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

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DIVORCE
PROCEDURE AND JURISDICTION

WIFE ENTITLED TO NEW TRIAL BECAUSE HUSBAND SERVED HER BY PUBLICATION AND TRIAL COURT FAILED TO APPOINT AN AD LITEM TO REPRESENT HER.

Jackson v. Jackson, No. 04-17-00771-CV, 2018 WL 3998627 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (08-22-18).

Facts: Husband and Wife met in Kyrgyzstan, where they married and had a child. Subsequently, Husband returned to the U.S. while Wife remained in Kyrgyzstan. Husband filed for divorce and attempted to serve Wife by registered mail but did not receive a return of service. Husband served Wife by publication and obtained a default divorce decree. Wife eventually filed an answer, but it was not timely. She also filed a special appearance, along with other pleadings, including a motion for new trial. At a hearing on the motion for new trial, the court found Wife failed to prove she had not been properly served and denied the motion. (The appellate court included a footnote in its opinion noting that the burden should have been on Husband to establish proper service.) Wife appealed.

Holding: Reversed and Remanded

Opinion: Tex. R. Civ. P. 244 provides:

> Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof.

Here, Wife was served by publication, and she did not answer or appear within the prescribed time. Thus, the trial court was required to appoint an ad litem to defend Wife's case.

The appellate relief for a default judgment for defective service would be a new trial if, as here, the appellant entered a general appearance by her actions before the trial court. At her hearing on her motion for new trial, Wife did not ask the trial court to rule on her special appearance before she sought relief from the default judgment. She violated the due-order-of-hearing required and waived her special appearance. Thus, her answer became a general appearance, which sufficed for valid service.

DEFAULT JUDGMENT SET ASIDE—IMPROPER SERVICE AND NO EVIDENCE TO SUPPORT DISPROPORTIONATE DIVISION AND CHILD SUPPORT LESS THAN GUIDELINE.

Childress v. Regalado, No. 13-17-00704-CV, 2018 WL 4016864 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (08-23-18).

Facts: Husband and Wife decided to get divorced and went to an attorney to discuss an agreed divorce. However, subsequently, Husband hired a different attorney filed for divorce and filed a return of service indicating that Wife was served with citation. Wife did not answer or appear. Husband obtained a default decree that appointed the parties joint managing conservators of their Child, asserted that there was no community estate of value, and awarded each party the property in his or her possession, granted Husband a standard possession order, and ordered him to pay $600 a month in child support. When Wife learned of the default decree, she found the citation at her parents' house, and her brother said that he might have accepted service on her behalf. Wife filed a motion for new trial, to which Husband did not respond. Her motion was overruled by operation of law, and she appealed.

Holding: Reversed and Remanded

Opinion: If a defendant's factual assertions are not controverted by the plaintiff, the defendant satisfies her burden if she has set forth facts which, if true, negate a finding of intentional or consciously indifferent conduct.

Husband did not controvert Wife's affidavit in support of her motion for new trial. Wife asserted that she was not personally served with citation. Additionally, one month before the default judgment was signed, she asked Husband if he had filed for divorce, and Husband responded that he did not have time to worry about the divorce. Wife further alleged that the trial court did not divide the community estate equally and that Husband did not provide the trial court with any basis for a disproportionate division. Wife stated that Husband's income was $100,000 a year and that he had

other children for whom he paid support. Thus, according to the statutory guidelines, Husband's child support obligation should have been set at $1488.09 a month. Finally, Wife stated that she was willing and able to reimburse Husband all reasonable expenses incurred in obtaining the default.

DIVORCE
INFORMAL MARRIAGE

DESPITE SEVEN YEARS OF TAX RETURNS FILED AS A MARRIED COUPLE, EVIDENCE INSUFFICIENT TO ESTABLISH INFORMAL MARRIAGE.

Pedone v. Harvey, No. 07-17-00394-CV, 2018 WL 3677804 (Tex. App.—Amarillo 2018, no pet. h.) (mem. op.) (08-02-18).

Facts: After Boyfriend and Girlfriend were dating for about a year or two, Boyfriend proposed, and Girlfriend accepted. They moved to Texas and enacted their dream of having a multi-million-dollar horse clinic, at which Boyfriend was a vet, and Girlfriend was a horse trainer. With bank loans and financial assistance from family, they purchased property for the clinic. Their businesses were intertwined, and they maintained joint bank accounts. Bookkeeping for the two businesses remained separate. They filed joint tax returns for seven years. When the relationship became irreconcilable, Girlfriend filed for divorce. After a trial, the court signed an order finding no informal marriage and dismissed Girlfriend's petition. She appealed.

Holding: Affirmed

Opinion: Contrary to Girlfriend's assertions, Boyfriend disputed Girlfriend's evidence in support of an informal marriage. Although Girlfriend asserted that Boyfriend gave her a ring that resembled a wedding band, Boyfriend stated that Girlfriend wanted a ring that would not snag on things, so he designed a band with a lower profile than a typical engagement ring. Boyfriend testified that when he proposed, it was a proposition to marry in the future, not to be married that moment. Boyfriend testified that Wife handled the tax returns and that he signed them without really reading them or getting involved with the accountants. While Girlfriend produced witnesses who believed the couple was married, Boyfriend produced witnesses who claimed to have never believed the couple were married. Further, deeds for property and other documents identified the parties as single individuals.

HUSBAND'S EXECUTION OF SWORN INVENTORY AND APPRAISEMENT DURING DIVORCE PROCEEDINGS DID NOT CONSTITUTE JUDICIAL ADMISSION OF INFORMAL MARRIAGE, MUCH LESS A SPECIFIC DATE OF MARRIAGE.

Gil v. Holderman, No. 04-17-00701-CV, 2018 WL 3861718 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (08-15-18).

Facts: Wife filed for divorce alleging an informal marriage to Husband. The couple had two homes during the disputed time period. One of the homes was deeded to Husband's mother. Wife argued that the deeds to Husband's mother were ineffective for several reasons, including that both parties had not signed any single deed. The trial court found that the parties' marriage commenced after the property was deeded, so the property was not owned by the parties. Wife appealed, arguing the trial court erred in determining the date of marriage and in not ordering a partition-by-sale of the disputed house. Specifically, Wife argued Husband judicially admitted to the existence of marriage by executing and introducing his inventory and appraisement.

Holding: Affirmed

Opinion: When the trial court admitted Husband's inventory and appraisement into evidence, it asked Husband whether the document—by its existence—was an admission that the parties were married. Husband responded, "Absolutely not." Further, the document did not clearly or unequivocally state any of the elements of a common law marriage or list the disputed property as community property.

HUSBAND RAISED MORE THAN A SCINTILLA OF EVIDENCE AS TO EACH ELEMENT OF COMMON-LAW MARRIAGE.

Tran v. Ngo, No. 01-17-00138-CV, 2018 WL _____ (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (08-30-18).

Facts: The parties formally married in 2000 and were divorced in 2005, after which they continued to live together and have 2 children in 2006 and 2007. In 2012, Husband moved out, then moved back in with Wife in 2013 and continued to live with Wife until late 2014. In 2015, Husband filed for divorce, after which Wife filed an MSJ asserting that the parties were not married pointing to affidavits signed by the parties that in 2013 that the parties were not married, not living together, and not holding themselves out as married. In his deposition, Husband acknowledged that he had filed a bankruptcy petition in 2005 representing under oath that he was divorced and not currently married. Wife also pointed to Husband's tax filings from 2007-2014, identifying a different address than Wife's. Husband claimed that while he was formally married to Wife, he encountered financial trouble, and to protect Wife from creditors, the parties agreed to divorce. Husband also asserted that, after they divorced, the parties agreed to be married but to keep it secret from Husband's creditors, so that is why the parties used two different addresses. Husband also supported his assertions with declarations from 12 persons, who stated that the parties referred to each other as husband and wife, believed the two parties were married, and that they lived together. One of the declarations was from a nanny of the children, who attested to the parties living together and referring to one another as husband and wife. Husband also relied on a number of cards in which Wife wrote him, one of which said "Happy anniversary to my husband." Wife acknowledged the authenticity of the card and that she sometimes wore her wedding ring after the divorce. Additionally, as late as 2014, the parties' auto insurance policy identified the parties as married. The trial court granted the MSJ.

Holding: Reversed and Remanded

Opinion: Husband raised more than a scintilla of evidence as to each element of common-law marriage.

DIVORCE
Alternative Dispute Resolution

BECAUSE MSA HAD ARBITRATION PROVISION, TRIAL COURT SHOULD NOT HAVE RESOLVED DISPUTED INTERPRETATIONS BUT SHOULD HAVE ORDERED PARTIES TO ARBITRATION.

In re K.A.M., No. 12-17-00402-CV, 2018 WL 3748687 (Tex. App.—Tyler 2018, no pet. h.) (mem. op.) (08-08-18).

Facts: In a child-custody dispute that involved allegations of drug use and abuse, the parties entered into a binding MSA that included an arbitration provision. Subsequently, due to material and substantial changes in circumstances, the parties continued to litigate some of the child-related issues. At a hearing on the entry of a final judgment, the parties disputed some of the language included in a proposed order including whether the words "designate" and "consent" were interchangeable. The MSA stated Father would have the exclusive right to designate medical care for the Child, while the proposed decree gave Father the exclusive right to consent to medical care. Mother also complained of other inconsistencies in the proposed judgment. The trial court overruled Mother's objections and signed the order. Mother appealed.

Holding: Reversed and Remanded

Opinion: The parties' MSA included an arbitration provision that required any disputes regarding interpretation or performance of the agreement or regarding the drafting of the final judgment to be submitted to binding arbitration. Because there was a fact question as to the parties' intent as to the Child's medical care, the trial court was required to order the parties to binding mediation to resolve the dispute.

DIVORCE
Property Agreements

BECAUSE HUSBAND FRAUDULENTLY INDUCED WIFE INTO MARRIAGE, PREMARITAL AGREEMENT WAS VOID.

In re Ja.D.Y., No. 05-16-01412-CV, 2018 WL 3424359 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (07-16-18).

