SECTION REPORT
FAMILY LAW

http://www.sbotfam.org Volume 2012-4 (Fall)

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IN THIS MONTH'S REPORT

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MESSAGE FROM THE CHAIR

I so enjoyed seeing everyone in Houston at the Advanced Family Law Course. The Course was well attended and those of you who could not make it live will perhaps be able to see the video. My year as Chair has started out very busy.

Texas Supreme Court Justice Debra Lehrmann attended the annual meeting of the Family Law Council as the Court's liaison to the Council and reported on recent activities of the Court.

While we were finishing up the Advanced Course in Houston, the Court was conferring in Austin on cases and the forms issue, reviewing some 400 pages of the record regarding that issue. Meanwhile, some 30 family law judges submitted to the Court a resolution urging it to accept the compromise proposed to it by the Section and the Texas Family Law Foundation. At the time of this writing, the Court had not yet decided whether and how to go forward on this issue.

Section Membership Committee Chair Chris Nickelson reported at the Section meeting held in Houston that our membership has expanded substantially over last year. Once all the renewals are processed, we expect to have had about a 20% increase in membership and could approach nearly 6,000 members for the first time. Kudos to Chris and the Committee for their fine work.

The leadership of the Family Law Section has retained Dallas-based Professional Solutions Group, headed by Larry Upshaw, to better project the Section's positions on key issues, address current events and keep the Section membership informed. The firm has long experience communicating on behalf of the legal profession and is prepared to diversify our message as determined by events as they occur. This may surround issues and events in the courts, within the Legislature, inside the State Bar or internal to the Section. Your Section leadership intends to manage this function so that it is targeted and responsive to current events of interest to our members. Our first press release came out the last week of August and is focused on our pro bono program. It has already prompted a number of phone calls and interest in the media and our profession. All of our press releases will be on our website.

Jack Marr and I presented the Section's legislative program for approval by the State Bar and I am happy to report the package was once again approved. I'll have a separate report on the package soon. In the meantime, we will post the package on our website. Foundation lobbyist, Steve Bresnen, has made it clear this legislative session will be like few others. The key committee chairs in each house are retiring and many new Senators and Representatives will take office. He and I will be reporting on events and our progress to the Section as the session begins January 8, 2013.

I hope to see many of you at our upcoming CLE which include:

- **NEW FRONTIERS IN MARITAL PROPERTY LAW:** October 4-5, 2012 in New Orleans, LA, led by Warren Cole and Rick Robertson as Course Directors.
- **FAMILY LAW & TECHNOLOGY: FROM NO TECH TO HIGH TECH IN TWO DAYS:** December 13-14, 2012 in Austin, TX at the ATT Center, led by Sherri Evans as Course Director.
- **MARRIAGE DISSOLUTION:** April 18-19, 2013 in Galveston, TX, led by Craig Hasten as Course Director.
- **ADVANCED FAMILY LAW COURSE:** August 4-8, 2013 in San Antonio, TX, led by Kathryn Murphy and Bill Morris as Course Directors.

----------Diana Friedman, Chair

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EDITOR'S NOTE

Please take the time when you see them to thank the authors of our regular columns. Unfortunately, our own Jeff Coen was attacked by an errant mosquito a few weeks back and ended up in the hospital with West Nile Virus. Consequently, this was enough to excuse him from his Evidence Bytes column, but he has promised to return in the Winter issue. Also, please take the time to thank our guest editors, who lend their pithy comments and observations to the case law summaries. Finally, I would ask you to please read the excellent article on Reimbursement contributed by Michael Geary and Jim Wingate. It may be the most definitive article out there. I am always on the lookout for articles for the Section Report. Length is not a factor be it long or short, I will fit it into the report. I only ask that it is on a subject that is of interest to the membership. Professor Jack Sampson has promised me a batch of new student articles from his family law writing seminar for our Spring and Summer issues.

--------- **Georganna L. Simpson, Editor**

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Here Come DA Family Court Judges, Dana **Prescott**, 24 J. AM. ACAD. MATRIM. LAW 505 (2012).

ASK THE EDITOR

Dear Editor*:** I just finished a final hearing where both the mother and father were asking for primary possession of a 13-year-old boy and an 8-year-old girl. Instead of keeping the children together, the judge split the siblings apart ordering that the 13-year-old go to live with his father in Chicago and the 8-year-old stays here with her mother in Denton and each child is ordered to fly to see the other parent and sibling once a month. My client, the mother, is devastated as is her 8-year-old daughter who does not want to be away from her brother. Is there anything I can do to remedy this. ***Devastated in Denton

***Dear Devastated in Denton*:** Yes, I suggest you file a motion to reconsider and advise the court regarding the case law that strongly urges that siblings of the same marriage be kept together, absent clear and compelling reasons. Specifically, where it is possible for siblings to be kept together and reared as a family, it is not in the best interest of the children that they be separated. *In re De La Pena*, 999 S.W.2d 521, 535 (Tex. App.—El Paso 1999, no pet.); *Autry v. Autry*, 350 S.W.2d 233, 236 (Tex. Civ. App.—El Paso 1961, writ dism'd). It is well settled that siblings are not to be separated except upon a showing of clear and compelling reasons. *Coleman v. Coleman*, 109 S.W.3d 108, 111 (Tex. App.—Austin 2003, no writ); *De La Pena*, 999 S.W.2d at 535; *Dalton v. Doherty*, 670 S.W.2d 422, 424 (Tex. App.—Fort Worth 1984, no writ); *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Zuniga v. Zuniga*, 664 S.W.2d 810, 812 (Tex. App.—Corpus Christi 1984, no writ); *Ex parte Simpkins*, 468 S.W.2d 908, 909 (Tex. Civ. App.—Amarillo 1971, no writ); *Griffith v. Griffith*, 462 S.W.2d 328, 330 (Tex. Civ. App.—Tyler 1970, no writ); *DeGaish v. Marriott*, 345 S.W.2d 585, 587 (Tex. Civ. App.—San Antonio 1961, no writ); *Beasley v. Beasley*, 304 S.W.2d 158, 161 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.); *Beadles v. Beadles*, 251 S.W.2d 178, 180 (Tex. Civ. App.—Texarkana 1952, no writ). In the absence of such clear and compelling reasons, children should be raised with their brother(s) and/or sister(s). *O. v. P.*, 560 S.W.2d 122, 127 (Tex. Civ. App.—Fort Worth 1977, no writ).

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JUST FOR FUN

Members of the judiciary* share some of their recent pro se proveups (yes, they did have forms):

- I was explaining to a pro se this morning that I could not hear his divorce because his Waiver was defective. He got very indignant and said "They told me all I had to do was bring my Debris of Divorce!" Let me just say that the way he had filled out his paperwork—it was debris.

*If you hear something funny down at the courthouse, please share it with the rest of us.

THERAPY TO GO

A hearty Family Law Section welcome for our guest TTG columnist, Jeremy Lanning, LCDC – The LifeWorks Group, PA, Former Petty Officer, Hospital Corps / Field Medicine, USN

Dear TTG:

Hey TTG, I have something strange simmering here. My client is a male in his late thirties going through a divorce. Nothing new, right? But his spouse is bipolar – and – wait for it… this thing is MESSY. He is not the one who filed, he is not the one who cheated, he has the best interests of his children in mind, AND he came to me with tons of work already done. Dream client, yes? However, while this drama is unfolding, I am still having a hard time figuring him out. The first thing he said to me was, "Ya know those guys on television that kidnap their kids or do something dreadful during a divorce? I get it." Should I be worried? This dude seems complex and maybe disturbed. What am I dealing with, and what gloves do I put on? Thanks for any advice you can give – Boxed-in-Becky

Dear BIB –

Take a deep breath, put the stereotypes down, and for this one…no gloves. You are going to have to go skin and bones here. Most likely this man has been dealing with a difficult marriage for some time. The doomsday divorce drama has been played out in is head many times and now it is here. Since his spouse is bipolar, he may have been warned many times what to expect when the cow pie hits the fan. Splat – it's happened - and now he's trying to figure out what the heck to do.

Most likely the spouse's affair has confirmed some things for him and he is feeling simultaneously emasculated and empowered. You have a burning ember here and he needs to know it is going to be okay. As I'm sure you know, divorce is not a single, nice and tidy, psychological event. Especially if there are kids involved. It goes on and on and on. Like a bad Zombie movie. Many researchers say that the actual crisis period for divorce is two years, and that is true even for amicable ones. Your client may be in the acute, or immediate, phase.

There are many factors at play with this man's mind. Your client is at high risk for anxiety, depression, suicide and substance abuse – among other assorted disasters. If we add in feelings of hopelessness, and periods of feeling outside one's body…well now we what's called Acute Stress Disorder.

Research suggests that men who were the most present in the affairs of their families, especially the children, are the most likely to disappear from their family and responsibilities altogether during an ugly split like this one. While this may make no sense to you and me, for this guy, the pain of living any other way is simply just too great. These guys are all-in or all-out. This conflict may already be playing itself out in your client's mind. His devotion to his family has manifested itself in diligence and perseverance. Also, your client has a name to repair and a relationship with his kids to preserve. In these matters you are his legal counsel, but from my perspective you are his coach as well.

This is a traumatic event for your client in many ways. For example, this man may have come from a divorced home and never wanted this for himself and his children. For him, depression would be a normal response to these stressors. Typically we hear about women and post-divorce depression more frequently than

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men. In my opinion, this doesn't accurately reflect reality. Women talk more, plain and simple. The stigma with mental health issues for men is real and very powerful. These guys need help, and genuine encouragement to seek it.

You got this coach?

Get him in the game, tell him that as a team you need a five tool player on the field. Tell him to keep his head clear and avoid any behavior that may prove his adversaries correct. That will work, trust me. He may lose interest in work and hobbies and be having trouble knowing where his downtime is. You tell this guy that now is the time for him to be the man he has always known himself to be.

Your client may not look so good when he comes to see you. Fatigue from loss of sleep and a weakened immune system could make him look like said Zombie (see earlier Zombie movie reference). You tell him, Coach, that now is the time to fight, not be consumed by the fight. Tell him he is in a beater of a game and he has got to play it smart. Now is the time when he can be the greatest example to his children and the people who are affected by this tragedy. He needs to keep it together at work, eat right, and hit the gym. Keeping it together protects his legacy and his name and the name he has given his children.

Suggest to your client that routinely seeing a mental health professional during this ordeal will actually help him. With the diagnosis his soon-to-be ex-wife has, it is unlikely that she is treatment compliant. Sell the idea of mental health for your client as part of your strategy. He's more likely to go for help if you insist on it as part of your legal approach to his case. After all – she's the crazy one, not him, right? He needs to understand how therapy can help him.

Your client's identification with desperate men and the things they do in similar situations is no need for alarm (though a stern lecture from you wouldn't hurt). He is simply trying to make sense of the disaster. He knows that impulsive, moronic, destructive behavior will only guarantee that he never sees his children again. The emotions your client is feeling are normal. What is important, Coach, is for your one-man team to not lose control over those emotions.

This man needs help and support and he needs a plan. Let this guy know that operating in the truth and the truth only is the best plan for attack. Usually this requires the least amount of thinking, which of course allows for the most room for action.

Now, here's where it gets tricky. Up until now you're thinking "I can do this," and you would be right. Where it is going to get real tough for you and your client are the moments where he is carrying out the plan you guys have formulated, and he is hit with a legal threat from his soon to be ex-spouse, most likely after hours or on the weekend, when she knows that communication with you is not possible. I would suggest handling these situations on the front end.

This guy is not going to need hours of counsel on the fly—just a minute of reassurance from his lawyer occasionally. Look at his situation and attempt to see each and every possible threat that can be levied against him, and address it head on. If you prep him for everything coming his way, when he feels helpless, he will seek HELP LESS – get it?

The man in front of you, BIB, is normal. He just needs to know that he is a good guy who wants to do right by his family. He needs to know that his feelings are normal, and his concerns are normal–even his feelings of depression and anxiety are normal. But they can all be managed. He needs to know that he can do this. You tell him to live in the truth, and to not choke. He doesn't need to prove the nay-sayers right. He is the kicker, you are the place holder, and the uprights are the horns of the devil about to be breached. Woah!! Mixed Multiple Metaphor Violations!

Anyway counselor, you got this.

For his high school graduation gift from his father, Jeremy Lanning received a ride to the recruitment office. He took the hint and joined the U.S. Navy–and later the Marines. He served from 1993-2001 as a hospital corpsman, field medic, sailor, surgical technologist and all around good guy. With his wide range of life experiences–his gritty childhood in the lovely city of Cleveland, Ohio, his military service, his work as a paramedic, and his work with the POTUS (we'd tell you which one, but Jeremy would have to kill you) – Jeremy has developed a genuine and abiding interest in people and the skin they live in. A Licensed Chemical Dependency Counselor with The LifeWorks Group, Jeremy works with military veterans, PTSD, addiction, divorce recovery, spiritual issues and parenting. You can reach him at jlanning@wefixbrains.com

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IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Child support: Indiana's income-shares model of child support required both father and mother to pay child support to their 19-year-old daughter until she reached 21 years of age, despite the fact that the daughter lived by herself and was nearly self-supporting. *Ashabranner v. Wilkins*, 968 N.E.2d 851 (Ind. App. 2012). The Illinois Supreme Court held that money an unemployed parent regularly withdrew from a savings account should not be included as income for purposes of calculating child support. *In re Marriage of McGrath*, 2012 WL 112792 (Ill. May 24, 2012). A Wisconsin trial court did not abuse its discretion when it ordered 25% of anticipated bonus income to be paid as lump-sum child support and not to be included in income for purposes of periodic child support calculations. *Tierney v. Berger*, 2012 WL 2545647 (Wis. App. July 3, 2012).

Custody: A California appellate court overturned a trial court's order that a father's visitation with his sons should be monitored based on a finding that "on numerous prior occasions," the father had sexually abused his stepdaughter, but there was no evidence that the father had abused his sons. *In re Alexis S.*, 205 Cal. App. 4th 48, 139 Cal. Rptr. 3d 774 (2012). A Florida trial court did not abuse its discretion when it ordered unsupervised, overnight visitation for a father even though the mother claimed that the father was unprepared to monitor and care for the parties' daughter, who suffered from juvenile diabetes, asthma and damage to her nervous system. *Culbertson v. Culbertson*, 90 So.3d 355 (Fla. App. June 20, 2012).

Division: A Florida appellate court reversed a property division based, in part, on a trial court finding that the husband had intentionally dissipated marital assets, when the record did not evidence intentional misconduct or use of funds "for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown." *Walker v. Walker*, 85 So.3d 553 (Fla. App. 2012) (per curiam). In Massachusetts, a divorce court may award a family business to one spouse and order the other spouse not to compete with it because allowing competition would undermine equitable distribution by endangering the business's good will, a martial asset. *Cesar v. Sundelin*, 967 N.E.2d 171 (Mass. App. May 4, 2012). A Montana divorce court has the power to order a former spouse to liquidate assets, in this case real estate, to achieve equitable distribution of a martial estate. *In re Marriage of Alderson & Bargmeyer*, 364 Mont. 551 (Mont. Feb. 21, 2012).

Modifying maintenance: A New York obligor failed to obtain a reduction in maintenance payments, even though he lost his job, because he later turned down a job offer. *Sheets v. Sheets*, 95 A.D.3d 1198, 945 N.Y.S.2d 143 (N.Y. 2012). A California trial court denied an ex-wife's request to extend her ex-husband's spousal support payments, which by agreement were to end when the ex-wife obtained a Master's degree, when the ex-wife failed to finish the thesis required for the degree. *In re Marriage of Khera & Sameer*, 206 Cal.App.4th 1464, 143 Cal. Rptr. 3d 81 (Cal. App. June 19, 2012). A Florida appellate court reversed a trial court that had increased the monthly amount of maintenance an ex-husband must pay, based upon an increase in the cost of living, because "reduction in the purchasing power of the dollar is insufficient grounds, on its own, to support a modification." *Silverman v. Silverman*, 89 So.3d 974 (Fla. App. May 2, 2012).

Retirement: A California husband who served in the military prior to marriage lost his argument that a portion of his CalPERS annuity should be separate property when he took advantage of CalPERS' program to allow years of military service to be included in calculating the amount of a CalPERS annuity, but the parties paid for the military credit "buy-in" with community funds. *In re Marriage of Green*, 205 Cal.App.4th 1475, 205 Cal.Rptr.3d 915 (Cal. App. May 16, 2012). A Pennsylvania appellate court held that post-divorce cost-of-living increases in an ex-husband's pension benefits, which were divided between the spouses upon divorce, also must be divided between the parties because they were due to "passive appreciation" rather than any work on the part of the ex-husband. *MacDougall v. MacDougall*, ___ A.3d ___, 2012 WL 1185994 (Pa. Super. Apr. 10, 2012). According to the Third Circuit, ERISA does not prevent an ex-husband's estate from su-

ing an ex-wife to recover the proceeds of the ex-husband's 401(k) plan when the ex-wife waived any claim to those proceeds in the parties' divorce but, because no qualified domestic relations order was signed, ERISA required payment of the 401(k) proceeds to the ex-wife upon the ex-husband's death. *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131 (U.S. 3d Cir. Mar. 20, 2012).

Sanctions: A California appellate court upheld sanctions against an ex-wife of $552,153.28, based on her conduct in post-divorce custody litigation, and on its own motion, sanctioned her $15,000 and each of her attorneys $5,000 for prosecuting a frivolous appeal. *In re Marriage of Wahl & Perkins*, 203 Cal.App.4th 108, 137 Cal.Rptr.3d 361 (Cal. App. Feb. 2, 2012). A Wisconsin appellate court sanctioned a *pro se* appellant for bringing a frivolous appeal, in an amount to be determined by the trial court, when, among other things, the appellant sought reversal of stipulated child support. *Sokol v. Sokol*, 812 N.W.2d 539 (Wis. App. Feb. 7, 2012).

Temporary orders: A Florida appellate court held that temporary orders requiring a husband to designate his wife as beneficiary of an IRA did not survive abatement of the parties' divorce proceedings caused by the husband's death. *Topol v. Polokoff*, 88 So.3d 341 (Fla. App. May 9, 2012). A New Hampshire woman failed to state a claim for relief when she sought imposition of a constructive trust against her daughters to recover insurance and retirement account proceeds received upon their father's death during divorce proceedings, even though the father designated the daughters as beneficiaries while subject to an anti-hypothecation order, because the wife's beneficiary status was not "property." *Elter-Nodvin v. Nodvin*, ___ A.3d ___, 2012 WL 20944389 (N.H. June 12, 2012). A Connecticut appellate court held that a trial court has the power, upon filing of a petition for divorce, to order a party to repay funds withdrawn from a couple's line of credit prior to that filing. *Parlato v. Parlato*, 134 Conn. App. 848, 41 A.3d 327 (2012).

Words can matter: A Pennsylvania spouse did not render herself ineligible to receive temporary support because she did not "desert" her spouse when she left the marital home after the husband emotionally abused her, including by sending her messages while she was on a cruise with her friends that she was a "whore" and should "suck his dick." *S.M.C. v. W.P.C.*, 44 A.3d 1181 (Pa. Super. Apr. 24, 2012).

COLUMNS

CHALLENGE EXPERTS WITH THEIR OWN WORDS
by John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Clear, sharp writing reflects clear, sharp thinking—true for legal briefs and for psychological evaluation reports. So instead of merely viewing an expert's report as a professional document, step back and critique the report as a Bryan Garner writing exercise. As a result, you will see new openings from which to question the quality of the expert's work and the reasoning the expert brought to her opinions.

Consider the following excerpt from a forensic psychological report:

"It appears that the narcissism and disavowal of a former partner that are present in any breakup as ego-defense mechanisms have become perverted to the point of a near-pathological impairment on the part of the father, and that he has bolstered his unhealthy and attacking approach to the breakup of the marriage with supporters who further obscure reality . . . ."

[1] *John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs* PSYCHOLOGYLAW PARTNERS, *a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. He also authored an ABA-published book, Confronting Mental Health Evidence: A Practical Guide to Reliability and Experts in Family Law. Dr. Zervopoulos is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

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Is the expert's description of the father understandable? Meaningful? In reality, the language is too abstract, jargon-laden, obtuse; the writing style, ponderous.

Experts' words matter—as does writing style. Treat poor report writing that relies on overly abstract psychological words and phrases and on confusing paragraphs as a reflection of the expert's inability to think clearly about her work and opinions. Caselaw addresses unclear testimony: "Factors that could affect a trial court's determination of reliability include ... the clarity with which the testimony can be explained in court." *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). This makes sense: If an expert cannot explain her reasoning clearly, how can the court determine whether the testimony is reliable?

In addition, target experts' uses of adjectives and adverbs that intensify or tone-down the meanings of key words or phrases. Experts modify their assertions for important reasons. Use those modifiers to access an expert's true thinking. Consider the following examples:

• "She *likely* is inconsistent in her nurturing skills." (To what extent does "likely" refer in this damning statement from a parenting evaluation?);

• "There appears to be no overt indicators of *gross* confusion or *seriously* distorted thinking process." (Isn't confusion enough? How serious must distorted thinking be to cause difficulties?)

• "She is *very likely* to have engaged in antisocial behaviors during her school years and to continue to engage in reckless behaviors that *may or may not be explicitly* illegal." (Absent evidence of past antisocial behavior, what does "very likely" mean? How do "explicitly" illegal behaviors differ from illegal behaviors?).

Finally, challenge the meanings of specialized psychological terms that mental health experts use in their reports. Experts often summarize evaluation data with emotion-laden inferences packaged in psychological words that also are commonly used words—trauma, PTSD, attachment. At times, the words' common meanings accurately characterize a litigant's concerns or condition. But make sure that you don't let the common definitions of those words substitute for the expert's meanings of those words—challenge the expert to define each term. Experts may also slant their testimony with evocative words that will snap a court's attention to a litigant's alleged condition—e.g. when a child is described as "traumatized" if she is, instead, only "unsettled." Left unchallenged, such language may crystallize a biased picture of the litigant's condition in the minds of a judge or jury and direct the interpretation of subsequently offered evidence.

Clear, sharp writing. It makes sense.

OPPORTUNITIES TO INCREASE YOUR CHARITABLE GIFT
by Christy Adamcik Gammill, CDFA[2]

If you are among the many people who would like to make a sizeable contribution to the charitable organization of your choice, there may be a way to do so at reasonable cost. Through life insurance, an individual or family can donate what may potentially become many times the value of their contribution.

A life insurance policy can transform a small giver into a substantial donor. This can be accomplished in several ways. One way is to consider the purchase of a life insurance policy and donate it outright to charity. Depending on your age, a few hundred dollars a year in premiums could potentially return tens of thousands of dollars to the charity after your death, provided the insurance policy is kept in force.

In addition to leveraging a smaller contribution into a larger one, there may be other substantial advantages to donating life insurance. For the donor, there may be possible tax benefits. If the gift is proper-

[2] This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC (NY, NY, 212-314-4600), member FINRA, SIPC. Investment advisory products and services offered through AXA Advisors, LLC, an investment advisor registered with the SEC. Insurance and annuity products are offered through AXA Network, LLC. CBG Wealth Management, is not owned or operated by AXA Advisors or AXA Network. Christy@CGBwealth.com or 214-732-0917. GE 80016(8/12) (Exp 8/14)

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ly structured* and you itemize deductions, you generally may receive a current federal income tax deduction for the charitable gift equal to the lesser of your basis in the policy or its fair market value. An outright gift of life insurance to a charity is typically not subject to gift tax and may carry estate tax benefits as well. Further, since a gift of life insurance is self-executing, it does not require rewriting your will. The proceeds of the policy will be paid directly and immediately to the charitable beneficiary and are not subject to probate.

For the charity, there are also benefits beyond the value of the contribution. An outright gift allows the charity, depending on the type of policy, to receive any policy dividends (this applies only to participating whole life policies and, of course, dividends are not guaranteed), and gives access to the policy's loan and cash value.

Another option is to buy a life insurance policy and name the charity the beneficiary. In this case, you would not receive an income tax deduction, since you still maintain substantial interest in the policy. A donor can buy a policy, assign it to a charity and give the charity a donation to pay annual premiums. The "premium payments" could be deductible each year. However, your estate would generally be entitled to an estate tax deduction when the death benefit is paid to the charity. The charity still benefits from the leverage effect, since the death benefit has the potential of being many times greater than the amount you paid in premiums.

Still another option is to donate an existing policy to the charity. For example, a couple reviewing their financial situation decided that the life insurance policy they carried while their children were dependent was no longer needed now that the children were grown. They decided to donate the fully-paid up policy to charity. In this case, they were entitled to a charitable income tax deduction of the lower of the cost basis in the policy generally the premiums they paid over the life of the policy or the cost of a replacement policy, if purchased today.

In the case of a couple who were uninsurable, they chose to purchase life insurance for an adult child and donated that policy to the charity. The younger the age when the policy is bought the greater the potential return in death benefits. The potential return on this policy could be as much as 50 times its cost, depending upon when the insured dies. In fact, some families choose to spread out their gifts over many years by donating some funds now, donating insurance on their own lives, and donating insurance on their children's lives. In this way, they have the pleasure of knowing that their family will be contributing to the charity for many years to come.

A GIFT THAT CAN BE COUNTED ON

For the charity, the use of life insurance as a gift can offer significant benefits. Not only is the amount of your donation potentially multiplied, but as a planned gift, it can be included in future calculations of the value of the endowment. Planned gifts are especially valued as they help assure a source of future income and encourage others to give.

For more information or to help you determine the type of investment strategy that is right for you, please contact your financial advisor.

AXA Advisors, LLC and its affiliates do not provide legal or tax advice. Please consult your tax or legal advisor regarding your individual situation. Accordingly, any tax information provided in this document is not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer. The tax information was written to support the promotion or the marketing of the transaction(s) or matter(s) addressed and you should seek advice based on your particular circumstances from an independent tax advisor.

* In some states, a charity does not have an "insurable interest" in the lives of its donors, which may mean that the charity may not own the policy. Consult your legal advisor as to your state's requirements. Normal limitation rules for deductions for gifts to charities in general apply.

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WHY BECOME A BOARD CERTIFIED PARALEGAL?
By Kay Redburn[3]

Special thanks to Heide Beginski, Board Certified Paralegal, Personal Injury Trial Law-Texas Board of Legal Specialization, who is employed at the Lovett Law Firm, El Paso, Texas and Michele Boerder, Senior Paralegal, Board Certified Paralegal - Civil Trial, Texas Board of Legal Specialization, who is employed at the firm of K&L Gates LLP in Dallas, Texas for allowing me to use portions of previous articles written by them.

As of August 10, 2012, there are 89,402 licensed attorneys in the State of Texas. According to the TBLS web site, www.tbls.org, only 8,515 of these attorneys are board certified. There are only 323 Board Certified Paralegals. If only half of all attorneys in Texas utilized the services of a paralegal in their offices, that would be 44,701 paralegals employed under the supervision of an attorney in this state. How do you make yourself stand out in such a large crowd?

Currently there is no threshold to cross before entering the paralegal profession, other than having an attorney hire you and give you the title "paralegal." There are no restrictions, educational or experience requirements, or constraints on who may be employed as a Paralegal. There are even some disbarred attorneys making a living as paralegals.

Definition of Paralegal

Until 2005 in Texas there was no difference between the terms "LEGAL ASSISTANT" and "PARALEGAL." The two terms were synonymous and interchangeable, as are "lawyer" and "attorney." That changed in 2005, when the State Bar of Texas Board of Directors, and the Paralegal Division of the State Bar of Texas, adopted a new definition for "Paralegal" that replaces the previous definition adopted in 1986:

> *A paralegal is a person, qualified through various combinations of education, training, or work experience, who is employed or engaged by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of a licensed attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal principles and procedures that, absent such person, an attorney would be required to perform the task.*

On April 21, 2006, the State Bar of Texas Board of Directors approved amending this definition by including the following standards, which are intended to assist the public in obtaining quality legal services, assist attorneys in their utilization of paralegals, and assist judges in determining whether paralegal work is a reimbursable cost when granting attorney fees:

A. Support for Education, Training, and Work Experience:
   1. Attorneys are encouraged to promote:
      a. paralegal attendance at continuing legal education programs;
      b. paralegal board certification through the Texas Board of Legal Specialization (TBLS);
      c. certification through a national paralegal organization such as the National Association of Legal Assistants (NALA) or the National Federation of Paralegal Associations (NFPA); and
      d. membership in the Paralegal Division of the State Bar and/or local paralegal organizations.

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2. In hiring paralegals and determining whether they possess the requisite education, attorneys are encouraged to consider the following:
   a. A specialty certification conferred by TBLS; or
   b. A CLA/CP certification conferred by NALA.; or
   c. A PACE certification conferred by NFPA; or
   d. A bachelor's or higher degree in any field together with a minimum of one (1) year of employment experience performing substantive legal work under the direct supervision of a duly licensed attorney AND completion of 15 hours of Continuing Legal Education within that year; or
   e. certificate of completion from an ABA-approved program of education and training for paralegals; or
   f. A certificate of completion from a paralegal program administered by any college or university accredited or approved by the Texas Higher Education Coordinating Board or its equivalent in another state.
3. Although it is desirable that an employer hire a paralegal who has received legal instruction from a formal education program, the State Bar recognizes that some paralegals are nevertheless qualified if they received their training through previous work experience. In the event an applicant does not meet the educational criteria, it is suggested that only those applicants who have obtained a minimum of four (4) years previous work experience in performing substantive legal work, as that term is defined below, be considered a paralegal.

B. Delegation of Substantive Legal Work:

"Substantive legal work" includes, but is not limited to, the following: conducting client interviews and maintaining general contact with the client; locating and interviewing witnesses; conducting investigations and statistical and documentary research; drafting documents, correspondence, and pleadings; summarizing depositions, interrogatories, and testimony; and attending executions of wills, real estate closings, depositions, court or administrative hearings, and trials with an attorney.

"Substantive legal work" does not include clerical or administrative work. Accordingly, a court may refuse to provide recovery of paralegal time for such non-substantive work. *Gill Savings v. Int'l Supply Co., Inc.*, 759 S.W.2d 697, 705 (Tex. App. Dallas 1988, writ denied).

C. **Consideration of Ethical Obligations:**

1. **Attorney.** The employing attorney has the responsibility for ensuring that the conduct of the paralegal performing the services is compatible with the professional obligations of the attorney. It also remains the obligation of the employing or supervising attorney to fully inform a client as to whether a paralegal will work on the legal matter, what the paralegal's fee will be, and whether the client will be billed for any non-substantive work performed by the paralegal.

2. **Paralegal.** A paralegal is prohibited from engaging in the practice of law, providing legal advice, signing pleadings, negotiating settlement agreements, soliciting legal business on behalf of an attorney, setting a legal fee, accepting a case, or advertising or contracting with members of the general public for the performance of legal functions.

The History

The history of the Board Certification Exam in a nutshell:

1987 - A Task Force for Voluntary Certification was established. The Paralegal Division Board of Directors resolved to go forward with a Texas exam, although no definitive exam was discussed. Edu-

cational programs were created in a list format that offered paralegal training to paralegals. Mock grievance procedures were conducted by the Ethics Committee.

1988 - Funds were allocated for future implementation of a certification program.

1990 - A Paralegal Division ad hoc committee was formed to digest the data on voluntary certification.

1991 - The voluntary certification digest was released and the consensus was that the Paralegal Division would support a certification exam. A Voluntary Certification Task Force was created to work with the division.

1992 - The Joint Task Force on Specialty Certification made significant advances toward establishing a plan toward certification exams for paralegals. The Paralegal Division sponsored joint CLE seminars with local associations.

1994 - The first specialty exams were given by TBLS on March 26, 1994 to 157 paralegals.

I was honored to be on the first Exam Committee for the Family Law Exam. We had a Committee of four - two paralegals and two attorneys who wrote and graded the first exam. I could not wait to see what the first group of test-takers thought of the Family Law Exam, so I joined them for dinner in Austin after that test. Boy was that a mistake! They were very verbal about how hard they thought the test was. But, most of them passed the test, so the grumbling died down. They were very proud to be the first-in-the-nation Board Certified Family Law Paralegals. The philosophy is that if the test was easy, it wouldn't mean anything and would not demonstrate advanced competency.

Terminology

Now that you have the definition, let's talk about terminology.

First, it's important to understand the terminology and the difference in being "certified" and in what some refer to as "Certificated" (meaning receipt of a "Certificate" from a paralegal academic program).

Many attorneys, and even some paralegals, are confused about the meaning of these terms.

When attorneys place ads for a "certified" paralegal, many times what they intend to mean is a "certificate" of successful completion from a paralegal program. Since our profession does not *license* paralegals, certification exams are a vehicle to demonstrate a level of competency and knowledge.

Some attorneys do not realize we are NOT licensed. Also, some attorneys do not realize the broad range of "certificate" programs out there for paralegals. There are some excellent programs that are ABA Approved, there are Associate Degree programs and even Bachelor and Master level programs, and then there are also what I call "poof" programs, which means you attend a class for 3 or 4 weekends and "poof, you're a paralegal".

The Benefits of Certification

1. Certification sets you apart as having both the prerequisites to sit for the exam, and the ability to successfully pass the exam, demonstrating a level of knowledge and capabilities and competency.
2. Certification denotes that you have the professionalism it takes to even pursue obtaining this designation, and sets you apart from those who do not.
3. Attorneys can tell clients that they have board-certified paralegals. This helps demonstrate to clients your worth and substantiate billing rates. It increases your value to the firm. Often firms will increase your billing rate once the paralegal becomes Board Certified, thereby increasing the profit to the firm.
4. Attorneys are probably more likely to recognize TBLS certification, since they too can take TBLS specialty exams. They know the terminology and most know what it takes to become "Board Certified by the Texas Board of Legal Specialization."
5. Certification is one of the evidentiary prongs in proving up paralegal time as an attorney fee award.
6. There is self-satisfaction in knowing you have completed a certification

Just as clients seek attorneys who have expertise, attorneys will look for paralegals that have the skills and the abilities to perform. This is what separates the paralegal profession in doing substantive work versus clerical—the value we bring with our knowledge and abilities. And Board Certification is a tool for demonstrating that value.

