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

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DIVORCE
DIVISION OF PROPERTY

TRIAL COURT ABUSED ITS DISCRETION WHEN IT IN EFFECT AWARDED PARTNERSHIP PROPERTY AS PART OF THE COMMUNITY ESTATE.

Gonzales v. Maggio, ___ S.W.3d ___, No. 03-14-00117-CV, 2016 WL 4429930 (Tex. App.—Austin 2016, no pet. h.) (08/18/16).

Facts: Gonzales and Maggio are each Texas-licensed attorneys who were formerly partners in both marriage and law practice. They divorced both maritally and professionally. The district court rendered its decree consistent with the jury's findings, naming Gonzales and Maggio joint managing conservators and granting Maggio the exclusive right to determine the children's primary residence within the State of Texas.

During their marriage, Gonzales and Maggio had formed a general partnership known as "Gonzales & Gonzales" (the Partnership) through which they had both practiced law. Although there was no written partnership agreement, it was undisputed that the couple had agreed to share 50-50 in the Partnership's capital, profits, and losses. The Partnership's chief business was plaintiffs' personal-injury work, principally auto-collision claims that tended to settle prior to suit or trial. The Partnership's standard contracts with clients provided for a "contingent-fee" arrangement—if and when the Partnership obtained a recovery on the claim, it was entitled to reimbursement of any expenses it had advanced plus a percentage of the net recovery. When and to the extent the Partnership enjoyed a net profit on a claim, the proceeds would be split evenly between Gonzales and Maggio, and the two partners would likewise participate equally in any losses.

In a Rule 11 agreement dated May 30, 2012, Gonzales and Maggio agreed that "Marissa is no longer a partner at Gonzales & Gonzales and the partnership is dissolved." They further agreed in the Rule 11 that "[t]he liabilities of [the Partnership] and other issues pertaining to winding up the firm will be handled at a later time, most likely a final hearing." This provision, as the parties acknowledge, referenced principles of Texas law governing dissolution and termination of general partnerships, which have been codified at relevant times in the Texas Business Organizations Code. Under these requirements, the Rule 11 agreement "dissolved" the Partnership but did not immediately or automatically conclude the Partnership's legal existence or operations. Instead, it triggered requirements under the Code that the partners "wind up" the Partnership's business and affairs—basically discharge its existing obligations and liquidate or distribute any remaining Partnership property among the partners—"as soon as reasonably practicable." During this process, a partnership's business operations continued to the limited extent necessary to wind up, and the partners continued to owe duties to the Partnership and each other to act with loyalty, with care, and in good faith. Only upon completion of this winding-up process does a partnership's legal existence terminate.

The Partnership's matters to be wound up included its rights and duties under its contingent-fee contracts in a number of cases that had not yet been resolved by the date of dissolution. Within a few weeks after dissolution, and as contemplated by another term of the Rule 11 agreement, Gonzales and Maggio transmitted a joint letter on Partnership letterhead advising each of the Partnership's clients that Maggio had left the Gonzales & Gonzales firm "to practice as a solo practitioner"; that Gonzales was continuing to practice law under the name of "Gonzales & Gonzales, Attorneys at Law"; and that the client had the right either to have Maggio "continue in her new capacity to represent you in this matter," have "the firm known as Gonzales & Gonzales, Attorneys at Law to continue to represent you," or retain "an entirely new attorney." The letter also included a form in which the client could indicate his or her choice, along with a self-addressed stamped envelope in which to return the form. The vast majority of Partnership clients opted to have the new Gonzales & Gonzales entity "continue to represent" them.

Thereafter, while their divorce litigation remained pending, both Gonzales and Maggio settled a number of cases that had originated with the Partnership and received expense reimbursements and attorney's-fee payments. Disputes arose concerning the respective entitlements of Gonzales and Maggio to these monies or similar payments that either side would receive from Partnership-originated cases in the future. Ultimately, the parties' dispute focused on what were termed two "buckets" of Partnership-originated cases. "Bucket 2" consisted of thirty Partnership-originated cases that had been settled between the date of the Partnership's dissolution and the date of divorce, twenty-five of which had been handled and payment received by Gonzales post-dissolution and five of which had been handled by Maggio. "Bucket 3," on the other hand, consisted of approx-

imately forty cases that had still been pending on the date of divorce, in thirty-three of which Gonzales was counsel or co-counsel of record, six in which Maggio was counsel or co-counsel, and the remainder having previously been referred by the Partnership to another lawyer.