Facts: When Husband and Wife met, Husband told her that he had been married once before, that he had two degrees and was working on a PhD, that he was a math teacher at UNT, that he was a career marine, that he earned between $100,000 and $225, 000 a year for decades, and that he had never been unemployed. After marriage, Wife learned Husband had been married twice before, had no degree, was not a teacher, was only a marine for a few weeks but was kicked out for being under age, was in the army but was kicked out for homosexual behavior, only made in excess of $100,000 in one year, and had taken unemployment several times in his life. Wife testified that she married Husband because she thought he was a person who had an ability to do what he said and to succeed in life. Wife filed a petition for divorce and subsequently filed an amended petition seeking an annulment and raising a claim for fraud. While they were together, Wife's business had purchased a truck, which Husband put in his name and then sold without Wife's permission. After a trial, the court granted the requested annulment and awarded Wife "actual damages" for the amount her business paid for the truck. Husband appealed. Among other complaints, Husband argued that the parties had signed a premarital agreement, and under the agreement the truck was his separate property.

Holding: Affirmed

Opinion: In a suit for dissolution of marriage, the husband and wife are competent witnesses for and against each other. Further, the trial court, as factfinder, is the sole judge of the credibility of the witnesses. Thus, Wife's testimony was sufficient to support the trial court's judgment that Husband fraudulently induced her into marriage.

A premarital agreement becomes effective on marriage. If a marriage is void, an agreement that would have otherwise been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. Wife's company purchased a truck for Husband to use, but she asserted she did not agree for title to be in his name.

DIVORCE
Property Division

EVIDENCE INSUFFICIENT TO SUPPORT DISPROPORTIONATE DIVISION AWARDED IN DEFAULT DIVORCE DECREE.

Pena v. Pena, No. 13-17-00585-CV, 2018 WL 3301920 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (07-05-18).

Facts: Husband filed for divorce, but Wife did not respond or appear. At a final trial, Husband testified as to some of the parties' property. He asked the court to award him all the property to which he testified and to award Wife any property in her possession. Husband did not present any evidence of the values of any of the parties' property. The trial court granted Husband a default judgment that awarded the requested property to Husband but included no property award to Wife. Two months later, Wife filed a restricted appeal.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Husband presented no evidence to rebut the community property presumption or to support any of the *Murff* factors. No evidence supported a 100-0 disproportionate division to Husband. Further, he presented no evidence of values of any of the property to the trial court, so the trial court could not have had sufficient evidence to determine whether the division was just and right.

LETTER OF INTENT TO TRANSFER INTEREST IN LIMITED LIABILITY COMPANY FROM HUSBAND TO WIFE—WITHOUT MORE—INSUFFICIENT TO CONCLUSIVELY ESTABLISH WIFE'S SEPERATE PROPERTY INTEREST IN LLC.

***Maldonado v. Maldonado*,** ___ S.W.3d ___, No. 01-16-00747-CV, 2018 WL 3543023 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (07-24-18).

Facts: During the marriage, Wife started a litigation support business. After a few years, Husband began working at the business, which became the parties' primary source of income. Husband managed the finances, while Wife managed marketing, production, and quality control. Subsequently, the parties established an LLC, which purchased a building for the litigation support business's place of business. Throughout the marriage, Husband claimed they had no money because clients were not paying their bills. Upon investigation, Wife learned Husband had been embezzling funds. Wife confronted Husband frequently about the issue, and Husband claimed "she would never find [the money]." After an argument, Husband signed and notarized a letter purporting to give Wife all his interest in both the litigation support business and in the LLC. A year later, Wife filed for divorce. During the divorce proceedings, Wife sought partial summary judgment to determine the character of the two businesses. The trial court found both were Wife's separate property. After a final trial, the court signed a decree of divorce that divided the parties' remaining assets. Husband appealed, challenging, among other findings, the characterization of the two businesses.

Holding: Reversed and Remanded

Opinion: Wife argued Husband waived his issues by failing to address them during the final trial. However, the trial court had ruled against Husband by way of partial summary judgment and denied his motion for reconsideration. Thus, Husband was not required to raise his complaints at trial again in order to preserve them for appeal.

Additionally, while Wife filed motions that included statements that may have been interpreted as assertions that the companies were community property, those statements could not be considered deliberate, clear, and unequivocal. The motions referenced "businesses" over which Wife sought temporary control and did not specify the businesses by name. Additionally, the motions were filed at the same time Wife had a pleading on file seeking a declaration that the litigation support business was her separate property. Thus, contrary to Husband's assertions, Wife never judicially admitted that any of the businesses were community property.

Husband argued that the letter purporting to transfer his interests did not satisfy all three elements of a gift. Before Husband signed the letter, Husband had a community-property interest in the litigation support business, but he did not personally own any of its assets. Further, Wife's summary judgment evidence included the letter as well as the business's stock certificate identifying her as the owner of all issued shares. Thus, Husband's delivery of the letter was sufficient to transfer his intangible community-property interest in the business. The trial court did not err in finding Husband gifted his interest in the litigation support business to Wife.

However, the only evidence regarding the LLC was Husband's letter. Wife produced no evidence of what the LLC was or did, what type of organization it was, the nature of her interest, or who else had an interest in the LLC. Because the evidence was inconclusive, the trial court erred in granting summary judgment as to the character of the LLC. Accordingly, the entire property division had to be remanded to the trial court, and Husband's remaining issues did not need to be addressed by the appellate court.

WIFE ENTITLED TO DISPROPORTIONATE SHARE OF RECONSTITUTED ESTATE DUE TO MASSIVE EXPENDITURES BY HUSBAND DURING HIS THIRTY YEARS' OF AFFAIRS.

***Cantu v. Cantu*,** ___ S.W.3d ___, No. 14-17-00175-CV, 2018 WL 3543366 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (07-24-18).

Facts: When the parties married, they were both pharmacists. Husband encouraged Wife to go to medical school, which she did. Wife opened an ophthalmology practice, and Husband opened five pharmacies and two clinics. After about six years of marriage, Wife learned that Husband was cheating on her, but she forgave him, believing it was an isolated indiscretion. After about 20 years of marriage, Wife filed a petition for divorce due to Husband's abusive behavior. After a short separation, the couple reconciled. After more than thirty years of marriage, Wife suspected Husband of cheating on her again, so she hired a private investigator. The investigator informed Wife that Husband had been having a series of affairs throughout the thirty-year marriage. Husband described his behavior as "normal, in the norm of marriages" and could not remember all the women's names even after being shown pictures. He had taken the women on shopping sprees and vacations, paid their rents and car notes, and gave them jobs or seed money for start-ups. Wife hired a CPA, who specialized in white collar crime, to do an accounting of Husband's expenditures. During

discovery, a forensic analyst appeared at one of Husband's business locations to find Husband running a scrubbing program to cause the permanent deletion of electronic files. The same program was installed at each of Husband's business locations. Husband claimed the scrubbing was routine procedure to improve computer performance. Based on the records available to the CPA, she estimated Husband's fraud exceeded $7 million, with some of her calculations based on extrapolating data. The trial court found Husband committed fraud on the community in the amount of $3,911,805 and awarded that amount to Husband as a community asset. It then awarded Wife 55% of the community and Husband 45%. Husband appealed, arguing that the court awarded him a "phantom asset" and removing that from the calculations, it actually awarded Wife 88% and him 12%. Husband also challenged Wife's expert's findings and complained of the trial court's failure to issue additional findings requested by Husband.

Holding: Affirmed

Opinion: The Court reviewed evidence as to 11 different categories of fraud. Even disregarding amounts claimed by Wife for which Husband introduced credible explanations, the total of Husband's fraud still exceeded the amount of fraud actually found by the trial court.

Although Husband complained that Wife's expert's analyses and conclusions were problematic, he failed to present his complaints to the appellate court with any specificity. Thus, Husband's inadequately briefed complaints were overruled. While Husband complained of Wife's expert's methodologies, he failed to object to those methodologies when the expert testified. Further, Husband agreed to the admission of the expert's report without objection. Thus, his complaint was waived. Finally, the additional findings requested by Husband regarding the trial court's precise calculations were unnecessary to the judgment and did not prevent Husband from adequately presenting his appeal.

BECAUSE FATHER FAILED TO OBJECT OR DISPUTE MOTHER'S EVIDENCE, THE EVIDENCE SUPPORTED A DISPROPORTIONATE DIVISION IN MOTHER'S FAVOR.

In re A.G., No. 05-16-01516-CV, 2018 WL 3545022 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (07-24-18).

Facts: Mother's amended petition for divorce asked for a disproportionate division because, among other reasons, all of the parties' debt was in her name. Additionally, because Father failed to pay any temporary child support or medical support or reimburse her for uncovered medical expenses, Mother asked the trial court to confirm Father's arrearages.

Father had a real estate license but claimed not to be making any money on real estate. He was allegedly in a business relationship with a woman who flipped houses, but he was not receiving money in exchange for his advice. He claimed not to be in a romantic relationship with her, but he took the parties' Children to dinners with her, and the Children reported that Father and the woman sometimes talked in the bedroom with the door locked. After a hearing, the trial court awarded Mother a disproportionate share of the marital estate and confirmed Father's arrearages. Father appealed, complaining the evidence was insufficient to support the judgement.

Holding: Affirmed

Opinion: Mother offered her requested relief and evidence to support her requests. Father did not dispute or object to her testimony, her documentation, or the trial court's oral division.

TRIAL COURT ERRED IN FINDING THAT HUSBAND'S RECOVERY FOR PERSONAL INJURIES WAS HIS SEPARATE PROPERTY, BUT WIFE FAILED TO SHOW THAT THE ERROR CAUSED HER HARM.

In re L.M., No. 05-17-00601-CV, 2018 WL 3599110 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (07-27-18).

Facts: While Husband and Wife lived in California, Husband was in a severe car accident that left him permanently disabled. The couple reached a settlement with an unknown third party. Husband received $915,928 and Wife received $190,000. Each party deposited their respective funds in a separate account in his or her own name. Subsequently, the couple moved to Texas and funds from Husband's account were used to make a down payment on a home. After a final trial in their divorce, the court ordered the house be sold, and the proceeds were to be divided 50/50 after Husband was reimbursed for his down payment. Wife appealed, arguing that the trial court erred in characterizing the proceeds as Husband's separate property.