How Do I Become Board Certified?

First of all, go to the web site www.tbls-bcp.org and review the criteria to sit for the specialty area in which you qualify. There may be some slight differences in necessary qualifications between specialty areas.

Generally, to Become Board Certified in a specialty area, a paralegal must:

1. Have at least 5 years of experience as a paralegal (3 years in Texas);
2. Currently work under the supervision of a licensed attorney doing business in Texas;
3. Have at least 50 percent of paralegal duties concentrated in specialty areas;
4. Attend continuing education seminars regularly to keep legal training up to date;
5. In addition to the above, successfully complete one of the following:
   - NALA Certification, or
   - Baccalaureate or higher degree, or
   - ABA approved paralegal program, or
   - Paralegal program consisting of a minimum of 60 semester credit hours of which 18 hours are substantive legal courses, or
   - Paralegal program consisting of a minimum of 18 semester credit hours of which 18 hours are substantive legal courses in addition to a minimum of 45 semester credit hours of actual paralegal experience under the supervision of a licensed attorney;
   - Have been evaluated by lawyers, judges, and other professionals associated with the specialty area;
   - Pass a 4-hour written exam.

The "Certification Task List" on the TBLS-BCP web site is:

Step I: Application

1. The certification process is governed respectively by the Texas Plan for Recognition and Regulation of Paralegals Certification.
2. Determine your CLE standing with respect to a specific specialty area by contacting the TBLS. There is a minimum, 30-hour requirement, and only TBLS approved courses count toward specialty area certification.
3. Use the TBLS Paralegal Approved Course Search page to find qualifying courses, or contact the TBLS for additional course information.
4. Read the Standards for Paralegal Certification as well as Rules and Regulations for the specialty area.
5. Download the appropriate Paralegal Certification Application.
6. Complete the application, submit references and pay the appropriate Paralegal Certification Application fee. The application and filing fee deadline is typically in April. References must be received by May 31.
7. Upon the receipt of your completed application, TBLS performs an initial administrative check and resolves any deficiencies. Please respond promptly to requests for additional information or clarification.
8. The appropriate TBLS Paralegal specialty area Advisory Commission reviews and votes on each individual's certification application. Approved applicants are allowed to take specialty area examinations.

Step II: Examination

1. Approved applicants receive examination registration information by mail, pay the appropriate examination fee, and then take a day-long examination. Exams are administered only once each year. Paralegal Exam Specifications for each specialty area covering knowledge, skills and subject matter are available online for use in preparing for exams.
2. Examinations are scored with results sent to applicant by mail.
3. Upon meeting all qualifications and passing the examination, a paralegal is considered Board Certified and is conferred a Certificate of Special Competence in a specialty area of law.

What is On the Exam?

Exam Specification for each specialty exam is available on TBLS's website. The specifications and exams are revised annually. All exams are confidential and unavailable for public review.

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Preparatory Courses

TBLS does not sponsor or recommend any specific preparatory course for the exam. However, certified attorneys and paralegals have reported that the State Bar Professional Development Program's Advanced courses are very comprehensive with the most up-to-date law. Continuing Legal Education seminars that have been approved by the Texas Board of Legal Specialization are beneficial to persons who apply to take the TBLS examination.

To Maintain Certification

TBLS requires all certified paralegals to report annual substantial involvement percentages and pay annual fees. Paralegals are mailed a form for reporting the annual information and paying the fees. Paralegals must complete the annual process by April 15th of each year. The paralegal annual fee is $25 per certificate.

TBLS reviews hundreds of CLE courses for specialization approval, and updates its database daily with course approval information. TBLS also approves certain CLE courses that may not have been approved by the State Bar of Texas CLE Department. Contact TBLS for additional information regarding approved CLE.

Board Certified paralegals have a continuing duty to disclose the following matters at any time during the certification period: (i) any sanction(s) imposed against the Board Certified paralegal; (ii) a criminal indictment or information filed against the Board Certified paralegal for a felony or misdemeanor involving moral turpitude or other serious crime; or (iii) a conviction of (including probation or deferred adjudication), or fine, for a felony or misdemeanor involving moral turpitude or other serious crime as defined in the Attorney Standards – General Requirements, Section III, B, 1. All such matters must be reported to TBLS within 30 days after the initiation of such proceedings or imposition of sanction or judgment, as appropriate.

What are the Specialty Areas and How Many Board Certified Paralegals are in Each?

Per the TBLS web site here is the breakdown:

Board certified Paralegals in Texas:

Civil Trial Law	83
Criminal Law	9
Estate Planning and Probate Law	16
Family Law	110
Personal Injury Trial Law	82
Real Estate Law	22

Bankruptcy was just added this year and the first Specialty Certification Exam in Bankruptcy will be given in October.

Because our profession is not regulated, pursuing voluntary certification demonstrates our level of knowledge and competency to attorneys, clients, courts and colleagues.

To me it is a threshold that is worth the time and effort to cross to possess that credential.

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ARTICLES

Reimbursement
Statutory and Common Law Recoveries
By Michael Geary & Jim Wingate[1]

I. Introduction

Beginning in 2001, the Texas Family Code, for the first time, included statutory provisions with respect to reimbursement claims. Family Code Section 3.408 was enacted and specifically set forth two (2) statutory reimbursement claims. One was for the payment by one marital estate of the unsecured liabilities of another marital estate. The second claim was for the "inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse." Since 2001, these two statutory reimbursement provisions remained unchanged and were not modified by the 2009 amendments, but instead became part of new TFC § 3.402.

In 2009, as a part of the elimination of the economic contribution provisions, the statutory reimbursement provisions have been expanded to include a number of additional types of reimbursement claims. The statutory reimbursement provisions, for the most part, are a codification of existing common law. After the 2009 amendments and the repeal of economic contribution, the family law bar appears to be focused on the extent of the application of the new reimbursement provisions and their ramifications.

Two of these areas are: (1) whether common law reimbursement claims still exist; and (2) what does the reimbursement claim involving inadequate compensation for time and effort of a spouse by a business under the control and direction of that spouse mean? As to the latter claim, the authors have not located a case that specifically discusses the former Tex. Fam. Code Ann. § 4.08(b)(2) [now Tex. Fam. Code Ann. § 3.402(a)(2)], what it means, and how it is to be determined.

II. Common Law Reimbursement - Does it Still Exist?

After the passage of the 2009 amendments, one of the initial questions was whether you could have both a statutory reimbursement claim as well as a common law reimbursement claim, or did the statutory provisions abrogate the common law claims? At the beginning of the reimbursement provisions in both the original 2001 statute and the 2009 revisions, the opening sentence provides that "a claim for reimbursement includes …." Under the Code Construction Act, which is found in the Texas Government Code, the general definition provisions, provides that **"'Includes' and 'Including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."** Tex. Gov't Code §311.005(13) (emphasis added.)

Two Texas family law cases, *Nelson v. Nelson*[2] and *Bigelow v. Stephens,*[3] have addressed the issue of the continued viability of common law reimbursement claims in light of the statutory provisions. The Court in *Nelson* discussed the provisions contained in Tex. Fam. Code Ann. § 7.007(b), which directed the trial courts to apply equitable principles in resolving reimbursement claims (now Tex. Fam. Code Ann. § 7.007) and the then existing two (2) statutory reimbursement claims contained in Tex. Fam. Code Ann. § 3.408(b) with regard to the trial court's authority to award reimbursement for prenuptial expenditures. The appellate court stated that "[Tex. Fam. Code Ann.] Section 3.408 is simply a non-exhaustive list of two potential reimbursement claims …. Consequently, we do not believe that the legislature intended that a reimbursement claim could never exist for prenuptial expenditures."[4]

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[2] 193 S.W.3d 624 (Tex. App.–Eastland 2006, no pet.).

[3] 286 S.W.3d 619 (Tex. App.–Beaumont 2009, no pet.).

[4] *Nelson*, 193 S.W.3d at 632.

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Bigelow v. Stephens, supra, stated:

> We disagree that [Tex. Fam. Code Ann.] section 3.408(b) necessarily excludes a reimbursement claim that is premised on the payment of a secured debt. In our opinion, "[t]he definition of reimbursement in [Tex. Fam. Code Ann.] section 3.408[b] is simply a non-exhaustive list of two potential reimbursement claims.[5]" We do not believe that the legislature, by providing two examples of reimbursement claims in [Tex. Fam. Code Ann.] Section 3.408(b), intended to limit the trial court's power to use equity to achieve a fair division of the parties' property.[6]

Additionally, in order for a statute to completely replace a common law remedy, the statutory provisions must expressly provide that the statutory scheme is exclusive. In the case of *Holmans v. Transource Polymers, Inc.*,[7] the Fort Worth Court of Appeals held that "abrogation by implication of a cause of action and remedy recognized at common law is disfavored and requires a clear repugnance between the common law and statutory causes of action.[8]" Finally, in the case of *Sanders v. Construction Equity, Inc.*,[9] the court of appeals held that "[t]he Supreme Court has consistently declined to construe statutes to deprive citizens of common law rights unless the Legislature clearly expressed that intent. *Cash America Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000)."

III. Reimbursement Under the Family Code

As a result of the 2009 amendments, the Family Code contained nine (9) different types of statutory reimbursement claims. Two (2) of the claims involve the payment of unsecured liabilities [Tex. Fam. Code Ann. § 3.402(a)(1)] and unsecured debt [Tex. Fam. Code Ann. § 3.402(a)(9)]. There is a reimbursement claim similar to, but different than the common law *Jensen* claim [Tex. Fam. Code Ann. § 3.402(a)(2)], two (2) claims involving the reduction of the principal amount of debt secured by a lien on the property [Tex. Fam. Code Ann. §§ 3.402(a)(3) and (4)], which would apply to both real property and personal property such as an automobile loan; two (2) claims involving the reduction of the principal amount of debt secured by a lien on real property incurred for the acquisition of, or for the construction of, capital improvements to the property [Tex. Fam. Code Ann. §§ 3.402(a)(5) and (6)]; one (1) claim for the refinancing of the principal amount of debt secured by a lien on property [Tex. Fam. Code Ann. § 3.402(a)(7)]; and finally there is a reimbursement claim for the acquisition of, or for the construction of, capital improvements on real property without incurring any debt [Tex. Fam. Code Ann. § 3.402 (a)(8)]. Also note that the 2009 amendments retained the original statutory reimbursement claims from 2001, which are now Tex. Fam. Code Ann. § 3.402(a)(1) [formerly Tex. Fam. Code Ann. § 3.408(b)(1)] and Tex. Fam. Code Ann. § 3.402(a)(2) [formerly Tex. Fam. Code Ann. § 3.408(b)(2)].

As stated above, while the statutory *Jensen* claim, has been in existence since 2001, there are no reported cases on how the statutory *Jensen* claim is to be interpreted and what evidence needs to be presented in order to be successful. Finally, as will be discussed later, the statutory *Jensen* claim would appear to be easier to prove then the common law *Jensen* claim.

A number of questions remain regarding the application of the statutory reimbursement provisions, and there are several observations that may be made regarding the new reimbursement statutes. These are as follows:

A. What is the purpose of having both Tex. Fam. Code Ann. §§ 3.402(a)(1) and (9)? Subparagraph (1) is clearly the broader of the two. Is a distinction somehow being made between unsecured liabilities in (1) versus unsecured debt in (9)? Alternatively, does the reference to a reduction of unsecured debt in subparagraph (9) refer to a refinancing of debt as opposed to a payment of a debt.

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[5] No.04-07-00759-CV, (Tex. App.–San Antonio April 9, 2008, no pet.)(mem. op.); *Nelson v. Nelson*, 193 S.W.3d at 632.
[6] *Bigelow*, 286 S.W.3d at 622.
[7] 914 S.W.2d 189 (Tex. App.–Ft. Worth 1995, writ denied).
[8] *citing Coppedge v. Colonial Savings and Loan Ass'n*, 721 S.W.2d 933, 938 (Tex. App.–Dallas 1986, writ ref'd n.r.e.).
[9] 45 S.W.3d 802, 803-04 (Tex. App.–Beaumont 2001, no pet.)(op. on reh'g).

B. Is Tex. Fam. Code Ann. § 3.402(a)(2) an attempt to replicate the *Jensen* reimbursement claim? It appears to be, but the statutory provisions do not contain all of the elements of a common law *Jensen* claim.

C. Since Tex. Fam. Code Ann. §§ 3.402(a)(3),(4),(5),(6) and (7) only speak in terms of the reduction of the principal amount of debt on property, does a claim for reimbursement also exist for the payment of the interest, insurance, and ad valorem taxes on the same piece of property? Would it be an error by the trial court to award all such reimbursement claims to a marital estate, assuming all of the other elements necessary for such a recovery were proven (i.e. insufficient or no offsetting benefits)?

D. In Tex. Fam. Code Ann. § 3.402(a)(7) does refinancing of the principal amount also include the right to recover reimbursement for the closing costs paid at the time of the refinancing?

E. What constitutes a "capital improvement" referred to in Tex. Fam. Code Ann. § 3.402(a)(8)?

1. "Capital improvements" have been defined as costs related to making changes to improve capital assets, increase their useful life, or add to the value of these assets. Capital improvements may be structural improvements or other renovations to a building, or they may enhance usefulness or productivity.
2. Presumably, a capital improvement also means the same thing as a "capital expenditure." Capital expenditures, for tax purposes, include amounts paid or incurred to add to the value, or to substantially extend the useful life, of property owned by the taxpayer.[10]
3. It should be noted that there is a distinction between capital improvements and deductible repairs. No reimbursement claim is allowed for repairs since they are not considered to be an enhancement. Deductible repairs would include, as it relates to a rental property or other investment property, wallpapering, painting, caulking, repairing a roof, repairing or replacing plaster, replacing retaining walls. Items that would be considered capital improvements are installation of new doors or windows, or replacement of doors or windows, replacement as opposed to repairing of a roof, installation of an air conditioner or ventilation system, installation of a burglar alarm system, or improvement of a storefront in the case of a retail shop. All of these expenditures can affect the outcome of a reimbursement claim under Tex. Fam. Code Ann. § 3.402(a)(8).
4. If capital improvements and capital expenditures are synonymous, and capital improvements are made to rental property owned by one of the spouse's separate estate, the cost for the capital improvement is added to the basis of the property and depreciated over its useful life. As the depreciation is taken in each yearly tax return, then the marital estate that expended the money to make the capital improvement would receive the tax benefits as an offsetting benefit to any reimbursement claim.
5. If a capital expenditure is made for improvements to the parties' marital residence, rather than to a rental property, then the only tax treatment that could be made would be to add the cost of the capital improvement to the basis of the property. In this event, since the basis will increase as a result of the expenditure, when the property is sold, the capital gains tax on the gain, if there is one, would be less as a result of the increase in basis.
6. When discussing offsets and tax benefits, one must also analyze the ultimate impact of taking depreciation on the parties' federal income tax returns as a result of the ownership of rental properties by a spouse's separate property estate. In theory, at the time of the divorce, the community estate would argue that the separate estate has benefitted as a result of the use of community funds to pay down any debt on the separate property rental property. However, the spouse owning the separate property would argue that the community estate received all the rental income, as well as the deduction of depreciation and interest payments attributable to the rental property.
7. The real problem becomes when the rental property is sold, assuming it is sold for an amount in excess of basis, because of all the depreciation that was previously taken on the prior years' tax returns is recaptured by the selling of the separate property estate.
8. Since Tex. Fam. Code Ann. § 7.008 authorizes the trial court to consider the tax consequences attributable to specific assets when dividing the parties' marital estates, including whether a specific

[10] Internal Revenue Code § 263; Reg. § 1.263(a)-(1).

asset will be subject to taxation and, if so, when the tax will be required to be paid, would it not be important for the trial court to consider the future recapturing of depreciation by the separate estate as a part of an award of reimbursement involving rental property?

F. What is the purpose of Tex. Fam. Code Ann. § 3.402(a)(9) ("unsecured debt") since it would seem to be covered in Tex. Fam. Code Ann. § 3.402(a)(1) ("unsecured liabilities")?

G. Are Tex. Fam. Code Ann. §§ 3.402(b) and (d) a codification of existing common law? They appear to be.

H Tex. Fam. Code Ann. § 3.402(c) is a codification of existing case law, with exception that the use and benefit by the community estate of a spouse's separate property as the parties' primary marital residence or of a secondary residence cannot be used to offset a reimbursement claim made by the community estate.

I. Tex. Fam. Code Ann. § 3.402(e) finally makes it clear that the marital estate seeking to offset a reimbursement claim has the burden to prove what the offset is and the value of the offset.

J. Tex. Fam. Code Ann. § 3.406 makes clear that the trial court has the authority to impose an equitable lien on property owned by a marital estate to secure the reimbursement award owed to another marital estate.

However, based upon the Texas Supreme Court ruling in *Heggen v. Pemelton*,[11] it would appear that the trial court does not have authority to impose an equitable lien on property that is proven to be a spouse's homestead unless it meets the requirements of the Texas Constitution. Also, please see the below discussion and the cases of *Smith v. Smith*,[12] *Smith v. Smith*[13] (a different Smith), *Barber v. Barber*,[14] and *McCanless v. Davenport*.[15]

The 1986 case of *Smith v. Smith*, *supra*, and some of the other cases that discuss the issue of equitable liens on homesteads, indicates that in those cases where an equitable lien is allowed to be placed on a homestead, there was no evidence presented on the issue of homestead during the trial, but that such issue was raised for the first time on appeal.

IV. Common-Law Reimbursements

A. In General. Common law reimbursement between the three marital estates is purely an equitable one. The contexts in which a common law reimbursement claim may be asserted between the marital estates are numerous. However, as indicated above, Tex. Fam. Code Ann. § 3.409 has statutorily abolished reimbursement claims for the payment of child support, alimony, spousal maintenance, living expenses of a spouse or child of a spouse, the payment of a student loan owed by a spouse, contributions of property of a nominal value and the payment of a liability of a nominal amount.

B. Overview. The Family Code defines marital estates as: (1) the community estate; (2) Husband's separate property estate; and (3) Wife's separate property estate. The cases of *Garcia v. Garcia*,[16] *Hailey v. Hailey*,[17] *Garza v. Garza*,[18] and *Phillips v. Phillips*,[19] contain a good overview of the basic principles involving common-law reimbursement. These cases and others provide that:

1. The rule of reimbursement is purely an equitable one and a court of equity is bound to look at all facts and circumstances and determine what is fair, just and equitable.[20]
2. Reimbursement is not an interest in property or an enforceable debt, *per se*, but an equitable right that arises upon dissolution of the marriage through death or divorce.[21]

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[11] *Heggen v. Pemelton*, 836 S.W.2d 145 (Tex. 1992).
[12] 715 S.W.2d 154 (Tex. App.–Texarkana 1986, no writ).
[13] 187 S.W.2d 116 (Tex. Civ. App.— Ft. Worth 1945, no writ).
[14] 223 S.W. 866 (Tex. Civ. App.–Ft. Worth 1920, writ dism'd).
[15] 40 S.W.2d 903 (Tex. Civ. App.–Dallas 1931, no writ).
[16] 170 S.W.3d 644 (Tex. App.–El Paso 2005, no pet.).
[17] 176 S.W.3d 374 (Tex. App.–Houston [1st Dist.] 2004, no pet.).
[18] 217 S.W.3d 538 (Tex. App.–San Antonio 2006, no pet.).
[19] 296 S.W.3d 656 (Tex. App. – El Paso 2009, pet. denied).
[20] *Penick v. Penick*, 783 S.W.2d 194, 197 (Tex. 1988); *Vallone v. Vallone*, 644 S.W.2d 455, 458 (Tex. 1982); *Phillips*, 296 S.W.3d at 664.
[21] *Id.*

3. An equitable right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit.[22]
4. A claim for reimbursement includes payment by one marital estate of the unsecured liabilities of another marital estate.[23]
5. The trial court resolves a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset if the court determines it to be appropriate.[24]
6. Except for those reimbursement claims involving a primary or secondary home, benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate.[25]
7. The party seeking reimbursement has the burden of pleading and proving that the expenditures and improvements were made and that they are reimbursable.[26]
8. Reimbursement is not available as a matter of law but lies within the discretion of the court.[27]
9. A trial court is required to consider offsetting benefits when a litigant requests that relief.[28] [29]
10. An equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates.[30]
11. Mathematical precision in determining the amount of a reimbursement claim is not required.[31]
12. According to *Penick v. Penick*,[32] "the discretion to be exercised in evaluating a claim for reimbursement is equally as broad as the discretion subsequently exercised by the trial court in making a just and right division of the community estate." Therefore, the logical extension of this would be that a reimbursement claim is just another factor that the trial court should consider in dividing the community estate just like the earning capacity of the spouses, length of marriage, age, health and education of the spouses, business opportunities, and employability of the spouses, etc.[33]
13. In *Anderson v. Gilliland*,[34] the Supreme Court stated that equity requires the courts to ensure that the benefitted estate is not required to pay more in reimbursement than the amount by which it was benefitted. Likewise, it is necessary to ascertain that the benefitted estate pays no less than it has been benefitted.[35]

C. When a Claim Arises. A claim for reimbursement, both at common law and under the Family Code, arises in one of the following situations:
1. When one marital estate utilizes its funds or assets to pay the debts and liabilities of another marital estate;[36]
2. When funds belonging to one marital estate are used to make capital improvements to another marital estate;[37]
3. When a spouse is inadequately compensated for his/her time, toil, talent and effort by a business entity under the control and direction of that spouse;[38] and
4. "When community time, talent and labor are utilized to benefit and enhance a spouses' separate estate, beyond whatever care, attention and expenditure are necessary for the proper maintenance and

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[22] *Id.*
[23] *Id.*
[24] *Id.* (Tex. Fam. Code Ann. § 3.402(b)).
[25] *Id.* (Tex. Fam. Code Ann. § 3.402(c) with limitation).
[26] *Id. Vallone*, 644 S.W.2d at 459; *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex. App.–San Antonio 1990, no writ).
[27] *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App.–Houston [14th Dist.] 1996, no writ)(op. on reh'g); *Vallone*, 644 S.W.2d at 459.
[28] *See also Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988) (outright rejection of offsetting benefits is inconsistent with the equitable nature of a claim for reimbursement).
[29] *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App.–San Antonio 1990, no writ).
[30] *Penick*, 783 S.W.2d 194, 198 (Tex. 1988).
[31] *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.–Texarkana 1986, no writ) and *Gutierrez*, 791 S.W.2d at 663.
[32] 783 S.W.2d at 198.
[33] *See Baccus v. Baccus*, 808 S.W.2d 694 (Tex. App.–Beaumont 1991, no writ).
[34] 684 S.W.2d 673 (Tex. 1985)
[35] *Id*. at 675.
[36] Tex. Fam. Code Ann. §§ 3.402(a)(1),(3),(4),(5),(6),(7) and (9).
[37] Tex. Fam. Code Ann. § 3.402(a)(8).
[38] Tex. Fam. Code Ann. § 3.402(a)(2).

preservation of the separate estates, without the community receiving adequate compensation."[39] In *Jensen v. Jensen*,[40] the Supreme Court held that "the community will be reimbursed for the value of time and effort expended by either or both spouses to enhance the separate estate of either, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration received for that time and effort in the form of salary, bonus, dividends and other fringe benefits, those items being community property when received."[41]

D. Analyzing the claim. The first form of reimbursement involves the use of money to pay the debts of a marital estate, and in fact out of the nine (9) types of statutory reimbursement claims, seven (7) of them involve the use of money belonging to one marital estate for the benefit of another marital estate. The second form of reimbursement, both statutorily and at common law, involves the construction of capital improvements to the benefit of a marital estate. The final two forms of reimbursement involve the utilization of community time and effort for which there has been inadequate compensation paid to the community estate for such time and effort.

When analyzing a potential reimbursement claim, the questions that should be considered are:

1. Is reimbursement available?;
2. Who has the burden of pleading and producing evidence?;
3. How is it measured?;
4. If applicable, has there been an enhancement in value to the benefited estate?;
5. If applicable, did the expenditures exceed the benefits received?; and
6. What offsetting benefits are available and how do you prove them?

Because the award of a reimbursement claim is determined in the sole discretion of the trial court, the trial court cannot be reversed with regard to an error involving a reimbursement claim unless it results in the overall property division being an abuse of discretion.

V. Pleadings, Burden of Proof and Evidentiary Elements

A. Pleadings.

Reimbursement must be pled in order for it to be awarded. Where there is no pleading whatsoever for reimbursement, a property division that includes reimbursement will be reversed.[42]

In *Vallone v. Vallone*, *supra*, the wife was deemed to have waived her claim for reimbursement for the value of uncompensated community time, talent and labor expended by the husband in enhancing his separate estate because she pleaded only for reimbursement for community funds expended and for a claim that the increase in value of her husband's separate property was a community asset and not for reimbursement for the husband's labor. In the subsequent case of *Jensen v. Jensen*, *supra*, the wife, who was seeking reimbursement for the uncompensated community time, talent and labor expended by the husband to enhance the husband's separate estate, was given a remand "in the interest of justice," to allow her to replead her case and seek reimbursement upon retrial.

In *Holloway v. Holloway*,[43] the appellate court found that the appellant waived her claims for reimbursement when she failed to affirmatively plead her reimbursement claims and failed to request or submit special issues on some of the claims.

In *Lindsay v. Clayman*,[44] the Supreme Court said that "there being no pleadings, evidence, or jury finding on which to base any judgment for any reimbursement of the community estate, no judgment can be given in favor of Petitioner. . ." In *Lindsay*, the Petitioner had no pleadings requesting reimbursement for the enhanced value as a result of improvements made to separately owned lots, but instead had simply requested, in the prayer, reimbursement for the cost of the improvements, which was the incorrect request for relief.[45]

Notwithstanding the "in the interest of justice" remand in *Jensen*, reimbursement claims should always be pleaded.

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[39] *Vallone*, 644 S.W.2d at 459. There is no equivalent provision under the reimbursement provisions of the TFC.
[40] 665 S.W.2d 107 (Tex. 1984).
[41] *Jensen*, 665 S.W.2d at 109.
[42] *Gay v. Gay*, 737 S.W.2d 94, 96 (Tex. App.–El Paso 1987, writ denied).
[43] 671 S.W.2d 51 (Tex. App.–Dallas, 1983, writ dism'd).
[44] 151 Tex. 593, 254 S.W.2d 777 (1952).
[45] *See also* *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964) and *Morgan v. Morgan*, 725 S.W.2d 485 (Tex. App.–Austin 1987, no writ).

B. Burden of Proof. The statutory reimbursement provisions do not address who has the burden of proof with respect to a reimbursement claim. However, the case law is clear. The party claiming the right of reimbursement has the burden of pleading and proving "the expenditures and improvements were made and are reimbursable."[46]

In *Gutierrez v. Gutierrez, supra*, the court stated that the party seeking reimbursement has the burden to prove that he/she is entitled to it. In *Zeptner v. Zeptner*,[47] the court stated that "the party claiming reimbursement bears the burden of establishing the net benefit to the payee estate."[48]

Additionally, if the marital estate seeking reimbursement is the separate estate of a spouse, that spouse also has the burden to prove, by clear and convincing evidence, that separate funds were used for the benefit of the community estate or the other spouse's separate estate.[49]

C. How and When to Measure.

1. Principal Payments. The Family Code reimbursement provisions draw a distinction between the use of money belonging to one marital estate to pay the unsecured liabilities of another marital estate as opposed to the use of money belonging to one marital estate to pay the principal amount on a loan secured by real property owned by another marital estate. With regards to unsecured liabilities, no distinction has been drawn in the Family Code with respect to the principal amount of an unsecured debt versus the interest that accrues on that debt.[50] However, for secured debts, the Family Code provides for reimbursement only for the reduction of the principal amount of the debt. Thus in Tex. Fam. Code Ann. §§ 3.402(a)(3),(4),(5),(6) and (7), the Family Code provisions specifically reference "reduction of the principal amount" of a debt as the basis for reimbursement. As discussed below, common law provisions would still apply with respect to reimbursement for the payment of interest on secured debts.

In 1988, the Texas Supreme Court decided *Penick v. Penick*.[51] Prior to the *Penick* decision, the Appellate Courts had been inconsistent in their treatment of reimbursement claims for the payment of the principal amounts on a pre-marriage liability. However, *Penick* finally set forth the principle that reimbursement for principal payments was to follow the same standard set out in the Supreme Court decision in *Anderson v. Gilliland, supra.*

> The *Penick* Court said:
> Of these two cases, *Anderson* is more closely analogous to our present case.
> . . . In resolving this conflict we emphasized the equitable nature of the claim and selected what we considered the fairest measure, holding 'that a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefited estate.' *Anderson*, 684 S.W.2d at 675.
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> The court of appeals, however, distinguishes *Anderson* because it concerned reimbursement for a capital improvement to separate property rather than reimbursement for a prenuptial purchase money debt. A distinct and different set of rules have evolved for evaluating a reimbursement claim for capital improvements as opposed to one for purchase money.
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> Why we should have two distinct sets of rules for two very similar claims for reimbursement is another matter which is not entirely clear. . . We view the advancement of funds by one marital estate

[46] *Vallone*, 644 S.W.2d at 459.
[47] 111 S.W.3d 727 (Tex. App.–Ft. Worth 2003, no pet.).
[48] *See also Zieba v. Martin*, 928 S.W.2d at 788-89.
[49] *Beard v. Beard*, 49 S.W.3d 40 (Tex. App.–Waco 2001, pet. denied).
[50] Tex. Fam. Code Ann. §§ 3.402(a)(1) and (9).
[51] 783 S.W.2d 194 (Tex. 1988).

to another under either transaction, payment of a purchase money debt or as a capital improvement, as essentially identical and therefore subject to the same kind of measurement.[52]

Other than the court's reference to its holding in *Anderson v. Gilliland*, the *Penick* decision makes no further reference to "enhancement in value" and instead has a detailed discussion involving offsetting benefits, and the need to show that the expenditures exceeded the benefits received. Therefore, in asserting a claim for reimbursement for the payment of principal amounts due on a debt owed by one of the marital estates, one is left with the question of what constitutes enhancement in value from the payment of a debt? Except in cases involving bankruptcy, it would seem that an estate would always be enhanced in value by the payment of its debt by the contributing estate. With respect to offsetting benefits, it would seem to be impossible for a community estate to be benefited by the payment of a separate debt of a spouse.

2. What about Interest, Taxes, and Insurance? In light of the new Family Code provisions, does a marital estate have a common law claim for reimbursement as a result of the payment of interest, taxes (ad valorem), and insurance on behalf of another martial estate? The simple answer is yes.

The statutory provisions do not mention interest, and therefore, under the rules of statutory construction, the reimbursement for the payment of interest expense is not precluded from a claim for reimbursement. However, a claim for reimbursement of interest paid by a contributing estate on purchase money debt for realty owned by a benefitted estate is frequently offset in part by a tax benefit in a personal or business tax return. A tax deduction for interest in a tax return will never completely offset a reimbursement claim for payment of that interest because the benefit received for tax purposes is always only a fraction of the interest paid.[53]

Keep in mind, however, that a claim of an offsetting tax benefit for the payment of interest expense on the unsecured personal debt owed by a marital estate is not available due to the fact that, as a general rule, interest expense on unsecured debt such as credit cards, is not tax deductible. On the other hand, if the interest expense is in the nature of investment interest expense, which may be deductible, then the offsetting benefits arguments would be revived.

With respect to a reimbursement claim involving the payment of ad valorem taxes, the payment of these taxes are generally deductible on a primary residence, secondary residence, or rental property. Therefore, an offsetting benefit claim is available in that circumstance.

As it relates to the payment of insurance, unless the insurance premiums paid involve rental property, insurance premiums paid on a homeowner's insurance policy for a primary or secondary residence are not tax deductible. Of course, premiums paid on rental property would be deductible for tax purposes and would therefore create an offsetting benefit to the contributing estate.

D. Enhancement in Value.

1. How to Measure. In accordance with Tex. Fam. Code Ann. § 3.402(d), reimbursement for the expenditure of funds by one marital estate for improvements to another marital estate is to be measured by the enhancement in value to the benefitted marital estate. This statutory provision is in line with the prior decisions including *Dakan*[54] and *Anderson v. Gilliland*.[55]

Prior to *Anderson v. Gilliland*, there had been some confusion as to whether enhancement in value or the cost, whichever was less, was the measure for reimbursement. This confusion was the result of purportedly conflicting statements made by the *Dakan* court. However, since the *Anderson v. Gilliland* decision, and now by virtue of the statutory provisions, enhancement in value is the measure for reimbursement claims other than those resulting from community time, toil, and effort.

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[52] *Id.* At 197.
[53] *See Pelzig v. Berkebile*, 931 S.W.2d 398.
[54] 83 S.W.2d at 628.
[55] 684 S.W.2d at 675.

2. When to Measure the Enhancement. Another issue that exists in determining the enhancement in value is when do you measure the amount of enhancement? Is it immediately following the enhancement or is it at the time of the termination of the marriage?