The court awarded Gonzales and Maggio, as his or her separate property, 50% of the fees that had been earned on the Bucket 2 cases, to "be calculated after the party who advanced the out-of-pocket case expenses is reimbursed." In the event the out-of-pocket expenses to be reimbursed had been advanced by the Partnership, the court ordered that the reimbursement payment would be split 50-50 between Gonzales and Maggio. In addition to stating these awards in terms of equations or formulas, the district court awarded Maggio a lump sum of $44,815.39 to be paid her by Gonzales "for her equal share of the net proceeds" in the Bucket 2 cases. This figure corresponded to 50% of $89,630.78, a calculation presented in evidence as the difference between the total expense reimbursements and net fees Gonzales had received on Bucket 2 cases over the total amount Maggio had received.

As for the Bucket 3 cases, the district court awarded Gonzales and Maggio, as his or her separate property, percentages of any net fees ultimately earned on those cases that varied according to the level of that attorney's involvement post-Partnership dissolution. The percentages varied as follows: 60% if the attorney had retained the case following the Partnership's dissolution; 40% if the other attorney had retained the case; and 50% if the case had been referred to a third-party attorney for handling. As with the Bucket 2 cases, the shares were to be calculated only after reimbursing the party who had advanced the out-of-pocket expenses, with Gonzales and Maggio each entitled to half of reimbursements of any expenses that had been advanced by the Partnership.

Gonzales appealed complaining of both aspects of the disunion that were addressed by the final decree. Gonzales challenged a decree provision allowing Maggio, as JMC with exclusive right to determine the primary residence of two children of the marriage, to locate that residence anywhere within the State of Texas. Gonzales's remaining issues complain of the decree's award of interests in cases that had been originated by the Gonzales-Maggio law partnership. As to the interests of Gonzales and Maggio in the Partnership *entity*, Gonzales argued that the parties' interests did not extend to rights in particular *assets* owned by the Partnership, as opposed to entitling them as partners to receive equal shares of profits and surplus. Emphasizing these principles, Gonzales characterized the district court's decree as having purported to divide Partnership property as if part of the community estate, a clear abuse of discretion.

Holding: Affirmed as to the geographic restrictions, reverse and remand, in part, as to the award of interests in cases.

Opinion: The Rule 11 agreement in evidence explicitly contemplated that the Partnership would be wound up "most likely at a final hearing," and the parties' conduct thereafter was consistent with that expectation. The district court's ensuing award of lump sums from the Bucket 2 settlements is consistent with a winding up of this portion of the Partnership's work in progress. These respective distributions, in turn, would have become part of the community estate and subject to the district court's "just and right" division. However, the court's disposition of the Bucket 3 cases—which, again, was in the form of percentages of future net fees under contingent-fee contracts rather than lump sums—was inconsistent with a winding up. This is so because "a partner ... is not entitled to demand or receive from a partnership a distribution in any form other than cash" unless the partnership provides otherwise, and there was no evidence of such an agreement provision here. Consequently, the decree's disposition of the interests in Bucket 3 cases had the effect of awarding Partnership property as if part of the community estate, an abuse of discretion.

SAPCR
PROCEDURE AND JURISDICTION

FLORIDA TRIAL COURT'S FAILURE TO COMMUNICATE OR RULE ON FATHER'S PENDING MOTION CONSTITUTED ITS IMPLICIT DECLINATION TO EXERCISE HOME-STATE JURISDICTION.

In re T.B., ___ S.W.3d ___, No. 02-16-00006-CV, 2016 WL 3889293 (Tex. App.—Fort Worth 2016, no pet. h.) (07-14-16).

Facts: Mother and Father never married but lived together and had two Children in Florida. When the couple broke up, Mother and the Children moved to Texas. Father filed a paternity suit in Florida. The Florida court signed an order approving a settlement agreement between the parties that declared Father the Children's father, set a visitation schedule, and did not require Father to pay child support. After Mother and the Children had lived in Texas for six months, Mother filed a motion to modify, seeking child support. Father filed a plea to the jurisdiction arguing that Florida retained jurisdiction under both the UCCJEA and UIFSA. After failed attempts to communicate with the Florida court, the Texas trial court signed an order granting Mother's requested relief. Father appealed.