Holding: Affirmed

Opinion: A spouse's separate property includes "recovery for personal injuries sustained by the spouse during marriage, except for any loss of earning capacity during marriage." Here, no evidence was offered regarding the breakdown of the settlement. Thus, the trial court erred in finding that Husband's portion of the proceeds was his separate property. However, without findings regarding value, the appellate court could not assess whether the error was harmful. Wife made no attempt in her appellate brief to show that the error resulted in an unjust division of the community estate.

FATHER-IN-LAW PUT ON EVIDENCE OF PARTIAL PERFORMANCE, WHICH IS AN EXCEPTION TO THE STATUTE OF FRAUDS.

In the Matter of the Marriage of Hashimi and Alwash, No. 14-17-00488-CV, 2018 WL _____ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (08-30-18).

Facts: Wife challenged final decree claiming trial court erred in awarding her father-in-law property that Wife contends belonged to the community. Father-in-law intervened claiming that come of the property that Wife was claiming as community was actually his and requested the imposition of a constructive trust. Husband testified that his Father transferred money to him to invest and as part of that investment, he purchased what was known as the Canadian House and the League City House, that he put his and Wife's names on the deed, but he was holding the houses in trust for Father-in-Law. Trial court awarded the houses to Father-in-law.

Holding: Affirmed.

Opinion: Wife's sole argument that Father-in-law failed to rebut the community property presumption is based on the statute of frauds. Wife argued that the agreements described by Father-in-law and Husband regarding the disputed property were unenforceable because Father-in-law's claims to this property were based on a contract for the sale of real estate or an agreement that was not to be performed within one year. Therefore, the statute of frauds applied and the trial court erred in not applying it.

The statute of frauds is an affirmative defense to a breach of contract claim that renders certain oral contracts unenforceable. An exception to the statute of frauds exists when there has been a breach of a fiduciary, or confidential, relationship that requires the imposition of a constructive trust. A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment. The Statute of Frauds is not a bar to the creation of a constructive trust arising from an abuse of a confidential or fiduciary relationship in the context of a parol transaction. To obtain a constructive trust, the proponent must prove: "(1) breach of a special trust or fiduciary relationship or actual or constructive fraud; (2) unjust enrichment of the wrongdoer; and (3) an identifiable res that can be traced back to the original property."

Partial performance is another exception to the statute of frauds alleged by Father-in-law. Under this exception, contracts that have been partially performed, but do not otherwise meet the requirements of the statute of frauds, may still be enforced in equity if denial of enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he has no adequate remedy, and the other party would reap an unearned benefit.

Whether the circumstances of a particular case fall within an exception to the statute of frauds is generally a fact question. Although Wife put on evidence of the first exception, she failed to attack the second exception on which Father-in-law put on evidence.

DIVORCE
Spousal Maintenance/Alimony

WIFE FAILED TO ESTABLISH SHE COULD NOT MEET HER MINIMUM REASONABLE NEEDS.

Waldrup v. Waldrup, No. 05-17-00779-CV, 2018 WL 3598956 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (07-27-18).

Facts: Husband and Wife separated for many years. During the separation, Wife became ill and was paralyzed from the waist down. She filed for a no-fault divorce. Although she did not plead for maintenance or support, at final trial, Wife, who was 65 years old, requested support. She asserted that she currently lived with her daughter and that, with that living arrangement, her income exceeded her expenses. However, Wife wished to move into an assisted living facility where her mother currently resided and asked that Husband pay the shortfall she would incur after the move. The trial court denied Wife's request for support. She appealed.

Holding: Affirmed

Opinion: The only evidence before the court was that Wife's retirement and disability income exceeded her monthly expenses. Wife presented no evidence that her expenses would increase after the divorce, that she could no longer live with her daughter, or that the facility to which she wished to move was the only one that could meet her needs.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

ENFORCEMENT ORDER PROVIDING DETAILS FOR PAYMENT UNDER CIRCUMSTANCES NOT CONTEMPLATED IN DECREE DID NOT MODIFY OR ALTER PROPERTY DIVISION.

In re C.M.F., No. 05-16-01385-CV, 2018 WL 3829262 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (08-13-18).

Facts: During their divorce proceeding, Husband (a physician) and Wife agreed that Wife would receive 50% of Husband's shares in a partnership. The agreement was drafted in accordance with the partnership agreement and provided that the shares would be divided between the spouses, then Wife would offer portion of the shares to the partnership for sale. The remaining shares were to be purchased by Husband at the same price paid by the partnership for the first portion. When Wife timely made her offer, Husband decided to purchase the shares, rather than allowing the partnership to do so. Thus, Husband argued, because the partnership did not pay for the first shares, the "price paid" was zero, and he was not required to pay Wife anything for the remaining shares. Wife filed a petition to enforce the AID. After a trial, the court ordered Husband to pay Wife at a price determined by the amount he paid for the first portion. Husband appealed, arguing again that he was not required to pay Wife anything and that the enforcement order improperly modified the property division.

Holding: Affirmed

Opinion: The AID clearly provided that Husband's shares of the partnership were to be divided equally between the parties. Because Wife, who was not a physician, could not own interest in the partnership, the AID provided a mechanism to carry out the division. However, Husband subsequently took an action not contemplated by the AID. Because the meaning of the AID was uncertain in that scenario, the trial court had the power to enter further orders to enforce the property division. Moreover, the enforcement order did not modify the property division; rather, it implemented the intent of the property division.

DECREE GIVING WIFE RIGHT TO LIVE IN HOME UNTIL SOLD DID NOT ALLOW HER TO BLOCK SALE OF HOME FOR 27 YEARS.

***Vara v. Vara*,** ___ S.W.3d ___, No. 08-17-00101-CV, 2018 WL 4001869 (Tex. App.—El Paso 2018, no pet. h.) (08-22-18).

Facts: A divorce decree included a provision that the parties' home would be sold, and its proceeds would be divided between the parties equally. The decree required a listing agreement be signed by a date certain and that the parties sell the house at a mutually agreeable price. Husband was responsible for the mortgage payments, and Wife had the exclusive right to use the premises. Husband would be reimbursed for the mortgage payments upon sale of the home. Enforcement and clarifying orders were needed to ultimately get the house sold. Subsequently, Wife filed a petition for enforcement complaining that she was forced to sell the home at the price of $450,000, which was not agreeable to her. Wife sought a money judgment. Wife testified that she never intended to sell the house before the mortgage was paid off in 2036, during which time she intended to lease out the home. Based on her calculations of the income she should have received as rental income and the projected value of the home in 2036, she believed her lost rental income plus her share of the proceeds of the sale amounted to $1.8 million. The trial court denied Wife's motion. She appealed.

Holding: Affirmed

Opinion: Wife's plans were immaterial because the divorce decree did not give her the option to lease the house for more than 27 years. Wife's right to use the house until closing did not give her the unilateral power to block the sale of the home until 2036. Further, Wife did not establish she had any expertise related to real estate sales or rentals, so her testimony regarding the projected sales price of the home in 2036 was not competent evidence.

CHILD HAD NO "HOME STATE," SO TEXAS COULD EXERCISE JURISDICTION OVER SAPCR BECAUSE FATHER AND CHILD HAD "SIGNIFICANT CONNECTIONS" WITH TEXAS.

***In re S.MA.*,** ___ S.W.3d ___, No. 06-18-00004-CV, 2018 WL 3431881 (Tex. App.—Texarkana 2018, no pet. h.) (07-17-18).

Facts: The Child was born in Georgia. Mother and Father were not married. The family moved to Texas for a few months and then returned to Georgia. Later, Father moved to Texas alone, and the Child alternated between Texas and Georgia for extended periods. After the Child had been in Texas for a few months, Father filed an original SAPCR in Texas. Mother filed a plea to the jurisdiction and her own SAPCR in Georgia. The Texas trial court determined it had jurisdiction over the proceeding and rendered a judgment appointing the parents joint managing conservators and giving Father the exclusive right to designate the Child's primary residence with a geographical restriction in Texas. Mother appealed, challenging Texas's jurisdiction under the UCCJEA.

Holding: Affirmed

Opinion: In the six-month period preceding filing, the child had not lived for six consecutive months in either Texas or Georgia. The Child was in Georgia for about two-and-a-half months and was otherwise in Texas. The trial court was correct in determining that neither state was the Child's home state.

Thus, to determine whether Texas had jurisdiction, the court had to consider whether the Child and Father had significant connections with Texas, other than mere physical presence. The question was not whether Texas had the most significant connection. Evidence showed the Child lived with Father for a significant period of time; had other relatives in Texas; had numerous photos of her enjoying company of friends and family in Texas; and had many personal belongings in Texas.

TEXAS COURT NOT REQUIRED TO EXTEND COMITY TO BRAZILIAN COURT'S HAGUE CONVENTION ORDER THAT CLEARLY MISINTERPRETED THE HAGUE CONVENTION, CONTRAVENED THE CONVENTION'S FUNDAMENTAL PREMISES OR OBJECTIVES, OR FAILED TO MEET A MINIMUM STANDARD OF REASONABLENESS.

Guimaraes v. Brann, No. 01-16-00093-CV, 2018 WL 3543022 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (07-24-18).

Facts: Mother filed for divorce in Harris County. Temporary orders appointed her and Father joint managing conservators of the Child, with Mother having the exclusive right to designate the Child's primary residence. Subsequently, the parents entered into a Rule 11 Agreement giving Mother permission to take the Child to Brazil for a trip. Mother was to return by a certain date to return the Child to Father; however, she failed to return. While in Brazil, Mother enrolled the Child in school and initiated judicial proceedings in Brazil. Father filed a petition pursuant to the Hague Convention in Brazil, but the Brazilian Court held that the Child should remain in Brazil. Mother then filed the Brazilian order in Texas and argued that because of the Brazilian Court's order, Texas lost subject-matter jurisdiction. The Texas court disagreed with Mother and ultimately rendered the parties divorced, appointed Father sole-managing conservator, and divided the parties' assets. Mother appealed, arguing in part that the Texas court lacked subject-matter jurisdiction.

