Mother to Father. A few years later, Mother moved to modify again, asking to be named the parent with the exclusive right to designate the Children's primary residence. Mother asserted that the Children were frequently left at Husband's sister's house and that Mother would be able to provide the Children with a more stable environment. After hearing the evidence, the trial court granted Mother's request. Father appealed, arguing in part that the evidence was insufficient to support a finding of a material and substantial change in circumstances.

Holding: Affirmed

Opinion: Although little evidence was presented regarding the Children's home surroundings at the time of the prior order, there was evidence that at the time of that order Mother was living in a rehabilitation facility as part of the terms of her probation for a drug offense. The undisputed evidence also showed that since the prior order Mother had completed her probation, started taking college classes, maintained her sobriety, married, and moved into a three-bedroom house. These changes were sufficient to support a finding of a material and substantial change in circumstances.

Miscellanous

DISTRICT COURT HAD CONCURRENT JURISDICTION OVER WIFE'S PARTITION SUIT BECAUSE PROBATE OF HUSBAND'S ESTATE NOT INITIATED AT TIME WIFE FILED.

Baker v. Baker, No. 02-18-00051-CV, 2018 WL 4224843 (Tex. App.—Fort Worth 2018, no pet. h.) (mem. op.) (09-06-18).

Facts: Husband and Wife divorced, but the decree failed to divide the parties' community interest in a house. Husband died, and his two adult children immediately had a vested interest in the house. Wife filed an original petition in a district court to partition her interest in the house. Three days later, the Children filed an application for independent administration in the statutory probate court and moved to dismiss Wife's petition in the district court for lack of subject-matter jurisdiction. Finding the probate court had exclusive jurisdiction over the partition suit, the district court dismissed Wife's petition. Wife appealed.

Holding: Reversed and Remanded

Opinion: A joint property owner may bring a claim to partition the property in a district court in the county where the property is located. However, the district court's jurisdiction over partition suits is not exclusive. A cause of action related to a probate proceeding must be filed in a statutory probate court unless the jurisdiction is concurrent with that of a district court. To trigger the probate court's exclusive jurisdiction, there must be a pending probate proceeding at the time the other petition is filed. Here, Wife filed her partition suit three days before Children filed their probate proceeding. Thus, the probate court did not have exclusive jurisdiction, and the district court erred in dismissing Wife's petition.

MOTHER'S CLAIM FOR ATTORNEY'S FEES SURVIVED HUSBAND'S NONSUIT OF HIS SAPCR.

In re N.M.B., No. 14-17-00317-CV, 2018 WL 4427404 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (on reh'g) (09-18-18).

Facts: Father initiated a SAPCR. Mother filed an answer that included a request for attorney's fees and subsequently requested interim fees. Father nonsuited his petition. Mother filed another motion for attorney's fees, which the trial court granted. Husband appealed, arguing that Mother's claim for fees could not survive Husband's nonsuit.

Holding: Affirmed

Opinion: A claim for attorney's fees constitutes a claim for affirmative relief that is not disturbed by nonsuit.

WIFE WAIVED RIGHT TO APPEAL IN RULE 11 AGREEMENT.

***Emerson v. Emerson*, ___** S.W.3d ___, No. 14-17-00064-CV, 2018 WL 4515872 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (09-20-18).

Facts: The parties' divorce decree awarded the marital home to Husband and ordered Husband to refinance the home and pay Wife about $30k within 60 days of the divorce. Six years later, Wife filed a motion to enforce the divorce decree and requested an owelty lien for the amount awarded her in the decree at the "maximum lawful interest rate." Additionally, Wife moved for attorney's fees. On the date of final trial in the enforcement proceeding, the parties agreed to a settlement, and the trial court read into the record its understanding of the agreement. The only issues remaining to be decided by the trial court would be attorney's fees and whether to impose interest. The parties' attorneys indicated the parties would accept the trial court's judgment with respect to attorney's fees and post-judgment interest. The attorneys and trial court then discussed whether that acceptance meant that the parties were waiving their right to appeal. Wife's attorney acknowledged "waiving appellate rights is a big waiver" and asked to confer with Wife before continuing. After conferring, Wife's attorney stated Wife agreed, so long as the agreement was reciprocal.

A few weeks later, the trial court entered an order that denied Wife's requests for attorney's fees and interest. Wife appealed, arguing in part that she was entitled to post-judgment interest and attorney's fees. Husband moved to dismiss the appeal.