Holding: Affirmed

Opinion: Under the UCCJEA, a home-state court may decline to exercise jurisdiction based on an inconvenient forum analysis. Here, Father and the Texas trial court each made multiple attempts to contact the Florida court, but no response was received. The Florida trial court's failure to communicate with Father or the Texas trial court or rule on Father's pending motion for over six months constituted an implicit determination by that court to decline to exercise its home-state jurisdiction. Accordingly, because the Child had lived in Texas for over six months, the Texas trial court properly exercised its jurisdiction under the UCCJEA.

Further, because the Florida trial court only approved the parties' settlement agreement, it did not consider the issue of child support. Additionally, the only monetary obligation in the agreement was a requirement that Father pay his own travel expenses for himself and the Children for transport between Florida and Texas, which did not meet the definition of a "child support order." Thus, Florida never acquired jurisdiction under UIFSA, and the Texas trial court had jurisdiction to enter an order for child support.

"ACTUAL CONTROL" DOES NOT REQUIRE A PARENT OR CONSERVATOR TO RELINQUISH THEIR RIGHT OVER A CHILD OR THE PERSON ASSERTING STANDING TO HAVE ULTIMATE LEGAL CONTROL OVER A CHILD.

***In re Lankford*,** ___ S.W.3d ___, No. 12-15-00149-CV, 2016 WL 4447697 (Tex. App.—Tyler 2016, orig. proceeding) (08-24-16).

Facts: T.D.L. is 14 year old biological child of F and M, who were divorced in 2003. T.D.L. started living with F when she was 3 months old after F and M separated. From 2003 until sometime in 2007, F "outside of the States." During that time, Paternal Grandmother ("PGM"), lived in F's house with T.D.L.

F and Smith married in 2008, but had been together since sometime in 2007. T.D.L. was approximately 5 years old when the relationship began. From 2007 to 2012, F worked out of town, and was away from home between 50% and 80% of the time. Smith and T.D.L. remained in the family home. In July 2012, F began working in Afghanistan. According to F, this was "a decision by [him] that [he and Smith] discussed and agreed upon." F elected expatriate status, which prohibits him from being in the U.S. more than 35 days a year. Smith and T.D.L. again remained in the family home.

In November 2014, Smith filed for divorce at F's request. Her petition included a motion to modify the existing conservatorship order to appoint Smith and F as JMCs of T.D.L. Smith also requested that she be designated as the conservator having the exclusive right to designate T.D.L.'s primary residence. She alleged that she has standing under Texas Family Code Section 102.003(a)(9) to seek modification of the order.

Through various errors and misunderstandings that occurred in prior proceedings, the existing conservatorship order, which was rendered in 2004, made PGM managing conservator and F and M possessory conservators. However, F believed the 3 were JMCs. He also believed that he had the right to designate T.D.L.'s residence.

In December 2014, F and PGM filed a motion to modify the 2004 order to make them joint managing conservators. Additionally, they asserted that Smith's motion to modify must be filed in the pre-existing SAPCR. Smith moved to sever the conservatorship issue and consolidate it with the SAPCR. The trial court granted the motion. F filed a plea to the jurisdiction and motion to dismiss alleging Smith lacked standing. PGM raised the issue in her answer. After a hearing, the trial court concluded that Smith has standing under section 102.003(a)(9) and, by written order, overruled the pleas to the jurisdiction and the motion to dismiss. The trial court also rendered temporary orders designating Smith as a JMC of T.D.L.

Holding: Mandamus denied.

Opinion: F and PGM insisted that to have standing under subsection (a)(9), Smith must establish that she has had "legal control" over T.D.L. However, had the legislature intended "control" to mean "legal control" instead of "control" in its ordinary sense, it could easily have defined it as such. Or it could have defined "actual control" to mean "legal control." But it did neither. Therefore, the Tyler Court of Appeals joins the courts that hold limiting standing under subsection (a)(9) to those having the ultimate legal right to control a child would require reading words into the text "that are not there" and render the word "actual" either superfluous or meaningless. *See Jasek v. Tex. Dep't of Family & Protective Servs.*, 348 S.W.3d 523 (Tex. App.–Austin 2011, no pet.); *see also, See In the Interest of K.G.*, No. 05–14–01171–CV, 2016 WL 3265215, at *6 (Tex. App.–Dallas June 13, 2016, no pet.) (mem. op.); *In the Interest of K.S.*, No. 14–15–00008–CV, 2016 WL 1660366, at *4 (Tex. App.–Houston [14th Dist.] Apr. 26, 2016, pet. denied) (op.); *Interest of B.A.G.*, No. 11–11–00354-CV, 2013 WL 364240, at *10 (Tex. App.–Eastland Jan. 13, 2013, no pet.) (mem. op.); *In the Interest of K.K.T.*, No. 07–11–00306–CV, 2012 WL 3553006, at *4 (Tex. App.–Amarillo Aug. 17, 2012, no pet.) (mem. op.).