Holding: Affirmed

Opinion: Contrary to Wife's assertion, the Texas trial court clearly had subject matter jurisdiction, and the Hague order could not revoke that jurisdiction. Thus, the question was not whether Texas lost jurisdiction but whether Texas should have extended comity to the Brazilian court's resolution of Father's Hague Convention Petition. Although the court found that Wife waived this issue for appellate review, it sua sponte discussed the issue of international comity.

A comity analysis begins with an inclination to afford deference to a foreign court's decision of a related Hague petition. However, a court may decline to extend comity if the foreign court "clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness."

Once a petitioner seeking the return of a child establishes that the retention or removal of a child was in violation of the petitioner's rights, the court must order the child's return to the country of habitual residence unless the respond-

ent demonstrates one of the Hague Convention's four narrow exceptions apply. Two of the defenses are: (1) the "well-settled" defense; and (2) the "grave-harm" defense.

The "well-settled" defense only applies if the child has been in the new country for at least a year before the petitioner seeks relief and if the child has become "well-settled" in his new environment. Here, the Hague Court Order applied the "well-settled" exception even though it acknowledged the Child had not been in Brazil a year. Thus, the application of the exception was a clear misinterpretation of the Convention, and the Texas trial court did not abuse its discretion in refusing to extend comity on that exception.

To establish the applicability of the "grave-risk" exception, there must be a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. While there is no clear definition of what constitutes a "grave risk," the risk must be more than "merely serious" and must be greater than that normally expected when taking a child away from one parent and passing the child to another parent. The exception is not a license for a court to speculate about where the child would be happiest. Only severe potential harm will trigger the exception. Here, the Hague Convention Order found that separating the Child from his mother would cause the Child harm and that Mother would be a more attentive parent than Father. The Brazilian Court's analysis engaged in exactly the sort of best-interest review the Hague Convention is designed to prohibit. Thus, the Texas trial court did not abuse its discretion in refusing to extend comity based on the "grave risk" exception.

PATERNAL AUNT AND PATERNAL GRANDMOTHER ESTABLISHED THEY HAD ACTUAL CARE, CONTROL, AND CUSTODY OF THE CHILD FOR AT LEAST SIX MONTHS BEFORE SEEKING CONSERVATORSHIP.

In re Y.Z.C.T., No. 05-17-00530-CV, 2018 WL 3599108 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (07-27-18).

Facts: At the time of trial, Mother was incarcerated. The Child's Paternal Aunt filed a SAPCR seeking conservatorship of the Child. Later, Paternal Grandmother joined the suit seeking conservatorship. Mother testified that Paternal Aunt, Paternal Grandmother, and Maternal Grandmother all cared for the Child while Mother was incarcerated. The two grandmothers lived together initially, but after time, Maternal Grandmother moved out. Mother had not lived with the Child in about six or seven years. After a hearing, the court found Paternal Aunt and Paternal Grandmother had actual care, control, and custody of the Child for at least six months. Mother filed a motion for new trial challenging, for the first time, Paternal Aunt's standing to seek conservatorship. The trial court held a hearing on Mother's motion. Mother asserted that Paternal Aunt never had care, control, or custody of the Child. However, Paternal Grandmother and Paternal Aunt testified that they each cared for the Child, particularly because Paternal Grandmother had to leave for work at 6am. After hearing evidence, the court denied Mother's motion for new trial. She appealed.

Holding: Affirmed

Opinion: When standing is addressed pre-trial, the court takes as true all evidence favorable to the parties alleging standing. However, because the issue here was not addressed pre-trial, the appellate court reviewed the implied findings for legal and factual sufficiency. While the facts were sparse and disputed, the trial court was free to believe Paternal Grandmother's testimony over Mother's.

SAPCR
Temporary Orders

MOTHER'S FREQUENT MOVES INSUFFICIENT TO SUPPORT TEMPORARY ORDERS CHANGING THE PERSON WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S RESIDENCE.

In re Tindell, No. 03-18-00274-CV, 2018 WL 3405035 (Tex. App.—Austin 2018, orig. proc.) (mem. op.) (07-12-18).

Facts: Father filed a petition to modify the parent-child relationship because he had concerns for the Child's well-being. Without making any finding that the Child's present circumstances would significantly impair the Child's physical health or emotional development, the trial court signed temporary orders that changed the person with the exclusive right to designate the Child's primary residence from Mother to Father. Mother sought a writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted in Part

Opinion: While the trial court did not make any Tex. Fam. Code § 156.006(b)(1) findings, the judgment would stand if an implied finding was supported by the evidence. However, the evidence offered did not rise to the level of significant impairment.

Much of the evidence focused on Mother's conduct and the past conduct of her boyfriends, rather than the Child's present circumstances. Father lacked personal knowledge of many of his allegations. There was no evidence anyone ever physically abused the Child. Both parents testified that Mother and the Child immediately left a living situation when a friend used marijuana around the Child. There was no evidence Mother ever drank or used marijuana in front of the Child. Although Father asserted that he believed the Child was underweight, his concern did not prompt him to take the Child to a doctor. Mother's frequent moves were insufficient to rise to the level of significant impairment. As were Mother's occasional phone calls to Father's mother stating that it was hard to be a single mom, that she couldn't do it anymore, or that she believed she wasn't being a good mom. Asking a grandparent for help is not evidence of an act or omission from which the court could imply physical health or emotional development would be significantly impaired.

SAPCR
Alternative Dispute Resolution

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

Williams v. Finn, No. 01-17-00476-CV, 2018 WL 3910162 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (mem. op.) (07-07-18).

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: Husband 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.

SAPCR
Paternity

MOTHER NOT PRECLUDED FROM FILING PATERNITY SUIT ON CHILD'S 15TH BIRTHDAY BECAUSE THE 2011 STATUTORY EXCEPTIONS APPLIED TO STATUTE OF LIMITATIONS; MOTHER NOT ESTOPPED BY AMENDED BIRTH CERTIFICATE NAMING HUSBAND AS FATHER BECAUSE BIOLOGICAL FATHER HAD NO KNOWLEDGE OF AMENDED BIRTH CERTIFICATE.

In re V.M.T., No. 04-17-00575-CV, 2018 WL 3861724 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (08-15-18).

Facts: The Child was born during the pendency of Mother and Husband's divorce proceedings. When the final decree was entered, it provided Husband was not the Child's father. Seven years later, Mother and Husband remarried. They applied for a new birth certificate to add Husband as the Child's father. Eight years later, Mother filed a suit alleging Father was the Child's father, which was confirmed by genetic testing. Mother and Father filed competing motions for summary judgment. Father asserted Mother's suit was barred by the statute of limitations and that she was equitably estopped from bringing her suit based on the amended birth certificate. The trial court granted Father's motion as to the limitations defense, denied his estoppel claims, and denied Mother's motion for summary judgment. Mother appealed.

Holding: Reversed and Rendered

Opinion: When presented with cross-motions for summary judgment, the appellate court must consider all evidence presented by both sides, and if the trial court erred, render the judgment the trial court should have rendered.

When the Child was born (in 2000), the paternity statute in effect allowed a paternity challenge until the Child turned 20. About a year after the Child's birth, the statute was amended to limit a challenge to a four-year statute of limitations. Two years later, the statute was again amended to include an exception if the presumed father never represented to others that the child was his own. Eight years later (in 2011), the statute was again amended to allow an exception if the presumed father did not live with or engage in sexual intercourse with the mother during the time she became pregnant, or if the presumed father was precluded from adjudicating his parentage based on a mistaken belief that he was the child's father. Moreover, the Legislature provided that changes would apply to proceedings commenced on or after the effective date of the amended statute.

Thus, at the time the Child was born, the statute provided for a paternity suit until the Child turned 20. At the time the suit was filed, the statute allowed Mother to bring her suit because the 2011 exceptions applied.

Father argued that the amendments were unconstitutionally applied to him. The appellate court balanced the public policy of the statute against the nature of Father's prior right or "settled expectations." Public interests are served by preventing a man being required to support a child he did not conceive and by benefiting the child by ensuring the courts remain open to a claim allowing the child to seek support from his biological father.

In comparison to these interests, Father produced no evidence he contemplated such a claim being brought against him. At the time the Child was born, a claim could have been brought any time in the next 20 years. Further, although Father tried to point to the amended birth certificate in support of his estoppel claims, Father did not know of the amended birth certificate until after the underlying suit began, so he could not have detrimentally relied on it. Additionally, a party cannot assert a quasi-estoppel claim based on representations made to a third party.

Because the paternity test showed that Father was 99.9999999946% more likely to be the Child's father than a random Caucasian man, the trial court erred in denying Mother's motion for summary judgment.

MOTHER FAILED TO SHOW DILIGENCE AND COULD NOT ESTABLISH ESTOPPEL CLAIM AGAINST BIOLOGICAL FATHER AFTER FOUR-YEAR LIMITATIONS PERIOD HAD LAPSED.

In re J.E.P., No. 05-17-00095-CV, 2018 WL 3968418 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (08-20-18).

Facts: Mother had an affair with Father while married to Husband, and the affair resulted in a Child. When Mother told Father of the pregnancy, he began paying monthly child support and continued to do so until the initiation of the underlying suit. When the Child was seven-years old, Mother filed a paternity suit to adjudicate Father's paternity and obtain child support orders. Father argued that her suit was barred by the statute of limitations. Mother contended that Father's payment of child support induced her not to timely file her suit and that Father was equitably estopped from challenging the claim. The trial court agreed with Mother. Father appealed.

Holding: Reversed and Rendered

Opinion: To maintain a paternity suit after the expiration of the 4-year statute of limitations, one must generally establish one of the statutory exceptions: (1) that the presumed mother and father did not live together or have a sexual relationship at the time of conception; or (2) that the presumed father was precluded from commencing suit based on a mistaken belief. Here, Mother failed to conclusively establish either exception.

Mother additionally argued that Father's behavior equitably estopped her from filing suit within the statutory period. However, a claimant must be diligent to file the cause of action she knows she has; she may not continue to rely upon the defendant's original inducement beyond a point when it becomes unreasonable to do so. Here, although Father paid child support up until Mother filed suit, the appellate court held that Mother cited no evidence that she exercised diligence. Mother's conclusory statement that there was no lack of diligence on her part was insufficient to establish that point.