In two separate probate cases, the Texas Supreme Court clearly indicates that enhancement is measured at the time of the termination of the marriage by death or law. Thus in *Dakan*,[56] a probate case, the Texas Supreme Court stated that ". . . in case of reimbursement for improvements, the amount of recovery is limited to the amount of enhancement of the property at the time of partition by virtue of the improvements placed thereon."[57] In *Anderson v. Gilliland*,[58] the Supreme Court also indicated that courts are to measure the enhanced value as of the date of death of a spouse.[59] Since the claim for reimbursement does not mature until termination of the marital relationship (*i.e.*, divorce or death), then measuring enhancement in value on the date of death or divorce would seems logical. Tex. Fam. Code Ann. § 3.404 provides that "the claim (for reimbursement) matures on dissolution of the marriage or the death of either spouse." However, this provision logically goes towards when the claim can be asserted and not on what date the enhancement in value is to be determined.

Other than the two foregoing Supreme Court cases, the authors found only three cases that discuss the issue of what date you should use to determine the enhancement in value. They are *Girard v. Girard*,[60] *Ogle v. Jones*,[61] and *Nelson v. Nelson*.[62] In *Girard*, the Houston court of appeals quoted the rule established in *Dakan* that enhancement is to be measured as of the time of the partitioning.[63] In *Ogle*, also a probate case, the Waco court of appeals likewise held that enhancement in value is to be measured as of the date of the partitioning of the marital estate.[64]

In *Nelson*, Kenneth Nelson and Bessie Mae Nelson were married on April 9, 1995. Prior to their marriage, Kenneth purchased five acres of land from his parents. Several months before marriage, the parties began construction of a home on Kenneth's five-acre tract. The construction, although started prior to marriage, was essentially completed at the time of their marriage on April 9, 1995. The parties did most of the work on the construction themselves, and $16,616.51 from Bessie's separate funds were used on the construction. The trial court awarded Bessie reimbursement of $16,600.00 as a result of the use of her separate funds.[65] Bessie introduced without objection a tax role as of January 1, 1995, at which time construction had just started, that reported a value of $9,664. She also introduced without objection the tax assessment as of the date of trial, which indicated that the value of the property had increased to $53,950. Of that amount, $43,750 was attributable to improvements. No evidence was given as to the value of the property as of the date of the parties' marriage on April 9, 1995. The trial court's findings of fact mistakenly stated that the value of the property as of the date of marriage was $9,664, but this was actually its value on January 1, 1995, prior to the construction of the residence. Because a court of appeals is not allowed to modify findings of fact, it held that the trial court abused its discretion when it calculated the reimbursement claim using the value prior to improvements, and remanded the case to the trial court for reconsideration of the reimbursement issue. The *Nelson* court of appeals gave no indication as to whether the proper date of valuation for reimbursement purposes was the date of completion of the residence or the date of divorce.

It is hornbook law that any improvements made by the community to separate realty do not belong to the community, but rather belong to the separate estate that owns the real property. Furthermore, Texas courts

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[56] 83 S.W.2d at 628.
[57] *Id.* (emphasis added).
[58] 684 S.W.2d at 675.
[59] During the marriage, the community expended $20,237.89 to build a home on the property of the deceased. At the time of death, this home had enhanced the separate property of the deceased by the sum of $54,000.00, and the Supreme Court based its determination of the amount of the reimbursement claim on this value.
[60] 521 S.W.2d 714 (Tex. Civ. App.–Houston [1st Dist.] 1975, no writ).
[61] 143 S.W.2d 644 (Tex. Civ. App.–Waco 1940, writ ref'd).
[62] 193 S.W.3d.
[63] 521 S.W.2d at 717.
[64] 143 S.W.2d at 645
[65] On appeal, Kenneth, argued that because the funds were used before their marriage, and based upon the statutory definition of "marital estate," Bessie was not entitled to reimbursement. The Appellate Court ruled that the trial court had the authority to award reimbursement for pre-marital expenditures made to benefit Kenneth's separate property.

cannot divest a spouse of his or her separate property.[66] This raises a question then as to whether valuing a reimbursement claim for improvements as of the time of partitioning of the marital estate is an unconstitutional divestiture of separate property. Although an award of a reimbursement claim does not affect title, it can effectively transfer a portion of post-improvement appreciation in value from the separate estate to the community estate. To say that the community has only a reimbursement claim and not an ownership claim does not change the economic effect of allowing the community to share in post-improvement appreciation in value. Isn't the right to receive the benefit of appreciation of property owned by a spouse fundamental to the concept of ownership of property? If it is, then does measuring appreciation in value as of the partitioning date instead of the date of completion of the improvements effectively transfer to the community an interest in separate property when reimbursement claims are asserted by the community estate against a separate estate?

Measuring reimbursement claims as of the date of the termination of the marriage also raises other issues. For example, what if at the time of marriage the husband owns an unimproved lot and three years later the parties decide to build, with community funds, a new residence on the lot? Assume further that the new house is completed after two years of construction, and the parties move in and reside in the property for ten years, at which time a divorce is filed. Over a ten-year period, there could be significant fluctuations in the value of the property. It would even be possible that at the time of completion of the construction the value of real estate was at an all-time high, but, ten years later, the value of residential property, in general, had substantially diminished.

2. Comparison of *Jensen* to *Dakan* & *Anderson*.

In *Vallone*,[67] the Supreme Court first recognized a cause of action arising from the receipt of inadequate compensation for the use of community time, talent and labor to benefit and enhance a spouse's separate estate beyond that needed for the proper maintenance and preservation of that estate. Although the Supreme Court held that this cause of action existed in a divorce case, Mrs. Vallone had failed to plead it, and she therefore waived this claim.[68]

In just over a year after its decision in *Vallone*, the Supreme Court again considered a reimbursement issue arising from the use of community time, talent, and labor to enhance a spouse's separate estate in *Jensen*.[69] The trial court in *Jensen* had found that the husband's time, toil, and efforts were primarily responsible for the successful operation of the company.[70] The court of appeals held that the enhancement in value of the husband's separate property stock during the marriage was a community asset.[71] The Supreme Court framed the issue as being a choice between two competing theories—the reimbursement theory and the community ownership theory. The reimbursement theory compensated the community for the time and effort of the spouses that contributed to the increase in value of the separate property stock. The community ownership theory treated the increase in value of the shares as a community asset due to the community efforts that enhanced its value.

Although *Dakan*, *Anderson*, and *Jensen* all dealt with reimbursement claims arising from enhancement by the community of one spouse's separate property, the Texas Supreme Court crafted significantly different remedies for enhancements to property based upon funds expended as opposed to enhancement due to the time, toil, and effort expended by the community to enhance separate property. When a reimbursement claim arises from the expenditure of funds, then the claim is measured by the enhancement in value to the benefitted estate. On the other hand, when enhancement arises from community time, talent, and efforts, then the measure is not the amount of enhancement, but rather the value of the community time, talent, and effort expended. Surprisingly, the Texas Supreme Court failed in *Jensen* to link the community's reimbursement claim to enhancement in any way other than requiring simply that there be enhancement. Presumably, even a small enhancement could be the basis of a *Jensen* claim if there was inadequate compensation.

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[66] *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (1977).
[67] *Vallone*, 644 S.W.2d at 459.
[68] *Id.* at 459.
[69] 665 S.W.2d.
[70] *Id.* at 108.
[71] *Jensen v. Jensen*, 629 S.W.2d 222, 224 (Tex. Civ. App.—Tyler 1982, writ granted)(overturned on appeal, 665 S.W.2d 107 (Tex. 1984)).

The Texas Supreme Court's justification in part for choosing the reimbursement theory was based on its belief that this would eliminate the need for the trial court to "undertake the onerous and quite often impossible burden that would be placed on it under the community ownership theory of attempting to determine just what factors actually contributed to the increase in value of the stock and in what proportion."[72] This is an interesting observation, given that approximately one year later in *Anderson v. Gilliland*, the Court required that enhancement in value be measured at the time of the partitioning of the community estate, which could be years after the improvements were made. There could be any number of market factors that come into play during the intervening years that would have nothing to do with the enhancements.

3. Evidentiary Issues.

(a) Elements of Proof. When asserting a reimbursement claim for enhancement in value due to the construction of capital improvements, the evidentiary issues could be summarized as follows:

Need to prove:

(1) Value of property unimproved;
(2) Value of property improved;
(3) Cost of the improvements;
(4) That the improvements are capital improvements; and
(5) The nature of the improvement.

Although cost is not relevant to the proof of enhancement in value, it may be beneficial to show the Court the amount spent on the improvements if there is a significant disparity between the value of the enhancement versus the money expended to make that enhancement. Thus, if $50,000 were spent by the community installing a pool and spa on a separate property residence, and the funds only enhanced the value of the separate property by $20,000, the Court would be limited to granting a reimbursement claim of only $20,000, but could consider this disparity as part of a just and right division of the community estate.

Even though the Texas Supreme Court clearly indicated in its decision in *Anderson v. Gilliland* that enhancement in value is to be measured as of the date of divorce, it could be beneficial to present to the trial court evidence as to what the enhanced value was at both the time of improvement and the time of divorce.[73] Depending upon the passage of time between the construction of the capital improvements and the filing of the divorce, it is possible for values to fluctuate considerably due to market conditions. Depending upon which side of the reimbursement issue you are on, it may be worthwhile to point out to the Court any wide disparity in values between the time the improvements are made and the time of measurement at divorce since '[t]he discretion to be exercised in evaluating a claim for reimbursement is equally as broad as that discretion subsequently exercised by the trial court in making a 'just and right' division…."[74]

(b) Testimony. Who is allowed to testify with respect to the enhancement in value?

In most cases, the parties will retain appraisers to provide expert testimony on the issue. However, in the cases of *Snider v. Snider*,[75] and *Smith v. Smith*,[76] the parties testified as to their opinions on the enhancement in value. In *Snider*, the wife testified, without objection, that in her opinion the enhanced value to her deceased husband's property was equal to the cost of the improvements, and the reimbursement award to the wife was affirmed. In *Smith*, both parties testified as to their opinion on the enhancement in value to Mr. Smith's property with and without the improvements. The trial court's award of reimbursement for the enhancement in value to the husband's property was affirmed on appeal.

Two questions arise from these holdings. The first is can an award of reimbursement for enhancement in value be equal to the cost of the improvements? The *Snider* case was decided before the Supreme Court's decision in *Anderson v. Gilliland*, *supra*. However, would it not be plausible that given the state of the economy and other market factors that the enhancement in value would equal the cost of the improvements?

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[72] *Jensen*, 665 S.W.2d at 109.
[73] *Anderson*, 684 S.W.2d at 675. In *Anderson*, the Texas Supreme Court rendered judgment for the widow based upon the enhancement in value measured as of the time of the death of her husband.
[74] *Penick*, 783 S.W.2d at 198.
[75] 613 S.W.2d 8 (Tex. Civ. App. – Dallas 1981, no writ).
[76] 715 S.W.2d 154 (Tex. App. - Texarkana 1986, no writ).

The second question is can the testimony of the parties, without expert testimony, be sufficient to sustain a reimbursement award for enhancement in value? In *Smith*, which was decided after the *Anderson* decision, the wife, the non-owner spouse, gave her opinion as to the enhancement in value to her husband's separate property. Is this proper evidence or does it conflict with the principle that only an owner of the property can provide his or her opinion as to value, and even then only when he/she has a proper basis on which to form an opinion as to value?

See also *Kamel v. Kamel*,[77] where the trial court also allowed the non-owner spouse to testify and give her opinion as to the enhancement in value to her husband's separate property as a result of the improvements constructed thereon.

VI. Offsets

A. General. Since 2001, the Family Code has specifically provided that the party seeking an offset to a reimbursement claim has the burden of proof with respect to the offset.[78] The party seeking an offset will always be the party whose estate was enhanced. This is the direct opposite of the burden under Texas common law. As discussed above, Texas common law required the estate seeking reimbursement to prove that the enhancement to the benefitted estate was greater than any offsetting benefit received by the contributing estate.

Colden v. Alexander[79] was one of the first cases to address offsets. In that case, the Supreme Court held that payment of interest on the husband's pre-marital purchase-money debt "would not even create an equitable claim for reimbursement, unless it is shown that the expenditures by the community are greater than the benefits received."[80] However, probably the most important decision to discuss offsetting benefits is *Penick v. Penick*.[81]

In *Penick*, community funds (mostly income from husband's separate property) were used to retire husband's separate property indebtedness. The principal question was whether or not the resulting tax benefits to the community estate should offset the reimbursement claim. The court of appeals, distinguishing reimbursement claims related to the payment of debts from those related to capital improvements, held that the reduction of principal indebtedness was not subject to any offsets. After giving a summary of the conflicting appellate court decisions on the applicability of offsets, the Supreme Court found no distinction between claims related to capital improvements, payment of principal indebtedness or the time, talent, and effort of a party, stating:

> The outright rejection of offsetting benefits is inconsistent with the equitable nature of a claim for reimbursement. Most recently in *Jensen v. Jensen*, we embraced the concept of offsetting benefits. In *Anderson v. Gilliland*, we did not consider or mention offsetting benefits but did emphasize that reimbursement is an equitable claim. As such, a court of equity is bound to look at all the facts and circumstances and determine what is fair, just, and equitable. The rule applied here by the court of appeals does not serve equity because it forecloses consideration of some facts and circumstances material to the reimbursement claim.[82]

It is also worth noting that the Supreme Court in *Penick* compared the discretion available to the trial court in considering reimbursement to be equivalent to that available in awarding property to the parties, stating:

> In the final analysis, great latitude must be given to the trial court in applying equitable principles to value a claim for reimbursement. As we said in *Dakan*, an equitable claim for reimbursement is not merely a balancing of the ledgers between the marital estates. The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as that discretion subsequently exercised by the trial court in making a "just and right" division of the community property. In the present case the trial court did not abuse its discretion by considering the tax benefits returned to the con-

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[77] 760 S.W.2d 677 (Tex. App. – Tyler 1988, writ denied).
[78] Currently Tex. Fam. Code Ann. § 3.402(c) and formerly Tex. Fam. Code Ann. § 3.408(c).
[79] 141 Tex. 134, 171 S.W.2d 328 (1943).
[80] *Id.* at 147–148.
[81] 783 S.W.2d 194 (Tex. 1988).
[82] *Id.* at 197 (citations omitted). In reaching its conclusions, the Supreme Court also analogized a reimbursement claim to an action for quantum meruit.

> tributing community estate and the effect the depreciation deduction had on the value of [the husband's] separate property.[83]

It is important to remember when reviewing cases dealing with reimbursement claims that many of the cases decided by the courts of appeal prior to *Penick* are no longer good law because of the distinctions that they drew between various types of reimbursement claims. For example, prior to *Penick*, the Houston court of appeals distinguished between reimbursement claims for the payment of principal versus those for payment of interest, taxes and insurance, requiring evidence of the amount of offsetting benefits for the latter but not for the former. After *Penick*, such distinctions are no longer valid. Also, as discussed above, case law requiring the contributing estate to prove that the enhancement in value to the benefited estate exceeded offsetting benefits has been supplanted by Tex. Fam. Code Ann. § 3.402(e), which now places the burden on the party seeking an offset.

B. Should Offsets be Pleaded?

1. Affirmative Defenses. Under Texas Rule of Civil Procedure 94, a party is required to "set forth affirmatively. . . any other matter constituting an avoidance or affirmative defense." Therefore, notwithstanding the fact that "offsets" are provided for by statute, is a party required, or should a party plead "offsets" to a reimbursement claim?

The only case that the authors have found that specifically discuss the requirement, or lack thereof, to plead offsetting benefits is the case of *Hilton v. Hilton*.[84] In *Hilton*, Mr. Hilton had generally pleaded for reimbursement to his separate estate as a result of the sale of his separate property stock to pay community debts. There was no specific discussion in the case as to what community debts were paid. Nevertheless, the court ordered reimbursement to Mr. Hilton's separate estate in the form of an award to him of the same number of shares of stock in Hilton Corporation that he had originally sold in order to pay community debts.

On appeal, Mrs. Hilton argued that Mr. Hilton's pleadings were inadequate to support the trial court's award of reimbursement to Mr. Hilton because Mr. Hilton had failed to allege that the expenditures made by his separate estate for the benefit of the community estate were greater than the benefits received by his separate estate. In other words, although Mr. Hilton had pleaded reimbursement in general, he did not plead that the expenditures exceeded the benefits.

The Appellate Court ruled that "the spouse who expends his or her separate funds to reduce the community estate indebtedness is entitled to reimbursement without the necessity of pleading or proof that such expenditures exceeded the benefits received."[85] Anyone relying on *Hilton* should be aware, however, that it was decided before the Supreme Court held in *Penick* that offsets should be considered not just in cases involving capital improvements but also in cases involving claims arising from payment of debts. The Supreme Court in *Penick* specifically rejected the analysis of the Houston court of appeals in *Hilton* as it related to offsets.[86]

However, the Houston court of appeals' holding seems to be based more upon its conclusion that "a pleading that the benefits bestowed by the expenditure is greater than the benefit received is unnecessary because a separate estate that is not specifically subject to community liabilities cannot directly benefit from the use of separate funds to retire that community debt" than it is upon a general conclusion that offsets are not available when considering payment of debts.[87]

Nevertheless, in order to avoid the possibility of being challenged at trial for the lack of an affirmative pleading of offset, the authors recommend that offsetting benefits, either generally or specifically, should be pleaded.

2. Gifts. Is "gift" a viable "offset" to a reimbursement claim and, if so, should it be pleaded as an affirmative defense? In *Hilton v. Hilton*, *supra*, Mrs. Hilton also tried to argue that the expenditures made by Mr. Hilton from his separate property to pay community debts constituted a gift of his separate property to the

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[83] *Id.* at 198 (citations omitted).
[84] 678 S.W.2d 645 (Tex. App.–Houston [14th Dist.]1984, no writ); *see also Morgan v. Morgan*, 725 S.W.2d 485 (Tex. App. – Amarillo 1987, no writ)(follows *Hilton*).
[85] *Hilton*, 678 S.W.2d at 648.
[86] *Penick*, 783 S.W.2d at 196.
[87] *Hilton*, 678 S.W.2d at 648.

community estate. The Appellate Court ruled that Mrs. Hilton waived this contention because she had no pleadings or presented no proof on her gift theory at trial.[88]

Obviously, when trying to defeat a reimbursement claim as a result of the use of separate funds for the benefit of the community estate, it would be hard to use, as an offset or affirmative defenses, "gift" since a party cannot make a gift to the community estate.

Although not technically an offset, a gift would seem to be a viable affirmative defense to a reimbursement claim if the community estate used funds for the benefit of a spouse's separate property estate or, if separate funds from one marital estate were used for the benefit of the other spouse's separate estate. In those situations, the argument of gift would be a viable defense.

C. What Offsets are Available? Although the type of offset available will be fact specific, offsets will usually fall into one or more of the following categories:

1. Use and benefit of the property (subject to the statutory exception);
2. Receipt/use of the income stream generated by a property;
3. Tax benefits attributable to the property utilized by the parties on their federal income tax returns such as interest, expense, ad valorem taxes, and depreciation; and
4. Income received from separate property and compensation received are considered offsetting benefits.

Some attorneys, and even some courts, are confused as to whether income received from separate property is allowed as an offset against a community claim for reimbursement for community payments made with respect to that separate property. Their reasoning is that there is no offsetting benefit received by the community since income from separate property during the marriage is community property, and thus the separate estate has not conveyed a benefit to the community. An example of this reasoning is found in *Cignainero*.[89] In that case, the community received over $500,000 in rental income from the husband's separate rental properties. The Texarkana court of appeals stated that "post-nuptial rental income from Timothy's separate property was community property. Naturally, the community estate benefitted from rental income, but it was not due to contributions by Timothy's separate estate. Thus, Timothy was not entitled to an offset for the community rental income that benefitted the community estate."[90]

The more commonly expressed opinion, however, is that income from separate property should be considered an offsetting benefit even though its character is community. The Houston courts of appeal (both the 1st and 14th districts), the Dallas court of appeals, the Waco court of appeals and the El Paso court of appeals have all expressed this opinion.[91] This is consistent with the Texas Supreme Court's treatment of income from separate property in *Jensen*.[92] While finding that a community claim for reimbursement existed with respect to the appreciation in value of Mr. Jensen's separate property stock, it also found that this claim was subject to the offsetting benefits that the community received in the form of salary, bonuses, dividends, and other fringe benefits received by Mr. Jensen with respect to his separate property stock, all of which constituted community income upon its receipt.

Additionally, the Texas Pattern Jury Charge in its comments addressing offsets specifically includes income from separate property as an offset.[93] Although there is a disclaimer in the introduction to the Pattern Jury Charge that neither the State Bar of Texas nor the authors "make either express or implied warranties in regard to their use," the comments and charges are considered by some to be authoritative.

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[88] *See also* *Beard v. Beard*, 49 S.W.3d 40 (Tex. App. – Waco 2001, pet. denied) (wife failed to allege gift in her pleadings and it was therefore waived).
[89] 305 S.W.3d 798 (Tex. App.–Texarkana 2010, no pet.).
[90] *Id.* at 802.
[91] *See* *Hailey v. Hailey*, 176 S.W.3d 374 (Tex. App.–Houston [1st Dist.] 2004, no pet.); *Phillips v. Phillips*, 296 S.W.3d 656 (Tex. App.—El Paso, 2009, pet. denied)(the El Paso court of appeals heard this Dallas court of appeals case under docket equalization; the opinion was issued by Justice Ann McClure); *Rusk v. Rusk*, 5 S.W.3d 299 (Tex. App.–Houston [14th Dist] 1999, pet. denied), *Beard v. Beard*, 49 S.W.3d 40 (Tex. App.–Waco 2001, pet. denied), and *Phillips v. Phillips*, 296 S.W.3d 656 (Tex. App.–El Paso 2009, pet. denied).
[92] *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).
[93] TEX. PJC § 204.1 (2012).

D. Offsets and the PJC. In *Phillips*, The El Paso court of appeals quotes with approval the definition of offsets as contained in the Texas Pattern Jury Charge.[94] As quoted in *Phillips*, the TEX. PJC definition of offsets distinguishes between offsets that apply to reimbursement claims for amounts expended to pay debts, taxes, interest, or insurance versus funds expended for improvements. With respect to the former, offsets are measured by the value of any related benefits received by the paying estate, such as income received and reduction of tax obligations, while for the latter it is measured by the fair value of the use of the property as well as income received and reduction of tax obligations.

E. Competing Reimbursement Claims. In *Hunt v. Hunt*,[95] the trial court found that the community estate was entitled to be reimbursed in the amount of $47,765.73 for community funds spent by the appellee on his separate estate. However, the trial court allowed an offset of $16,213.16 against the reimbursement because of separate funds that the husband had deposited into community bank accounts.

The Appellate Court, in affirming the trial court's offset, indicated that, in determining the community's equitable claim for reimbursement, the trial court was required to consider "all the facts and circumstances and determine what is fair, just and equitable. . ." We presume that the trial court properly exercised its discretion. . . Katherine has not shown a clear abuse of discretion.[96]"

The offset as set forth in *Hunt* is an example of a reimbursement claim being asserted by one estate only to be defeated by an unrelated claim that is asserted by another estate, alternatively, by an offsetting benefit. In *Hunt*, it was presumably shown by clear and convincing evidence that the $16,213.16 was in fact the sole and separate property of the appellee at the time that the funds were deposited into community bank accounts.

F. Burden of Proof. As indicated above, since 2001, the Texas Family Code has made it clear that the party asserting the offsets has the burden of proof to show what the offsetting benefits are and the value of the offsetting benefit(s). [See Tex. Fam. Code Ann. § 3.402(e)].

G. Use and Benefit. Prior to the 2009 amendments, former Tex. Fam. Code Ann. § 3.408(d) provided that benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate. However, the 2009 amendments specifically exclude a party from asserting "use and benefit" as an offset to a reimbursement claim as a result of expenditures made to benefit a martial estate, if the property the subject of the reimbursement claim was the parties' primary residence (presumably the marital residence) or was a secondary residence (presumably a vacation home) that was owned, in any proportion, by the separate estate of a spouse.[97]

VII. Other Reimbursement Issues

A. Property Disposed of During Marriage. The Texarkana court of appeals has specifically held that reimbursement is not available for improvements made to separately owned property that was lawfully disposed of during the marriage.[98]

B. Interest on Reimbursement Awards.

1. Pre-Judgment Interest. The case of *Pearce v. Pearce*,[99] suggests that a right exists to recover for pre-judgment interest on a reimbursement claim. In *Pearce*, the trial court denied the wife's request to amend her pleadings to seek pre-judgment interest on her reimbursement claim. The Appellate Court reversed the trial court, saying that the request to amend the pleadings to seek pre-judgment interest on the wife's reimbursement claim should have been granted. That indirectly suggests the court of appeals believed that the wife had such a claim.

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[94] *Phillips*, 296 S.W.3d at 665.
[95] 952 S.W.2d 564 (Tex. App. – Eastland 1997, no writ).
[96] *Id*. at 569.
[97] TEX. FAM. CODE ANN. §3.402(c).
[98] *Jones v. Jones*, 804 S.W.2d 623 (Tex. App. – Texarkana 1991, no writ).
[99] 824 S.W.2d 195, 210 (Tex. App.–El Paso 1990, writ denied).

2. Post-Judgment Interest. A money judgment in favor of a spouse on a reimbursement claim must include interest at the statutory rate, compounded annually, in accordance with the Texas Finance Code Ann. §§ 304.003, 304.006. *Kimsey v. Kimsey*[100] and *Gutierrez v. Gutierrez*.[101]

VIII. Where Reimbursement Might Be Available

A. Use of Community Credit. In *Thomas v. Thomas*,[102] one of the issues was whether the community estate had a reimbursement claim where community credit was used to refinance a spouse's separate property debt. In *Thomas*, a debt of husband's separate property corporation was refinanced with husband's personal guarantee, which subjected the community estate to liability.

Justice Dunn, in her concurring and dissenting Opinion, stated:

> Neither the parties' research nor ours has revealed a Texas case deciding the question of whether the community has a right to reimbursement for the use of its credit to secure a loan to refinance the husband's separate property debts. However, I am not willing to state, at this time, that this new reimbursement theory is without merit. I would analogize this situation to cases where separate debts are discharged with community funds.[103] However, there is an important difference between the case before us and cases involving the discharge of a separate debt with community funds. When a debt is discharged, the cost to the community is obvious, but when a separate property debt is refinanced with the community acting as a guarantor, the cost to the community is not so readily ascertainable. In the latter situation, expert testimony would be required on the percentage risk undertaken by the community, and a dollar value would have to be assigned to that risk.
>
> In the case before us, there is no testimony concerning the cost to the community resulting from the use of their credit to guarantee the refinancing of the separate property debt. Further, there is evidence in the record that even though the guarantee was for $2,200,000, and the net community assets were approximately $660,000, the appellant was nevertheless able to negotiate a loan from the River Oaks Bank & Trust Co. subsequent to the guarantee. The appellee has, therefore, failed to meet her burden of establishing the community's right to reimbursement for the use of the community credit.

B. Reimbursement for Payment of Sub-Chapter S Earnings. In *Thomas*, *supra*, the court held that retained earnings of husband's separate property Subchapter S Corporation were neither separate property nor community property, since they were assets of a corporation and not assets of a spouse. This was true despite the fact that the corporation's earnings were reported on the spouse's federal income tax return and community funds were used to pay the income tax liability.

Question: If the community estate paid income tax on the earnings that remained inside husband's separate property corporation, would the community estate have a claim for reimbursement to the extent of the federal income taxes paid?

C. Use of Community Funds to Defend Litigation. As previously indicated, the use of community funds to pay for previously court-ordered child support or alimony payments is generally not reimbursable. However, what about the use of community funds for the purposes of prosecuting or defending a motion to modify those obligations that resulted from a prior marriage during an existing marriage? In *Farish v. Farish*,[104] the trial court determined that the community estate had a claim for reimbursement from the appellant as a result of the use of community funds to pay attorneys' fees resulting from litigation involving his child support obligations from a prior marriage. Although the trial court did not order reimbursement of the $31,000.00 in legal

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[100] 965 S.W.2d 690 (Tex. App.–El Paso 1998, no writ).
[101] 791 S.W.2d 659 (Tex. App.–San Antonio 1990, no writ).
[102] 738 S.W.2d 342 (Tex. App.–Houston [1st Dist.] 1987, writ denied).
[103] *See* *Villarreal v. Villarreal*, 618 S.W.2d 99 (Tex. Civ. App.–Corpus Christi 1981, no writ); *Hawkins v. Hawkins*, 612 S.W.2d 682 (Tex. Civ. App.–El Paso 1981, no writ).
[104] 982 S.W.2d 623 (Tex. App.–Houston [1st Dist.] 1998, no pet.).

fees that were expended by the husband, it clearly factored that amount of money when making a division of the community estate.

The Appellate Court, in affirming the trial court's right to factor in the use of community funds to pay attorneys' fees resulting from litigation involving child support obligations arising from a prior marriage stated as follows:

> Other than reflecting that the fees were related to modification and contempt proceedings, there is no indication in the record of who initiated the proceedings, the basis of the proceedings, what evidence was heard or who prevailed. There is no indication that the attorney's fees were incurred for the benefit of George's (the appellant) children from his prior marriage. . . Therefore, the trial court did not abuse its discretion by factoring in a reimbursement claim for $31,000.00 when it divided the community estate.

The Appellate Court went on to state, in a footnote, as follows:

> Our holding is not to be interpreted as stating that, had the record established that the attorney's fees were for the benefit of George's children, a claim for reimbursement would not lie. Rather, we base our holding on the state of the record before us and leave for another day the issue of whether a claim for reimbursement may attach to such fees.

IX. Disposition, Remedies and Enforcement

A. Disposition of Reimbursement Claims. As previously indicated, Texas recognizes three types of marital estates—the community estate, the separate estate of the husband and the separate estate of the wife. The principle of reimbursement applies to all three. Therefore, there may be claims for reimbursement from the community estate to the separate, from the separate estate to the community, and from the separate estate of the husband to the separate estate of the wife and vice versa.

As a general rule, you will have only the following types of reimbursement claims: (1) a claim for reimbursement for funds expended by an estate to pay another estate's debt, taxes, interest, and/or insurance; (2) a claim for reimbursement as a result of the expenditure of funds owned by one estate for improvement to real property that is owned by another estate; and (3) a claim for reimbursement as a result of the use by a spouse of his or her community time, talent, and labor or effort to benefit or enhance that particular spouse's separate estate.

Each one of these claims for reimbursement, as developed by case law, can be offset by showing that the contributing estate received a benefit as a result of the expenditure of funds and/or the use of a spouse's time, talent, and labor for the benefit of the receiving estate.

In Tex. Fam. Code Ann. § 7.007, trial courts are required to "determine the rights of both spouses in a claim for reimbursement … and shall apply equitable principles to (1) determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and (2) order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right…."

Furthermore, Tex. Fam. Code Ann. § 3.402(b), in addition to instructing trial courts to use equitable principles when resolving reimbursement claims, provides the trial court with authority to offset competing reimbursement claims if the court believes that it is appropriate.

Finally, Tex. Fam. Code Ann. § 7.008 authorizes the trial court to consider the tax consequences attributable to specific assets when dividing the parties' marital estates, including whether a specific asset will be subject to taxation and if so, when the tax will be required to be paid. This could be important in determining whether the trial court should award a reimbursement claim involving funds spent to maintain or improve rental property owned by a spouse's separate estate.

B. Money Judgments. While the reimbursement award is usually in the form of money or a money judgment, the trial court can award specific property in satisfaction of the reimbursement claims.[105]

[105] *Hilton*, 678 S.W.2d at 649 (court awarded shares of stock to satisfy reimbursement claim).

C. Judicial/Equitable Liens. Tex. Fam. Code Ann. § 3.406 specifically provides the trial court with authority to impose an equitable lien "on the property of a benefited marital estate to secure a claim for reimbursement against that property by a contributing marital estate."

There are a number of cases which, prior to the statutory provisions, discuss the trial court's ability to impose an equitable lien on real property to secure a reimbursement award. These cases include *Kamel v. Kamel, supra, Smith v. Smith, supra, Cook v. Cook, supra; Magill v. Magill, supra;* and *Kimsey v. Kimsey, supra.*

In *Jensen*, however, the Supreme Court specifically held that no equitable lien would be placed on Mr. Jensen's separate property stock to secure a reimbursement award. The cases subsequent to *Jensen* have distinguished this holding, and the Family Code now provides that liens may be attached to the property of the benefitted marital estate. Presumably, this would now include stock in a separately owned corporate entity.

D. What about the Homestead? In the case of *Kamel v. Kamel, supra*, the trial court awarded an equitable lien to secure not only the interest in the homestead, but also a reimbursement award. *Smith, supra*, and *Cook, supra*, also approved an equitable lien on property. In *Kamel*, the court did state that a court has authority to place an equitable lien on one spouse's homestead if the lien secures the amount awarded to the other spouse "for his or her interest in the homestead." However, it did not directly discuss homestead as it relates solely to a reimbursement claim.

In *Smith*,[106] Mr. Smith argued that the court could not secure a reimbursement claim by means of an equitable lien against his property because the property was his homestead, and therefore was protected under the Texas Constitution, Article XVI, Section 50. The appellate court in discussing the *Eggemeyer v.Eggemeyer* decision[107] stated that the *Eggemeyer* court found that equitable liens on a homestead are proper to secure reimbursement for taxes and lien indebtedness. However, there are no cases that discuss equitable liens on a homestead that involve improvements. The *Smith* court held that the Constitution adds an additional requirement for improvement liens in that a lien on a homestead for improvements has to be in writing with the consent of both spouses.