IF THE EVIDENCE CREATES A FACT QUESTION REGARDING THE JURISDICTIONAL ISSUE, THEN THE TRIAL COURT CANNOT GRANT A PLEA TO THE JURISDICTION.

***In re R.E.R.*,** ___ S.W.3d ___, No. 13-14-00489-CV, 2016 WL _____ (Tex. App.—Corpus Christi 2016, no pet. h.) (08-25-16).

Facts: A.R. and N.G., were in a same-sex relationship, and they decided that N.G. would have a child. A donor provided the sperm. A.R. and N.G. signed a donor agreement that stated, among other things, that N.G. "shall have absolute authority and power to appoint her life partner [(A.R.)] as guardian for CHILD, and that the mother and guardian may act with sole discretion as to all legal financial, medical and emotional needs of CHILD without any involvement with or demands of authority from DONOR and DONOR's WIFE." The agreement further stated that A.R. and N.G. "intended to go through the process known as second parent adopting" for R.E.R. N.G. gave birth to R.E.R., on July 21, 2009. According to A.R., both she and N.G. parented R.E.R. and resided together for approximately the next four years of R.E.R.'s life.

In June 2013, A.R. and N.G. separated. On July 5, 2013, N.G. drafted and signed a notarized document (the "July 2013 document") stating:

> I [N.G.] temporarily give temporary rights of [R.E.R.] to [A.R.].
> [A.R.] will have the rights and say so to any decision needed to be made for [R.E.R.].
> I [N.G.] will be able to see [R.E.R.] and keep her when able to. Also I [N.G.] will still be able to voice opinion for [R.E.R.'s] well-being.

In July of 2013, R.E.R. resided exclusively with A.R., and A.R. and N.G. agreed that they would implement a possession schedule. Subsequently, R.E.R. resided with N.G. and R.E.R. spent some weekends with A.R. In October of 2013, N.G. stopped allowing R.E.R to spend weekends with A.R. In November and December of 2013, A.R. continued visitation with R.E.R. two to three days per week at school and on weekends when N.G. allowed her visitation. According to A.R., throughout this time period, she "raised the issue [with N.G.] for the necessity for court orders for R.E.R.—however[,] [N.G.] informed her throughout this time that she considered [A.R.] to be R.E.R.'s mother, and that there was no need for the court to get involved."

In 2014, A.R. filed her original SAPCR petition. N.G. filed her original answer claiming that A.R. lacked standing because "she did not have care, control, and possession" of R.E.R. A.R. amended her petition, along with a supporting brief, asserting that she had standing pursuant to Family Code Section 102.003(a)(9). N.G. filed a response arguing, among other things, that although she signed the July 2013 document, she later revoked that document by signing a notarized document, which is included in the record, that she claimed nullified the July 2013 document. N.G. also filed a plea to the jurisdiction on arguing that A.R. is not R.E.R.'s biological mother and had "not had care, control and possession of the child[]."

On May 14, 2014, the trial court issued temporary orders finding that it was not in R.E.R's best interest to sever her relationship with A.R. and that R.E.R. "has a special and important relationship with" A.R. The trial court appointed N.G. as temporary sole parent managing conservator and A.R. as temporary non-parent possessory conservator of R.E.R. N.G. then filed a motion to dismiss for lack of standing. The trial court issued its order granting N.G.'s motion to dismiss for lack of standing and plea to the jurisdiction and dismissing A.R.'s suit without prejudice. A.R. appealed.

Holding: Reversed and remanded.

Opinion: If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.