SAPCR
Possession

FATHER NOT ENTITLED TO LONGER PERIODS OF POSSESSION THAN MOTHER SIMPLY BECAUSE HE WAS GIVEN THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S PRIMARY RESIDENCE.

In re W.B.B., No. 05-17-00384-CV, 2018 WL 3434588 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (07-17-18).

Facts: The final divorce decree named the parents joint managing conservators, gave Father the exclusive right to designate the Child's primary residence, and ordered Mother to pay child support. Subsequently, Father filed suit to have himself named the Child's sole managing conservator and to increase Mother's child support obligation. Mother filed a counter-petition asking the court to order Father to pay child support. After a trial, a jury found that the parties should remain joint managing conservators and that Father should retain the exclusive right to designate the Child's primary residence. In addition to making orders regarding extracurricular activities and phone calls between the Child and the parents, the trial court then granted the parties a week-on-week-off possession schedule and ordered that neither party would be obligated to pay child support. Father appealed several issues, including complaints regarding the trial court's denial of his motion to recuse the judge and the trial court's possession order. Father argued that in granting the parents' equal periods with the Child, the trial court effectively ignored the jury's finding that he should be the "primary" parent.

Holding: Affirmed

Opinion: Without a reporter's record of the recusal hearing, the appellate court was required to presume the evidence presented supported the judgment. Further, Father provided no authority to support his argument that the mere fact that his attorney also represented the judge's ex-husband in a pending suit against the judge's son automatically would lead a reasonable person to doubt the judge's impartiality. Courts enjoy a presumption of impartiality.

The jury responded to questions of conservatorship and the assignment of rights and duties. The trial court's possession order did not interfere with the jury's answers. Contrary to Husband's assertions, he was not entitled to longer periods of possession simply because the jury found he should be the "primary" conservator.

SAPCR
Child Support

FATHER'S RETROACTIVE CHILD SUPPORT APPROPRIATELY BASED ON HIS ACTUAL EMPLOYMENT DURING THE RELEVANT TIME PERIOD.

In re L.J.F., No. 09-17-00151-CV, 2018 WL 3384501 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (07-12-18).

Facts: Father never lived with Mother, but he gave her $200 a month for three months to cover daycare expenses, paid some of the Child's medical bills, and bought some clothes and milk. Father briefly worked for CPS, earning $37,000 to $43,000 a year, but he lost that job. Subsequently, he worked with a general contractor doing maintenance work, earning $13.50 an hour. That job only lasted twelve weeks. At the time of trial, Father was taking unemployment but actively looking for work. Mother filed a petition seeking child support orders and retroactive child support. The trial court determined the amount of time Father was at each of his jobs and calculated appropriate child support for those periods, using minimum wage for the period of Father's unemployment. Additionally, the trial court credited Father for his payment of daycare and medical expenses. After completing the calculations, the trial court entered a judgment for child support and retroactive child support. Father appealed the judgment for retroactive child support.

Holding: Affirmed

Opinion: When determining retroactive child support, the court must consider, among other things, the net resources of the obligor during the relevant time period and whether the obligor provided actual support. Here, Father had 2 different jobs during the relevant time period and was temporarily unemployed, and the trial court considered Father's income for the specific number of months over that period. Additionally, the court credited Father for $2000 he had paid in actual 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 4123047 (Tex. App.—Beaumont 2018, no pet. h.) (mem. op.) (08-30-18).

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.

SAPCR
MODIFICATION

MOTHER ALLOWING GRANDMOTHER—WHO HAD HISTORY OF DRUG ABUSE—TO CARE FOR CHILD CONSTITUTED A MATERIAL AND SUBSTANTIAL CHANGE OF CIRCUMSTANCES.

Fleming v. Fleming, No. 13-16-00373-CV, 2018 WL 3599284 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (07-27-18).

Facts: When Mother and Father divorced, Mother was granted the exclusive right to designate the Child's primary residence and was awarded the parties' marital home. Mother worked a day shift, during which time, the Child attended daycare. The Child would spend a few hours after daycare with Father before returning to Mother for the night. About six months after the divorce, Mother started the nightshift. The Child continued to spend days at daycare, while Mother slept, and then spent the evenings with Father. A few months later, Mother's mother ("Grandmother") moved in with Mother and the Child. Father was concerned by this relationship because Grandmother frequently used profanity and had a history of drug abuse. He started noticing the Child using curse words. Father also complained that Grandmother had CPS take her kids away numerous times. Mother had been removed from Grandmother's care in the past. Mother stated that she was not concerned because "everybody has a past." Mother decided to sell the house to Father and move in with Grandmother. Mother returned to the dayshift and rather than leave the Child in daycare, she started leaving the Child with Grandmother. She also began strictly enforcing the 6:00 p.m. exchange times and would refuse to exchange the Child if Father was a minute late. Mother refused to allow Father to have Thanksgiving with the Child because he arrived at 6:07. Father filed a petition to modify, seeking the exclusive right to designate the Child's primary residence. The court granted Father's request. Mother appealed, arguing that Father should not have been allowed to put on evidence regarding Grandmother because of failures to disclose during discovery. Additionally, Mother complained that the trial court erred in finding a material and substantial change in circumstances.

Holding: Affirmed

Opinion: Although Father did not disclose that part of his complaint was in regard to Mother moving in with Grandmother, that information—and Grandmother's checkered past—was no secret to Mother or Father. Thus, Mother could not claim that she was surprised by the fact that her move and Grandmother's care of the Child was a basis for Father's petition.

While Mother had returned to her previous daytime schedule that she had at the time of divorce, she had moved in with Grandmother without knowing when Grandmother last did drugs or was arrested. Mother sold her home, pulled the Child from daycare and allowed her mother to care for the Child despite her mother's frequent use of swear words. Additionally, Mother suddenly initiated her zero-tolerance policy for Father's pick-up time which caused him to frequently miss his periods of possession.

FATHER'S INCREASED TRAVEL FOR WORK SUFFICIENT TO SHOW MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

In re Y.C., No. 13-17-00419-CV, 2018 WL 3764210 (Tex. App.—Corpus Christi 2018, no pet. h.) (mem. op.) (08-09-18).

Facts: The final divorce decree gave Mother the exclusive right to designate the Child's primary residence. A subsequent order gave Father that right. Later, Mother filed a petition to modify, seeking the exclusive right to designate the Child's primary residence. Father filed a counterpetition asking that Mother's visitation be supervised. Father testified that he travelled for work and sometimes was unable to come home during the week. When he was away, the Child's paternal Grandmother and Father's wife cared for the Child. Grandmother and Mother did not have a good relationship and exchanges of the Child were difficult. After a bench trial, the court granted Mother the exclusive right to designate the Child's primary residence. Father appealed, arguing Mother failed to establish a material and substantial change in circumstances.

Holding: Affirmed

Opinion: Because Father sought only to modify Mother's visitation, and Mother sought to change custody entirely, Father's assertion of a material and substantial change did not result in a judicial admission of a material and substantial change warranting Mother's requested relief. However, during the period in which Father was the primary conservator, his absences increased in duration, and the Child was cared for by Father's wife and the Child's Grandmother—with whom Mother had a strained relationship. On several occasions, law enforcement had to facilitate the exchange of the Child.

FATHER FAILED TO MAKE OFFER OF PROOF WHEN TRIAL COURT DID NOT INTERVIEW CHILD IN CHAMBERS AS REQUESTED.

In re T.A.L., No. 07-17-00274/275-CV, 2018 WL 3862994 (Tex. App.—Amarillo 2018, no pet. h.) (08-14-18).

Facts: Mother and Father had 2 biological children, T.A.L. and C.E.L. A third child, T.S. was placed with them after T.S.'s parents' rights were terminated. In April 2015, Mother and Father divorce, Mother and Father were appointed joint managing conservators, Mother was appointed primary conservator of the parties' 2 biological children, and ordered Father to pay child support. In July 2015, T.A.L. went to live with Father without Mother's objection. In January 2016, Mother remarried and transferred C.E.L. to another school. Subsequently, Father sought to modify the parties' decree to seek sole managing conservatorship of T.A.L. and C.E.L.

Both parents sought to modify T.S.'s termination order each seeking sole managing conservatorship or alternatively, the exclusive right to determine the child's primary residence.

Both modification cases were heard together, after which, the court appointed Mother as the primary conservator of C.E.L. and Father as the primary conservator for T.A.L., with each to pay child support. In regards to T.S., the parties were named joint managing conservators, with Mother having the exclusive right to determine T.S.'s primary residence. Father was ordered to pay child support to Mother for T.S. Father appealed.

Holding:

Opinion: Father complained that the trial court erred by splitting the siblings, failing to interview T.A.L. in chambers on the record, and by ordering him to pay child support to Mother for T.S. because the request for child support for T.S. was not in her pleadings and it was not tried by consent.

Father failed to show that the splitting of the siblings was not in their best interest.

Father failed to make an offer of proof or to show how he was harmed by the trial court's failure to interview T.A.L.

The evidence shows that child support for T.S. was tried by consent—it was mentioned in opening statement, Mother testified on direct that it was in T.S.'s best interest that Father pay child support, and in cross-examination Mother testified that she was asking for child support for T.S.

FATHER'S SAPCR FILED FRIVOLOUSLY, WHICH ENTITLED MOTHER TO ATTORNEY'S FEES.

***Kelsall v. Haisten*, ___ S.W.3d ___, No. 01-17-00389-CV, 2018 WL 4126590 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (08-30-18).**

Facts: After Mother and Father's divorce, Father brought a modification suit seeking primary conservatorship. After a year and a half of litigation in that suit, Mother and Father reached an agreement to settle all of the parties' issues. Nine months later, Father filed a pro se petition to modify, again seeking primary conservatorship. Before Mother could answer, Father served her with discovery requests, including requests for admissions, amended requests for admission, requests for production, and a subpoena duces tecum seeking production from the Child's psychiatrist's office. Mother answered, denying Father's allegations and alleging his suit was filed frivolously and was designed to harass her, and she sought attorney's fees. Father filed several motions to strike Mother's answer and issued supplemental requests for production. Mother filed a motion to quash her deposition and a motion for a protective order to protect the Child's psychiatric records. The trial court granted both of Mother's motions. Two days later, Father nonsuited all his claims. Mother requested a hearing on her attorney's fees. After a hearing, the trial court found that Father's suit was frivolous and awarded Mother her attorney's fees. Father appealed.