The *Smith* court also discussed *Barber v. Barber*,[108] which specifically held that an equitable lien will not be allowed to secure the payments for improvements where the property is a homestead. Furthermore, the case of *McCanless v. Devenport*,[109] also held that a lien would not attach for improvements to a homestead unless they were contracted for in writing as required by the Constitution. The *Smith* court, after referring to these cases, held that the equitable lien granted against Mr. Smith's property should be affirmed because Mr. Smith failed to plead and prove that the property was in fact his homestead.

In the case of *Magill v. Magill*,[110] Mr. Magill argued that the trial court erred in placing an equitable lien on his separate property because it was his homestead. However, there was no pleading or proof by Mr. Magill that the property was in fact his homestead, and the trial court's equitable lien was affirmed.

In 1992, the Texas Supreme Court decided *Heggen v. Pemelton*,[111] which discussed the trial court's authority to grant an equitable lien to secure a reimbursement award on a party's homestead. In reversing and remanding the Appellate Court's decision, the Supreme Court held that:

> Although courts may impress equitable liens on separate real property to secure reimbursement rights, they may not impress such liens, absent any compensable reimbursement interest, simply to ensure a just and right division.
>
> ….
>
> The lien imposed on Mrs. Heggen's separate property homestead was invalid for two reasons. First, it burdened her separate real property for reasons other than to secure Mr. Pemelton's reimbursement interest; that is the trial court impermissibly imposed it to secure a just and right division. And second, **it imposed a lien on Mrs. Heggen's homestead that, based on the record, did not fit into any of the categories allowed by the Texas Constitution; that is, it was not a tax lien, it was**

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[106] 715 S.W.2d at 158.
[107] 623 S.W.2d 462 (Tex. App. –Waco 1981, writ dism'd).
[108] 223 S.W 866 (Tex. Civ. App.–Ft. Worth 1920, writ dism'd).
[109] 40 S.W.2d 903 (Tex. Civ. App.–Dallas 1931, no writ).
[110] 816 S.W.2d 530 (Tex. App.–Houston [1st Dist.] 1991, writ denied).
[111] 836 S.W.2d 145 (Tex. 1992).

not a purchase money lien, nor was it an improvement lien for which the "work and material [had been] contracted for in writing with the consent of both spouses.[112]

In light of the *Heggen* decision, when faced with a reimbursement claim involving a homestead, the practitioner should probably plead and prove that the property which is subject to the reimbursement claim is the homestead of one of the spouses. As indicated, there are cases that have upheld the granting of an equitable lien against a spouse's separate property homestead because there was no pleading or proof that the property was the homestead. To this author's knowledge, in the context of a divorce action, the improvement cases that provide for an equitable lien for the sole purpose of securing a reimbursement award, do not have an executed contract for the improvements signed by both spouses. Therefore, and notwithstanding Tex. Fam. Code Ann. § 3.406(a), it would appear that an equitable lien on a homestead property, if pleaded and proven, would be constitutionally impermissible.

X. Comparison of Jensen Claims to the Reimbursement Statute

Under the holding of *Jensen*, the Texas Supreme Court set out the following elements necessary to prove a reimbursement claim for the use of community time, talent and effort to benefit a spouse's separate estate:

- the value of time and effort expended by either or both spouses;
- to enhance the separate estate of either;
- other than that reasonably necessary to manage and preserve the separate estate;
- less remuneration received for that time and effort in the form of salary, bonus, dividends, and other fringe benefits (those items being community property when received.)[113]

As noted above, the reimbursement statute in Tex. Fam. Code Ann. § 3.402(a)(2) also provides for reimbursement claims on facts similar to *Jensen*. The requirements of the statutory provisions may be summarized as follows:

- Inadequate compensation was received by a spouse for his or her time, toil, and effort;
- With respect to services performed for a business entity;
- that was under the direction and control of a spouse.

There are significant differences between the requirements as set out in *Jensen* and those of Tex. Fam. Code Ann. § 3.402(a)(2). In contrast to the requirements set out by the Texas Supreme Court in *Jensen*, the statute does not require the party who is asserting a reimbursement claim to show that there has been an enhancement in the value of the entity as a result of a spouse's time, talent, and effort. In theory at least, a reimbursement claim could be allowed by the court even if the contesting party could demonstrate that there had been no increase in the value of the entity. Also, and just as important, there is no requirement to prove what amount of time was reasonably needed to manage the entity. In the past, it was not unusual for a party who had been victorious in asserting a reimbursement claim for time, toil, and effort in the trial of the case to have it overturned on appeal because there was no finding as to what amount of labor was required to manage and preserve the property.[114] The elimination of these two requirements that were required under *Jensen* has made it much easier to assert a reimbursement claim for inadequate compensation. Since Tex. Fam. Code Ann. § 3.402(a)(2) does not allow a reasonable amount of time to be spent managing a separate property entity, it would appear that in theory at least a reimbursement claim can be asserted if any amount of time is spent managing an entity and the managing spouse is not adequately compensated.

Another important difference between the statutory claim and *Jensen* is that Tex. Fam. Code Ann. § 3.402(a)(2) applies only to reimbursement for services provided to an entity. *Jensen*, on the other hand, is broader, applying to any situation in which its requirements are met. For example, it applies to time, talent and effort expended to improve separate property real estate.[115] A *Jensen* claim can also arise as a result of time, talent, and effort expended on tangible personalty. For example, in *Gutierrez*, the wife asserted a reim-

[112] *Id.* at 146-47 (citing Tex. Const. Art. XVI, Section 50)(emphasis added).
[113] *Jensen*, 665 S.W.2d at 110.
[114] *See, e.g., Gutierrez*, 791 S.W.2d.
[115] *See, e.g., Garza*, 217 S.W.3d at 546-47.

bursement claim for the time, talent, and effort expended by her husband on his separate property herd of cattle.[116]

It is also important to remember that claims may be asserted under both Jensen and Tex. Fam. Code Ann. § 3.402(a)(2) for related facts. As discussed above, because Tex. Fam. Code Ann. § 3.402 does not provide that that section is the exclusive remedy, the statutory "*Jensen* claim" creates a new form of reimbursement in addition to the common law *Jensen* reimbursement claim.

There are two examples at the end of this article that highlight the differences between statutory and common law *Jensen* claims.

XI. Reimbursement Claims Arising from Entity Transactions.

A. Funds Transferred to a Corporation. Typically, a claim for reimbursement is brought by the community estate for funds expended for the benefit of a separate property interest held by a spouse in a closely held entity. This occurs when community funds are transferred to an entity as additional contributions of capital, but with no resulting increase in ownership. There are numerous examples of reimbursement claims asserted for contributions to entities. With respect to corporations, a reimbursement claim arises when amounts are remitted to a corporation without the issuance of additional shares. For example, in *Horlock v. Horlock*,[117] the husband owned separate property stock. Pursuant to a plan of merger, the husband contributed $60,000 of community funds to the capital of the corporation prior to the merger, and then contributed an additional $40,000 to the new entity post-merger. The wife claimed reimbursement in a total amount of $100,000 for contributions made to both the old and the new corporations.[118] The trial court held that the corporate shares were a community asset, and consequently denied the reimbursement claim. On appeal, the Houston court of appeals held that the stock was the husband's separate property, and therefore the community estate was entitled to reimbursement for amounts contributed to the corporation by Mr. Horlock. Of course, contributions of capital must be distinguished from payments by the community that are in the nature of a loan, which represent a community asset and are not subject to the rules regarding offsets for benefits received.

Although perhaps not as common, occasionally a spouse will transfer separate property funds to a community corporation. If the transfer is accomplished as a loan to the corporation from the spouse, then the funds received upon repayment will be a mutation in form and will have the same character as the funds contributed. Likewise, if shares are issued in return for the contribution of funds to a corporation, the shares received will be separate because they represent a mutation in form of separate property funds.

However, if the transfer of funds is accomplished as a contribution of additional capital to the corporation without the issuance of shares, then a different result is reached. There can be no mutation in form if funds are subsequently distributed by the corporation to the shareholders. Property owned by a corporation is not characterized as either separate or community property of the shareholders, but is simply the property of the corporation.[119] Any subsequent distributions from the community corporation would be accomplished as either a dividend, which is clearly community, or a return of capital, which would have the same character as the underlying shares, which are community. The spouse's separate estate, however, would have a reimbursement claim for amounts contributed to the community corporation. The claim would be reduced by any income received from the corporation, which would constitute an offset.

B. Professional Fees Paid in Conjunction with Acquisition of an Interest. Reimbursement claims can also arise as a result of professional or other fees that are paid from community funds and that are related to the acquisition of shares purchased using separate property funds of a spouse. The stock is characterized as separate property because it was purchased with separate property, even though the professional fees incurred in the acquisition were paid from community funds. An example of this is seen in a Houston court of appeals case, where professional fees of approximately $30,000 were paid from community funds to acquire shares of

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[116] *Gutierrez*, 791 S.W.2d at 665. However, the San Antonio court of appeals overturned the trial court's award of a community reimbursement claim, but only because the wife failed to show what amount of time was needed for management and preservation of the herd as well as what the value of that time would be.

[117] 533 S.W.2d 52 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ dism'd w.o.j.).

[118] *Id.* at 60.

[119] *See Mandell v. Mandell*, 310 S.W.3d 531 (Tex. App.—Fort Worth 2010, pet. denied).

stock that were the husband's separate property.[120] The trial court awarded the community estate reimbursement for the funds expended by the husband to pay these fees, and this was upheld by the court of appeals.

C. Taxes Paid on the Income of Pass-Through Entities. Pass-through entities are entities that for tax purposes are treated as owned directly by their partners, shareholders, or members.[121] Such entities include partnerships, Subchapter S corporations and, in many instances, limited liability corporations. According to Senator Max Baucus, who is chairman of the Senate Finance Committee, 95% of all U.S. businesses are structured as pass-through entities.[122] Their popularity has to do with the fact that such entities do not pay taxes because the Internal Revenue Code "looks through" the entity to tax the owners directly on entity income. The effect of this is that the income, gains, losses, credits, etc. generated by the entity are reported on the personal income tax returns of the partners, shareholders, or members, thus eliminating taxes at the entity level. There is a downside to this arrangement, however. That is that even if absolutely no income is distributed by a pass-through entity, the owners will have to pay taxes on their pro rata share of entity income. There is therefore a disconnect between distributions of income and the taxes paid on that income. The former is totally unrelated to the latter.

Upon divorce or death, this disconnect could be the basis for a reimbursement claim by the community estate for taxes paid on income that has been retained by the pass-through entity. By way of example, if a spouse holds a separate property interest in a family limited partnership that fails to make any distributions to its partners, then that spouse will be paying taxes on that undistributed income, and most typically the payments will be from community funds. The separate estate is enhanced in value by virtue of the fact it will receive income distributions post-divorce and not have to pay federal income taxes on those distributions.

Marshall v. Marshall[123] is an example of the disconnect between income and distributions. In *Marshall*, the husband held a separate property partnership interest, and federal income taxes were paid by the partnership directly to the U.S. Treasury on behalf of the husband. Because taxes that had accrued prior to marriage were paid from partnership income earned during the parties' marriage, the wife asserted a community claim for reimbursement for the taxes paid by the partnership. The trial court denied the wife's reimbursement claim with respect to the tax payments, but the court of appeals remanded the case back to the trial court for a determination of the community estate's reimbursement claim with respect to the payment of the husband's premarital income taxes.

What frequently happens, especially in the case of family limited partnerships, is that only enough income is distributed to pay the tax obligation of the owners. Assuming that an entity is the separate property of one of the spouses and that taxes on undistributed entity income are paid from community funds, then the community estate will quite likely have a reimbursement claim. At a superficial level, it would appear that there has been no detriment to the community estate because the taxes paid by the community are offset by the income that was distributed to it. However, in determining whether a reimbursement claim exists, the focus is on the enhancement in value to the separate estate.

A simple example is helpful in understanding the interplay between a reimbursement claim for taxes paid with respect to the income of a pass-through entity and the offsetting benefit from income distributed to the owner. Assume that the wife is a partner in a family limited partnership, and all interest in the partnership was acquired prior to marriage. Each year the partnership distributes income to the partners in an amount equal to the taxes owed on partnership income. Assume further that for the year under consideration the wife's share of partnership income was $2 million, the taxes owed on the income were $500,000, and the partnership distributed that amount to the wife. The wife's $2 million share of partnership income would be included in its entirety in the parties' joint federal income tax return. The wife's separate estate has been enhanced to the extent of income retained within the partnership that will be distributed to her post-divorce free of tax. There has been no offsetting benefit to the community estate because the entire distribution went to pay federal in-

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[120] *Jacobs v. Jacobs*, 669 S.W.2d 759, 763 (Tex. App.–Houston [14th Dist.] 1984, affm'd in part, rev. in part), 687 S.W.2d 731 (Tex. 1985).

[121] *See* 26 U.S.C.A. §§ 701 and 1366.

[122] Reported on the website of Accounting Today (http://www.accountingtoday.com/news/senate-tax-treatment-business-entities-63473-1.html) (August 1, 2012)

[123] 735 S.W.2d 587 (Tex. App.—Dallas 1987, writ ref'd n.r.e).

come taxes owed with respect to all partnership income, both distributed and undistributed. Example 3 at the end of this article presents this hypothetical in tabular form.

XI. Types of Reimbursement Claims

The types of reimbursement claims that might arise out of the marital relationship are numerous. Below is a non-exhaustive categorization of reimbursement claims that are available either by statute or by common law along with references to specific cases that discuss the specific claim. A word of caution: in reviewing the cases on reimbursement for this article, a substantial number of the cases discuss more than one type of reimbursement claim. A number of these cases will have the correct holding on the proper measurement to be applied to a particular reimbursement claim, but will have an incorrect holding on how another form of reimbursement claim is to be measured. For instance, in the case of *Brooks v. Brooks*,[124] it appears that the court correctly decided reimbursement claims involving the use of company assets and the cash value of separately owned life insurance policies for the benefit of the community estate, but used the incorrect method for determining reimbursement for the payment of the principal amounts of separate property obligation by the community estate (holding that there was no requirement to show that the expenditures exceeded the benefits received). Claims for reimbursement that have been recognized by the courts include reimbursements based upon:

1. Reimbursement for Improvements (measured by the enhancement in value)
   a. *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935).
   b. *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952).
   c. *Girard v. Girard*, 521 S.W.2d 714 (Tex. Civ. App.–Houston [1st Dist.] 1975, no writ).
   d. *Snider v. Snider*, 613 S.W.2d 8 (Tex. Civ. App.–Dallas 1981, no writ).
   e. *Cook v. Cook*, 665 S.W.2d 161 (Tex. App.–Ft. Worth 1983, writ ref'd n.r.e.); appeal after remand, 693 S.W.2d 785 (Tex. App.–Ft. Worth 1985, no writ).
   f. *Padon v. Padon*, 670 S.W.2d 354 (Tex. App.–San Antonio 1984, no writ).
   g. *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985).
   h. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.–Texarkana 1986, no writ).
   i. *Rogers v. Rogers*, 754 S.W.2d 236 (Tex. App.–Houston [1st Dist.] 1988, no writ).
   j. *Kamel v. Kamel*, 760 S.W.2d 677 (Tex. App.–Tyler 1988, writ denied).
   k. *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App.–San Antonio 1990, no writ).
   l. *Magill v. Magill*, 816 S.W.2d 530 (Tex. App.–Houston [1st Dist.] 1991, writ denied).
   m. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App.–Houston [14th Dist.] 1996, no writ)(op. on reh'g).
   n. *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. App.–El Paso 1998, pet. denied).
   o. *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App.–Ft. Worth 2003, no pet.)(op. on reh'g).
   p. *Hernandez v. Hernandez*, 2009 WL 1547746 (Tex. App.–San Antonio 2009, no pet.)(mem. op.).
   q. *Baker v. Baker*, 2009 WL 3382242 (Tex. App.–San Antonio 2009, pet. denied)(mem. op.).
   r. *In Re Marriage of Gill*, 41 S.W.3d 255 (Tex. App.–Waco 2001, no writ).
   s. *Nelson v. Nelson*, 193 S.W.3d 624 (Tex. App.–Eastland 2006, no pet.).
   t. *Garza v. Garza*, 217 S.W.3d 538 (Tex. App.–San Antonio 2006, no pet.).

2. Reimbursement for Payment of Pre-Marriage Purchase Money Indebtedness (Principal Reduction)
   a. *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935).
   b. *Allen v. Allen*, 704 S.W.2d 600 (Tex. App.–Ft. Worth 1986, no writ).
   c. *Penick v. Penick*, 783 S.W.2d 194 (Tex. 1988).
   d. *Kamel v. Kamel*, 760 S.W.2d 677 (Tex. App.–Tyler 1988, writ denied).
   e. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App.–Houston [14th Dist.] 1996, no writ)(op. on reh'g).
   f. *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App.–Corpus Christi 1996, no writ).
   g. *Rusk v. Rusk*, 5 S.W.3d 299 (Tex. App.–Houston [14th Dist] 1999, pet. denied).
   h. *Beard v. Beard*, 49 S.W.3d 40 (Tex. App.–Waco 2001, pet. denied).

[124] 612 S.W.2d 233 (Tex. Civ. App.–Waco 1981, no writ).

These cases followed the old form of measurement:

a. *Nelson v. Nelson*, 713 S.W.2d 146 (Tex. App.–Texarkana 1986, no writ).
b. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.–Texarkana 1986, no writ).
c. *Martin v. Martin*, 759 S.W.2d 463 (Tex. App.–Houston [1st Dist.] 1988, no writ).
d. *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App.–Waco 1981, no writ).
e. *Snider v. Snider* , 613 S.W.2d 8 (Tex. Civ. App.–Dallas 1981, no writ).
f. *Cook v. Cook*, 665 S.W.2d 161 (Tex. App.–Ft. Worth 1983, writ ref'd n.r.e.); appeal after remand, 693 S.W.2d 785 (Tex. App.–Ft. Worth 1985, no writ).
g. *Fyffe v. Fyffe*, 670 S.W.2d 360 (Tex. App. –Texarkana 1984, writ dism'd w.o.j.).

3. Reimbursement for Payment of Interest, Taxes Insurance
   a. *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (1943).
   b. *Snider v. Snider* , 613 S.W.2d 8 (Tex. Civ. App.–Dallas 1981, no writ).
   c. *Cook v. Cook*, 665 S.W.2d 161 (Tex. App.–Ft. Worth 1983, writ ref'd n.r.e.); appeal after remand, 693 S.W.2d 785 (Tex. App. – Ft. Worth 1985, no writ).
   d. *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App.–Houston [14th Dist.] 1984, affm'd in part, rev. in part), 687 S.W.2d 731 (Tex. 1985).
   e. *Fyffe v. Fyffe*, 670 S.W.2d 360 (Tex. App. –Texarkana 1984, writ dism'd w.o.j.).
   f. *Smith v. Smith*, 715 S.W.2d 154 (Tex. App.–Texarkana 1986, no writ).
   g. *Rogers v. Rogers*, 754 S.W.2d 236 (Tex. App.–Houston [1st Dist.] 1988, no writ).
   h. *Martin v. Martin*, 759 S.W.2d 463 (Tex. App.–Houston [1st Dist.] 1988, no writ).
   i *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App.–Houston [14th Dist.] 1996, no writ)(op. on reh'g).
   j. *Pelzig v. Berkebile*, 931 S.W.2d 398 (Tex. App.–Corpus Christi 1996, no writ).
   k. *Hunt v. Hunt*, 952 S.W.2d 564 (Tex. App.–Eastland 1997, no writ).

4. Reimbursement Involving Time, Talent and Labor
   a. *Vallone v. Vallone*, 644 S.W.2d 455 Tex. (1982).
   b. *Holloway v. Holloway*, 671 S.W.2d 51 (Tex. App.–Dallas 1983, writ dism'd).
   c. *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984).
   d. *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App.–Houston [14th Dist.] 1984, affm'd in part, rev. in part), 687 S.W.2d 731 (Tex. 1985).
   e. *Trawick v. Trawick*, 671 S.W.2d 105 (Tex. App.–El Paso 1984, no writ).
   f. *Rogers v. Rogers*, 754 S.W.2d 236 (Tex. App.–Houston [1st Dist.] 1988, no writ).
   g. *Gutierrez v. Gutierrez*, 791 S.W.2d 659 (Tex. App.–San Antonio 1990, no writ).
   h. *Pearce v. Pearce*, 824 S.W.2d 195 (Tex. App.–El Paso 1991, writ denied).
   i. *Alsenz v. Alsenz*, 101 S.W.3d 648 (Tex. App.–Houston [1st Dist.] 2003, pet. denied).
   j. *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex. App.–San Antonio 2006, pet. denied).
   k. *Cassel v. Cassel*, 1997 Tex. App. LEXIS 2641 (Tex. App.–Amarillo).
   l. *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App.–Ft. Worth 2003, no pet.).
   m. *Garza v. Garza*, 217 S.W.3d 538 (Tex. App.–San Antonio 2006, no pet.).

5. Reimbursement for Use of Separate Property for the Benefit of the Community Estate
   a. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.–Houston [14th Dist.] 1975, writ dism'd w.o.j.).
   b. *Hilton v. Hilton*, 678 S.W.2d 645 (Tex. App.–Houston [14th Dist.] 1984, no writ).
   c. *Graham v. Graham*, 836 S.W.2d 308 (Tex. App.–Texarkana 1992, no writ).
   d. *Winkle v. Winkle*, 951 S.W.2d 80 (Tex. App.–Corpus Christi 1997, pet. denied).
   e. *Beard v. Beard*, 49 S.W.3d 40 (Tex. App.–Waco 2001, pet. denied).

6. Reimbursement for the Use/Loss of Corporate Assets (Capital) Used for the Purchase and Payment of Community Assets
   a. *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App.–Waco 1981, no writ).

7. Reimbursement for the Decrease in Cash Value of Separately Owned Life Insurance Policies

a. *Brooks v. Brooks*, 612 S.W.2d 233 (Tex. Civ. App.–Waco 1981, no writ).

8. Reimbursement for Contributions to Separate Property Partnerships
   a. *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. Civ. App.–Houston [14th Dist.] 1975, writ dism'd w.o.j.).
   b. *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App.–Houston [14th Dist.] 1984, affm'd in part, rev. in part); 687 S.W.2d 731 (Tex. 1985).

9. Reimbursement for the Payment of Separate Property Judgment
   a. *Knight v. Knight*, 301 S.W.3d 723 (Tex. App.–Houston [14th Dist.] 2009, no pet.).

10. Reimbursement for Payment of Secured and Unsecured Debt
   a. *Winkle v. Winkle*, 951 S.W.2d 80 (Tex. App.–Corpus Christi 1997, pet. denied).
   b. *Bigelow v. Stephens*, 286 S.W.3d 619 (Tex. App.–Beaumont 2009, no pet.).
   c. *Knight v. Knight*, 301 S.W.3d 723 (Tex. App.–Houston [14th Dist.] 2009, no pet.).
   d. *Zeptner v. Zeptner*, 111 S.W.3d 727 (Tex. App.–Ft. Worth 2003, no pet.).
   e. *Hailey v. Hailey*, 176 S.W.3d 374 (Tex. App.–Houston [1st Dist.] 2004, no pet.).
   f. *Cigainero v. Cigainero*, 305 S.W.3d 798 (Tex. App.–Texarkana 2010, no pet.).

11. Reimbursement for the Payment of Professional Fees
   a. *Jacobs v. Jacobs*, 669 S.W.2d 759 (Tex. App.–Houston [14th Dist.] 1984, affm'd in part, rev. in part), 687 S.W.2d 731 (Tex. 1985).
   b. *Farish v. Farish*, 982 S.W.2d 623 (Tex. App. – Houston [1st Dist.] 1998, no pet.).

12. Reimbursement for Support Paid to Support Illegitimate Child
   a. *Butler v. Butler*, 975 S.W.2d 765 (Tex. App.–Corpus Christi 1998, no writ).

13. Reimbursement for Pre-Marriage Expenditures on Improvements to Separate Estate
   a. *Nelson v. Nelson*, 713 S.W.2d 146 (Tex. App.–Texarkana 1986, no writ).

XII. Conclusion

When dealing with reimbursement claims, it is important to have pleadings on file setting forth your specific claims and defenses. The cases that discuss the various forms of reimbursement are not always a picture of clarity. The cases that discuss the payment of pre-marital debts do not always specifically identify what was paid (i.e. principal, interest, taxes or insurance), yet some of these cases are affirmed based upon the "no abuse of discretion standard."

If faced with a reimbursement claim involving enhancement in value involving capital improvements or time, talent, toil, and effort, analyze what specifically you need to prove, the time frame in which you need to prove it, and how you are going to prove it. Due to the discretionary powers of the trial court, the failure to prove all essential elements of your specific claim will usually result in your claim being denied by the trial court or reversed on appeal.

Example 1
Comparison of Jensen Claims to Statutory Claim

- Collin County Cubicles, LLC ("CCC"), was formed before Husband's marriage to Wife.
- Husband holds a 50% membership interest in CCC, which rents divider panels to law firms to construct office partitions.
- Husband is the sole managing member. Joe, who holds the other 50% interest, and is simply an investor.
- During the parties' marriage, Husband received $50,000 in annual compensation, which was below market compensation for his services to the company.
- Husband was underpaid so that CCC would have additional funds available to expand its operations into Dallas County.
- Husband filed for divorce at the end of five years of marriage.

Wife's evidence:
- Fair compensation for Husband's services: $100,000
- The value of time reasonably necessary for Husband to manage his interest in CCC: not proven
- The increase in value of Husband's ownership: not proven

OUTCOME UNDER Tex. Fam. Code Ann. § 3.402(a):
Statutory reimbursement claim may be awarded because of evidence that Husband was under-compensated in the amount of $50,000 per year.

RESULT UNDER *JENSEN*:
No common law Jensen reimbursement claim can be awarded because:
- No evidence provided regarding the value of the time reasonably necessary for Husband to manage his interest in CCC; and
- No evidence provided regarding an enhancement in value of the company.

Example 2
Utilizing both Jensen and Statutory Reimbursement

Husband acquired a 1933 Bugatti Type 55 that was in a state of sad deterioration prior to his marriage to Wife. After his marriage, Husband spent 2,000 hours of his time and $80,000 of community funds for parts and materials to restore this vehicle.

OUTCOME UNDER THE FAMILY CODE:
- No claim for inadequate compensation under Tex. Fam. Code Ann. § 3.402(a)(2) because a claim under this statute must involve work for a business entity.
- However, a claim exists under Tex. Fam. Code Ann. § 3.402(a)(8) for capital improvements made to the vehicle. Reimbursement would be measured under Tex. Fam. Code Ann. § 3.402(d) by enhancement in value.

OUTCOME UNDER *JENSEN*:
- A claim exists for the value of the time and effort spent by Husband in repairing his vehicle to the extent that it exceeded the time reasonably required to maintain it in its previously existing state.
- Obviously, on these facts, no time was needed to maintain the vehicle in its state of deterioration, and Husband obviously received no compensation for his work.
- Therefore, the community would have a claim under *Jensen* for the full value of Husband's time, talent and effort expended on restoring the Bugatti.

APPLYING BOTH *JENSEN* AND THE FAMILY CODE:
- Both Jensen and the reimbursement provisions of the Family Code can be applied to these facts, resulting in a possible reimbursement claims for both the time spent by Husband in making the repairs as well as for the funds expended to enhance the vehicle.

Example 3
Calculation of Reimbursement for Taxes on Undistributed Income

	Retained by the Partnership	Distributed to the Partner	Total
Income	$1,500,000.	$500,000.	$2,000,000.
Taxes	(375,000.)	(125,000.)	(500,000.)
After-Tax Income	$1,125,000.	$375,000.	$1,500,000.

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Assumptions:
1. The partner holds a family limited partnership as his or her separate property.
2. The partner's share of partnership income for the year is $2,000,000.
3. Taxes owed by the partner with respect to partnership income were $500,000.

The partner received a distribution of $500,000 from the partnership, all of which was used to pay federal income taxes owed by the partner and his or her spouse in their joint return

This schedule allocates taxes between the partnership and the partner based upon the income retained by the partnership versus that distributed to the partner. As can be seen, if taxes are allocated between the partner and the partnership based on income retained by the partnership versus income distributed to the partner, taxes actually attributable to the $500,000 of income received by the partner were only $125,000, whereas taxes attributable to income retained within the partnership were $375,000. However the entire $500,000 of taxes were paid by the partner, and not the partnership. Post-divorce, the partner will ultimately receive distributions totaling $1,125,000 on a tax-free basis. If no reimbursement claim is recognized, the partner's separate estate has been enhanced to the extent of a $375,000 tax benefit, without any offsetting benefit being received by the community. The community estate ends up with a net zero while the spouse's separate estate retains $1,125,000 of income that will be received tax-free upon distribution subsequent to divorce due to the fact that the taxes on this income were paid by the community estate.

Of course, if a separate return is filed by the partner spouse and taxes paid on it from his or her separate funds, there is no reimbursement claim.

Guest Editors this month include Jimmy Verner (*J.V.*), Jimmy A. Vaught (*J.A.V.)*, Christopher Nickelson (*C.N.)*, Rebecca Tillery (*R.T.*), Sallee S. Smyth (*S.S.S.)*

ANNULMENT

ANULMENT GRANTED BECAUSE WIFE FRAUDULENTLY INDUCED HUSBAND TO MARRY HER SO SHE COULD RECEIVE HER GREEN CARD

¶12-4-01. ***Desta v. Anyaoha,*** -- S.W.3d --, 2012 WL 2371063 (Tex. App.—Dallas 2012, no pet. h.) (06/25/12).

Facts: Husband, a U.S. citizen, and Wife, an Ethiopian citizen, met on an internet dating site. Wife told Husband she wanted a marital relationship and to have several children. They married and began living together a year later after Wife arrived in the United States. Shortly after Wife received her green card, she claimed that Husband abused her and filed for divorced. Husband filed a cross-petition requesting dissolution of the marriage, or alternatively, annulment based on fraud. Trial court ruled the marriage should be annulled. Wife appealed, saying the evidence was insufficient to support an annulment, and that trial court erred in not determining whether the alleged fraud "went to the essentials of the marriage relationship."

Holding: Affirmed

Opinion: A court may grant an annulment if one spouse used fraud, duress, or force to induce the other to marry, and the innocent spouse did not voluntarily cohabitate with the inducing spouse after learning of the fraud. Fraudulent inducement occurs when a false representation is made and was known to be false, was intended to be acted upon, was relied upon, and caused injury. Here, Wife told Husband she loved him and wanted a long-term relationship, marriage and children. Husband testified that before the marriage, he and Wife spoke about wanting a long-term relationship with three or four children almost every day. A few days after Wife obtained her temporary green card, Husband came home to find that Wife and her belongings were gone, and Wife did not leave a note or call. Wife's cousin testified that Wife only married Husband so she could come to the United States. Husband's friend, with whom Wife lived temporarily after she left Husband, also testified that Wife wanted to marry Husband so she could come to the U.S. and was waiting until she got her green card before moving out. Wife also told Husband's friends that she received a birth control injection before coming to the U.S. because she "don't want to have a baby from him." Trial court could have reasonably found that Wife fraudulently induced Husband to marry her by making material representations that she loved him and wanted a long-term relationship, marriage and child, and that Husband believed and relied upon these representations when he asked Wife to marry him.

COMMON LAW MARRIAGE

HUSBAND'S EVIDENCE THAT WIFE WORE WEDDING RING AND DID NOT OBJECT TO BEING INTRODUCED AS HIS WIFE WAS MORE THAN A MERE SCINTILLA THAT THE COUPLE HELD THEMSELVES OUT AS MARRIED AND THEREFORE HAD AN INFORMAL MARRIAGE

¶12-4-02. ***Riley v. Riley,*** No. 14-11-00346-CV, 2012 WL 2550957 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (mem. op.) (07/03/12).

Facts: Husband and Wife ceremonially married in 1996 and divorced in 2000. They continued to live together until 2007. Husband sued Wife for divorce in 2010, alleging they had an informal marriage continuing after the earlier divorce. Wife presented evidence that the couple never agreed to be married and did not represent to others that they were married. Her evidence included a deed of trust, bond application for motor vehicle dealer's license, and tax returns. Husband introduced evidence including affidavits from him and his mother, photos of Wife wearing a wedding ring, and a hotel invoice. Trial court granted partial summary judgment for Wife, saying there was no evidence the couple represented to others they were married, a required element of informal marriage. Husband appealed, saying trial court erred in granting summary judgment because there was some evidence the couple represented to others they were married.

Holding: Reversed and Remanded

Opinion: To prove an informal marriage, a party must prove that the couple (1) agreed to be married, (2) lived together as husband and wife, and (3) represented to others they were married in Texas, also known as "holding out." Holding out may be shown by the conduct and actions of the parties, and turns on whether the couple had a reputation in the community for being married.

Here, Husband's affidavit stated that the couple constantly referred to each other publicly as husband and wife. Wife never objected to the label and wore her wedding ring for many years. The couple checked into a hotel as husband and wife when trying to reconcile, and maintained a joint checking account. This evidence is more than a mere scintilla that Husband and Wife represented to others that they were married. Wife's evidence that Husband identified himself as single or unmarried on tax returns, a deed, and a bond application did not conclusively negate the holding out element, especially when there was no evidence that these representations were disseminated in the community.