In support of her pleadings, A.R. stated that (1) N.G. and she had agreed that N.G. would have a baby, (2) the couple would co-parent the baby once it was born, (3) a donor provided the sperm, (4) the parties signed a donor agreement documenting the couple's intent that A.R. adopt the baby, (5) N.G. agreed that A.R. would adopt R.E.R., (6) A.R. resided with the child for the first four years of R.E.R's life, (7) N.G. gave the child, A.R.'s last name, (8) R.E.R. called A.R. "mommy," (9) N.G. signed the July 2013 document giving A.R. temporary custody of R.E.R., (10) A.R. had actual care, control, and possession of R.E.R. for at least six months, and (11) A.R. had filed her petition within ninety days of that period. Construing the pleadings liberally, A.R. gave fair notice of her basis to bring suit, and she sufficiently pleaded that she had actual care, control, and possession of R.E.R. Therefore, there is some evidence to support standing.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

MEDIATOR PROPER AUTHORITY TO RESOLVE DISPUTES REGARDING AN AMBIGUOUS MEDIATED SETTLEMENT AGREEMENT.

In re L.T.H., ___ S.W.3d ___, No. 14-15-00366-CV, 2016 WL 4480892 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (08-25-16).

Facts: Father filed a petition to modify the parent-child relationship seeking to revise and expand his possessory rights under an earlier agreed order. The trial court signed temporary orders providing that father would have possession of and access to the child pursuant to a modified standard possession order, which expanded father's periods of possession until the child reached the age of three. After the child reached the age of three, the temporary orders provided that father would have possession and access pursuant to a standard possession order.

Subsequently, father amended his petition to seek possession and access pursuant to a "fully expanded Standard Possession Order." The trial court referred the parties to mediation, and mother and father reached a settlement and executed a mediated settlement agreement (MSA). The MSA recited in boldfaced, capitalized, and underlined letters that it was not subject to revocation, and it was signed by the parties and their attorneys. The terms of the parties' agreement were contained in an attached Exhibit A incorporated into the MSA, which provided in relevant part:

POSSESSION AND ACCESS: Dad's periods of possession are to begin at 3 pm pickup from daycare or mom's residence. If the child is not at either location then Mom is to notify Dad so that he cannot pickup from the child's location

Dad"s periods of possession: Per Temporary Orders: Expanded SPO

If Dad does not take the child to daycare on his Friday possession period he must notify mom the location of the child where.

Kimberly Levi to draft Final Order: Order will include the Temp Order and the above additions to the Temp Orders.

Ms. Levi is father's attorney. The MSA also provided that the parties "shall" submit to binding arbitration with

the mediator "regarding all (a) drafting disputes, (b) issues regarding interpretation of this [MSA] and (c) issues regarding the intent of the parties as reflected in this [MSA]."

Subsequently, the trial court held a hearing to address a dispute that had arisen concerning the language of the proposed order on the MSA as drafted by father's attorney. At the hearing, mother took the position that the parties had agreed to an order incorporating the temporary orders as modified in Exhibit A to the MSA, and that—as in the temporary orders—the standard possession order would apply once the child reached the age of three. Mother complained that, contrary to the parties' agreement, the proposed order extended father's periods of possession after the child turned three beyond what was contemplated in the temporary orders. The trial court disagreed, concluding that "the MSA is clear."

Ultimately, the trial court signed an agreed order based on the MSA. This final order made several modifications to father's periods of possession, including granting father certain possessory rights after the child reached the age of three that differed from that portion of the temporary orders providing for a standard possession order after the child reached the age of three. Mother appealed.

Holding: Affirmed in Part, Reversed and Remanded in Part.

Opinion: Although mother and father provided conflicting interpretations of the meaning of "Per Temporary Orders: Expanded SPO," neither expressly argues that the terms of the MSA are ambiguous. The parties' failure to raise the issue of ambiguity is not determinative, however, because whether a contract is ambiguous is a question of law. On the record presented the court was unable to discern from the terms of the MSA or any other record evidence whether—as father argues—father's periods of possession under the modified standard possession order continue to apply after the child reaches the age of three, or—as mother argues—father's periods of possession return to a standard possession order after the child reaches the age of three as provided in the temporary orders.

Although conflicting interpretations alone do not establish ambiguity, the meaning of the phrase "Per Temporary Orders: Expanded SPO," is ambiguous because it is susceptible to more than one reasonable interpretation, creating a fact issue on the parties' intent. Because the MSA provides that in the event of in the event of drafting disputes, issues regarding the interpretation of the MSA, or issues regarding the parties' intent as reflected in the MSA, the parties must submit to binding arbitration. Because a fact issue exists regarding the interpretation of the MSA and the parties' intent concerning father's periods of possession, the trial court erred by resolving the dispute and determining the periods of possession to be awarded to father.