Holding: Affirmed

Opinion: Courts presume pleadings and other papers are filed in good faith. The party seeking sanctions bears the burden of overcoming the presumption. Father failed to file an affidavit to support his request to modify conservatorship within a year of the prior order. He made no allegation that the Child's safety was endangered until the second amended petition, in which he alleged Mother "spanked" the Child on one occasion.

Father engaged in a pattern of harassing behavior, which the court could have reasonably determined was intended to deplete Mother's resources and force her to succumb to his demands for access to the Child's psychiatric records. Father forced Mother to respond to a barrage of discovery requests and to file a motion to protect the Child's records. Father filed HIPAA complaints and a complaint to the Child's psychiatrist's licensing board relating to the psychiatrist's refusal to disclose the Child's records. These actions suggest that the modification was part of a broader pattern of harassment. Further, there was evidence Father filed suit as a means to get access to the psychiatric records, rather than its stated purpose of seeking primary, and later sole, conservatorship. His dismissal of his suit two days after the court's issuance of a protective order belied his assertion that he was motivated by genuine concern for the Child's safety.

SAPCR
Enforcement of Possession Order

BECAUSE MOTHER MADE THE CHILDREN AVAILABLE, CHILDREN REFUSED TO GO WITH FATHER, AND FATHER DID NOT RETURN FOR THE CHILDREN, MOTHER DID NOT REFUSE TO SURRENDER THE CHILDREN.

In re Miller, No. 09-18-00253-CV, 2018 WL 4138980 (Tex. App.—Beaumont 2018, orig. proceeding) (08-30-18).

Facts: Mother and Father divorced in 2017. Mother was ordered to surrender the children to Father at her residence. In a subsequent modification, Mother was ordered to surrender the children to Father at 5:00 p.m. on weekends Father had right to possession and at 5:00 p.m. on every Thursday during the year. Subsequently, Father filed an enforcement claiming Mother failed to surrender the children on 5 separate occasions. The trial court sentenced Mother to serve 90 days in jail for each violation, to be served concurrently. Trial court then suspended Mother's sentence and place Mother on community supervision for 1 year if she followed all Court orders. Mother sought mandamus relief.

Holding: Mandamus granted in part and denied in part.

Opinion: Mother argued that there was no evidence to support her failure to surrender the children on 4 of the 5 occasions alleged by Father. On each of those occasions, Mother put the children outside the front door, then locked the door. Then, only the oldest child complied with Father's demand that the children get into his car, after which Father left, and the children walked around to the back of the house. Mother also testified that she encouraged the children to go and texted Father to ask if he was coming back for the other 3 children. Father did not respond. Based on this evidence, there is no evidence that Mother failed to surrender the children on those 4 occasions.

On the 5th occasion, there was evidence that the 2 youngest children were at soccer practice, there was some evidence to support this violation.

Dissent: Because soccer practice was unexpectedly rescheduled, Mother did not willfully fail to surrender the children to Father on the 5th occasion.

SAPCR
CHILD SUPPORT ENFORCEMENT

CONTEMPT ORDER COULD NOT BE CHALLENGED VIA APPEAL, ONLY BY PETITION FOR WRIT OF HABEAS CORPUS OR MANDAMUS; DISMISSED FOR WANT OF JURISDICTION.

***Cline v. Cline*,** ___ S.W.3d ___, No. 01-17-00520-CV, 2018 WL 3651453 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (08-02-18).

Facts: In the divorce decree, Mother was ordered to pay monthly child support and medical support. She fell into arrears. Father filed a petition to enforce the divorce decree. Mother was ordered to make payments for the child support and medical support arrears plus other obligations in the divorce decree, which she did. Subsequently, Mother fell into arrears again, and Father filed another petition for enforcement. After a trial, the court signed a judgment for Mother's arrearages, held her in criminal contempt for four failures to pay support, and ordered her confined for 180 days for each violation, with the sentences to run concurrently. Mother appealed the contempt order and the arrearages order. Mother argued that the trial court misapplied her previous payment because only about 25% of her payments pursuant to the previous judgment was applied to child support. Mother argued that pursuant to the Family Code, the entire amount should have first been used to pay child support obligations.

Holding: Dismissed for Want of Jurisdiction in Part; Affirmed in Part

Opinion: A contempt order may only be challenged through a petition for writ of habeas corpus (if the contemnor is confined) or a petition for writ of mandamus (if the contemnor is not confined). While an appeal of only a contempt order can be construed as a petition for writ of habeas corpus or mandamus, there is no authority to support treating the case as both an original proceeding and an appeal. Thus, because she challenged both an appealable order and non-appealable order in one appeal, Mother's complaint regarding the contempt order was dismissed for want of jurisdiction.

Mother's second complaint lacked merit. First, Mother agreed in a Rule 11 to the allocation of her payments. Second, at the time Mother made the payments, her child support obligations were paid in full before other payments were made. Mother's additional arrears accrued after the complained of payments were made.

MOTHER WAS NOT REQUIRED TO PLEAD FOR REVIVAL OF A TEN-YEAR OLD JUDGMENT BEFORE HAVING FATHER'S ARREARAGES CONFIRMED.

In re S.H., No. 05-17-00336-CV, 2018 WL 3751297 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (08-08-18).

Facts: A final decree ordered Father to pay child support until the Child was 18 (a seven-year period). Father never paid any child support. Ten years after the order (and 5 years after the Child turned 18), Mother filed a motion for enforcement. After a trial, the court found it lacked authority to hold Father in contempt but retained authority to enter a judgment for unpaid support. After the entry of an order confirming Father's arrearages and awarding Mother her attorney's fees, Father appealed. He raised several complaints, including an argument that the decree Mother sought to enforce was a "dormant" order, and the trial court abused its discretion in reviving and reconfirming the judgment when Mother did not plead for a revival of the judgment.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: While the Civ. Prac. & Rem. Code provides that a judgment is dormant, and execution may not issue, when a judgment is greater than ten years old, in 2009, the legislature explicitly excluded child support from the dormancy statute.

NO MATERIAL AND SUBSTANTIAL CHANGE BECAUSE ALLEGED CHANGES WERE CONTEMPLATED WHEN PARTIES SIGNED MSA.

In re A.B.R., No. 04-17-00220-CV, 2018 WL 3998684 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (08-22-18).

Facts: Mother and Father signed an MSA in their divorce proceedings. At the time they signed the MSA, they still lived together, but the MSA contemplated that the parties would divorce and that Father would move to Puerto Rico. The parties dismissed their divorce proceeding but refiled soon after, and a divorce decree was signed incorporating the MSA.

After Father moved, he alleged Mother began to make his periods of visitation difficult and signed up the Children for so many activities that they were busy seven days a week. Just over a year after the MSA was signed, Father sought to modify the parent-child relationship. After a week-long trial with several witnesses and numerous exhibits, the trial court entered a 52-page order modifying many of the terms previously agreed to in the MSA. Additionally, the court ordered Father to post a cash bond for $50,000 and awarded Mother $150,000 in attorney's fees. The trial court issued over 120 findings of fact and conclusions of law. Mother appealed, raising several issues, including a complaint that the trial court erred in finding a material and substantial change in circumstances. Father cross-appealed complaining of the order for a cash bond and the award of attorney's fees.

Holding: Reversed and Rendered in Part; Reversed and Remanded in Part

Majority Opinion: (J. Chapa, J. Angelini)

The alleged "changes" to support a material and substantial change were all either contemplated—such as Father's move to Puerto Rico—or insufficient to constitute a "material and substantial" change—such as the Children's failing communications with their therapist.

Mother sought the cash bond because Father was allegedly very litigious and often threatened to sue people. However, Mother presented no evidence, and the trial court made no finding, that it was reasonably likely that Father would file a subsequent petition to modify.

Finally, in light of the appellate court's decision to reverse and render judgment denying any modifications, the court remanded the case for reconsideration of attorney's fees.

Concurring and Dissenting Opinion: (C.J. Marion)

After Mother and Father signed the MSA, they chose to remain married for the benefit of the Children, and the divorce proceeding was dismissed. The parties orally agreed that Father would continue living with Mother but would travel to Puerto Rico on the weekends. At the time Father filed his modification petition, the parties no longer lived together. At the time the MSA was signed, the Children were engaged in therapy, which was reported to be effective. However, at the time of the modification suit, the Children had become closed down and mistrusting, apparently because of concerns about what the therapist would tell their parents.

Given the abuse of discretion standard of review, the Chief Justice would have affirmed the finding of a material and substantial change because there was "some evidence of a substantive and probative character" to support the finding.

SAPCR
FAMILY VIOLENCE/PROTECTIVE ORDERS

PROTECTIVE ORDER VACATED BECAUSE IT DID NOT INCLUDE A FINDING THAT "FAMILY VIOLENCE HAS OCCURRED" AND IS "LIKELY TO OCCUR IN THE FUTURE."

Maldonado v. Bearden, No. 01-17-00371-CV, 2018 WL 4087411 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (08-28-18).

Facts: Bearden filed an application for a protective order against Maldonado. She argued that she was entitled to a protective order because Maldonado had "violated a previously rendered protective order by committing an act prohibited by that order" while it was in effect and before it had expired.

Bearden attached to her application the parties' Agreed Final Decree of Divorce and her affidavit. In her affidavit, Bearden testified that she was requesting the new protective order against Maldonado as a result of his "physical and verbal abuse" against her. She detailed his violations of the prior protective order, stating that he had attempted to communicate with her by phone, made airline reservations in her name, and messaged her through a dating website. And she noted that Maldonado has continued to contact and threaten her since the prior protective order expired, including by showing up to her apartment complex and placing an advertisement for "sex acts that included a picture of

[Bearden's] face and other pictures of naked bodies" on the website Craig's List. An associate judge of the trial court granted Bearden's application for the new protective order.