Editor's Comment: *These informal marriage cases can be real tricky when the couple continues to live together after they are divorced. This is a close call but I think that the COA got it right. Of course, the husband will still have to prove his case. J.A.V.*

Editor's Comment: *Sometimes you hit a home run in the trial court only to lose on appeal. This is particularly true when you win a summary judgment, like the case here. The court of appeals is going to review the decision on the more stringent "de novo" standard of review, and the "mere scintilla" standard of proof is usually pretty easy to prove. In hindsight, sometimes it seems like you would have been better off simply taking the case to final trial because if you win there, and the other side appeals, you will likely be under the looser standard of "abuse of discretion" and will have a better chance of your win being affirmed. Common law marriage questions are extremely fact-specific, so it's not surprising that the court of appeals felt like there were fact issues that precluded summary judgment. R.T.*

INFORMAL MARRIAGE EXISTED WHERE COUPLE LIVED TOGETHER FOR 18 YEARS, FILED JOINT TAX RETURNS AND SIGNED MINERAL LEASES AS HUSBAND AND WIFE

¶12-4-03. ***Garcia v. Garcia,*** No. 02-11-00276-CV, 2012 WL 3115763 (Tex. App.—Fort Worth 2012, no pet. h.) (mem. op.) (08/02/12).

Facts: Husband and Wife divorced but moved back in together shortly after the divorce. They lived together for the next 18 years. Husband visited Mexico every year during this period, and about five years before he and Wife stopped living together, he met a Mexican woman (Girlfriend). Husband began a relationship with Girlfriend, but only told Wife about Girlfriend five years later, when Girlfriend was pregnant. Husband said he wanted to marry Girlfriend and returned to Mexico where they married in civil court. Husband then returned to Wife's home and continued living with her for a few months before returning to Mexico, where he and Girlfriend had a Catholic wedding ceremony. After this ceremony, Husband again returned to Wife's home, but she would not let him in the house, and subsequently she filed for divorce. Husband and Wife owned three properties together. One of these properties was a rental home, and Husband kept the rental pay-

ments. During the divorce proceedings, it was disputed whether Husband had purchased property in Mexico. Wife testified that Husband had purchased two lots, but Husband claimed he had inherited property from his father. Trial court granted the divorce, finding that the couple had an informal marriage and that Husband had committed adultery. Trial court awarded Wife two properties, including the rental property, and awarded the third property to Husband. Husband appealed.

Holding: Affirmed

Opinion: An informal marriage is established when there is an agreement to be married, the couple is living together as husband and wife, and they are representing to others that they are married. An agreement to be married and representations to others that the parties are married may be established by direct or circumstantial evidence, including testimony of the parties and their conduct and representations. Here, Husband stated during the trial that he was not married to Wife, but admitted they slept in the same room and lived together as husband and wife. Wife provided evidence they had lived together for 18 years and had represented to third parties that they were married by filing joint tax returns and signing mineral leases as husband and wife. Further, the couple maintained a joint checking account to which both parties had full access. Husband said he filed joint tax returns because it meant he would pay less in taxes, therefore his representation should not carry much weight in determining whether he and Wife were married. However, Wife corroborated Husband's assertion on his tax return with other evidence that they represented they were married. Finally, the ceremonial marriage to Girlfriend did not negate the validity of Husband's informal marriage to Wife. Wife testified that Husband came back to live with her after he had been married to Girlfriend. Husband also testified that he never planned to live with Girlfriend in Mexico, did not tell Wife about Girlfriend for years, and knew his marriage to girlfriend was not "okay."

Editor's Comment: *Although the couple continued to live together after they were divorced, this is not a close call in my opinion because, among other things, they filed joint tax returns, signed mineral leases as husband and wife and maintained a joint checking account. J.A.V.*

DIVORCE
PROPERTY AGREEMENTS

PREMARITAL AGREEMENT WAS NOT ENFORCEABLE WHEN HUSBAND LIED ABOUT HAVING POSSESSION OF THE AGREEMENT, WHICH PREVENTED WIFE FROM SEEKING LEGAL ADVICE REGARDING THE AGREEMENT; DIRECT THREATS OR COERCION ARE NOT REQUIRED IN ORDER TO SHOW AN AGREEMENT WAS SIGNED INVOLUNTARILY

¶12-4-04. ***Moore v. Moore,*** -- S.W.3d --, 2012 WL 2553565 (Tex. App.—Dallas 2012, no pet. h.) (07/03/12).

Facts: Husband and Wife divorced after three years of marriage. Before Husband and Wife married, Husband told Wife he wanted a premarital agreement to protect Wife from "loans, liens and lawsuits." Initially, Husband wanted his lawyer to draw up the agreement, but after he learned the agreement could be subject to attack if Wife did not have her own lawyer, he suggested she hire an attorney who worked in the same building as Husband's attorney. Nine days before the wedding, Wife met with the attorney suggested by Husband. Wife's attorney suggested some changes and met with Husband's attorney to discuss them. Husband's attorney never made the suggested changes, but rather removed all references to the value of Husband's assets in the agreement. Days before the wedding, Wife tried to reach Husband's attorney to arrange to pick up the agreement. Husband's attorney said he had mailed the agreement to Husband. However, Husband said the agreement was going to be sent to their wedding site in Massachusetts. Wife later discovered that Husband had the agreement with him before they left for Massachusetts. Hours before the wedding, Husband produced the agreement, which had a schedule of Husband's assets attached, but contained no values for the assets.

Wife assumed her attorney had approved the document. Husband asked Wife to sign a waiver of disclosure. Wife tried to call her attorney to discuss this but was unable to reach him. Husband represented that her attorney had approved the document and it was okay for Wife to sign. Wife later discovered her attorney had never reviewed any changes to the document, never reviewed the final draft, and never said it was okay for Wife to sign the document. Trial court found that Wife did not sign the agreement voluntarily and refused to enforce it. Husband appealed.

Holding: Affirmed
Opinion: Premarital agreements are presumptively binding and enforceable, unless there is evidence of involuntariness. In determining whether any evidence of involuntariness existed, courts consider whether (1) whether a party has had the advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided, and (4) whether the information has been withheld.

Here, Wife presented evidence that Husband misrepresented his financial condition to her by saying he was "digging himself out of a hole" and wanted her to sign an agreement to protect her from his debts. Husband made it impossible for Wife's lawyer to review the document by misrepresenting that he did not have the document before they left Texas for their wedding in Massachusetts and then hiding the document for several days. The final version did not state the value of Husband's assets. Further, Husband assured Wife that her lawyer had approved the final agreement and that she was okay to sign it. Wife testified that she was concerned but signed the document only because of Husband's assurances. Wife was not required to prove an "express direct threat or coercion" to establish voluntariness, as Husband asserted. Finally, even though the agreement contained recitations that Wife's attorney had reviewed the agreement and that Wife read and understood the agreement, there was evidence that Husband tricked Wife into signing the agreement without first getting legal advice. The evidence supported trial court's finding that Wife signed the agreement involuntarily.

Editor's Comment: *As to the recitations, the court reasoned that a person who signs a contract "must be held to have known what words were used in the contract and to have known their meaning, and he must also be held to have known and fully comprehend the legal effect of the contract." But this rule does not apply to premarital agreements because the Texas Family Code states that a premarital agreement is not enforceable if it is not voluntarily signed. Husband could not prevent wife from showing involuntariness "by including recitations in the very agreement that she alleges was not voluntarily signed." J.V.*

Editor's Comment: *This case is an absolute must-read because the body of caselaw analyzing premarital agreements is small, and the reported decisions that have refused to enforce a premarital agreement are few and far between. Rarely do we get to see an opinion that analyzes the "voluntariness" requirement so thoroughly. R.T.*

DIVORCE

ALTERNATIVE DISPUTE RESOLUTION

HUSBAND AND WIFE COULD NOT MODIFY TERMS OF THEIR MSA TO ALLOW WIFE TO RECEIVE HIGHER BENEFITS UNDER HUSBAND'S MILITARY RETIREMENT PLAN; ONCE AN MSA IS SIGNED, IT IS BINDING, AND PARTIES CANNOT AGREE TO STIPULATE AND MODIFY THE AGREEMENT

¶12-4-05. ***Byrd v. Byrd,*** No. 04-11-00700-CV, 2012 WL 2450814 (Tex. App.—San Antonio 2012, no pet. h.) (mem. op.) (06/27/12).

Facts: Husband and Wife divorced. Both parties signed an MSA, which the trial court approved. The MSA stated that the parties agreed to defer entry of the divorce decree until a later date so that Wife would be eligible for medical benefits based on Husband's 20 years of military service, since his benefits were not fully accrued at the time of the MSA. Husband and Wife further agreed that their property would be divided as of the date of the MSA, and that their attorneys would work out the "fine points" of Wife's shares of Husband's military retirement benefits. The inventory worksheet attached to the MSA reported Husband's retirement as "Military—Army 0—3E." A year later, both parties presented their own DRO proposing the division of Husband's military retirement benefits. Wife proposed that benefits should be calculated as of the date of Husband's retirement, which would be "0—4" as opposed to "0—3E," and Husband argued that benefits should be calculated as of the date of the MSA, per the parties' prior agreement. Trial court rendered the final divorce decree and signed Wife's proposed DRO, dividing the retirement benefits as of the date of Husband's retirement. Husband moved to reform the DRO, saying trial court erred in signing Wife's DRO, but his motion was denied. Husband appealed, arguing that trial court erred in signing an order that was beyond the scope of the MSA.
Holding: Affirmed As Modified

Opinion: An MSA that meets the requirements of Tex. Fam. Code Ann. § 6.602 is binding on the parties, and trial court is not required to determine if the property division within the MSA is "just and right" before approving the MSA. Absent allegations of fraud, duress or coercion, an MSA must be enforced, and trial court may not sign a judgment varying from the terms of the MSA. Once an MSA is signed, the parties cannot void or modify the agreement in any way.

Here, Wife argued that Husband's counsel stipulated at the final hearing that Husband had obtained the necessary ranking for an "0—4" retirement benefit. However, this stipulation could not alter the terms of the MSA. Wife further argued that she was entitled to the higher cost-of-living allowance that is attached to Husband's 0—4 ranking, and that awarding her anything less would be an unjust division of property. Since both parties agreed in the MSA to divide Husband's retirement benefits as of the date of the MSA, trial court did not have to decide whether the property division was just and right.

Editor's Comment: *To the extent that an MSA is a contract, it would seem that the parties' are at liberty to modify their contracts by agreement even if a court is not permitted to do so, however according to the SA COA, this is not allowed when the contract is an MSA under Tex. Fam. Code Ann. §6.602. Would the outcome have been different if the settlement had been reached under TRCP Rule 11 or an AID under Tex. Fam. Code Ann. §7.006? S.S.S.*

DIVORCE
DIVISION OF PROPERTY

WIFE COULD NOT ENFORCE RESIDUARY CLAUSE IN DIVORCE DECREE THAT PURPORTED TO SWITCH POSSESSION OF PREVIOUSLY AWARDED ASSETS IN THE EVENT THAT ASSETS WERE UNDISCLOSED OR UNDERVALUED; DIVORCE DECREE UNAMBGUOUSLY AWARDED ASSETS TO HUSBAND AS HIS SEPARATE PROPERTY

¶12-4-06. ***In re W.L.W.,*** 370 S.W.3d 799 (Tex. App.—Fort Worth 2012, orig. proceeding) (06/21/12).

Facts: Husband was president and majority shareholder of a company. He executed a merger with an affiliate, and in return received shares of the newly formed business entity, cash, promissory notes, and other payments, totaling approximately $13M. Husband and Wife divorced five months later. In his inventory, Husband listed his stock in the company as valued at $2M. Wife listed the stock in her inventory but listed "Unknown" as its value. Wife later acknowledged that she relied upon Husband's valuation, and said she knew she could have hired an expert to evaluate the stock but chose not to. As part of the division of the estate, pur-

suant to section 18.a of the decree, trial court awarded Husband the balance of a money market account, less approximately 70% to be paid to Wife, and the company stock. The divorce decree also included what Husband and Wife referred to as a residuary clause, which stated: "IT IS ORDERED AND DECREED that any asset of the parties that was not disclosed or undervalued in the spreadsheet attached to each party's Inventory and Appraisement as Exhibit "A" is awarded to the party not in possession or control of the asset." Six months after the decree was entered, Wife filed a "Motion for Clarification Order and to Enforce Property Division," alleging that Husband had failed to disclose or had undervalued several assets, including the company stock, and requesting that these assets be delivered to her pursuant to the residuary clause. Husband filed a plea to the jurisdiction, saying trial court lacked subject-matter jurisdiction to substantively alter the divorce decree's property divisions. Trial court denied his motion. Wife filed seeking discovery related to the alleged undervalued and undisclosed assets. Husband filed a petition for writ of mandamus.

Holding: Petition for Writ of Mandamus Conditionally Granted

Majority Opinion: Husband argued that the decree unambiguously awarded him all the assets Wife alleges he undervalued or failed to disclose, and therefore Wife is seeking a post-divorce re-division of previously divided community property. Wife contended that the allegedly undervalued and undisclosed assets were never awarded to Husband, but instead were awarded to her pursuant to the residuary clause. Wife advocated that the residuary clause should be interpreted to mean that if a party failed to disclose or undervalued an asset, that asset was "concurrently" awarded to the other party when the decree was executed.

COA agreed that section 18.a of the decree expressly and unambiguously awarded all the disputed assets to Husband, but noted that if Wife's interpretation of the residuary clause were followed, a conflict existed between section 18.a and the residuary clause when an asset awarded under section 18.a is instead alleged to have been awarded under the residuary clause. Divorce decrees are contracts subject to the usual rules of contract provisions. Courts attempt to harmonize and give effect to all provisions of a contract to reflect the intent of the parties. Here, there was no indication that either party intended the section 18.1 asset awards to be contingent upon anything. A standard residuary clause in a divorce decree provides a remedy for property that was not otherwise divided and awarded by the decree. Husband and Wife's divorce decree thus did not contain a standard residuary clause, because it did not contemplate a division of property that was not otherwise divided by the decree, but rather operated on an unwritten contingency. It would only operate if Wife proved in a post-judgment action that Husband failed to disclose the asset or undervalued it in his inventory.

When portions of a contract cannot be reconciled, a court may resolve the conflict by striking one of the provisions. Section 18.a specifically awarded the disputed assets to Husband, ahead of the residuary clause. The residuary clause contributed to the uncertainty of the finality of the property division. If Wife's interpretation were used, an asset could never be finally awarded to a party, if that same asset could have been "concurrently awarded to the other party based on a post-judgment action to enforce or clarify that had not yet occurred. The only reasonable construction of the residuary clause is that it permits the post-judgment division of previously decree-divided property based upon the trial court's findings regarding the thoroughness of one side's inventory and appraisement. This would be a violation of TFC's prohibition on amending, modifying, altering, or changing a divorce decree's division of property.

Mandamus relief is appropriate when a trial court issues an order after its plenary power has expired. Here, the trial court issued an order denying Husband's motion to reconsider his plea to the jurisdiction and permitting Wife to conduct discovery in furtherance of her post-judgment action after the court's plenary power had expired. Further, mandamus will spare all parties and the public time and money that would have been wasted litigating the post-judgment action.

Dissenting Opinion (C.J. Livingston): Both parties executed an MSA that contained the residuary clause two months before the divorce decree was entered. The MSA included a stipulation that each party had made a "fair and reasonable disclosure to the other of the property…set forth in their respective" inventories. The plain meaning of the residuary clause that the parties negotiated for was that any asset that was not disclosed or undervalued in the inventories was to be awarded to the party not in possession or control. Therefore, the assets awarded to Husband were undeniably Husband's separate property under section 18.a, as long as he had properly disclosed and had properly valued those items through his inventory submitted to Wife before

signing the contract. Wife is not seeking a redivision of property, but rather is asking trial court to implement the stipulation that resulted from her bargain with Husband and to enforce her ownership of the property subject to the stipulation.

Editor's Comment: *I agree with the dissent that the plain meaning of the residuary clause that the parties negotiated for was that any asset that was not disclosed or undervalued in the inventories was to be awarded to the party not in possession or control. Although the value of the assets were clearly undervalued in this case, in many instances, it may be difficult to determine if and when an asset was undervalued. J.A.V.*

Editor's Comment: *A provision for "undervalued" assets in a residuary clause is an invitation to post-divorce litigation. J.V.*

Editor's Comment: *I find the dissenting opinion very persuasive here. The intent of the parties seems pretty clear to me. This case is a good reminder of why it is always the best practice to specifically delineate all awards in a divorce decree and not just generally award "all accounts in wife's name to wife." R.T.*

Editor's Comment: *Keep your eye on this case. If it stands, then it is a "must read" case for anyone going to mediation. Court of appeals holds that the trial court has no jurisdiction to enforce residuary clause that awards undervalued portion of an asset to the spouse not in possession of the asset where the residuary clause conflicts with a provision of the decree that unconditionally awards the asset in question to the spouse in possession. According to the majority, a general residuary clause, such as the one in this case, cannot be relied upon as a "claw-back" provision for post-divorce re-division of undervalued assets. For those keeping score, this is about the first time, ever, that the Second Court of Appeals did not bend over backwards to help out a wife who, with the benefit of 20/20 hindsight, made an improvident decision to settle at mediation. C.N.*

PREMARITAL AGREEMENT WAS ENFORCEABLE EVEN THOUGH WIFE BREACHED IT BY CONTESTING ITS ENFORCEABILITY IN DIVORCE PROCEEDINGS; HUSBAND CHOSE TO GO FORWARD WITH THE AGREEMENT IN PROCEEDINGS, WHICH ENTITLED WIFE TO RECEIVE HER BENEFITS

¶12-4-07. ***Dockery v. Dockery,*** No. 12-11-00160-CV, 2012 WL 3132159 (Tex. App.—Tyler 2012, no pet. h.) (mem. op.) (07/31/12).

Facts: Husband and Wife divorced after 12 years of marriage. Before marriage, they signed a premarital agreement that said their respective earnings would remain separate property and that there would be no community estate. The agreement said that if the couple divorced after five years, Husband would pay wife $25,000 in contractual alimony. The agreement also stated that if either party contested the enforceability of the agreement, that party would be considered in breach of the agreement. Husband filed for divorce. During the proceedings, Wife asserted the couple had acquired community property that needed to be divided by the court. However, on three separate occasions, Husband testified that he wanted to go forward with enforcing the premarital agreement. Trial court awarded each party their respective separate property pursuant to the agreement, awarded Wife $25,000 in contractual alimony, and found that neither party had breached the agreement. Husband appealed, saying Wife had breached the agreement by contesting it and therefore was not entitled to contractual alimony.

Holding: Affirmed

Opinion: Premarital agreements are interpreted like other written contracts. Consequently, when one party commits a material breach of the contract, the other party's performance is excused. However, if the non-breaching party treats the contract as continuing after the breach, that party is "deprived of any excuse for terminating its own performance. Here, Wife did breach the agreement by contesting it in court. However, Husband on three separate occasions indicated he wished to go forward with the agreement. Husband cannot

receive the benefits of the agreement while denying Wife her benefits from the agreement. When Husband learned of Wife's breach, he had the choice to either continue with the agreement or cease performance. Because he chose to continue, Wife is entitled to her benefits under the agreement.

Editor's Comment: *In short, a spouse breached a prenuptial agreement by challenging it but received $25,000 in contractual alimony anyway. This holding challenges the bar: What other provisions can a lawyer include in a prenuptial agreement to discourage the opposing party from breaching it? J.V.*

Editor's Comment: *We don't see too many cases that delve into contractual interpretation on marital property agreements, and this particular case, while the analysis is limited, comes to a concerning result. Wife's material breach of the prenuptial agreement is nullified simply because Husband asked that the prenuptial agreement be enforced. Yet, if he were to ask that the prenuptial agreement NOT be enforced, he would be saying that all of the parties' assets are community and subject to division instead of all separate property. Surely this cannot be husband's only two choices. R.T.*

Editor's Comment: *Note to self—when drafting pre-nup insert provision that says if wife contests the pre-nup the agreement is enforceable but wife gets no alimony and has to say she's sorry. C.N.*

INITIAL DIVORCE DECREE WAS NOT A FINAL JUDGMENT WHEN WIFE'S MOTION FOR NEW TRIAL WAS SUBSEQUENTLY GRANTED; TRIAL COURT HAD TO HEAR EVIDENCE ON ALL ASSETS TO RENDER A PROPER DIVISION OF PROPERTY, RATHER THAN HEARING EVIDENCE ONLY ON ONE DISPUTED ASSET

¶12-4-08. ***Gathe v. Gathe,*** -- S.W.3d --, 2012 WL 3223670 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (08/09/12).

Facts: Husband and Wife both filed for divorce in 2006. Over the next two years, the first Judge ordered the couple to attend mediation, conducted a bench trial at which the divorce was granted without rulings on property or children's issues, and refused to accept the parties' MSA on custody. In November 2008, the Judge orally rendered judgment by granting the divorce, adopting Husband's proposed property division, and ruling on the children's issues. The Judge signed the divorce decree in March 2009. Wife then filed a motion for new trial, alleging among other things that the court did not include accounts receivable from Husband's medical practice through the date of oral rendition of the divorce. A second Judge granted the motion for new trial on the property issues and regarding the Children's extracurricular activities. Husband requested the new trial be limited to the amount of accounts receivable related to his medical practice, and his request was granted. A third Judge issued an order saying that any and all temporary orders were superseded, and that the March 2009 decree was in effect. The Judge further awarded Husband and Wife each 50% of the accounts receive of Husband's medical practice as of November 2008 (when divorce was orally granted). Wife appealed, and Husband countered that Wife could not appeal because she accepted the benefits of the judgment she was appealing.

Holding: Reversed and Remanded

Opinion: A person who accepts the benefits of a judgment is estopped to challenge the judgment on appeal. However, when a court grants a motion for new trial, the court essentially "wipes the slate clean" and starts over. The new trial effectively vacates the original judgment and returns the case to the trial docket as though there had been on previous trial or hearing. Therefore, here, the order granting the motion for new trial set aside the March 2009 decree for all purposes and ordered a new trial on the division of property, not just on the accounts receivable. Further, because the issue of divorce and the issue of property division are not severable, the order granting new trial on only property division rendered the divorce interlocutory, and there was no final judgment. Because there was no final judgment, Wife could not have accepted benefits of the March 2009 decree, since it was set aside.

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Additionally, since the March 2009 decree was set aside and the divorce was not final, Husband and Wife were still legally married when the court awarded each party 50% of Husband's accounts receivable as of November 2008. The court should have considered any assets that had accumulated since November 2008 when dividing the community property. Finally, because the new trial was limited to evidence on one very discrete asset, the court did not hear evidence on any other assets or issues, rendering the evidence legally insufficient to support the property division and granting of divorce.

Editor's Comment: *It is my understanding that H has since remarried, making his new spouse now only a putative spouse. I'm guessing there might be more appellate activity to come from this one! S.S.S.*

Editor's Comment: *Do too many cooks in the kitchen spoil the broth? J.V.*

Editor's Comment: *The learned trial court should be applauded for trying to do the right thing. However, the trial court should not have granted a new trial but should have only used its plenary power to modify, correct, or reform the decree so as to divide the undivided property 50-50 or the court should have forced wife to bring a Chapter 9 suit to divide the undivided property. This is the risk with granting new trials in divorce cases, the community state remains open and the case never ends. The author has his suspicions as to whether diligence was shown as to why the undivided asset was not addressed at trial making the remedy of a new trial inappropriate and a Chapter 9 suit more appropriate. P.S., Being a trial judge can be a thankless job. C.N.*

DIVORCE

ENFORCEMENT OF PROPERTY DIVISION

TRIAL COURT'S ORDER AUTHORIZING AND REQUESTING FOREIGN COURT TO APPOINT A RECEIVER TO HELP DISPOSE OF PROPERTY AS STATED IN DIVORCE DECREE WAS NOT AN UNAUTHORIZED MODIFICATION OF THE DECREE; TRIAL COURT HAD PERSONAL JURISDICTION OVER PARTIES AND COULD THEREFORE ORDER DISPOSITION OF REAL PROPERTY LOCATED IN ANOTHER JURISDICTION

¶12-4-09. ***Vats v. Vats,*** No. 01-12-00255-CV, 2012 WL 2108672 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (mem. op.) (06/07/12).

Facts: Husband and Wife divorced. Their final divorce decree awarded each spouse a 50% interest in two parcels of land located in India. The decree reflects the intent of the parties to sell both pieces of land. It further stated that neither party would obstruct the sale of land in any way. Three years after the decree was entered, Wife filed a petition for enforcement of property division, asserting that Husband had failed to make a good faith effort to sell the property and had in fact impeded the sale. Wife said that Husband instructed his agent not to cooperate with Wife's agent in the sale. Also, Wife had an Indian attorney write a letter stating that because the United States is not a 'reciprocating territory,' as defined in the Indian Code of Civil Procedure, the decree would not be enforceable in India. The decree would be considered merely evidentiary in any suit filed in India. Further, the attorney said it could take Wife six to ten years to obtain a decree in India because their courts are overburdened. Wife asked trial court to request and authorize the Indian court to appoint a receiver in India to take control of the properties and sell or auction them and distribute the proceeds. The trial court signed the order. Husband appealed, asserting that the order was an inappropriate and unauthorized modification of the divorce decree and that the Texas trial court had no subject matter jurisdiction over the property in question.

Holding: Affirmed

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Opinion: A court rendering a divorce decree retains the power to enforce the property division. However, further orders to enforce the division of the property are limited by Tex. Fam. Code Ann. § 9.007, which says that "[a]n order to enforce the division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property." Husband argued that trial court's order was improper because the trial court tried to engage the jurisdiction of a foreign court. However, COA pointed out that the order was permissive in nature, stating only that the Indian court was "requested and authorized" to order the parties to sell the properties. The order sought to expedite a ruling by an Indian court to reduce Wife's wait for a final judgment. Further, the order was not a substantial modification of the decree. The decree was clear that the parties intended to sell the property. Trial court's order merely specified a more precise manner of effecting the property division.

Additionally, while trial court did not have in rem jurisdiction over property outside of Texas, it may require parties over whom it has personal jurisdiction to sell real property located in another state. But the order did not indicate that the trial court was attempting to exercise jurisdiction over the Indian property or the Indian court. The order served to assist in implementation of the decree's provision that the properties in India be sold.

WIFE WAS ENTITLED TO HER SHARE OF HUSBAND'S 401(K) IN THE FORM OF A MONEY JUDGMENT BECAUSE HUSBAND HAD VIOLATED DIVORCE DECREE BY WITHDRAWING FUNDS FROM THE ACCOUNT ELEVEN TIMES WITHOUT WIFE'S KNOWLEDGE OR CONSENT

¶12-4-10. ***Degroot v. Degroot,*** -- S.W.3d --, 2012 WL 2127574 (Tex. App.—Dallas 2012, no pet. h.) (06/13/12).

Facts: Husband and Wife divorced. In the decree, Wife was awarded fifty percent of Husband's 401(k) pursuant to the QDRO signed by the court. The trial court did not sign a QDRO when it signed the decree. The parties commenced post-divorce litigation. Trial court heard motions on petitions for enforcement, a motion for clarification filed by Wife regarding the marital home and Husband's pension plan, and a motion by Husband to divide undivided assets. Trial court issued a memorandum detailing its decisions on the petitions for enforcement and the division of the pension plan. A few months later, trial court signed QDROs for both the pension plan and the 401(k) plan. The QRDO for the 401(k) awarded Wife fifty percent of Husband's vested account balance as of July 19, 2006, and the amount assigned to Wife from the assignment date to the date of payment would include earnings and losses. Husband and Wife both requested the trial court enter a final order and QDROS. Trial court signed a final order dividing the pension plan, and a few days later signed new QDROS for both the pension plan and the 401(k) plan. The QDRO for the 401(k) plan awarded Wife 50% of Husband's vested account balance as of July 19, 2006, but did not include the sentence about earnings and losses. When Husband's former employer received the QDROs, it informed Wife that there was no money in the 401(k) plan. Wife filed a petition for enforcement, asserting Husband removed funds from the 401(k) plan on eleven occasions. After a hearing, trial court found that Husband violated the decree by withdrawing funds from the 401(k) plan eleven times, and that Wife's share of the plan was $145,310.36, or half the value of the plan as of July 19, 2006, as stated in the QDRO. Trial court ordered Husband to pay Wife an initial payment of $50,000 and ninety-six monthly payments of $1,000. Husband appealed.

Holding: Affirmed in Part, Reversed and Remanded in Part

Opinion: When a trial court renders a divorce decree, it generally retains the power to enforce the property division contained in the decree. To enforce a division in a divorce decree of specific, existing property, the trial court may order the property to be delivered. However, when delivery of property awarded in the decree is no longer an adequate remedy, the trial court may render a money judgment for damages caused by the failure to comply. Here, Husband argued that the enforcement order was a substantive change in the division of property because it awarded Wife her share of the 401(k) in cash, rather than in kind. However, because Husband violated the provisions of the order by withdrawing funds, therefore making it impossible for him to

comply with the terms of the decree, trial court had the authority to reduce the award to a money judgment. Further, trial court was within its right to determine that Husband should be responsible for all taxes and penalties owed due to his withdrawal of funds because of his unilateral liquidation of the funds.

FATHER'S CLAIM RELATED TO PROPERTY DIVISION AND ASSOCIATED WITH MOTHER'S COHABITATION BARRED BY LIMITATIONS

¶12-4-11. ***Morales v. Rice*****,** -- S.W.3d --, 2012 WL 2499004 (Tex. App.—El Paso 2012, no pet. h.) (06/29/12).

Facts: Father and Mother divorced. Mother was awarded the house, but if she remarried or had a "male non-family member" living with her, she was required to pay Father $10,000. Mother's boyfriend began living with her, and they married eight years later. Father demanded the $10,000 provided for in the divorce decree and filed a motion to enforce. Mother countered with a motion for enforcement and contempt, alleging Father had not paid Children's medical expenses, and attaching an exhibit summarizing unpaid expenses for the prior ten years. Mother also claimed Father had failed to provide insurance for the children. Trial court awarded Father $10,000 because Mother had a male non-family member living with her. Father appealed.
Holding: Affirmed In Part, Reversed In Part

Opinion: Mother argued that Father was not entitled to the $10,000 judgment because he knew Mother's boyfriend had been living with her for several years, and Father did not bring his claim with the statute of limitations. Mother's boyfriend began living with her in 1996, and Father was told about this by his oldest Child. Father had two years to enforce his claim, and because he did not bring his claim for eight years, his claim was barred. Therefore, the judgment awarding Father $10,000 is reversed.

Editor's Comment: *Lawsuit delayed equals justice denied. C.N.*

CLARIFYING DECREE AWARDING ONE-HALF INTEREST IN ACCOUNT TO EACH SPOUSE WAS VALID WHEN NO RECORD WAS PROVIDED TO COA TO DETERMINE WHETHER CLARIFYING DECREE SUBSTANTIVELY CHANGED ORIGINAL DIVISION OF PROPERTY

¶12-4-12. ***Campos v. Campos*****,** -- S.W.3d --, 2012 WL 3026371 (Tex. App.—El Paso 2012, no pet. h.) (07/23/12).

Facts: Husband and Wife divorced. At the hearing, associate judge entered findings that included awarding an account to both parties without specifying the percentage awarded to each. Neither party appealed to the district court. In the final decree, the account was awarded to Wife. Husband filed a motion for new trial, which was granted. At that trial, trial court valued the account at $6,899 and awarded it to Husband, but did not sign the divorce decree until more than two years later. Wife filed a motion to clarify and set aside the second judgment, saying the court lacked jurisdiction to grant a new trial. The judge concluded trial court had lost plenary power to grant a new trial, and therefore the order granting the motion for new trial and the final divorce decree were void. Husband did not appeal or challenge that ruling. Four years later, Wife filed a motion for clarification because trial court had not specified the percentage of the account to be awarded to each party. The judge awarded each party a one-half interest in the account and determined the account had a value of $18,620.77 on the date of divorce. Husband appealed, saying trial court did not have authority to change the value of the account after its plenary power expired, and that the evidence was insufficient to support trial court's determination of the value of the account.

Holding: Affirmed

Opinion: A court may specify more precisely the manner of effecting a property division made in a divorce decree as long as the substantive division of property is not altered or changed. Here, since the original decree

failed to specify a percentage to be awarded to either party, the decree was ambiguous and subject to clarification. However, a complete record of the final divorce hearing was not provided to COA. Therefore, COA could not determine whether the clarifying order changed the actual substantive division of property. In the absence of a reporter's record, trial court's findings of fact are conclusive.

Editor's Comment: *Husband also failed to include the reporter's record from the hearing on the motion to clarify. The trial court made bare-bones findings in its clarification order. Relying on Tex. R. Civ. P. 299, the El Paso Court presumed the existence of omitted findings because the trial court found some of them. J.V.*

Editor's Comment: *The record from the original divorce suit wasn't optional it was required to resolve the appeal. C.N.*

SAPCR
STANDING AND PROCEDURE

FORMER PARTNER LACKED STANDING TO BRING SAPCR WHERE NO EVIDENCE SHOWED THAT PARTNER HAD ACTUALLY EXERCISED LEGAL CONTROL OVER THE CHILD IN THE SIX MONTHS PRIOR TO FILING THE SUIT

¶12-4-13. ***In re Wells,*** -- S.W.3d --, 2012 WL 2149561 (Tex. App.—Beaumont 2012, orig. proceeding) (06/14/12).

Facts: Mother and Former Partner lived together before Mother had her Child. When their relationship ended, Former Partner moved out of Mother's home, but Mother and Former Partner divided responsibilities of caring for the Child by equally dividing possession of the Child. They had a written agreement concerning when each person would have possession of the Child during the week. Over the next year, Mother periodically stopped allowing Child to go to Former Partner's home, but would eventually allow the Child to visit and stay with Former Partner. Former Partner filed suit requested that she be appointed SMC of the Child, alleging that Mother had a history or pattern of mental and/or emotional abuse against the child. Mother contended the trial court lacked jurisdiction over the suit because Former Partner lacked standing. Trial court denied Mother's jurisdictional challenge and signed temporary orders appointing Mother as temporary SMC. Former Partner was named temporary possessory conservator of the Child and was granted weekend possession of the Child, as well as possession during the Child's spring break. Mother filed a petition for a writ of mandamus, challenging the trial court's authority to require her to share possession of her child with a non-parent, and asserting that there was no evidence that she was not a fit parent.