SAPCR
TEMPORARY ORDERS

TEX. FAM. CODE RESTRICTION AGAINST TEMPORARY ORDERS THAT CHANGE PERSON WITH RIGHT TO DESIGNATE CHILD'S RESIDENCE DID NOT APPLY BECAUSE NO FINAL ORDER PREVIOUSLY GRANTED THAT RIGHT.

***In re G.P.*,** ___ S.W.3d ___, No. 02-16-00236-CV, 2016 WL 4379450 (Tex. App.—Fort Worth 2016, orig. proceeding) (08-17-16).

Facts: An order adjudicating parentage appointed Mother and Father joint managing conservators of the Child. The order did not grant either parent the exclusive right to designate the Child's primary residence, but it did restrict the Child's residence to Denton County and contiguous counties. A few years later, the paternal Grandparents filed suit asking to be named joint managing conservators with Mother. Grandparents asked for Father's access to the Child be limited based on Father's history of family violence. The trial court signed temporary orders continuing Mother and Father as joint managing conservators, awarding Mother the exclusive right to designate the Child's primary residence, and delineating periods of possession for Mother, Father, and Grandparents. Subsequently, Grandparents filed a motion to modify the temporary orders and again asked to be granted the exclusive right to designate the Child's primary residence. The trial court declined to set a hearing, stating that it was prohibited from entering temporary orders changing the person with the exclusive right to designate the Child's primary residence. Grandparents amended their petition asserting that the requested change was necessary because the Child's present circumstances would significantly impair the Child's physical health or emotional development. Grandparents attached supporting affidavits to the amended petition.

The trial court responded by email stating that its position had not changed and that no hearing would be set. Grandparents filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Tex. Fam. Code 156.006 only prohibits temporary orders changing the person with the exclusive right to designate the child's primary residence under a previous *final order*. Here, the only prior final order did not award that right to either conservator. Moreover, even if the statue did apply in this case, Grandparents' petition satisfied exception by alleging that the requested change was necessary because the Child's present circumstances would significantly impair the Child's physical health or emotional development.

SAPCR
FAMILY VIOLENCE

FATHER'S ANGRY OUTBURSTS SUFFICIENT TO SUPPORT PROTECTIVE ORDER EVEN THOUGH NO EVIDENCE THAT HE EVER PHYSICALLY HURT ANYONE.

***Burt v. Francis*, ___ S.W.3d ___, No. 11-14-00244-CV, 2016 WL 4574286 (Tex. App.—Eastland 2016, no pet. h.) (08-25-16).

Facts: Mother and Father signed an agreed divorce decree providing that Father's visitations with the Children were to take place at his mother's house. Subsequently, Father would appear at Mother's and her mother's house to yell at them and the Children and would continue yelling after the front door was shut on him. Once, Father shot a gun at Mother's house, apparently to show the Children his new gun. When he would get angry, he would loom over Mother and the Children, flex his muscles, slam his fists, and yell foul language while standing very close to whomever he was yelling at. Mother testified that the Children were angry and stressed out "pretty much all the time" due to Father's conduct. Mother sought a protective order. In addition to Mother's testimony, Father's mother testified as to the negative effects Father's actions were having on the Children. Father testified that he was an emotional, passionate person and that he did not feel like he was yelling when talking to people. The trial court granted the protective order. Father appealed, arguing that there was no evidence that he ever tried to physically hurt Mother or the Children.

Holding: Affirmed

Opinion: Even where no express threats are conveyed, a factfinder may conclude that an individual was reasonably placed in fear by another's actions. Here, Mother testified that she and the Children were fearful of Father because of his intimidating posture when yelling. One Child reacted to Father by trembling and crying. The trial court could have reasonably concluded Mother and the Children reasonably feared imminent physical harm.

SAPCR
CHILD SUPPORT

MOTHER LACKED STANDING TO SUE FATHER FOR ADULT DISABLED CHILD SUPPORT BECAUSE MOTHER DID NOT HAVE PHYSICAL CUSTODY OF OR GUARDIANSHIP OVER CHILD.

***In re C.J.N.-S.*, ___ S.W.3d ___, No. 13-14-00729-CV, 2016 WL 3962705 (Tex. App.—Corpus Christi 2016, no pet. h.) (07-21-16).