During the trial de novo, Bearden testified that she and Maldonado had only lived together as a married couple for approximately 1 month, but they had been together for much longer and he had been violent with her throughout the course of their relationship. According to Bearden, Maldonado had violated the prior protective order "[a] lot." He called her repeatedly in June 2014. And in July 2014, he made airline reservations for a trip for the two of them on "what would have been" their anniversary, and he sent her e-mail messages about the trip. Maldonado also telephoned Bearden repeatedly in October 2014. And in April 2015, he, through a dating website, sent her messages identifying himself and making "threats and rants" that were "very frightening." Specifically, Maldonado threatened to telephone his best friend's brother, who is a "shot caller," i.e., "the person ... in a gang that decides who is going to get ... killed."

Bearden explained that since the prior protective order expired, she changed her phone number and moved. However, Maldonado has continued to harass and contact her. For example, Maldonado posted on the website Craig's List lewd photographs of Bearden along with her phone number in an advertisement for "sex acts."[1] Although he did not identify himself on the website by name, Bearden "knew" he had listed the posting because at the end of the advertisement he wrote "Coogs won," referring to a recent University of Houston football game that Bearden had attended with her son and friends and from which they had left early. The trial court granted Bearden's application.

Holding: Protective Order vacated and case dismissed.

Opinion: The trial court entered the new protective order without a finding that "family violence has occurred" and is "likely to occur in the future." Instead, in entering the new protective order, it relied on the legal conclusion that Bearden "provided sufficient evidence to show the Court that [Maldonado] violated [her] previous Protective Order while it was in effect and before it expired ...." Although there is evidence in the record that could support the trial court's conclusion of law that Maldonado violated the prior protective order, it issued no finding of fact to support that conclusion. The facts of Maldonado's arrests, criminal charges, and indictment for violation of the prior protective order do not, in and of themselves, constitute proof that he actually violated the order.

MISCELLANOUS

ERROR TO CONSENT TO WAIVER OF RECORD WHEN NOT ALL PARTIES PRESENT.

In re M.A.P., No. 04-17-00690-CV, 2018 WL 3369949 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (07-11-18).

Facts: The OAG had obtained an order for Father to pay child support. Subsequently, Father sought a credit against his obligation because the Children were in his possession. After a hearing, the court found that Father did not owe any child support. The OAG filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: Although the order stated that the making of a record was waived by the parties, neither the OAG nor Mother were present at the hearing. Thus, the making of a record could not be waived and doing so constituted an error apparent on the face of the record.

HUSBAND ENTITLED TO RESTRICTED APPEAL BECAUSE WIFE FAILED TO SHOW HUSBAND RECEIVED NOTICE OF FINAL TRIAL.

Moreno v. Moreno, No. 04-17-00586-CV, 2018 WL 3440713 (Tex. App.—San Antonio 2018, no pet. h.) (mem. op.) (07-18-18).

Facts: The parties divorced in1989, and Wife was awarded a portion of Husband's military retirement. In 2016, Wife filed a motion for clarification and enforcement asserted Husband had not paid her in full. Wife filed a series of motions to set the cause on the court's docket. Her first motion was served on Husband at the P.O. Box listed in his answer, the second was sent to his attorney's office address, and the third was served on his attorney by efile. Husband did not appear at the final trial, and a default order was signed. Subsequently, Husband filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: An attorney becomes an "attorney of record" of a party by filing pleadings or appearing in open court on a party's behalf. Nothing in the record established Husband had an attorney of record. Accordingly, Wife's assertion that

notice of the final trial was served on Husband by serving his attorney through e-file was insufficient to satisfy Tex. R. Civ. P. 21a(a).

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 3543473 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (mem. op.) (07-24-18).

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.

TRIAL COURT ABUSED DISCRETION IN ALLOWING WIFE'S ATTORNEY TO WITHDRAW ON THE DAY OF TRIAL WITHOUT DETERMINING THE BASIS FOR THE MOTION TO WITHDRAW OR ALLOWING WIFE TIME TO SECURE NEW COUNSEL.

***Jackson v. Jackson*, ___ S.W.3d ___, No. 01-17-00410-CV, 2018 WL 3625431 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.) (07-31-18).

Facts: Over the course of their divorce proceedings Wife was represented by three separate board-certified family law attorneys, each of whom had replaced the previous attorney. By the time of trial, Wife had filed a fifth amended petition for divorce, which—like her preceding petitions—requested a jury trial and indicated that a jury fee would be paid. However, no jury fee was ever paid. Four days before trial, Wife and her attorney discussed an issue Wife wanted to present at trial. Wife's attorney advised Wife that the issue had no basis in law, and it would be a violation of the attorney's ethical duty to the court to present the issue. Wife's attorney further advised that if Wife continued to press the issue, Wife's attorney would be forced to withdraw. On the morning of trial, Wife again pressed the issue, and her attorney filed the motion to withdraw. Before trial, the court heard the motion to withdraw. Wife refused to waive her attorney-client privilege and, thus, would not disclose to the court the basis for the dispute between Wife and her attorney. On the witness stand, Wife confirmed that she understood that her attorney warned her that withdrawal would be necessary if Wife pressed her issue, and Wife pressed the issue regardless. When asked if she had any alternative requests, Wife said she did not know what alternative request she would make. Husband objected that a continuance would be unfairly prejudicial to him. The trial court stated that it had not heard a motion for continuance. Wife's attorney confirmed that no motion for continuance had been filed. The trial court granted Wife's attorney's motion for withdrawal, and immediately proceeded with trial, during which Wife represented herself, pro se. Subsequently, Wife filed a motion for new trial and later appealed, complaining that the trial court erred in allowing her third attorney's withdrawal without sufficient evidence to establish good cause for the withdrawal, without sua sponte hearing the basis for the dispute in camera, and without sua sponte granting her a continuance to secure new counsel.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests. Additionally, before allowing an attorney to withdraw, the trial court should see that the attorney has complied with the Code of Professional Responsibility.

Here, Wife's attorney provided a mere hour and a half interval between filing her motion to withdraw and the final trial. Wife's attorney took no steps to ensure Wife had time to seek representation in a case involving a multimillion dollar estate, claims of reimbursement and waste, and at least some valuation disputes. Additionally, the trial court did not take any steps to assure that Wife's attorney had complied with her duties under the Disciplinary Rules of Professional Conduct. The trial court did not seek to discover the substance of the dispute, nor did it require notice sufficiently in advance to permit Wife to secure other counsel to investigate the case and prepare for trial.

Under the circumstances presented in this case, the trial court erred in granting Wife's attorney's motion to withdraw—a motion filed the morning of trial, that did not state whether Wife consented to the motion, that did not seek a continuance, and did not take into account the foreseeable material adverse effects of self-representation—without ascertaining the substantive basis of the dispute between Wife and her attorney and, therefore, without determining whether Wife's attorney had good cause to withdraw, and without providing adequate time for Wife to secure other representation.

WIFE COULD NOT USE JUDGMENT NUNC PRO TUNC AFTER EXPIRATION OF PLENARY POWER TO CORRECT FINAL DECREE'S FAILURE TO COMPORT WITH MSA.

***In re Marriage of Russell*, ___** S.W.3d ___, No. 14-17-00618-CV, 2018 WL 3625373 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (07-31-18).

Facts: During their divorce proceedings, the parties signed an MSA that awarded Wife a portion of Husband's retirement and required Husband to make 12 monthly payments of $750 to Wife. At the prove-up hearing, Wife and her attorney appeared, but Husband and his attorney did not. The only asset discussed at the hearing was the marital home, which was awarded to Husband. The trial court signed a final decree that awarded each party his or her own retirement accounts, ordered Husband to pay a single payment of $750 to Wife, and stated that if any conflict between the MSA and decree existed, the decree controlled. After the trial court's plenary power expired. Wife moved for a judgment nunc pro tunc to "correct" the errors in the judgment. The trial court granted Wife's motion, and Husband appealed.

Holding: Reversed and Rendered

Opinion: The parties did not dispute that the trial court's plenary power had expired. Nothing in the transcript of the prove-up hearing or in the original final decree indicated that the trial court approved or incorporated the MSA into the judgment. Wife did not reference retirement benefits or the monthly payments when proving up the decree. The "nunc pro tunc" did not correct a clerical error but made substantive changes to the judgment. Even if Wife had been entitled to judgment on the MSA, her entitlement expired when the trial court's plenary power expired.

HUSBAND'S INABILITY TO ATTEND FINAL TRIAL DID NOT ENTITLE HIM TO A NEW TRIAL.

Shadoian v. Shook, No. 03-18-00242-CV, 2018 WL 3625766 (Tex. App.—Austin 2018, no pet. h.) (mem. op.) (07-31-18).

Facts: After contentious pretrial proceedings, a final hearing was set. A little more than a month before trial, Husband's counsel filed a motion for withdrawal because Husband had fired him via email, and the attorney could not effectively communicate with Husband. Less than a week before trial, Husband filed a motion for continuance on the ground that his new attorney did not have time to adequately prepare, and Husband had a scheduling conflict. The court denied Husband's motion for continuance. Wife, her attorney, and Husband's attorney appeared at trial. The trial court asked Husband's attorney to call Husband to get him to appear, but Husband refused to appear. After a trial, the court granted a divorce and based its property division primarily on Wife's testimony. Subsequently, Husband filed a motion for new trial. At the hearing on the motion, Husband complained that had he appeared he would have controverted some of Wife's testimony. The trial court denied Husband's motion on the ground it was unverified. Husband appealed, complaining of the denials of his motion for continuance and of his motion for new trial.

Holding: Affirmed

Opinion: Husband made no attempt to establish that his prior attorney's withdrawal was not due to his own fault or negligence. Further, assuming arguendo that Husband was not required to verify his motion for new trial, he failed to establish his testimony was necessary. A party seeking a continuance on the ground that he is unavailable must file a motion explaining, among other things, the substance and materiality of his testimony. He did not assert that he would testify at the final hearing, address the nature of his testimony, or explain why his testimony would be material.