Holding: Petition for Writ of Mandamus Conditionally Granted

Majority Opinion (J. Horton): A writ of mandamus can be used to raise a complaint that another party lacked standing in cases where a court has ordered a fit parent to divide possessory rights with a non-parent. Tex. Fam. Code Ann. § 102.003(a)(9) provides that "a person, other than a foster parent, who has had actual care, control and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition" may file an original suit requesting managing conservatorship. Control must mean more than the control implicit in having care and possession of the child; it refers to the power or authority to guide and manage, and includes the authority to make decisions of legal significance for the child. However, Texas courts have not interpreted this provision to allow non-parents who have merely had periods of physical custody of a child to have standing to sue a fit parent for possession of the child. The United States Supreme Court has explained in *Troxel v. Granville* that "[s]o long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm

of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

Here, Mother never ceded to Former Partner any of her exclusive legal rights to control the Child; for example, Mother maintained and exercised the right to maintain health insurance and made all the relevant decisions related to the Child's education. Although Mother had signed a consent form designating Former Partner as a person able to provide consent to obtain medical treatment for the Child, there is no evidence that Former Partner ever actually exercised the right. Mother made all medical decisions concerning the Child during the six-month period prior to the filing of the SAPCR. There is evidence that Former Partner exercised actual car and possession of the child during the six-month statutory period, but no evidence that Former Partner maintained or actually exercised any legal control over the Child. Mother was under no enforceable obligation to allow the Child to stay with Former Partner. Mother made all decisions of legal significance for the Child and controlled where the Child would stay and for how long. Absent a finding that a child's parent is unfit, and absent any evidence showing that the non-parent actually exercised legal control over the Child during the statutory period, a trial court may not substitute its judgment regarding possessory rights for that of the Child's parent.

Concurring Opinion (J. McKeithen): A rational basis exists for conferring standing on a person who shares actual care, control, and possession of a child with that child's parents for a period in excess of six months. Nothing in the plain language of the statute necessitates the relinquishment or abdication by the biological parent of her parental rights, duties or responsibilities. However, because the Texas courts' precedent states otherwise, here the writ must be conditionally granted.

Editor's Comment: *This case (along with In re K.K.T. and In re JC, supra) are all good examples of how hard the appellate courts have clamped down on non-parent standing under Section 102.005 of the Texas Family Code. R.T.*

IN A PARENTAGE ACTION, TRIAL COURT WAS ENTITLED TO DECLINE TO ASSERT JURISDICTION OVER MOTHER WHO MOVED FROM TEXAS TO CALIFORNIA AND HAD LIVED THERE WITH HER CHILD SINCE THE CHILD'S BIRTH, EVEN THOUGH THE CHILD WAS LIKELY CONCEIVED IN TEXAS

¶12-4-14. ***Frazer v. Hall,*** No. 01-11-00505-CV, 2012 WL 2159271 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (mem. op.) (06/14/12).

Facts: Mother moved from Texas to California shortly before giving birth to her Child. Father filed a petition in Texas to adjudicate parentage and seeking to be named SMC or, in the alternative, JMC of the child. Mother filed a special appearance and a plea to the jurisdiction, arguing that because she was a resident of California, Texas courts lacked personal jurisdiction over her. Mother further argued that the court lacked subject-matter jurisdiction because under TFC, the home state of the child was California, since that is where the child had lived from birth with a parent. Mother testified that Father did not pay for expenses associated with the only pre-natal visit to which Father accompanied Mother and that although she tried to put Father's name on the California birth certificate, she was unable to because the hospital required Father's signature. Trial court found that it had personal jurisdiction but declined to exercise it, saying that to assert jurisdiction over the Mother would offend traditional notions of fair play and substantial justice. Father appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code Ann. § 160.064(b) provides that a court having jurisdiction to adjudicate parentage may exercise personal jurisdiction over a nonresident individual in certain circumstances, including when the parties engaged in sexual intercourse in Texas and the child may have been conceived by such acts. Although the trial court found that Mother and Father may have conceived the child in Texas, Tex. Fam. Code Ann. §

160.064(b) is permissive, not mandatory. Therefore, the trial court was entitled to decline to exercise jurisdiction.

GRANDFATHER LACKED STANDING TO BRING SAPCR BECAUSE CHILDREN ONLY STAYED FREQUENTLY AT HIS HOME TO FACILITATE THEIR PHONE CONVERSATIONS WITH THEIR INCARCERATED FATHER; GRANDFATHER LACKED ACTUAL CARE AND CONTROL EVEN THOUGH EACH CHILD HAD A BEDROOM AT HIS HOME AND GRANDFATHER DROVE THEM TO AND FROM SCHOOL

¶12-4-15. ***In re K.K.T.,*** No. 07-11-00306-CV, 2012 WL 3553006 (Tex. App.—Amarillo 2012, no pet. h.) (mem. op.) (08/17/12).

Facts: Mother and Father were named JMCs of their two Children. Father was incarcerated, and during his incarceration, Children stayed with Grandfather frequently, and Mother occasionally stayed at Grandfather's home as well. Grandfather claimed that Mother moved frequently. During Father's incarceration, Father was allowed to call Children at Grandfather's home, so Children would stay overnight at Grandfather's in order to receive Father's phone calls. Grandfather admitted during his testimony that the primary reason Children stayed with him was to speak with their father. While Children were staying with Grandfather, Mother would frequently go pick them up and then bring them back to Grandfather's. Grandfather filed a SAPCR to modify the order appointing Mother and Father JMCs and to appoint him managing conservator with the right to designate Children's primary residence, claiming that Mother had voluntarily relinquished actual care, control and possession of Children for at least six months. Trial court dismissed Grandfather's suit, saying he lacked standing. Grandfather appealed.

Holding: Affirmed

Opinion: To have standing to file a SAPCR under Tex. Fam. Code Ann. § 102.003(a)(9), a person other than a foster parent must have had "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." Actual control means "the actual power or authority to guide or manage or the actual directing or restricting of the child," and means more than just having care and possession of the child. Here, Grandfather argued that each Child had a bedroom in his home where they frequently stayed overnight. Grandfather testified that he drove Children to school and daycare and bought them clothing. Relying on both *Jasek v. TDFPS*, 348 S.W.3d 523 (Tex. App.—Austin 2011, no pet.) and *In re K.K.C.*, 292 S.W.3d 788 (Tex. App.—Beaumont 2009, orig. proceeding) the court found that Grandfather lacked "actual power or authority to guide and manage" the children. Father's incarceration was the primary reason Children stayed with Grandfather. Mother still exercised her ability to take the Children and return them at her will, which refuted Grandfather's claims that she had relinquished care and control of Children.

Editor's Comment: *The battle over the meaning of the phrase "actual care, control, and possession of the child" continues. Be mindful of which court of appeals jurisdiction you practice in when deciding if your client has standing to bring a SAPCR. C.N.*

GRANDPARENTS DID NOT HAVE STANDING TO FILE ADOPTION SUIT BECAUSE THEY HAD NOT ESTABLISHED SUBSTANTIAL PAST CONTACT WITH CHILD UNDER TEX. FAM. CODE ANN. § 102.005(5), AND WERE ALSO PROHIBITED FROM FILING SUIT UNDER TEX. FAM. CODE ANN. § 102.006 BECAUSE THEY WERE BLOOD RELATIVES OF THE PARENTS WHOSE RIGHTS HAD BEEN TERMINATED

¶12-4-16. ***In re J.C.,*** -- S.W.3d --, 2012 WL 3808597 (Tex. App.—San Antonio 2012, no pet. h.) (08/31/12).

Facts: Child was born premature and placed into the care of the Department. Child remained in the hospital for two months. When Child left the hospital, she was placed with Foster Parents. After her natural parents' parental rights were terminated, Child's Foster Parents and paternal Grandparents filed petitions to adopt Child. Foster Parents moved to dismiss Grandparents' adoption suit for lack of standing. Trial court found that Grandparents failed to establish substantial past contact with Child under Tex. Fam. Code Ann. § 102.005(c), but still had standing to file a petition for adoption under Tex. Fam. Code Ann. § 102.006(c). Foster Parents brought an interlocutory appeal.

Holding: Reversed and Rendered

Majority Opinion: (J. Angelini) Tex. Fam. Code Ann. § 102.005 governs who has standing to request termination of parental rights and to adopt a child, while Tex. Fam. Code Ann. § 102.006 limits standing where the parent-child relationship has been terminated. Under Tex. Fam. Code Ann. § 102.005(5), an adult who has had "substantial past contact" with the child may file suit requesting adoption. However, under Tex. Fam. Code Ann. § 102.006, if the adult seeking adoption is a family member of either former parent, and the parental rights of both parents have been terminated, that family member does not have standing to file an adoption suit. Therefore, a party must first satisfy the requirements of Tex. Fam. Code Ann. § 102.005 in order to have standing to file an adoption suit. Here, trial court determined that Grandparents did not meet the requirements of Tex. Fam. Code Ann. § 102.005 because they did not have substantial past contact with Child. Therefore, Grandparents could not have standing under Tex. Fam. Code Ann. § 102.006.

Concurring Opinion: (J. Hilbig) Grandparents sought to have contact with Child while Child was in the hospital, but the Department did not provide any information about Child or her location. A government agency prevented Grandparents from being able to establish "substantial past contact" with Child, interfering with a grandparent's "fundamental liberty interest in the parent-child relationship."

Concurring Opinion: (J. Speedlin) Grandmother testified she visited Child in the hospital six times. Both Grandparents tried to discover where Child had been placed by the Department, but the Department would not provide any information, because the parental rights of the natural parents had not yet been terminated. After the termination was final, Grandparents filed suit to adopt, but the Department only allowed Grandparents one supervised hour of visitation twice per month. While the Majority correctly interprets the two relevant statutes, the result seems to be an unintentionally harsh consequence. The Department removed Child and terminated parental rights, then proceeded to restrict Grandparents' access to Child, therefore preventing Grandparents from establishing "substantial past contact." The Legislature should clarify how Tex. Fam. Code Ann. § 102.006(c) and Tex. Fam. Code Ann. § 102.005(5) work together.

SAPCR
TEMPORARY ORDERS

APPOINTMENT OF A RECEIVER CANNOT BE CHALLENGED AFTER BOTH PARTIES REQUESTED AND AGREED TO THE APPOINTMENT

¶12-4-17. ***In re Marriage of Davis*,** -- S.W.3d --, 2012 WL 2094408 (Tex. App.—Texarkana 2012, no pet. h.) (06/12/12).

Facts: Husband and Wife divorced. In Wife's original petition she requested temporary orders prohibiting her exclusion from managing and operating the horse farm she owned and operated with Husband. Husband filed a motion for temporary orders that said he and Wife had been unable to agree on the temporary use and possession of their community property during the pendency of the divorce and that the animals were in danger of going unfed and uncared for. Wife responded, claiming that Husband abandoned the property and left Wife

to care for the animals without providing any financial means. Wife further requested that the court appoint a receiver to sell off the property, which she could no longer afford. At the hearing, trial court announced it was appointing a receiver to sell the property. Husband said he had a conflict with the receiver, but trial court appointed that receiver anyway. Subsequently, the parties signed a Rule 11 agreement, which stated that Wife would have exclusive and private use and possession of the farm, and reiterated that the receiver would sell the property and pay off any debts. At another hearing, Husband argued that the order appointing the receiver gave the receiver the right to manage and dispose of all of the business of the LLC, not just the property, and Husband disagreed with the appointment of a receiver for this purpose. Trial court entered an order appointing a receiver based on the parties' Rule 11 agreement, which omitted language giving the receiver authority to manage and control the property of the LLC. The receiver later filed a motion to confirm the sale of the property with the court, but Husband complained that the receiver had never contacted him to inquire about his interest in purchasing the property. Trial court noted that Husband had knowledge that the receiver was authorized to sell the property and could have made an offer, and entered an order confirming the sale. The LLC then interpleaded all its assets for dissolution of the business entity and disposition of its assets and liabilities. Husband filed a motion for reconsideration of the receiver's report, saying the receiver had received a higher offer. Wife opposed the motion for reconsideration, claiming the bid was engineered by Husband, which in fact it was. Husband argued that the LLC was required to be a named party to the divorce proceeding, and therefore the court could not appoint a receiver for property of a party that was not before the court. Husband gave notice of an interlocutory appeal and filed a motion to stay completion of the sale pending the appeal. Trial court noted during a hearing that both Husband and Wife, as owners of the LLC, had been before the court, had both requested a receiver to sell the properties, and knew that a receiver had been appointed. Husband appealed.

Holding: Affirmed

Majority Opinion (J. Morriss): Both parties asked for the trial court to appoint the receiver, and evidence of his lack of qualifications was not raised until four months after the receiver's appointment.

Concurring Opinion (J. Moseley): At the time of the first order appointing a receiver to deal with the assets of the LLC, the LLC had not been made a party to the lawsuit. A business entity exists as a separate legal entity and is not automatically a party to a lawsuit when its two owners are parties to that lawsuit. The business must be specifically named as a party. Just because the parties had not, up to that point, observed the formalities of running an LLC does not forever bar a future insistence that obedience to the governing documents of the entity are required. However, the second order, entered after the LLC had been made a party to the lawsuit, reaffirmed the entry of the order appointing a receiver of its assets.

DISTRICT COURT ABUSED ITS DISCRETION BY ISSUING TEMPORARY ORDERS THAT CHILDREN'S NAMES BE PERMANENTLY CHANGED BY ADDING THEIR FATHER'S SURNAME

¶12-4-18. ***In re Pacharzina,*** No. 03-12-00353-CV, 2012 WL 2161005 (Tex. App.—Austin 2012, orig. proceeding) (mem. op.) (06/14/12).

Facts: Father filed a motion to modify the district court's prior orders regarding custody of his two children. At the hearing, Father presented evidence regarding Mother's substance-abuse problems. District court issued temporary orders modifying various aspects of conservatorship, finding that the children's circumstances had materially and substantially changed. District court also appointed Father temporary SMC with right to designate primary resident, appointed Mother and her partner temporary possessory conservators, and ordered that each child's name be changed on a permanent basis by adding Father's surname. Mother and her partner filed a mandamus asserting that the temporary ordered improperly determined conservatorship matters that are reserved to a jury, including permanently changing the children's names.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: A district court does not have the authority to issue a temporary order that effects a permanent name change. *See* Tex. Fam. Code Ann. §§ 105.001, 105.006.

HUSBAND COULD NOT BE IMPRISONED FOR CONTEMPT FOR FAILURE TO PAY A DEBT

¶12-4-19. ***In re Davis,*** -- S.W.3d --, 2012 WL 2160437 (Tex. App.—Texarkana 2012, no pet. h.) (06/15/12).

Facts: During a bitterly contested divorce proceeding, the court ordered Husband to pay debts owed by the community estate that were necessary to protect community assets. Husband did not pay these debts. Trial court held him in contempt and ordered him confined to jail for failing to obey the court's order, but suspended confinement on the condition that Husband make the payments as ordered. Husband again failed to pay. Trial court then withdrew its suspension of the prior contempt order and issued a new order based on the prior order. This second order directed Husband to be confined for 72 hours and remain imprisoned until he purged himself of the contempt by paying the debts he was ordered to pay. Husband filed a writ of habeas corpus, seeking to be discharged from what he claims is an illegal confinement. Husband attached three affidavits swearing to his inability to get loans from his usual sources in order to pay the ordered sums. Husband argues that the order should be void because the underlying order was so ambiguous as to be unenforceable, and that his failure to pay was due to his inability to pay and not due to a contumacious refusal to obey the orders of the court.

Holding: Petition for Writ of Habeas Corpus Granted

Opinion: A writ of habeas corpus will issue if a trial court's contempt order is beyond the court's power or the court did not afford the relator due process of law. For a person to be held in contempt for disobeying a court decree, the decree must provide details of compliance in clear, specific and unambiguous terms. Here, the underlying order contained handwritten revisions, unexplained notations and incomplete sentences. However, the order itself was void because it ordered Husband's confinement solely on the basis of an unpaid debt that was not a failure to perform a legal duty. The order directed Husband to be incarcerated until he paid an additional attorney's fee that he was not previously ordered to be paid. The Texas Constitution prohibits confinement for debt, except where the nonpayment is treated as a failure to perform a legal duty, such as the payment of child support. An order to utilize community funds to preserve community assets pending divorce is not purely a debt-related situation, but an order to remain imprisoned until an attorney's fee, unconnected to any precedent order to pay that was not obeyed, is paid will not support an order of civil contempt.

EVIDENCE OF DAUGHTER'S EMOTIONAL DISTRESS RESULTING FROM BEING DENIED VISITATION WITH HER FATHER WAS NOT SUFFICIENT TO SHOW THAT HER PHYSICAL HEALTH OR EMOTIONAL WELLBEING WERE IMPAIRED BY HER PRESENT CIRCUMSTANCES, AND THEREFORE TRIAL COURT COULD NOT MODIFY TEMPORARY ORDERS TO CHANGE WHO HAD THE EXCLUSIVE RIGHT TO DESIGNATE DAUGHTER'S PRIMARY RESIDENCE

¶12-4-20. ***In re Clayborn,*** No. 02-12-00299-CV, 2012 WL 3631243 (Tex. App.—Fort Worth 2012, orig. proceeding) (mem. op.) (08/24/12).

Facts: Mother and Father had three Children. When their Daughter was four years old, Father discovered he was not Daughter's biological father. The final divorce decree awarded possessory conservatorship and standard visitation of Daughter to Father. Mother and Biological Father were appointed JMCs and Mother was given exclusive right to designate Daughter's primary residence. Biological Father filed a petition to modify the divorce decree by terminating Father's visitation with and possessory conservatorship of Daughter. Father

filed a motion for temporary orders seeking exclusive right to designate Daughter's primary residence, alleging that Mother and Biological Father were denying his visitation with Daughter. Trial court appointed Father temporary SMC and gave him exclusive right to designate Daughter's primary residence. Mother and Biological Father filed a petition for writ of mandamus.

Holding: Petition For Writ Of Mandamus Granted

Opinion: Tex. Fam. Code Ann. § 156.006 provides that while a suit is pending, a court may not issue temporary orders changing who has the exclusive right to designate a child's primary residence unless the order is in the child's best interest, and one of three conditions is met:

> (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;
> (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or
> (3) the child is 12 years of age or older and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child.

Here, the only applicable exception would be the first of the three. Father attached to his motion a social study that had been completed three years prior by a counselor. The study said that Daughter considered Father "as her real father" and did not feel this way about Biological Father. Further, Daughter was "sad and pouting" because she could not play with her brothers at Mother's house. Father testified that he did not think Daughter was receiving proper counseling to help her through this process. Another counselor testified that he believed Mother was creating confusion for Daughter regarding who Daughter's real father was, and that this could cause emotional problems for Daughter later in life. However, the evidence did not support the assertion that Daughter's present circumstances significantly impaired her physical health or emotional wellbeing. Father presented evidence of Daughter's emotional distress, but that did not satisfy the statutory burden. Because Father's evidence was not sufficient to trigger a statutory exception under Tex. Fam. Code Ann. § 156.006, trial court erred in granting Father the exclusive right to designate Daughter's primary residence.

Editor's Comment: *Significant impairment of a child's physical health or emotional development means more than the ordinary emotional distress a daughter would have when a mother tells her she has two fathers. C.N.*

SAPCR
CONSERVATORSHIP

STEPFATHER HAD STANDING TO FILE SUIT SEEKING CONSERVATORSHIP OF CHILDREN SINCE HE LIVED WITH CHILDREN FOR THREE YEARS; CONSERVATORSHIP PROCEEDING DID NOT QUALIFY AS A "FOSTER CARE PLACEMENT" UNDER THE INDIAN CHILD WELFARE ACT SINCE STEPFATHER WAS NOT MERELY SEEKING TEMPORARY PLACEMENT OF CHILDREN IN HIS HOME

¶12-4-21. ***In re E.G.L.,*** -- S.W.3d --, 2012 WL 3555308 (Tex. App.—Dallas 2012, no pet. h.) (08/20/12).

Facts: Mother and Father had one Child. After Mother and Father's relationship ended, Mother moved in *with* Stepfather, and they had one Child. Mother and Stepfather separated, and Stepfather filed suit seeking adjudication of the parentage of the two children, as well as seeking appointment as both children's SMC. Mother initially contested Stepfather's petition seeking conservatorship, but they agreed to become "co-parents" of the children. Father contested the petition and asked for a jury trial. Mother and Stepfather agreed to be JMCs of both children and agreed that Stepfather would have the exclusive right to designate the primary residence of both children. The only issue submitted to the jury was whether Stepfather or Father should

have exclusive right to designate the primary residence of the Child of Mother and Father. The jury found in Stepfather's favor, and the trial court entered an order appointing Mother and Stepfather JMCs of both Children and gave Stepfather the exclusive right to designate the primary residence of the Children. Father appealed.

Holding: Affirmed

Opinion: The Indian Child Welfare Act was passed to address issues arising from separating Indian children from their families and tribes through adoption or foster care placement. The ICWA applies to child custody proceedings, including foster care placement. Foster care placement is defined as (1) the removal of an Indian child from the child's parent or Indian custodian, (2) temporarily placing the child in a foster home or institution or the home of a guardian or conservator, where (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated.

Father argued that the ICWA applied to these proceedings because they were child custody proceedings. But he did not show that the proceeding satisfied the four prongs of "foster care placement" under the statute. Specifically, he did not show how appointing Stepfather as SMC of the first Child satisfied the second prong of "temporary placement in a foster home or institution or the home of a guardian or conservator." Stepfather's petition did not seek temporary placement of the Child, but rather sought to have Stepfather named SMC of the child.

Additionally, Father argued that Stepfather did not have standing to file suit seeking conservatorship. A person who has had actual care, control, and possession of the child for at least six months, ending not more than 90 days preceding the date of the filing of the petition, may file a suit seeking conservatorship. Stepfather testified that he and Mother lived with the Children for approximately three years, until Mother left with the Children. Stepfather filed his suit only a month after Mother and the Children left the home.

Finally, Father argued that his constitutional rights were violated by removing the children from his legal and physical custody, which violated his right to raise his Children without interference. Although Father did not properly preserve this argument, trial court review the evidence and found that appointing Father possessory conservator instead of managing conservator was in the best interest of the Children. Father had little relationship to the first Child for many years and did not exercise his rights to visitation. Trial court additionally found that Father had an abusive history toward Mother, including threats to kill her, and had threatened Stepfather that he would "never, ever stop litigation in this case."

IN CHOSING FATHER AS PRIMARY CONSERVATOR, JURY WAS ENTITLED TO DISREGARD MOTHER'S TESTIMONY REGARDING HER VERSION OF EVENTS LEADING TO HER DIVORCE, INCLUDING MOTHER'S LIE THAT HER RELATIONSHIP WITH HER BOSS WAS MERELY PLATONIC

¶12-4-22. ***Halleman v. Halleman,*** -- S.W.3d --, 2012 WL 3600001 (Tex. App.—Fort Worth 2012, no pet. h.) (08/23/12).

Facts: Father and Mother had one Child together. For most of their marriage, they worked for the same employer. Father and Mother each have different accounts of the events that led to the dissolution of their marriage. Mother said that shortly after Child was born, Father started spending a great deal of time away from home, Father and Mother's sexual relationship deteriorated, and they did not carpool to work very often. Father disagreed and said that their sexual relationship remained unchanged after Child's birth, that he did not spend as much time away from home as Mother alleged, and that Mother never recommended they attend counseling nor told Father that she had seen a marriage counselor. Father noticed that Mother was spending more time with her boss and became suspicious that something was going on between Mother and her boss. Father discovered emails on Mother's computer between Mother and her boss that led him to believe Mother was having an affair. Mother denied having an affair and refused to stop traveling with her boss for work. Father claimed that Mother's communication with Father slowed after that and she attempted to isolate Father from Child. Mother filed for divorce and requested the exclusive right to designate Child's primary residence.

Father filed a counterpetition for divorce and also requested that he have the exclusive right to designate Child's primary residence. Trial court issued temporary orders naming Father primary conservator and gave Mother standard possession. A jury trial chose Father as the person with the right to designate Child's primary residence.

Holding: Affirmed

Opinion: Mother argued that the jury's verdict awarded Father primary conservatorship was unreasonable because the jury had to disregard her testimony and all evidence from "objective, impartial third parties." Although Mother testified that she did not begin having a physical relationship with her boss until after she filed for divorce, she admitted that she lied at the temporary orders hearing when she said her relationship with her boss was purely professional. Further, the emails between Mother and her boss indicated that their relationship was not platonic. Mother testified that Father had physically abused her after he discovered the emails, but she did not call the police or file a protective order. Mother accused Father of smoking marijuana throughout their marriage and presented pictures allegedly of Father's marijuana, but the contents of the pictures were not easily identifiable. Mother alleged that Father only attended a few of her doctor's appointments during her high-risk pregnancy and that Father left the hospital after Child was born to go to a friend's house. Mother also said that when Father had possession of Child, Child would return smelling unclean and in the same clothes she had been dropped off in. Father disputed that he went to a friend's house immediately after Child's birth and that Child was not adequately cared for in his possession. A psychologist testified that Child was better with Mother because Mother's social skills were "smoother and more facile." However, the psychologist did not interview Child as required under Tex. Fam. Code Ann. § 107.0514, nor did he interview any of the people Father identified for him. A daycare teacher alleged that Father brought Child to daycare late often and that Child was Mother's number one priority, but Father said that the daycare staff ignored his requests to stop Mother from taking Child out for lunch during Father's possession periods and he thought the staff may have lied to him on occasion. COA reviewed this evidence and determined that the jury was entitled to disregard her testimony and that its verdict was reasonable.

Mother alleged the property division was unfair because Father was awarded 100% of the community funds in his 401(k), and Mother felt the trial court "punished" her by means of the division. A trial court has broad discretion in dividing a community estate, and circumstantial evidence may be used to establish any material fact, including adultery. Trial court reasonably could have inferred Mother committed adultery based on the evidence provided, and therefore was entitled to divide the community estate in the manner it did. Father was awarded all of the community estate in their residence but also the remaining $220,000 in debt remaining on the residence. Father was unemployed at the time of trial, whereas Mother was employed and had substantial financial assistance from her Mother.

Editor's Comment: *Social study evaluator's testimony that child was better with Mother because Mother's social skills were "smoother and more facile" won't cut it with a Denton County jury especially when the evaluator fails to interview the child as required under TFC 107.0514, and fails to interview any of the people identified by Father as collateral sources of information. Social study evaluators are appointed by a court to conduct an independent investigation into the circumstances of the child. Their opinions should be independent and based on data, not simply gut reactions to the parties' demeanor. C.N.*

SAPCR
GRANDPARENT POSSESSION AND ACCESS

GRANDMOTHER'S MERE OPINIONS THAT "SOMETHING WAS WRONG" WITH MOTHER WERE INSUFFICIENT TO SHOW THAT GRANDCHILDREN'S HEALTH OR WELL-BEING WOULD SUFFER WITHOUT GRANDPARENT ACCESS

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¶12-4-23. ***In re Johnson,*** No. 03-12-00427-CV, 2012 WL 2742122 (Tex. App.—Austin 2012, orig. proceeding) (mem. op.) (07/03/12).

Facts: Grandmother intervened in the underlying divorce between Mother and Father proceeding seeking grandparent possession or access. Trial court heard evidence and rendered a temporary order, granting Grandmother access to the Children. Mother filed a petition for writ of mandamus, saying trial court erred in granting Grandmother access without sufficient evidence to overcome the statutory presumption that parents act in the best interest of the child.

Holding: Petition For Writ of Mandamus Granted

Opinion: A trial court abuses its discretion is granting temporary access to grandchildren when a grandparent does not overcome the presumption contained in Tex. Fam. Code Ann. § 153.433 that a parent acts in his or her child's best interest. Here, Grandmother and a nurse who cared for Father testified. Grandmother said Mother had not allowed her to see the Children, that Grandmother believe something was "wrong" with Mother because "one minute she's okay and the next minute she just goes off," and Grandmother believed it was harmful to keep the children away from her. The nurse, who had only one interaction with the Children, said she believed that there was "something mentally wrong" with Mother. However, Grandmother's nonexpert opinions and assessments were not enough to overcome the statutory presumption. Further, the nurse's limited observations of the children were insufficient to overcome the presumption, and the nurse did not testify about the children's behavior or physical and emotional health. The testimony of Grandmother and the nurse taken together was insufficient to prove by a preponderance of the evidence that denying Grandmother access to the children would significantly impair the child's physical health or emotional well-being.

SAPCR
CHILD SUPPORT

BECAUSE FATHER PRESENTED NO EVIDENCE REGARDING HIS INCOME OR ASSETS, TRIAL COURT WAS ENTITLED TO PRESUME HE EARNED FEDERAL MINIMUM WAGE FOR PURPOSES OF CALCULATING CHILD SUPPORT PAYMENTS

¶12-4-24. ***Neal v. Neal,*** No. 12-11-00162-CV, 2012 WL 2126983 (Tex. App.—Tyler 2012, no pet. h.) (mem. op.) (06/13/12).

Facts: Mother and Father had one child before they divorced. When mother filed for divorce, she requested that she be appointed SMC, that Father be ordered to pay child support, and that Father be denied access to the child. Father was currently in prison serving a sentence for aggravated assault with a deadly weapon against Mother and would likely not be released until 2025. Mother believed it was in the child's best interest that the child not have access to Father if Father were released from prison. Trial court appointed Mother SMC with exclusive right to designate the primary residence of the child and ordered Father to have no visitation with or periods of access to the child, and to pay child support as well as retroactive child support based on the current federal minimum wage for a forty-hour week. Father appealed.

Holding: Affirmed

Opinion: In assessing child support, the trial court must calculate net resources for the purposes of determining child support liability. In the absence of evidence of the wage and salary income of a party, the court shall presume that the party has wages or salary equal to the federal minimum wage for a forty-hour week. Here, the record was devoid of evidence concerning Father's past employment, wages, salary, income, or financial resources. Because Father presented no evidence on the value of his net resources and his alleged inability to

earn any income while incarcerated, trial court was authorized to presume he earned minimum wage and that he earned that wage from the time he and Mother separated.

TRIAL COURT COULD NOT ORDER FATHER TO PAY CHILD SUPPORT WITHOUT ANY EVIDENCE OF HIS WAGES, SALARY OR INCOME

¶12-4-25. ***Marquez v. Moncada,*** -- S.W.3d --, 2012 WL 2924544 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (07/12/12).

Facts: Father and Mother had two children before they ended their relationship. Three years later, OAG petitioned to confirm a CSRO establish Father's paternity and child support obligations. The CSRO included a finding regarding Father's net resources per month. OAG attached an investigative report listing Father's net resources per month as the same amount listed in the CSRO. The report was not authenticated or admitted into evidence and gave no basis for how Father's net resources were computed. At the hearing, Mother introduced paternity tests proving Father was the biological father of both children. She testified Father had not paid child support for either child, but also said she did not know how much Father earned, had never seen his paystubs, and had no knowledge of his present lifestyle. Neither Mother nor OAG introduced documents regarding Father's income, salary or wages. Trial court confirmed the CSRO and found that Father's net resources were as stated in the CSRO. Trial court ordered Father to pay 25% of his net resources per month in child support and also ordered retroactive child support. Father appealed, saying the record contained no evidence of his monthly net resources.

Holding: Reversed and Remanded
Opinion: Tex. Fam. Code Ann. § 154.062(a) says a trial court "shall calculate net resources for the purpose of determining child support liability." Net resources include all wages and income actually received. In the absence of evidence of any income, a court presumes the party has wages equal to the federal minimum wage for a 40-hour week.

Here, there was no evidence concerning Father's employment, wages, salary or income. Mother even testified that she did not know how much Father earned or where he was employed. OAG said that its counsel's unsworn assertions regarding Father's net resources at the hearing should be considered testimony. However, the statements were not factual assertions about which counsel had personal knowledge and so could not be considered testimony. Because it was undisputed that Father owed some amount of child support, further proceedings were needed to determine Father's net resources and his monthly obligation.

SAPCR
CHILD SUPPORT ENFORCEMENT

PETITIONER WAS ENTITLED TO A JURY TRIAL WHERE PUNISHMENT FOR CIMINAL CONTEMPT WAS MORE THAN 180 DAYS AND WAS NOT REQUIRED TO PAY AN AMOUNT MORE THAN HE WAS HELD IN CIVIL CONTEMPT FOR IN ORDER TO PURGE HIMSELF OF THE CONTEMPT

¶12-4-26. ***In re Newby,*** -- S.W.3d --, 2012 WL 2018526 (Tex. App.—Fort Worth 2012, orig. proceeding) (06/06/12).

Facts: In the underlying divorce enforcement suit, Mother filed two motions for contempt and enforcement, one relating to unpaid child support and health care insurance reimbursements, and the other relating to violations of a protective order. Mother alleged sixteen counts of failure to pay child support and health care premium reimbursements and asked the trial court to hold Father in both civil and criminal contempt for 180

days for each of his violations. The trial court found Father guilty of missing 16 child support payments, 16 health care expense reimbursement payments, and guilty of 50 violations of the protective order. The trial court sentenced relator to 24 months' confinement as criminal contempt, and ordered him to remain incarcerated until he purged himself of civil contempt by paying all past due child support and health care expenses, as well as Mother's attorney's fees. Father filed a petition for writ of habeas corpus challenging the contempt order.