Facts: When Mother and Father divorced, they had two minor children, one of whom had medical problems before turning 18-years old. The Child was able to live on her own at age 20 and was able to hold down a job for some time; however, she lost the job after being diagnosed with gastroparesis. Mother paid for the Child's multiple medical procedures and visited the Child several times a week to help with household chores. When the Child was 21, Mother filed suit seeking an order requiring Father to pay to Mother child support and medical support for the Child. Father argued that Mother lacked standing to bring the suit under Tex. Fam. Code §

154.303. Holding that the language of the statute was unclear, the trial court granted Mother her requested relief. Father appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 154.303 grants standing to bring suit for support of a disabled child to:

(1) A parent of the child or another person having physical custody or guardianship of the child under a court order; or

(2) the child if …

The court held that the plain meaning of the words in the statute grant standing to a parent or other person with physical custody of or guardianship over an adult child. The statute requires more than parentage alone. Allowing a parent to sue for support of an adult child without having to show any sort of continuing obligation to the Child's care could lead to unjust enrichment.

SAPCR
CHILD SUPPORT ENFORCEMENT

FATHER'S ARREARAGES INCLUDED UNPAID CHILD SUPPORT OBLIGATIONS FOR TWO INDEPENDENT CHILD SUPPORT ORDERS RENDERED UNDER THE LAW PRIOR TO UIFSA.

***In re J.R.G.*,** ___ S.W.3d ___, No. 08-14-00313-CV, 2016 WL 4014089 (Tex. App.—El Paso 2016, no pet. h.) (07-27-16).

Facts: Mother and Father divorced in Alaska, and the decree included an obligation for Father to pay monthly child support. Subsequently, Father moved to Texas, and the Alaska OAG filed a petition in Texas seeking payment of child support arrearages. In early 1993, the Texas trial court rendered judgment against Father, ordered payment of the arrearages, and ordered Father to pay reduced monthly child support. However, the Texas order did not include language modifying the Alaska order or stating that it was the controlling order.

Many years later, the Texas OAG twice filed a motion to confirm arrearages; however, both motions were dismissed without prejudice. Subsequently, Father filed a petition for declaratory judgment, seeking a declaration that Texas had exclusive jurisdiction over the child support issues, that the Texas order was the only controlling order, and that any arrearages had been paid in full. After a trial, the trial court signed a judgment declaring that the Texas order had been entered pursuant to RURESA and that Father owed child support arrearages. The court further ordered Father to pay the arrearages pursuant to varying interest rates depending upon the dates during which the arrearages had been accrued. The OAG appealed, arguing that the judgment was not final and appealable because it failed to address all of Father's requested relief, that the trial court erred in failing to include the Alaska order's obligation when calculating arrearages, and that the trial court erred in its application of interest on Father's arrearages.

Holding: Reversed and Remanded

Opinion: Under the *Aldridge* presumption, any judgment following a conventional trial on the merits is presumed to be final for purposes of appeal. *See NE. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex. 1966). Here, nothing in the record dispelled the presumption of finality. Father, the petitioner, presented a proposed judgment, which was signed by the trial court with only one minor modification.

In September 1993, UIFSA replaced RURESA (Revised Uniform Reciprocal Enforcement of Support Act). Under RURESA, two independently valid support orders could exist simultaneously. Here, because the 1993 Texas support order—which was governed by RURESA—did not provide that it was modifying, replacing, or controlling the prior Alaska support order, both orders were enforceable.

Finally, the trial court abused its discretion by failing to apply the appropriate statutory interest rates effective at the time the arrearages were accrued.

MISCELLANOUS

TEX. R. CIV. P. 91a PROVISION DIRECTING COURTS TO RULE ON MOTIONS TO DISMISS WITHIN 45-DAYS OF FILING IS DIRECTORIAL LANGUAGE, NOT MANDATORY.

***Koenig v. Blaylock*, ___ S.W.3d ___, No. 03-15-00705-CV, 2016 WL 3610950 (Tex. App.—Austin 2016, no pet. h.) (07-01-16).