TRIAL COURT'S DENIAL OF HUSBAND'S MOTION TO APPEAR BY TELEPHONE EFFECTIVELY PREVENTED HIM FROM PRESENTING HIS CASE.

In re L.S.B., No. 05-17-00282-CV, 2018 WL 3629008 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (07-31-18).

Facts: Husband was an inmate in a Virginia federal prison. In 2012, a Collin County court signed a final decree of divorce. After the divorce, Husband filed motions to enforce the decree and a motion to appear by telephone. The trial court did not rule on Husband's motions until after he filed a petition for writ of mandamus and the appellate court ordered the trial court to rule. An amicus attorney was appointed to represent Wife because she could not be located. A final trial was set, and the bailiff called for the parties to appear. Wife's ad litem was present, but neither Wife nor Hus-

band appeared. The trial court heard Wife's counsel's argument, denied Husband's motion to appear by telephone, and denied Husband's motions for enforcement. Husband appealed.

Holding: Reversed and Remanded

Opinion: The right of a prisoner to have access to the court entails not so much his personal presence as the opportunity to present evidence or contradict the evidence of the opposing party. A trial court abuses its discretion if it effectively bars the inmate from presenting his case. By denying Husband the means to appear by telephone, and not providing him with any other means of proceeding, the trial court abused its discretion.

DEATH PENALTY SANCTIONS IMPROPER WHEN LESSER SANCTIONS NOT CONSIDERED AND NO EXPLANATION PROVIDED WHY LESSER SANCTION COULD NOT PROMOTE COMPLIANCE.

***In re Marriage of Mize*, ___ S.W.3d ___, No. 06-17-00108-CV, 2018 WL 3636495 (Tex. App.—Texarkana 2018, no pet. h.) (08-01-18).

Facts: Wife filed a petition for divorce, and Husband filed a counterpetition. Each party faulted the other for the breakup of the marriage, sued for spousal tort and fraud, and made claims for reimbursement from the community estate. Husband additionally asserted a claim for malicious prosecution against Wife for filing "blatantly false" criminal charges against him for family violence assault. While the criminal charges were pending, Husband refused to answer many questions propounded to him during a deposition on the ground that the answers might tend to incriminate him and thus violate his Fifth Amendment rights. Wife sought sanctions. After a hearing, the trial court prohibited Husband from introducing evidence at trial in support of his affirmative requests for relief and barred him from testifying. Based on the sanctions order, Wife moved for and obtained partial summary judgment on many of her claims. After a final trial, the court signed a final decree granting Wife a disproportionate share of the community estate and held that Wife's separate estate was entitled to reimbursement from the community estate. Husband, who had been acquitted of the criminal charges, appealed, arguing that the trial court erred in imposing death penalty sanctions against him.

Holding: Reversed and Rendered in Part; Reversed and Remanded in Part

Opinion: A party is entitled to plead his Fifth Amendment privilege during discovery in a civil suit. However, that privilege cannot be used offensively. If a court determines that the privilege has been used offensively, it may impose death-penalty sanctions, but only after the trial court has considered whether remedial steps can alleviate the problem. Courts should avoid a "trial by sanctions" whenever possible. Sanctions must be just and comport with due process. There must be a direct relationship between the offensive conduct and the sanction imposed, and the sanction must not be excessive.

Here, Husband's attorney advised Wife that Husband's deposition would be futile because Husband had been advised by his criminal attorney to plead his Fifth Amendment privilege. During his deposition, Husband repeatedly stated that he was pleading the Fifth on the advice of his counsel. When it is clear that the party believes he has a Fifth Amendment privilege, and the trial court does not inquire whether the party or his attorney was responsible for that belief, there is no evidence that the sanctions were visited on the actual offender. Further, Wife did not seek to compel Husband's answers. Husband was not advised that his failure to answer could result in stricken pleading and his ability to present evidence at trial.

WIFE NOT ENTITLED TO NOTICE BEFORE ENTRY OF TURNOVER ORDER.

***In re Marriage of Tyeskie*, ___ S.W.3d ___, No. 06-18-00020-CV, 2018 WL 3651146 (Tex. App.—Texarkana 2018, no pet. h.) (08-02-18).

Facts: During the divorce proceeding, Wife withdrew $300,000 from a community account and gifted those funds to her daughter from a prior marriage, with whom Wife was living, without reporting the gift to the IRS. Wife argued that she did not believe Husband was entitled to the income she earned during the marriage. A subpoena was issued requesting documentation and bank statements regarding the $300,000, but Wife did not comply. Wife advised her daughter to avoid service and not to appear at trial. A final judgment awarded Husband $68,752.66, representing his 50% of the community portion of the account. Wife was given 15 days in which to either pay the judgment or deliver Husband a promissory note. Wife did not comply. The trial court then entered a turnover order and appointed a receiver to take possession of Wife's leviable assets. The order was delivered to Wife, but she did not comply. The receiver filed a motion for enforcement by contempt. Because she had fired her attorney, Wife asked the trial court to appoint her an attorney, but the trial court found she was not indigent. Wife was served with a subpoena to appear at the hear-

ing, in which she was warned that failure to appear would result in a finding of contempt. Wife expressed an intent not to appear, but she did appear and provided testimony demonstrating she had not complied with court orders. Additionally, evidence showed Wife endorsed a $299,681.93 cashier's check to her brother-in-law, but when asked about the transaction, Wife "pled the fifth." The trial court held Wife in contempt. Subsequently, the trial court approved the receiver's filing of a final accounting and motion to disburse funds. Wife appealed, arguing that the trial court erred in failing to provide her adequate notice of the turnover order.

Holding: Affirmed

Opinion: A court that renders a divorce decree retains the power to enforce the property division. The court may appoint a receiver with the authority to take possession of nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. The turnover statute does not require notice and a hearing prior to issuance of a turnover order.

DIVORCE DECREE DID NOT SUPERSEDE TRUST CREATED FOR CHILD'S BENEFIT BECAUSE DECREE'S MERGER CLAUSE DID NOT REFERENCE TRUST.

In re K.K.W., No. 05-16-00795-CV, 2018 WL 3968475 (Tex. App.—Dallas 2018, no pet. h.) (mem. op.) (08-20-18).

Facts: In an MSA, Mother and Father agreed to form a trust for the Child's benefit. Father was to give Mother $1 million, and then Mother would fund a trust with that money plus $1 million of her own. The funds would be used to reimburse the parents for the Child's financial needs, including, but not limited to, the Child's health, education (including extracurricular activities), clothing (including reimbursement for such clothing purchased by either parent), special activities and the expense of providing for daycare or private nanny services. The trust further provided that the trustee was authorized to determine whether expenses were reimbursable. Neither parent was ordered to pay child support, and the decree provided that each parent would be responsible for the expenses of the Child, incurred while in his or her respective possession, that are not paid by the trust. For a few years, Mother was regularly reimbursed for her claimed expenses. However, about 6 years after the divorce, Mother was denied reimbursement requests totaling about $38,000. The trustee stated that he had not interpreted the trust to allow for "child-support-like" expenses. Mother did not identify the specific expenses, nor did she dispute they were "child-support-like." Father filed a petition seeking a declaratory judgment construing the trust agreement and divorce decree. Mother filed a counter-petition against Father and a third-party petition against the trustee, seeking a declaration of the trustee's obligation to pay certain expenses, seeking enforcement of the decree, and alleging various claims, including fraud, breach of contract, constructive fraud, and removal of trustee. The trustee responded that Mother lacked standing to seek his removal because she was not an interested party. The trial court granted five partial summary judgments finding against Mother and in favor of Father and the trustee on all issues. After a final hearing on attorney's fees, the trial court signed a judgment incorporating the summary judgments. Mother appealed.

Holding: Reversed and Remanded in Part; Affirmed in Part
Opinion: A written agreement is not superseded or invalidated by a subsequent integration relating to the same subject matter if the agreement is such that might naturally be made as a separate agreement. In the parties' decree, a merger clause referenced both their MSA and AID but did not include a reference to the trust. Inherently, a trust instrument is a stand-alone document intended to be separate from the other aspects of divorce proceedings because it contains extensive provisions governing the assets of the trust not appropriate to put into the AID or decree. Thus, Mother's assertion that the decree superseded the trust lacked merit.

The Texas Property Code confers standing to seek removal of a trustee on any interested person as defined by that Code. An interest party may be legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible. The trust provided that if the Child and his descendants died before the trust terminated, the funds would be distributed to Father if living, otherwise to Mother, if living. Thus, Mother had a contingent remainder interest and contingent reversionary interest in trust property and standing to seek the trustee's removal.

TRIAL COURT FAILED TO PROVIDE FATHER WITH SUFFICIENT NOTICE BEFORE FINDING HIM IN CRIMINAL CONTEMPT.

In re Kodati, No. 04-18-00349-CV, 2018 WL 3998586 (Tex. App.—San Antonio 2018, orig. proceeding) (mem. op.) (08-22-18).

Facts: A final divorce decree appointed the parents joint managing conservators of their Children. At a subsequent hearing on a motion for enforcement, the trial court held Father in contempt for pulling the Child from school to attend a

hearing. Father filed a petition for writ of mandamus challenging the court's order. The trial court filed a response in the court of appeals, but Mother did not respond.

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

Opinion: The trial court stated that it wanted to interview the Child, but it also explicitly stated, "If this child misses a single minute of school, you are not going to like it." This admonition was sufficiently specific to put Father on notice of the prohibited conduct.

A court may conduct a summary proceeding without notice and a hearing if there are exigent circumstances. Here, there was no evidence of exigent circumstances, so Father was entitled to notice and a hearing.

The trial court's contempt order was punishing conduct that already occurred, it was not coercive in nature. Thus, it was an order for criminal contempt.

At end of the first hearing, the Child left school early to appear at court. The trial court expressed its displeasure with Father and stated, "you are in direct contempt…I am at a loss of what to do…at the very least I am suspending the hearing." The trial court did not enter a show cause order. Instead, it summarily held Father in contempt and suspended the hearing to determine "the right consequence." Father was not provided with constitutionally-sufficient notice.