Holding: Affirmed

Opinion: Contrary to Wife's assertions, the trial court did not dictate that the parties were required to reach a certain agreement; rather, he indicated that he dictated the parties' terms as he understood them. Wife expressly agreed to waive her appellate rights after conferring with her attorney and after being afforded a break to consider the import of the agreement. Although Wife claimed on appeal that she had only agreed under duress, she failed to specify the nature of any alleged threat, and nothing in the record indicated the trial court would have treated Wife unfairly if the parties had proceeded to trial.

REQUEST FOR DE NOVO HEARING OF TITLE IV-D RULING TIMELY BECAUSE MADE WITHIN THREE DAYS OF WHEN THE JUDGMENT WAS *SIGNED*.

***In re R.A.O.*, ___** S.W.3d ___, No. 14-17-00043-CV, 2018 WL 4571836 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (09-25-18).

Facts: The OAG filed a motion to modify Father's child support obligation. Mother filed her own modification petition. The case was referred to a Title IV-D court. After a hearing, the IV-D court raised Father's child support obligation. Subsequently, the IV-D judge signed a final order. Father filed a request for a de novo review. At a hearing before the district court, the parties disputed whether Father's request was timely. Determining Father's request was not timely, the district court denied his request. Father appealed.

Holding: Reversed and Remanded

Opinion: Subchapter B of Texas Family Code Chapter 201 affords specialized judges for Title IV-D cases. Although subchapter B incorporates some of the general provisions of subchapter A—applying generally to associate judges—subchapter B also contains provisions that differ from those in subchapter A. No party disputed that the associate judge was a Title IV-D judge. Under the Texas Family Code Section 201.015(a)—of subchapter A—a party must request a de novo hearing no later than the third day after receiving notice of the substance of the AJ's report. Thus, if the associate judge had not been a Title IV-D judge, that deadline would have been the third day after the judge's oral ruling. However, because the judge was a Title IV-D judge, Section 201.1042 applied, which provides that a party must request a de novo hearing not later than the third working day after the date the Title IV-D judge *signs* the proposed order or judgment. Here, the Title IV-D judge signed the proposed judgment about 6 weeks after he gave his oral ruling. Father filed his notice of de novo hearing within 3 days of the date the judgment was signed. Thus, his request was timely, and the district judge erred in denying Father's request for a de novo hearing.

WIFE WAIVED APPELLATE COMPLAINTS.

***Barton v. Barton*, ___** S.W.3d ___, No. 08-15-00110-CV, 2018 WL 4659568 (Tex. App.—El Paso 2018, no pet. h.) (09-28-18).

Facts: In their divorce proceedings, Wife sought "her fair share" of the community estate and raised claims for reimbursement. During trial, the trial court attempted to clarify her request regarding the division of the community estate:

[The trial court]:	Okay. And, [Wife], on your list of proposed property division…are you requesting anything else, any other personal property?
[Wife]:	The furniture and the appliances.
[The trial court]:	What furniture and appliances?
[Wife]:	That are in the house.
[The trial court]:	All of it?
[Wife]:	At least half of it.
[The trial court]:	Okay. And here's where we get back to difficulty, I can't divide -- well, I can, I guess, it would be a disaster if I did -- to say, you get half the property -- half the furniture in the house and he gets half the furniture in the house. I don't -- I've never been in y'all's house. I don't have a clue what's in there. And you've gave me a list. I kind of assumed that was it. Is there more?
[Wife]:	Of the furniture or you mean if anything else?
[The trial court]:	Yes.
[Wife]:	No.
[The trial court]:	Okay. So this list is it?
[Wife]:	Yes.

The trial court divided the parties' assets, awarded Wife reimbursement for one of her three claims, and granted Wife a judgment to equalize the division of the marital estate. Wife appealed, challenging the sufficiency of the evidence to support the trial court's judgment.

Holding: Affirmed

Opinion: An appellate record is limited to the evidence admitted at trial. Thus, Wife could not rely on discovery attached to her appellate brief because it was never admitted to the trial court.

Contrary to Wife's assertion, the trial court awarded her a greater amount than what she requested for her 401k reimbursement claim. Although Wife complained about a lack of findings regarding her other two reimbursement claims, she failed to ask the trial court for additional findings and, thus, waived her appellate complaint.

Additionally, the trial court made findings regarding the community property that Wife asked to be awarded to her. Despite the trial court's direct questions about other aspects of the community, Wife did not admit any evidence of that property and did not request findings regarding additional items of community property. Thus, Wife waived her complaint regarding the incompleteness of the findings.