Holding: Affirmed In Part, Reversed and Remanded In Part

Opinion: A person being held in contempt has a right to trial by jury in contempt proceedings if the punishment assessed is "serious." Punishment beyond 180 days for criminal contempt is considered serious and cannot be implemented unless there was a jury trial or waiver. Such person is also entitled to a jury trial if the aggregated sentences run consecutively, resulting in punishment exceeding six months. Here, the record did not show that Father waived his right to trial by jury. Further, trial court did not inform Father of his right to a trial by jury until midway through the hearing, after Mother had presented evidence and just before Father was to testify. Father only waived his right to testify, not his right to a jury trial. Therefore, the sentence of greater than six months' confinement violated Father's right to a jury trial.

Additionally, trial court erred in ordering Father to pay an amount more than that for which he was held in contempt. Trial court found Father not guilty for failing to pay 3 months' of child support and health care reimbursement, but included amounts for those months in the total amount required to purge relator of his contempt. Further, trial court ordered Father to pay attorney's fees in an amount different that the amount to which the attorney testified his costs and expenses to be. Accordingly, trial court's order holding relator in civil contempt was modified to reflect the amount for which he was actually in contempt, and the order holding Father in criminal contempt was void.

INMATE'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN TRIAL COURT DENIED HIS REQUEST FOR TELEPHONE HEARING REGARDING AN ORDER TO SURRENDER HIS INMATE TRUST ACCOUNT TO PAY PAST-DUE CHILD SUPPORT PAYMENTS; INMATE SUBMITTED AN ANSWER AND A BRIEF WHICH WERE CONSIDERED BY THE COURT

¶12-4-27. ***In re D.L.D.,*** -- S.W.3d --, 2012 WL 2126816 (Tex. App.—San Antonio 2012, no pet. h.) (06/13/12).

Facts: Father, an inmate, was ordered to pay retroactive child support. Mother did not seek current child support. OAG issued a notice of lien, a copy of which was sent to Father, stating that Father owed $1270.15 in child support arrearages. Almost a year later, OAG moved to foreclose on the child support lien, and argued that Father had non-exempt personal property in his possession in the form of his inmate trust account. OAG requested trial court to order Father to surrender the assets in the trust. Father filed a letter brief, arguing he did not receive due process and should not be deprived of his interest in the trust without a hearing. Father requested a telephone hearing, which was denied. Trial court held a hearing on OAG's motion. Father was not present but had been provided notice of the hearing. Trial court signed an order foreclosing the lien and noting that Father had filed an answer and letter brief, which were considered by the court. Trial court ordered the liquidation and surrender of the assets in Father's inmate trust account. Father appealed.

Holding: Affirmed

Opinion: An inmate does not have an absolute right to be present in a civil action, but should be allowed to proceed by deposition, affidavit, or other means, if a court determines that a pro se inmate is not entitled to appear personally or by telephone. Here, although Father was not present, the court received and considered his answer and brief, therefore allowing him the opportunity to be heard by other means.

In determining whether procedural due process has been violated, the court uses a three-part balancing test that considers the private interest that will be affected by the official action, the risk of erroneous depriva-

tion of private interest through the procedures used, and the government's interest in the procedures used. Father had a property interest in his inmate trust account, satisfying the first element, but OAG followed all TFC procedures for foreclosing the lien in support of the government's interest in enforcing child support payments. COA noted that OAG even chose a more burdensome procedure for foreclosing the lien to ensure that Father was not erroneously deprived of his private interest in his trust account.

Finally, OAG has the right to collect child support arrearages even when Mother never requested child support. The Social Security Act requires a state to provide services relating to the enforcement of child support obligations for a child who receives government assistance payments, including medical assistance and for a child whose guardian requests the service. TFC authorizes OAG to collect and distribute child support payments and to enforcement child support orders. TFC also authorizes an enforcement action to reduce unpaid child support to judgment. Therefore OAG was entitled to an assignment of child support rights even though Mother had never requested child support.

Editor's comment: *The opinion states that the Social Security Act requires a state to provide services relating to child support of obligations* ***for a child who received government assistance payments, including medical assistance for a child whose guardian requests the service.*** *The facts as set forth in the opinion do not include such a request for government assistance from the mother. Therefore, it appears on the face of the opinion that there was no basis for the OAG to insinuate itself into this matter, especially since the mother did not appear to be seeking any current support. G.L.S.*

FATHER OBLIGATED TO PAY MEDICAL EXPENSES FOR CHILDREN WITHIN FIVE DAYS OF RECEIPT EVEN THOUGH HE DID NOT RECEIVE ALL OF THE BILLS UNTIL SUIT FILED

¶12-4-28. ***Morales v. Rice,*** -- S.W.3d --, 2012 WL 2499004 (Tex. App.—El Paso 2012, no pet. h.) (06/29/12).

Facts: Father and Mother divorced. The decree ordered Father to provide medical and dental insurance for the Children and to pay half of such expenses not paid by insurance. Mother had sole decision-making authority over medical care for the Children and was required to provide Father with copies of bills not covered by insurance. The decree specified that charges were presumed reasonable on presentation of the bill to Father. Trial court awarded Mother money for unpaid medical expenses. Father both appealed.

Holding: Affirmed In Part, Reversed In Part

Opinion: Father argued that Mother did not send him copies of the medical and dental bills within five days of receiving them, as required by the divorce decree. Mother testified that she did not have the correct address for Father, that certified mail sent to him was returned to her on one occasion, and that on another occasion Father signed for the mail but ignored it. Mother requested assistance from the AG's office and checked with the court clerk for a current address. Further, the decree did not specify that Mother had to send bills to Father within five days of receiving them, but did obligate Father to pay bills with five days of receiving them. Finally, the decree stated that chargers were presumed reasonable upon presentation of the bill to Father. Father did not rebut the presumption that the charges were reasonable.

Editor's Comment: *This case is illustrative of the ambiguity of some decrees regarding medical and dental bills – when they must be submitted and when they must be paid. It is not that unusual for one parent to pull out years of unpaid medical bills when a dispute arises. I frequently use language that the party submitting medical expenses must submit them to the other party within 30 days of each calendar month and if not submitted timely, the claim for reimbursement is waived. J.A.V.*

FATHER EFFECTIVELY CONSENTED TO CHILD'S PLACEMENT IN MENTAL HEALTH PROGRAMS BECAUSE HE WAS INFORMED OF THE PLACEMENTS, NEVER OBJECTED,

AND PARTICIPATED IN CHILD'S THERAPY SESSIONS; BECAUSE HE CONSENTED, HE WAS LIABLE FOR HALF THE EXPENSES INCURRED, PER HIS DIVORCE DECREE

¶12-4-29. ***Loras v. Mitchell,*** No. 03-11-00028-CV, 2012 WL 2979057 (Tex. App.—Austin 2012, no pet. h.) (mem. op.) (07/12/12).

Facts: Husband and Wife divorced. Their initial divorce decree required each party to pay half of the expenses for the Child's psychiatric and psychological treatment for three months after the divorce. After that, each parent would pay for all treatments authorized by that parent. They later modified the provisions to stipulate that both parents would attempt to use "preferred providers" according to their insurance plan, except in emergencies, and that each party would pay half of the reasonable and necessary expenses for Child's health care. The Child began exhibiting violent and destructive behavior and asked Mother for help. Mother informed Father, who said Child needed to leave Mother's home "ASAP." Mother enrolled Child in a nine-week outdoor therapeutic camp. Father participated in the Child's therapy sessions, both in person and over the phone. After Child completed the program, his therapist told Mother that Child should be enrolled in a residential treatment facility. Mother informed Father, who was invited to visit treatment centers with Mother. Father never responded to the request that he visit facilities. Mother enrolled Child in a residential treatment facility and, for the next year, Father again participated in Child's therapy sessions in person and over the phone. Father repeatedly encouraged Child not to withdraw from the program. Mother submitted invoices to Father for the two programs, but Father never paid. Mother sued Father for the costs, and trial court ordered Father to pay Mother for the health-care expenses, child-support arrearages, and attorney's fees. Father appealed.

Holding: Affirmed

Opinion: Father contended that the expenses incurred at the residential treatment facility were not health-care expenses because the invoice referred to "tuition" and did not include itemized medical care expenses. Further, Father argued that he should not be liable for the expenses because they were incurred without his consent.

Prior Texas cases show that expenses for residential treatment centers are health-care expenses. The record revealed several instances that demonstrated Child needed intensive therapy. Child had been diagnosed with intermittent rage disorder, severe depression, and attention-deficit hyperactivity disorder. He had been violent toward his Stepfather, Mother and Grandmother. Mother informed Father that Child reached out to her for help, and Stepfather told Father that he would be informed about where Child would be placed. Father never responded, and once informed did not object to Child's placement. Father participated in Child's therapy sessions and did not seek to withdraw Child from either program. Mother invited Father to participate in selecting Child's second placement, but Father never responded. Therefore, the expenses incurred were health-care related expenses, and Father effectively consented to Child's treatment by not objecting to any of the placements and by participating in Child's therapy sessions.

MOTHER NOT ENTITLED TO SUMMARY JUDGMENT BY CLAIMING FATHER FAILED TO TIMELY SET A HEARING ON A MOTION TO STAY, BECAUSE IT WAS TRIAL COURT'S DUTY TO SET A HEARING DATE; A 1970 CONTEMPT ORDER SPECIFYING THE AMOUNT OF CHILD SUPPORT FATHER OWED RENDERED THE ISSUE RES JUDICATA, SO MOTHER COULD NOT CLAIM THIRTY YEARS LATER FATHER OWED A HIGHER AMOUNT

¶12-4-30. ***In re D.W.G.,*** -- S.W.3d --, 2012 WL 3711337 (Tex. App.—San Antonio 2012, no pet. h.) (08/29/12).

Facts: Mother and Father divorced in 1958. Father was ordered to pay $15 per week in child support. Father failed to make the payments, and Mother initiated a contempt action against him. Father was found guilty of contempt for failing to pay child support and was found in arrears in the amount of $1500. The contempt or-

der was signed in 1970. Father's obligation to pay child support ended in 1975, when the couple's Child turned eighteen years old. In 2009, Mother filed an application for a judicial writ of withholding, alleging Father owed approximately $129,000 in past due child support, which she later amended to state that Father owned approximately $171,000. Father filed a motion to stay issuance and delivery, and Wife asked for affirmative relief of a determination of arrearages. Father pleaded several defenses, moved to dismiss Mother's request for affirmative relief, and moved for partial summary judgment claiming the contempt order was res judicata as to arrearages claimed by Mother. Mother filed three motions for summary judgment, stating Father failed to secure a hearing on his motion to stay within the statutory time period, that there were no issues of material fact regarding Father's defenses, and that she was entitled to judgment for $171,000 in child support arrearages. Trial court denied Father's motion to dismiss, granted all of mother's summary judgment motions, granted Mother a determination of arrearages totaling approximately $171,000 and awarded Mother approximately $50,000 in attorney's fees. Father appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code Ann. § 158.309 imposes a duty on the trial court to set a hearing on a motion to stay. Father timely filed his motion to stay, and therefore it was the trial court's responsibility to set a date for a hearing. Trial court should not have granted Mother's summary judgment motion in which she alleged that Father failed to secure a hearing on his motion, because it was not Father's duty to set the hearing date. Further, Father submitted evidence that he made all the payments required in the 1970 contempt order though his attorney's office or directly to Mother, and that he gave Mother cash and a valuable necklace in settlement of his child support arrears. This evidence created a fact issue as to the existence or amount of arrearages, and therefore Mother's motion for summary judgment should not have been granted. Additionally, the 1970 contempt order determined the amount of arrearages Father owed. Because the trial court addressed the child support payments owed to Mother in the contempt order, the issue was res judicata, and Mother's motion for summary judgment on this issue should not have been granted.

Editor's Comment: *Texas Family Code Section 158.309 does say that "the court shall set a hearing on the motion." From this language and citing one of its prior opinions, the San Antonio Court concluded that it is the trial court's job to set a hearing even if the obligor does not request one. The court has imposed another duty upon our overburdened trial courts. J.V.*

SAPCR
MODIFICATION

EVIDENCE SUPPORTED TRIAL COURT'S DECISION TO RESTRICT CHILD'S PRIMARY RESIDENCE SO THAT PARENTS WOULD CONTINUE TO HAVE EQUAL ACCESS AND POSSESSION; BUT TRIAL COURT CANNOT ORDER MEDIATION BEFORE ALLOWING PARTIES TO FILE FUTURE MOTIONS TO MODIFY CONSERVATORSHIP

¶12-4-31. ***In re K.L.D.,*** -- S.W.3d --, 2012 WL 2127464 (Tex. App.—Tyler 2012, no pet. h.) (06/13/12).

Facts: Mother and Father had one Child. The court named them JMCs and ordered standard possession. Mother was given the right to determine the primary residence of the child within Smith County and contiguous counties. Father was ordered to pay child support. Three years later, mother filed a motion to modify, requesting that the court lift the geographic restriction to allow her to move to Dallas to attend school and that the amount of monthly child support be increased. Father filed a counterpetition requesting the court modify terms and conditions for access to or possession of the child, appoint him as the person responsible for designating primary residence of the child, and ordering Mother to pay child support and provide health insurance for the Child. After the hearing, the court ordered that the parents would continue as JMCS with the primary

residence restricted to Smith County, specifically within the attendance zone of the elementary school. The court also ordered that possession be "2-2-5-5" so that neither parent would go more than five days without seeing the child. The court further ordered that neither parent pay child support, that Father arrange and pay for day care, that Mother provide health care coverage for the Child, that the parents only communicate through written notes, and that the parents mediate controversies before setting any hearing or initiating discovery in a suit for modification of the terms of the order. Mother appealed, contending the modifications were an abuse of discretion.

Holding: Affirmed as Modified

Opinion: A trial judge has no authority to order mediation as a precondition to file in the future a motion to modify conservatorship issues pertaining to a minor child. Therefore, trial court erred in ordering the parties to mediate before setting any hearings or discovery in a suit for modification of the terms of conservatorship, possession or support of the Child.

Editor's Comment: *The Tyler Court extended the First District's prohibition on requiring mediation before filing suit to prohibiting post-filing hearings and discovery prior to mediation. While correct, this holding undermines mediation as a tool to resolve bitter disputes in SAPCRs because the parties are free to litigate while the mediator is trying to pour oil on troubled waters. J.V.*

TRIAL COURT DOES NOT RETAIN JURISDICTION OVER MODIFICATION OF CHILD CUSTODY MERELY BECAUSE ONE PARENT STILL RESIDES IN TEXAS WHEN THE OTHER PARENT AND CHILDREN RESIDE IN ANOTHER STATE AND MAINTAIN NO SIGNIFICANT CONNECTION TO TEXAS

¶12-4-32. ***In re Isquierdo,*** -- S.W.3d --, 2012 WL 2455074 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (06/28/12).

Facts: In 2004, Mother filed for divorce. Trial court signed the final decree, named Mother SMC and Father possessory conservator. In 2011, Father filed a SAPCR regarding his visitation rights. Mother filed a special appearance, plea to the jurisdiction and motion to decline jurisdiction in favor of Arizona, because she and the Children resided in Arizona. Mother testified that she and the Children had lived in California for two years before moving to Arizona, where they had lived for four years. Mother testified that her Children had not been to Texas since 2008, had only visited on a few occasions, that they had no significant connection with Texas, and that "all evidence concerning what is in the best interest of the children" regarding visitation was in Arizona. Trial court denied Mother's special appearance, plea to the jurisdiction, and motion to decline jurisdiction, because Father still lived in Texas and trial court was the court of continuing exclusive jurisdiction. Mother filed petition for writ of mandamus.

Holding: Petition for Writ of Mandamus Granted

Opinion: Under Tex. Fam. Code Ann. § 152.202(a)(1) a state's jurisdiction over custody determination continues until "neither the child, nor the child and one parent, nor the child and a person acting as a parent, have a significant connection with this state." Here, Mother's uncontroverted testimony established that she and the children had lived in Arizona since 2007, and neither she nor her children had been present in Texas since 2005, except for a few visits with Father. After 2008, the children had no visitation with Father. There was no evidence that trial court could have used to find that the children maintained a "significant connection" to Texas. The mere fact that Father still lived in Texas did not give trial court continuing jurisdiction over the modification proceeding. Father argued that because trial court entered a child support modification order in July 2010, due to Father's $14,000 in unpaid child support, trial court retained exclusive continuing jurisdiction. But Father's failure to pay and stay current on his child support obligations did not provide any evidence that his children possessed a "significant connection" to Texas. The July 2010 proceeding was initiated by

OAG to collect delinquent child support and did not controvert Mother's testimony that neither she nor the child had any connection to Texas after 2008.

Editor's Comment: *Another reminder that if you are asking the court to modify your child support obligation, you must put on SPECIFIC evidence regarding your financial circumstances at BOTH the time of the prior order and for the current time. R.T.*

FATHER NOT ENTITLED TO MODIFICATION OF CHILD SUPPORT WHEN NO EVIDENCE OF PAST AND PRESENT INCOME WAS PROVIDED SO THAT COURT COULD COMPARE FATHER'S FINANCIAL CIRCUMSTANCES; FATHER ALSO OFFERED NO REASON SUMMER VISITATION SCHEDULE SHOULD CHANGE EVEN THOUGH CHILD HAD AGED FIVE YEARS

¶12-4-33. ***In re C.H.C.,*** -- S.W.3d --, 2012 WL 2878158 (Tex. App.—Dallas 2012, no pet. h.) (07/16/12).

Facts: In 2007, Mother filed a petition to modify a 2004 SAPCR order and motion for enforcement. Father also filed a petition to modify (to reduce child support and increase summer visitation) and motion for enforcement. At trial, Father argued his child support should be reduced because his income since the 2004 order had substantially decreased. Trial court determined a material and substantial change had occurred since 2004, reduced his monthly payment amount, and increased Father's summer visitation time with the Child. Mother appealed, saying the evidence was insufficient to support finding a material and substantial change in Father's income and Father's need for more time with the child.

Holding: Affirmed In Part, Reversed and Rendered In part

Opinion: A child support order may be modified in the circumstances of the child or a person affected by the order have materially and substantially changed since the date the order was rendered. The court must compare the financial circumstances of the affected party at the time the order was entered with the circumstances at the time of the proposed modification. Here, Father did not provide any evidence in 2004 of his income. At the modification hearing, he testified generally that in 2004 "business was good" and he was "making a good amount of money." Further, Father only provided general estimates of his income in 2008, when he sought modification of the child support order. Father offered into evidence an unsigned, unfiled copy of his 2007 tax return. Without more specific testimony from Father, the court could not make the requisite comparison of his financial circumstances between the time of the requested modification and the time of the original order.

Merely desiring to spend more time with a child is not a material and substantial change that will allow modification of possession rights. Here, Father, failed to provide any evidence that his ability to spend time with the Child during the summer had changed. Father did not argue that his desire to spend more time with the Child was based on the Child's ability to engage in more activities that they previously could not do together due to the Child's age. Therefore, trial court should not have modified the 2004 order to give Father more summer visitation with the Child.

SAPCR

TERMINATION OF PARENTAL RIGHTS

TERMINATION OF FATHER'S PARENTAL RIGHTS SUPPORTED BY EVIDENCE OF HIS FAILURE TO COMPLY WITH A COURT ORDER REQUIRING PARENTING CLASSES, DRUG AND ALCOHOL ASSESSMENT, AND ABSTENTION FROM CRIMINAL ACTIVITY; TRIAL COURT WAS ENTITLED TO CONSIDER FATHER'S CRIMINAL HISTORY AND SPORADIC VISITS TO AND SUPPORT OF THE CHILD

¶12-4-34. ***In re D.R.A.,*** -- S.W.3d --, 2012 WL 2312711 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (06/15/12).

Facts: TDFPS received allegations of neglectful supervision and physical neglect of two-year-old Child and her one-year-old Sister by their Mother, Grandmother, and maternal Aunt; the children had the same Mother but different Fathers. When TDFPS staff arrived at the home, the children were alone, and they were taken into custody on the ground that they were at risk of continued abuse and neglect. TDFPS filed a petition for protection, conservatorship, and termination of the parent-child relationship. Trial court entered an emergency protective order making TDFPS temporary SMC of both Children. The two-year-old Child was placed with her aunt. Two weeks later, trial court ordered Child's Father to comply with the terms of the family service plan, which Father had signed. A few months later, Father participated in a home burglary and was subsequently arrested and convicted. After being formally adjudicated as the two-year-old Child's Father, his parental rights were terminated, on the grounds that he failed to comply with the court-ordered family service plan and that the termination was in the Child's best interest. Father appealed, arguing that TDFPS did not prove Child was removed from the home for abuse or neglect, and that the evidence was insufficient to overcome the presumption that maintaining the parent-child relationship was in the Child's best interests.

Holding: Affirmed

Opinion: Tex. Fam. Code Ann. § 161.0001(1)(O) supports termination if the parent "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of TDFPS for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child." This subsection does not require that the parent who failed to comply with a court order be the same parent whose abuse or neglect of the child warranted the child's removal. The evidence supports that the Child was removed from Mother's home because of abuse or neglect. According to the family service plan, the Children were frequently alone both day and night. The Children wandered around the apartment complex without diapers and with dirty faces. A pest control company who entered the apartment found feces and open diapers lying on the floor, open lunch meat on the counter, and saw that the apartment was infested with rodents.

After the Child was in TDFPS care, Father brought her toys and clothes once, but provided no financial support to the Aunt who was caring for the Child. Father's visits to the Child were sporadic and interrupted by a significant amount of jail time. Father was unable to prove that he had attended Alcoholics Anonymous meetings or that he had a sponsor, in accordance with the family service plan. Father did not outline any specific plans for the Child's future other than an intention to be her conservator. At the time of the trial, he lived in a two-bedroom apartment with his mother but did not indicate how long he intended to live there. Father presented no excuses for his illegal conduct, which included two convictions for theft and two convictions for possession of marijuana, other than that he made a "choice of error" in committing the burglary. Although Father stated he did not "anticipate getting in any other legal trouble" and testified that was attempting to enroll in community college and was attending parenting classes, the evidence was sufficient to support trial court's conclusion that Father was an unfit parent and that the best interest of the Child would be served by terminating Father's parental rights.

FATHER DID NOT ESTABLISH THAT HIS TERMINATION PROCEEDING WOULD HAVE HAD A DIFFERENT RESULT IF HE TESTIFIED INSTEAD OF INVOKING HIS FIFTH AMENDMENT RIGHTS, SINCE HE PROVIDED NO INDICATION OF WHAT HIS TESTIMONY WOULD HAVE BEEN AND DID NOT OBJECT TO TRIAL COURT'S CONCLUSIONS OF LAW

¶12-4-35. ***In re A.B,*** -- S.W.3d --, 2012 WL 2344849 (Tex. App.—Fort Worth 2012, no pet. h.) (06/21/12).

Facts: TDFPS investigated Father and Mother concerning allegations of domestic violence, Father's prior child abuse conviction, and Mother's mental health. TDFPS filed a petition for protection, conservatorship, and termination in a SAPCR. Trial court appointed TDFPS as TMC, placed the two Children with their maternal Grandmother, and ordered Father and Mother to perform a service plan. During a scheduled visit, a TDFPS employee observed that Father had an erection while bouncing the ten-month-old Child on his lap. At a subsequent visit, another TDFPS employee reported that she thought Father had inappropriately touched the eight-year-old Child on her chest. The eight-year-old Child confirmed the inappropriate touching with the prosecutors. At the termination trial, Father was incarcerated pending trial for the offense of indecency with a child by contact. Trial court ordered a monitored return of the Children to Mother, who had performed her service plan, and severed TDFPS's suit against Mother from the suit against Father. Trial court explained to Father, regarding his Fifth Amendment privilege against self-incrimination, that "it's an all-or-nothing proposition. You either testify and answer all the questions or you invoke your Fifth Amendment privilege and answer no questions." Father said he did not want to testify. Trial court then terminated Father's parental rights. Father appealed, saying that trial court violated his due process rights by instructing him to either answer all the questions or invoke his Fifth Amendment rights and not testify at all, and that his trial counsel was ineffective for failing to object to trial court's inaccurate Fifth Amendment instruction.

Holding: Affirmed

Opinion: A party may invoke his Fifth Amendment privilege against self-incrimination in a civil proceeding if he reasonably fears that the answer sought might incriminate him, but the privilege must be asserted on a question-by-question basis. Blanket assertions of the privilege are impermissible outside of criminal proceedings. But Father never objected to or otherwise contested the inaccurate instruction, and therefore failed to preserve the issue for appeal.

To establish ineffective assistance of counsel, appellant must show that his counsel's representation fell below the standard of prevailing professional norms, and that there is reasonably probability that, but for counsel's deficiency, the result of the trial would have been different. Father filed a motion for new trial but did not raise ineffective assistance. Further, there is no record of a hearing where Father detailed what his testimony would be had he testified. Also, Father did not challenge trial court's conclusions that (1) he knowingly placed or knowingly allowed the Children to remain in conditions or surroundings that endangered their physical or emotional well-being, (2) he engaged in conduct, or knowingly placed the children with persons who engaged in conduct, that endangered the children's physical or emotional well-being, or (3) that he failed to comply with the provisions of a court order that specifically established the actions necessary to obtain the return of the children. Without an indication of what Father's testimony would have been, and since the trial court's conclusions of law were unchallenged, COA could not conclude there was a reasonable probability the result of the termination proceeding would have been different if Father had testified.

TERMINATION OF PARENT-CHILD RELATIONSHIP WAS NOT IN CHILD'S BEST INTEREST WHERE MOTHER SHOWED EVIDENCE OF REHABILITATION FROM DRUG PROBLEM, AND NON-PARENTS COULD NOT SHOW THAT MOTHER COULD NOT PROVIDE STABLE ENVIRONMENT FOR CHILD; NON-PARENTS COULD NOT TERMINATE PARENTAL RIGHTS JUST BECAUSE CHILD MIGHT BE BETTER OFF IN ANOTHER FAMILY

¶12-4-36. ***In re A.L.D.H.,*** -- S.W.3d --, 2012 WL 2377201 (Tex. App.—Amarillo 2012, no pet. h.) (06/25/12).

Facts: Mother had a Child. At the time of the Child's birth, the Child tested positive for drugs, and Mother admitted to using drugs during her pregnancy. Shortly after the birth, Mother left the hospital and travelled to Amarillo, where she continued to use drugs. When she returned to Lubbock, she was arrested. The hospital was unable to contact Mother during this time regarding the medical treatment of the Child, and they notified the Department of the Child's positive drug test. Mother agreed to temporarily place the Child with her relatives. However, her relatives divorced shortly thereafter, and the child was placed with the Sister of one of the

relatives; Mother agreed the placement would be temporary until she got out of jail and back on her feet. While Mother was incarcerated, the Sister and her Husband (the Family) filed a petition to terminate Mother's parental rights and adopt the Child. When the trial started, the Child had been living with the Family for nearly her entire life, approximately two years. The Child had bonded with the family, and Mother had only limited opportunities to visit the Child after Mother's release from prison. However, Mother presented detailed testimony and documentary evidence that she had attended treatment in prison, outpatient treatment after her release, and continued to attend AA and NA groups. Mother had tested negative for drugs since her release. She had also attended parenting classes and attempted to visit the Child, but the Family prevented visitation. The issue of whether Mother was aware of the Family's intention to adopt the child was contested, but trial court found that Mother had been adamant that she was not willing to agree to termination of her parent rights. Trial court concluded it was not in the Child's best interest to terminate the parental relationship. The Family filed a motion for new trial, which was overruled. The Family appealed.

Holding: Affirmed

Opinion: A trial court may only terminate the parental rights of a parent when it is shown by clear and convincing evidence that termination was in the best interest of the child. When reviewing a decision that termination was not in the best interest of the child, COA must review the evidence to determine if the evidence was of such a character that it had to produce in the mind of the lower court a firm belief or conviction that termination was in the best interest of the child.

Here, the record established that the Mother had a long history of drug abuse, and the Family provided a nurturing and loving home for the Child while the Family had custody. However, COA noted that the best interest of the child "is not a comparative contest in which a non-parent party can earn the right to terminate a parent's parental rights so the non-parent might adopt the child." Trial court determined that the Child was too young to voice an informed desire, there was no evidence that Mother could not meet the Child's emotional needs in the future, there was no evidence that Mother presented an emotional or physical danger to the Child, and both Mother and the Family had the ability to meet the parenting needs and provide a stable home for the Child. Further, the Family prevented visitation from the Mother, keeping Mother from being able to bond with the Child. The trial court is responsible for resolving conflicting testimony and passing upon the credibility of the witness. Because the evidence did not prove as a matter of law that termination of the parent-child relationship was in the best interest of the child. COA affirmed the trial court's judgment denying termination of the parent-child relationship.

BECAUSE FORMER TEX. FAM. CODE ANN. § 263.405(i) WAS UNCONSTITUTIONAL, FATHER HAD A RIGHT TO APPEAL TRIAL COURT'S DENIAL OF HIS MOTION TO EXTEND DISMISSAL DEADLINE

¶12-4-37. ***In re A.J.M.***, -- S.W.3d --, 2012 WL 2877457 (Tex. App.—Fort Worth 2012, no pet. h.) (07/16/12).

Facts: Trial court terminated Father's parental rights to his two Children while Father was incarcerated. Father filed a motion to extend the dismissal deadline, saying he might be released soon after that date and therefore needed the time to fulfill the terms of his service plan and try to get his daughters back. Trial court dismissed his motion to extend. Father appealed, saying trial court should not have denied his motion, and the evidence did not support trial court's termination findings.

Holding: Affirmed

Majority Opinion (C.J. Livingston): A decision to grant or deny an extension of a dismissal date is reviewed for abuse of discretion. The focus is on the needs of the child, whether extraordinary circumstances necessitate the child remaining in the temporary custody of the Department, and whether continuing such is in the best interest of the child.

On COA's first hearing of this appeal, COA held that pursuant to Tex. Fam. Code Ann. § 263.405(i), Father had forfeited the issue of whether trial court erred in denying his motion to extend the dismissal date because Father had not included the issue in his statement of points. However, COA has since held that Tex. Fam. Code Ann. § 263.405(i) is unconstitutional, and therefore COA noted that Father did in fact preserve the issue for appeal. Father requested the extension within the 180-day permissible extension timeframe from the anniversary of the temporary order appointing the Department as managing conservator. Father argued that since he was still incarcerated at that time, he needed an extension so that he could comply with his service plan and attempt to get his Children back. However, the Children's ad litem attorney argued that an extension would be against the Children's best interests for their long-term emotional and developmental needs. Further, the statute's clear preference is to complete the process within the one-year period, and the statute's language is mandatory for dismissal within that time period, unless the court has commenced a trial on the merits or granted an extension.

Additionally, a court may properly consider a party's incarceration on the issue of endangerment when incarceration affects the parent's ability to care for the child, to provide safe living conditions, or to ensure the child's safety and well-being. A parent's mental state may also be considered. The Department offered multiple reports of allegations that Father had abused the Children physically and sexually. The Children went to live with Mother when Father was incarcerated, and Mother neglected the Children. When Mother was incarcerated, the Children lived with their Grandmother, who allowed the Children to wear dirty clothes and run up and down the nearby highway embankment. The Children's social worker explained that Father had engaged in conduct and knowingly placed the Children with persons engaged in conduct that endangered the Children's physical or emotional well-being because he chose to break the law and risk incarceration, and left the children with an inappropriate caregiver. Father's probation officer reported that Father did not seem capable of learning from past mistakes. The Children's caseworker said Father did not understand the neglect that triggered the removal of the Children, and did not understand the Children's emotional and psychological issues stemming from years of neglect and abuse.

Concurring Opinion: Tex. Fam. Code Ann. § 263.405(i) was void only as to the appellant in the case that declared the statute unconstitutional. It is not unconstitutional when it operates to bar COA from considering points that were not properly preserved in trial court. Therefore, COA could reach the merits of Father's issues on appeal.

Concurring and Dissenting Opinion: The Texas Supreme Court has rejected the case the majority cites that finds Tex. Fam. Code Ann. § 263.405(i) unconstitutional, and therefore COA should be bound to do the same. COA should hold that Father forfeited the issue of whether trial court erred in denying his motion to extend the dismissal date because Father had not included the issue in his statement of points.

MOTHER'S PARENTAL RIGHTS COULD NOT BE TERMINATED BASED SOLELY ON TESTIMONY AND AFFIDAVITS DESCRIBING A VOLATILE HOME ENVIRONMENT, WHERE PARENTS OCCASIONALLY USED DRUGS AND ABUSED EACH OTHER; RECORD DID NOT ESTABLISH THAT CHILD WAS ACTUALLY THE VICTIM OF ABUSE OR NEGLECT

¶12-4-39. ***In re C.B.,*** -- S.W.3d --, 07-12-00065, 2012 WL 3104825 (Tex. App.—Amarillo 2012, no pet. h.) (07/27/12).

Facts: The Department removed Child from Mother and filed a petition to terminate Mother's parental rights. Trial court issued a temporary order based on the Department's petition and affidavit. Trial court concluded there was sufficient evidence that, pursuant to Tex. Fam. Code Ann. § 262.201(b) the Child's health and safety were in danger if the Child were to remain with Mother, the Child needed to be immediately removed from the home despite reasonable efforts to keep the Child in the home, and there was a substantial risk of continuing danger to the Child if the Child were returned to the home. A year later, after the family service plan had been reviewed four times, trial court conducted the termination hearing. At the hearing, the conservatorship Worker who had been assigned to the case after the Department filed its termination petition testified. The

Worker testified that the Child was removed because Mother was in an abusive relationship and used methamphetamine. However, the Worker could not recall whether a specific incident brought a report to the Department. Trial court judicially noticed its temporary order and three drug tests from Mother in the four months before the order; the first drug test was positive for methamphetamine, but the other two were negative. Trial court terminated Mother's parental rights under Tex. Fam. Code Ann. § 161.001(1)(O) and named the Department permanent managing conservator of the Child. Mother appealed, claiming the evidence was factually and legally insufficient to support the termination order.