Facts: Husband purchased a home while dating Wife before they lived together. During the marriage, they lived in the home, and Wife contributed some funds to pay towards the mortgage. During their divorce proceedings, they reached a mediated settlement agreement that awarded the home to Husband upon a cash payment by him to Wife. Subsequently, when Husband failed to make the cash payment, Wife filed a motion to enforce asking the family court to either order a forced sale of the home or award her a money judgment. The family court declined to order a forced sale but awarded her a money judgment plus interest and fees. When Wife was unable to collect on her judgment, she filed a partition suit in a district court seeking an order to sell the home and distribute the net proceeds according to the parties' respective ownership interests in the home. Husband filed a motion to dismiss under Tex. R. Civ. P. 91a. The district court was unable to schedule a hearing within the Rule's requisite 45-day period, and at the hearing on Husband's motion, the district court denied the motion on the procedural ground that it had not ruled within 45-days and awarded Wife attorney's fees as the prevailing party. After an evidentiary hearing, the district court denied Wife's requested relief without stating a reason. Wife appealed. Husband filed a cross-appeal, arguing that the district court abused its discretion in denying his motion to dismiss.

Holding: Reversed; Rendered in part; Remanded in Part

Opinion: When a statute directs, authorizes, or commands an act to be done within a certain time, the absence of a stated consequence for failure to act indicates a *directory* construction, as opposed to a *mandatory* construction. Here, the requirement to grant or deny the motion to dismiss within 45 days is intended to promote the orderly and prompt dismissal of baseless causes. The district court's construction would frustrate the legislative intent of the Rule that a defendant be made whole through an award of attorney's fees and costs incurred in successfully dismissing a baseless suit.

Further, here, because the family court granted Wife a money judgment in exchange for her interest in the property, her subsequent suit seeking "her interest" in the sale of the property was baseless and should have been dismissed.

BECAUSE PROTECTIVE ORDER ISSUED BASED ON SEXUAL ASSAULT, ONLY THE VICTIM HAD STANDING TO MOVE TO RESCIND PROTECTIVE ORDER.

***R.M. v. Swearingen*, ___ S.W.3d ___, No. 08-15-00359-CV, 2016 WL 4153596 (Tex. App.—El Paso 2016, no pet. h.) (08-05-16).

Facts: R.M. filed an application for a protective order against Swearingen alleging sexual assault. The trial court issued a 10-year protective order finding that R.M. and Swearingen were intimate partners, that there were reasonable grounds to believe Swearingen sexually assaulted R.M., that Swearingen committed family violence, and that further family violence was likely to continue. One year later, Swearingen moved to terminate the protective order, alleging that he wanted to apply for a transfer at work but that it was common knowledge at his office that employees subject to pending administrative investigations could not transfer. He believed that lifting the protective order would allow him to convince his employer to end the investigation trembling on the witness stand. At the hearing's conclusion, the trial court remarked that if Swearingen left town, it would take pressure off R.M. However, the trial court further noted that if anything happened to make

R.M. feel unsafe, she should get something filed ASAP, and the trial court would hear it. Once the protective order was lifted, R.M. promptly appealed.

Holding: Reversed and Rendered

Opinion: The Texas Code of Criminal Procedure allows a victim of a sexual assault (among certain other listed crimes) to seek a protective order. No prior relationship between the assailant and the victim is required. If there are reasonable grounds to believe the applicant is the victim of a sexual assault, a protective may be issued for the duration of the lives of the offender and victim or for any shorter period stated in the order. While the Texas Family Code allows either the applicant or the person subject to the order to move the issuing court to reconsider the need for a protective order after one year, the Code of Criminal Procedure only permits the trial court to rescind a protective order issued on the ground of sexual assault on the victim's request. Further, the relevant article of the Code of Criminal Procedure specifically states that to the extent that its provisions conflict with the Family Code, the Code of Criminal Procedure takes precedent. Accordingly, Swearingen lacked standing to move to rescind the order prior to its expiration.

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 4203494 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (08-09-16).**

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.

TRIAL COURT ABUSED DISCRETION BY REFERRING CLARIFICATION PROCEEDING TO SPECIAL JUDGE OVER HUSBAND'S OBJECTION.

***In re Turner*, ___ S.W.3d ___, No. 03-16-00367-CV, 2016 WL 4272121 (Tex. App.—Austin 2016, orig. proceeding) (08-09-16).**

Facts: Husband and Wife agreed to an order referring their divorce proceeding to a special judge. After a bench trial, the special judge signed a divorce decree that was later approved by the referring court. A few months later, Wife filed a motion to clarify the property division and requested to have the case referred to the same special judge. Husband objected to the referral. After the trial court referred the case to the same special judge, Husband filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A suit to enforce or clarify a divorce decree is a separate lawsuit from the original divorce proceeding. Thus, the referral to the special judge required a new referring order, which required a second agreement from both parties.