Holding: Affirmed In Part, Reversed and Rendered In Part

Opinion: To support termination under Tex. Fam. Code Ann. § 161.001(1)(O), the Department must prove that the parent failed to comply with provisions of a court order that specifies the necessary actions for return of a child and that the child was removed from the parent because of abuse or neglect. Whether the child was removed because of abuse or neglect is determined on a case-by-case basis, but abuse can include the parent's use of a controlled substance to an extent that results in physical, mental, or emotional injury to a child. Here, there was little evidence regarding the Child's physical, mental or emotional condition. Neglect can include "placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and results in bodily injury or a substantial risk of immediate harm to the child." Mother's continued involvement in an allegedly abusive relationship and her failure to remove the Child from the situation could be deemed neglect, but the record did not support a conclusion that the Child was subjected to a substantial risk of immediate harm. Trial court made no finding that the Child was actually abused or neglected. Mother testified that she and her lover occasionally used methamphetamine, and that her lover occasionally physically abused her. Mother's testimony plus the Department's affidavit established a potentially volatile home environment, but did not establish an actual occurrence of abuse or neglect that justified termination of Mother's parental rights.

EVEN THOUGH EVIDENCE DID NOT SHOW FATHER PHYSICALLY ABUSED CHILDREN, FATHER'S HISTORY OF VIOLENCE AGAINST CHILDREN'S MOTHER AND HIS CRIMINAL CONVICTIONS SUPPORTED TERMINATING HIS PARENTAL RIGHTS; FATHER'S MOTHER COULD NOT BE CHILDREN'S CONSERVATOR BECAUSE OF HER HISTORY OF SERIOUS MEDICAL PROBLEMS AND LACK OF STABLE PERMANENT HOME

¶12-4-40. ***In re C.J.,*** -- S.W.3d --, 2012 WL 3139778 (Tex. App.—Dallas 2012, no pet. h.) (08/02/12).

Facts: Mother and Father met when Mother already had one Child. Mother and Father never formally married but claimed to be common-law married. They had three children together over the next seven years. The Department received a report of possible domestic violence and neglect of the Children. Mother agreed to place the children temporarily with Father's Mother (Grandmother). The Department was unable to find the children for several months after the placement, but finally Father brought the Children to the Department. The Children were placed in foster care while Mother and Father completed services ordered by the Department. Shortly after Mother gave birth to her third Child by Father, Mother claimed Father hit her while she was holding the youngest Child. The Department moved Mother and the Children to a domestic violence shelter. While there, the youngest Child sustained skull fractures when she allegedly fell out of her broken crib and hit two concrete steps. The hospital and Department concluded the Child's injuries were consistent with an accidental fall and allowed the Child to stay with Mother. Mother and the Children returned home, but Father was ordered to stay away from the family until he completed a batterer's intervention program. However, he returned to the home before completing the program. One night, he discovered the youngest Child in Mother's bed, cold and not breathing. The Child died that night, and the medical examiner could not rule the death a "SIDS-type" death because of the history of skull fractures. The State obtained temporary conservatorship of the remaining three Children and moved to terminate both Mother and Father's parental rights to their respective children. Mother voluntarily relinquished her rights, and Father's rights were terminated after a jury trial.

The jury found that Father had knowingly placed or allowed the Children to remain in dangerous conditions and had failed to comply with court orders. The jury also found it was in the Children's best interests to terminate Father's parental rights, and appointed the Department sole permanent managing conservator of all three Children. The jury further found that the paternity of the oldest Child was unknown and terminated that Child's Father's parental rights. Father appealed the factual sufficiency of the evidence.

Holding: Affirmed

Opinion: A trial court may terminate the parent-child relationship if it determines by clear and convincing evidence that a parent committed one or more of the enumerated statutory acts or omissions, and that termination is in the best interest of the child. Father did not challenge the finding that he committed one or more of the enumerated statutory acts or omissions, only the evidence supporting the finding that termination of his parental rights was in the Children's best interest.

First, the evidence regarding the oldest Child's biological father was at best conflicted. Father testified he wanted to believe he was the biological father, but Mother testified she believed someone else was the biological father. Second, while there was no evidence that the Children were physically abused, there was also no evidence that Father protected the Children from observing violence in the home. Mother had at one point obtained a protective order against Father. After the youngest Child's death, Father was arrested for aggravated assault with a deadly weapon, and was very verbally abusive and uncooperative with the police. Father also had a history of criminal convictions for weapons and drug charges, among others. Evidence showed that both Mother and Father used drugs, sometimes in front of the children. Both parents failed to comply with court-ordered services, when they hid the Children from the Department and when Father returned to the family's home before his batterer's intervention program was completed. A Department caseworker said that the children became very agitated and worked up during supervised visits with the parents and had violent tendencies and low self-esteem, but the Children became much more stable and confident after the visits stopped. Third, the evidence was insufficient to support a finding that Grandmother should be appointed sole permanent managing conservator instead of the Department. Grandmother had a history of medical problems, including strokes, heart attack, seizures, depression, and diabetes. She had no permanent home; she moved in and out of government housing and her daughter's home. Further, she maintained an abusive relationship with her husband.

TEX. FAM. CODE ANN. § 161.001(1)(Q) APPLIES TO THE DATE OF THE ORIGINAL TERMINATION PETITION FILING, RATHER THAN ANY AMENDED FILINGS, WHEN DETERMINING WHETHER A PARENT WILL BE INCARCERATED FOR TWO YEARS FROM THE DATE OF FILING; FATHER'S PATTERN OF INTENTIONAL CRIMINAL ACTIVITY NEGATIVELY IMPACTED CHILD AND SUPPORTED TERMINATION UNDER TEX. FAM. CODE ANN. § 161.001(1)(D)

¶12-4-41. ***In re D.J.H.,*** -- S.W.3d --, 2012 WL 3104502 (Tex. App.—San Antonio 2012, no pet. h.) (08/01/12).

Facts: The Child was living with his maternal Grandfather. When the Child's Brother was born, both Brother and Mother tested positive for heroin. The Child was removed from Grandfather's home and eventually placed with his maternal Grandmother. At the time of the Child's removal, Father was in prison. The State filed a petition to terminate Father's parental rights based on Tex. Fam. Code Ann. § 161.001(1)(D), and later amended its petition to add Tex. Fam. Code Ann. § 161.001(1)(Q) as grounds for termination. At the trial, Father testified that he had been convicted of aggravated assault with a deadly weapon and was serving a three year prison sentence. Father testified that he had been arrested seven times for theft and said that he stole because he could not support himself. Father also testified that he had used heroin with Child's Mother and had never received treatment. A counselor, a foster parent, and a caseworker all testified that the Child wanted to stay with his Grandmother, was happy there, and received the support and security he needed from Grandmother. Trial court terminated Father's parental rights under both Tex. Fam. Code Ann. §

161.001(1)(D) and Tex. Fam. Code Ann. § 161.001(1)(Q), and found it was in Child's best interest to terminate Father's parental rights. Father appealed, alleging that under Tex. Fam. Code Ann. § 161.001(1)(Q), Father would be released from prison less than two years from the date of the State's amended petition for termination, and challenging the sufficiency of the evidence supporting termination of his parental rights under Tex. Fam. Code Ann. § 161.001(1)(D).

Holding: Affirmed

Opinion: Under Tex. Fam. Code Ann. § 161.001(1)(Q), a trial court may terminate parent rights if the court finds by clear and convincing evidence that the parent knowingly engaged in criminal conduct that resulted in conviction of an offense and confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition. Under Tex. Fam. Code Ann. § 161.001(1)(D), parental rights may be terminated if the parent knowingly placed or allowed the child to remain in conditions or surroundings that endangered the child's physical or emotional well-being. While incarceration alone does not justify termination, a parent's repeated criminal acts may constitute sufficient evidence of conduct that endangers the well-being of a child.

Here, the plain wording of Tex. Fam. Code Ann. § 161.001(1)(Q) discusses when "the petition" is filed, and the Texas Supreme Court has explained that this subsection was enacted not as a notice provision but as a protective measure for children. The subsection's purpose is to protect children from being neglected and refers to the date an original petition was filed, rather than any amended petitions. Therefore, even though Father will be out of prison less than two years from the date of the amended petition, he will still be incarcerated two years from the date of the original petition. Additionally, Father's pattern of criminal activity subjected him to the possibility of incarceration, which negatively impacted the Child's living environment and emotional well-being. Father had several convictions for theft, as well as an untreated drug problem. At one point, Father said he was taking the Child to the store, and instead used heroin behind a dumpster in the presence of the Child. Father's pattern of intentional criminal conduct supported termination pursuant to Tex. Fam. Code Ann. § 161.001(1)(D).

DEPARTMENT NOT REQUIRED TO PERSONALLY SERVE NOTICE ON ALLEGED FATHERS WHO HAVE NOT REGISTERED WITH PATERNITY REGISTRY; ALLEGED FATHERS WHO HAVE NOT ESTABLISHED PARENT-CHILD RELATIONSHIP WITH THE CHILD AT ISSUE ARE NOT ENTITLED TO PRESUMPTION OF CONSERVATORSHIP

¶12-4-42. ***In re R.J.,*** -- S.W.3d --, 2012 WL 3195086 (Tex. App.—San Antonio 2012, no pet. h.) (08/08/12).

Facts: The underlying case involved Mother and the two Fathers of Mother's five Children. The Department filed its petition to terminate the parental rights of all three Parents to all five Children. Both Fathers were Mexican Nationals. The Department alleged that it exercised due diligence in attempting to locate both fathers to notify them of the termination proceedings. The Department searched CPS records, interviewed parties who might have had access to the Fathers' whereabouts, and sent letters to the Mexican consulate asking for help locating the men. Neither Father registered his paternity to any of the Children with the Texas registry of paternity. The trial court authorized service by posting the citations at the courthouse door. Trial court eventually terminated the parental rights of Mother and both Fathers to all the children, and named the Department permanent managing conservator of the children. Both Fathers appealed the factual sufficiency of the diligence of the Department's search and the constitutionality of appointing the Department as permanent managing conservator.

Holding: Affirmed

Opinion: Under the TFC, an alleged father is a man who alleges that he is the genetic or possible genetic father of a child, but the child's paternity has not been determined. If the child is more than one year old when a termination petition is filed, the alleged father's rights may be terminated without personal service of citation,

and if the alleged father has not registered with the paternity registry, there is no requirement that he be identified or located. Failure to comply with the paternity registration requirement because of ignorance of the law does not excuse noncompliance. But a man is entitled to notice of termination proceedings regardless of paternity registration status if a father-child relationship between the man and the child has been established. Under the Vienna Convention on Consular Relations, a Texas court may terminate an alleged father's parental rights even if he and the child are both foreign nationals, if the proceeding complies with applicable treaty requirements. The Department must notify the foreign consul of the parental termination proceeding affecting a foreign national child. But the VCCR does not alter the receiving state's procedural or substantive laws controlling the matter.

Here, both Fathers asserted the Department did not exercise due diligence in locating them because the Department did not search the Mexican paternity registry. Tex. Fam. Code Ann. § 161.107 does require the Department to make a diligent search to locate a missing parent, but the definition of "parent" under the statute does not include "a man who does not have a parent-child relationship established under Chapter 160." To establish a parent-child relationship, the Father must have (1) married the mother, (2) acknowledged paternity, (3) been previously adjudicated to be the father, or (4) initiated or completed adoption proceedings. Neither Father was listed on any of the Children's birth certificates, nor did they register with the Texas paternity registry. When the petition was filed, each child was over one year old. The Department was not required to give notice to the Mexican consulate since the Children were not Mexican nationals, according to the record. Further, because neither Father established a parent-child relationship with the Children, the court was not constitutionally required to appoint either Father as conservator of the Children. Under Tex. Fam. Code Ann. §§ 153.131 and 153.191, parental presumptions for conservatorship apply to parents who meet the statutory definition of "parent" which neither Father did.

MOTHER'S HISTORY OF KEEPING A DIRTY AND UNSAFE HOME AND NEGLECTING HER CHILDREN DID NOT OUTWEIGH HER RECENT IMPROVEMENTS IN HER LIVING SITUATION AND PROMISES TO BE A BETTER PARENT; FACTUAL SUFFICIENCY COMPLAINTS MUST BE PRESERVED BY BEING INCLUDED IN A MOTION FOR NEW TRIAL

¶12-4-43. ***In re A.M.,*** -- S.W.3d --, 2012 WL 3242733 (Tex. App.—Waco 2012, no pet. h.) (08/09/12).

Facts: Police responded to a child-neglect call at Mother's home. Her two Children, ages five and three, had been seen banging on their bedroom window and screaming. Police found the house full of trash, rotting food, dirty clothes, rodents, and rodent droppings, and the house was extremely hot. Mother's electricity had been shut off, but she had run an extension cord from her neighbor's house, and used it to plug in several extension cords and surge protectors in her own house. Mother said she locked the Children in their bedroom because they had thrown a tantrum and would not go to bed. The Department investigated, found the home unsafe for children, and placed them ultimately with their Great-Aunt and Great-Uncle. Mother was jailed for several months, and after being homeless and then living with her brother, she found an apartment and completed required services. However, during her services, she failed to inform the Department of her unsupervised contact with the Children and admitted she lied about it during a hearing. Mother told the Children not to tell the Department about her contact with them, and because of this pressure, the oldest Child developed an incontinence problem. Mother also did not tell the Department that her parents had substance-abuse problems and that she was in a relationship with a state prison inmate, which was a violation of her service plan and community supervision plan. After a jury trial in which the jury determined that termination was in the Children's best interest, Mother's parental rights were terminated. Mother appealed, saying the evidence was factually insufficient to support the termination.

Holding: Affirmed

Majority Opinion (Davis, J. and Scoggins, J.): COA first overruled prior case law and held that in termination cases, to raise a factual-sufficiency complaint on appeal, it must be preserved by including it in a motion for new trial. COA applied this rule prospectively, considering three factors under *Elbaor*: (1) whether the

decision establishes a new principle of law by either overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether prospective or retroactive application of the particular rule will further or retard its operation through an examination of the history, purpose, and effect of the rule; and (3) whether retroactive application of the rule could produce substantial inequitable results. COA determined considerations of fairness and policy dictated a prospective effect in this case.

In determining the best interest of a child, the court considers a long list of factors with the end goal of establishing a stable permanent home for the child. Evidence of past misconduct or neglect can be used to measure a parent's future conduct. Recent improvements in the parent's situation do not absolve a parent of a history of irresponsible choices. The need for permanence is a paramount consideration for a child's present and future physical and emotional needs.

Here, Mother had a history of neglecting and endangering the Child, of exposing them to domestic violence between Mother and Father, and of unstable housing, employment, and relationships. She had been educated in child development, worked as a teacher's aide in Head Start, and completed Department services, and yet her home was found filthy and unsafe on two separate occasions. At the time of the trial she had a clean apartment and would be eligible for food stamps, but her history of irresponsible choices did not outweigh her recent improvements. Although Mother asserted she would continue the Children's therapy and change her parenting habits, the jury was free to reject her assertions. Further, Great-Aunt and Great-Uncle, who had been in their home for more than four years, wanted to adopt the children and end their instability. Mother admitted she neglected the children but blamed it on her poor health.

Concurring Opinion (Gray, J.): The analysis for determining whether to apply a decision retroactively or prospectively is a factor analysis, rather than an elemental analysis. All three factors need not be discussed, as the majority did. Express overruling of prior case law does not establish a new principle on which litigants may have relied. Every court in the last 10 years that has analyzed this issue has determined that a factual sufficiency issue from a jury trial in a termination case must be preserved by making it a ground in a motion for a new trial, so the disposition of this issue was clearly foreshadowed. Further, Mother would not suffer substantial inequitable results if the decision were applied retroactively. Mother's remedy for failure to preserve the factual sufficiency issue would be to raise ineffective assistance of counsel on appeal.

MOTHER'S DRUG USE AND LACK OF AWARENESS THAT HER DECEASED NEWBORN HAD BEEN ABUSED BY FATHER SUPPORTED TERMINATION OF MOTHER'S PARENTAL RIGHTS

¶12-4-44. ***In re D.J.W.,*** -- S.W.3d --, 2012 WL 3525542 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (08/16/12).

Facts: Mother and Father had two Children, D.J.W. and a Newborn. One night, Mother rocked the Newborn to sleep, then she and Father asked another family member to watch the Children while they went to the store. When they returned, Father checked on the Newborn and said he was fine. A short while later, a family member said the Newborn had vomited. Mother performed CPR and called an ambulance, but the Newborn died that evening. D.J.W. was placed with his Great-Grandfather while the Department investigated the Newborn's death. The autopsy revealed blunt head trauma and dozens of bone fractures, some of which had occurred shortly before the time of death. The Department filed a petition to terminate both Mother and Father's parental rights and for conservatorship of D.J.W. The court ordered Parents to comply with the Department's service plan, as well as to submit to drug testing. Mother refused to provide a urine sample, but her hair sample tested positive for cocaine and marijuana. Mother denied ever using cocaine, but admitted using marijuana, including after the court had ordered her to remain drug-free. Father voluntarily relinquished his parental rights after admitting he caused the Newborn's death and was criminally prosecuted. Mother claimed that she did not know how the Newborn was injured, and that if she had thought Father was abusing the Newborn, she would have had nothing further to do with Father. Trial court found that Mother had endangered D.J.W., that

termination of her parental rights was in the Child's best interest, and named the Department SMC. Mother appealed.

Holding: Affirmed

Majority Opinion (Massengale, J. and Huddle, J.): Here, Mother admitted to marijuana use, and though she denied using any other drugs, her positive test for cocaine supported the trial court's conclusion that Mother's ability to effectively parent was affected by her drug use. Further, Mother was responsible for caring for the Newborn, yet the Newborn died of injuries caused by Father, and Mother claimed to be completely unaware of the abuse.

Dissenting Opinion (Jennings, J.): The Department failed to present any evidence of the frequency of Mother's drug use and did not establish that Mother used drugs during the few weeks before Newborn died. The majority improperly infers based on scanty evidence that Mother's admitted drug use at various points affected her ability to properly supervise her Children. Further, there is no evidence that anyone else was involved in the Newborn's death aside from Father or that anyone else could have known that the abuse was occurring, since there were apparently no visible bruises or injuries to the Newborn.

TERMINATION OF FATHER'S PARENTAL RIGHTS AND ORDER NAMING THE DEPARMENT PERMANENT MANAGING CONSERVATOR SUPPORTED BY EVIDENCE THAT PARENTS OFTEN LEFT CHILD ALONE IN THE HOME AND DID NOT SUFFICIENTLY FEED CHILD

¶12-4-45. ***In re E.P.C.,*** -- S.W.3d --, 2012 WL 3733841 (Tex. App.—Fort Worth 2012, no pet. h.) (08/30/12).

Facts: A maintenance man found ten-month-old Child alone in her family's apartment. The apartment manager called Father, who said he was picking up Mother and would return shortly. There is conflicting evidence regarding how long Parents had been gone, but approximately one-and-a-half hours passed between the time the apartment manager called Father and the time Mother arrived home. The Department received a call the same day regarding Child being left alone in the apartment. Father told the Investigator that Child was sleeping and he did not want to wake her, so he went to pick up Mother, who had been grocery shopping. Father also looked at tires before returning home. When the Department removed Child from the home that day, Mother was very upset, but Father seemed concerned "only about whether he would lose his job." An Investigator took Child to a doctor's appointment, where the doctor found that Child was small for her age. The Investigator noticed that when Child was fed, Child seemed to "gulp" down her food as though she had not been fed regularly. Another Investigator learned that neither Parent had good relationships with their own parents, and both had suspected histories of being physically and sexually abused. Mother had shown signs of aggression both toward animals and other people, including on one occasion slapping and "beating up on" a man with Asperger's Syndrome who had stayed briefly with her and Father. A psychologist testified that the Parents' troubled backgrounds could lead to their inability to properly care for a child or to recognize that a child wasn't properly developing. After Child was placed in foster care, Child's weight and development greatly improved. After a bench trial, trial court found that both parents placed Child with people who endangered her physical or emotional well-being and allowed Child to remain in conditions that endangered her physical or emotional well-being. Trial court terminated Father's parental rights only, but named the Department permanent managing conservator. Both parents appealed.

Holding: Affirmed

Majority Opinion: (J. Gardner) A trial court may terminate parental rights only upon proof by clear and convincing evidence that the parent has committed an act set forth in Tex. Fam. Code Ann. § 161.001(1) and termination is in the best interest of the child. Under Tex. Fam. Code Ann. § 161.001(1)(E), a court considers whether evidence exists that the endangerment of the child's physical well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. The statute requires a voluntary, deliberate, and

conscious course of conduct by the parent. Here, Father admittedly left Child alone in the apartment, and trial court heard evidence that Mother and Father had been seen in public without Child several times. Further, there was evidence that Child was very small for her age, and that bones in her back were visible and her development was delayed. Father's attempts to minimize his act of leaving Child alone only highlighted the evidence that Child was exposed to a course of conduct while living with Father involving failure to provide proper nutrition and being left home alone on numerous occasions. Additionally, there was evidence to support that terminating Father's parental rights was in Child's best interest, since he left Child alone and showed no remorse.

In regards to Mother, the evidence supported that appointing the Department as permanent managing conservator was in Child's best interest. While Mother appeared to be bonded with Child, she exhibited aggressive behavior toward other people and toward animals. Mother was unable to live independently and was not close with any other family members who could help her care for Child.

MISCELLANEOUS

WHAT DOES DUE DILIGENCE MEAN IN REGARDS TO SERVICE OF CITATION?

¶12-4-46. ***Vasquez v. Aguirre,*** No. 04-11-00736-CV, 2012 WL 2022653 (Tex. App.—San Antonio 2012, no pet. h.) (mem. op.) (06/05/12).

Facts: An accident occurred on October 31, 2008. The plaintiff filed suit against the defendant on October 4, 2010, but did not serve Aguirre until February 5, 2011, which was after the expiration of the limitations period. The defendant moved for summary judgment asserting the plaintiff's claims were barred by limitations. The trial court granted summary judgment, saying that the Plaintiff failed to establish they exercised due diligence in serving the defendant. The Plaintiff appealed.

Holding: Reversed and Remanded

Opinion: Once a defendant has affirmatively pleaded the limitations defense and shown that service was affected after limitations expire, it becomes the plaintiff's burden to prove the efforts made to serve the defendant, and to explain every delay or lapse. The relevant inquiry is whether the plaintiff acted as an ordinarily prudent person would have acted and was diligent up until the time defendant was served. If the plaintiff's explanation for any delay raises a material fact issue concerning the diligence of service efforts, the burden shifts back to the defendant to conclusively show why the explanation is insufficient. The mere fact that some periods of time elapsed between service efforts does not conclusively demonstrate that a plaintiff was not exercising diligence in attempting to locate the defendant.

Here, the plaintiff's attorney retained the services of a process server, who attempted to serve the defendant seven times in the three months following the filing of the suit. The process server then confirmed through an online search that the defendant owned the property where service was being attempted and notified the plaintiff's attorney of her unsuccessful attempted. The process server, at the attorney's request, prepared an affidavit of attempted service and then made a final attempt to serve the defendant. The lapses between service attempts do not conclusively demonstrate that the plaintiff was not exercising diligence in his attempt to locate the defendant. Because the plaintiff offered evidence of his diligence and an explanation for delays in attempting service, the burden shifted to the defendant to show why the explanation was insufficient as a matter of law. The defendant did not do so, and therefore the evidence raised a genuine issue of material fact. The defendant failed to conclusively establish lack of diligence by the plaintiff in effecting service.

★★★TEXAS SUPREME COURT ★★★

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APPELLANTS MAY COMPLAIN FOR THE FIRST TIME ON APPEAL THAT EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT JUDGMENT

¶12-4-47. ***OAG v. Burton,*** -- S.W.3d --, 2012 WL 2053321 (Tex. 2012) (06/08/12) (per curiam).

Facts: Mother and Father had one child before they divorced. Father was ordered to pay child support of $300 per month. A few years later, Father suffered a series of strokes and began receiving social security disability benefits. Father's disability qualified the Child to receive $481 per month. Four years later, Father filed a SAPCR and requested his child support be reduced. Trial court signed a temporary order significantly reducing Father's child support obligation. OAG intervened and asserted that Father was in arrears in excess of $57,000. At a hearing, Father admitted he was in arrears but disputed OAG's figures. Father calculated he owed closer to $37,000 because of social security benefits received by his son. However, no one at the hearing produced any documentation establishing how much had been paid to the Child in social security benefits. Trial court issued an order directing the Social Security Administration (SSA) to disclose the amounts paid to the Child. SSA responded saying it could not comply with the order because it had never received proper consent to release the confidential information. Father did not return the consent form but asked trial court to order Mother to execute the form. After a few months of inactivity, trial court announced that Father's child support arrearage was $0 because Mother failed to disclose the amount of benefits given to the child, making it impossible to correctly determine the correct amount of arrearage. OAG appealed, complaining that no evidence supported trial court's determination that Father owed no child support arrearage. However, COA concluded that OAG had failed to preserve the issue for review because OAG had not complained about the zero arrearage in trial court before seeking appellate review.

Holding: Reversed and Remanded

Opinion: A motion for new trial is not a prerequisite to an appellate complaint about the legal sufficiency of the evidence. Tex. R. App. P. 33.1(d) proves that "[i]n a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence…may be made for the first time on appeal in the complaining party's brief." COA accordingly erred in concluding that a post-judgment motion or other objection was needed to preserve the complaint for appellate review. Further, OAG's no-evidence complaint has merit. Father admitted he was in arrears, even though he disagreed about the amount. Nothing in the record suggests that Father was not in arrears. Therefore, no evidence supports the trial court's conclusion that Father's arrearage was $0.

★★★TEXAS SUPREME COURT ★★★

MOTHER WAS ENTITLED TO PROCEED ON APPEAL WITHOUT ADVANCE PAYMENT OF COSTS WHEN TRIAL CLERK DID NOT TIMELY FILE A CONTEST TO MOTHER'S AFFIDAVIT OF INDIGENCE

¶12-4-49. ***Morris v. Aguilar,*** 369 S.W.3d 168 (Tex. 2012) (06/08/12) (per curiam).

Facts: In a SAPCR, trial court appointed Mother's parents as JMCs of Mother's older daughter and granted visitation rights for Mother's younger daughter. Mother and her Husband were appointed possessory conservators of the older daughter, and Mother and ex-husband were named JMCs of the younger daughter. Mother and Husband then filed an affidavit of indigence and a notice of appeal. Twenty-four days after the deadline to file a contest had passed, the court reporter filed a contest to the affidavit of indigence. Mother was represented by pro bono counsel at a hearing, and trial court sustained the contest. Mother appealed, and the court of appeals affirmed, concluding that because Mother did not object to the late filing of the reporter's contest, Mother failed to preserve any error related to the untimely contest. Mother appealed.

Holding: Reversed and Remanded

Opinion: Tex. R. App. P. 20.1(f) says, "Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs." The rule is mandatory to protect indigent appellants and ensure that the courts remain open to all, even those who cannot afford to pay. Many indigent parties are pro se and requiring a pro se party to object to a late-filed contest to an affidavit of indigence in order to preserve error goes against the protections Rule 20.1(f) is intended to afford, since many pro se parties would not likely know they were required to object in that instance. An appellate court may suspend the deadline for contesting an affidavit of indigence, but only for good cause. Lack of actual notice to a court reporter of the filing of an affidavit of indigence is not good cause. The rules obligate the trial court clerk to notify the appropriate court reporter of the filing of an affidavit of indigence. The clerk's failure to comply with the rule is not grounds for denying an indigent appellant the benefit the rules. Because no contest was timely filed, Mother is entitled to proceed on appeal without advance payment of costs.

HUSBAND WAS NOT REQUIRED TO WAIT FOR RULING ON HIS MOTION FOR NEW TRIAL BEFORE FILING NOTICE OF APPEAL

¶12-4-50. ***In re Norris,*** -- S.W.3d --, 2012 WL 2076849 (Tex. App.—Austin 2012, no pet. h.) (06/07/12).

Facts: Mother and Father were named JMCs, but neither was ordered to pay child support in the divorce decree. Mother filed a modification suit seeking child support from Father. Trial court signed a final order that Father pay child support (12/14/11), after which Father filed a motion for new trial (01/13/12) and a notice of appeal (02/17/12). Mother then filed for temporary orders pending appeal asking for appellate attorney's fees (03/06/12). Trial court granted Mother's motion on 03/20/12 and signed order on 03/29/12. Husband filed a petition for writ of mandamus.

Holding: Writ Conditionally Granted

Majority Opinion (Pemberton, J.): Even though notice of appeal was filed prematurely, pursuant to Tex. Fam. Code Ann. § 109.001, the trial court had until March 19 (Monday after the 30th day following the filing of the notice of appeal) to sign temporary orders pending appeal. Because the temporary orders pending appeal were signed after that date, the orders are void.

Concurring Opinion (Jones, C.J.): When Tex. Fam. Code Ann. § 109.001(a), on which the majority relies, was enacted, Tex. R. Civ. P. 306c provided that in cases in which a motion for new trial was filed, a notice of appeal was not deemed to have been filed until the day of, but after, the motion for new trial was overruled. The appeal was not perfected until that date. Therefore, Legislative intent seemed to have been that trial courts could render orders necessary to preserve and protect the safety and welfare of the child for thirty days beyond the date a motion for new trial was overruled. This creates a dilemma in which a party seeking temporary relief must file a motion that may require a court to hold hearings, take evidence, make a ruling and sign an order, all of which may become moot if the trial court grants the motion for a new trial or modifies the judgment. The legislature should adjust the language of Tex. Fam. Code Ann. § 109.001(a) to state that the trial court should rule on the motion for new trial first, and then decide whether to grant an order to preserve and protect the safety and welfare of the child during the pendency of the appeal.

Editor's comment: *Concurring opinion gets this one right. Temporary orders pending appeal are meant to assist in the preservation of property in the case of a divorce or for welfare and safety of the children in a SAPCR case. Under current statute, if a notice of appeal is filed prematurely (say before the final order is even entered), this very important statute can be circumvented. This is definitely a trap for the unwary. Legislative committee and/or Texas Family Law Foundation please get this fixed. G.L.S.*

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MOTIONS FOR CONTINUANCE MUST BE VERIFIED OR INCLUDE AN AFFIDAVIT STATING A SUFFICIENT CAUSE

¶12-4-51. ***Fuentes v. Killingsworth,*** -- S.W.3d --, 2012 WL 2344658 (Tex. App.—Dallas 2012, no pet. h.) (06/20/12).

Facts: During the pendency of a temporary protective order, Appellant moved for a continuance and requested that he be permitted to depose the complaining witness. Trial court denied his motion.

Holding: Affirmed

Opinion: The denial for a motion for continuance is reviewed under an abuse of discretion standard. If a motion for continuance is not verified or support by affidavit, COA presumes trial court did not abuse its discretion in denying the motion. Here, the record reflected that Appellant's written motion was not verified.

Editor's Comment: *A written and verified motion for continuance should be part of any trial notebook in those cases where you think there is even a CHANCE you might need to request a continuance. Oral motions for continuance and unverified motions for continuance DO NOT preserve the error. R.T.*

★★★TEXAS SUPREME COURT ★★★

SERVICE BY PUBLICATION IS A POOR AND SOMETIMES A HOPELESS SUBSTITUTE FOR ACTUAL SERVICE AND WAS NOT CONSTITUTIONALLY ACCEPTABLE WHEN THE STATE KNEW MOTHER'S IDENTITY AND HAD REGULAR CONTACT WITH HER.

¶12-4-52. ***In re E.R.,*** -- S.W.3d --, 2012 WL 2617604 (Tex. 2012) (07/06/12).

Facts: The Department removed Mother's four Children and became TMC. Four months later, the Department petitioned to terminate Mother's parental rights. After an unsuccessful attempt to personally serve Mother, the Department served Mother by publication. Mother's Caseworker found no address for Mother through various internet searches and inquiries with utility companies, Voter Registration, and Adult Probation. Trial court authorized citation by publication. At the final hearing, which Mother did not attend, the Caseworker testified Mother had visited the Department's offices one month prior and that the Caseworker had contacted Mother about court hearings via the telephone number Mother had provided. After hearing testimony that the children had lived with their Guardian for six months, that their Guardian planned to adopt them, and that Mother had physically abused the Children and used drugs, trial court terminated Mother's parental rights. Mother moved for a new trial within two years of the judgment, saying that service by publication was invalid because she had been in regular personal contact with the Caseworker and had visited the Department during the period of attempted service. Trial court ruled that Mother's motion was untimely filed under Tex. R. Civ. P. 329(a) and denied the motion. COA affirmed, citing a six-month deadline for challenging a termination order under Tex. Fam. Code Ann. § 161.211. However, the dissent concluded that the six-month deadline applied only to people who were validly served by publication and disagreed that Mother was validly served, since the Department had contact with her and knew her whereabouts during the time they were attempting to serve her. Mother appealed.

Holding: Reversed and Remanded

Opinion: The U.S. Supreme Court has indicated that when a defendant's identity is known, service by publication is generally inadequate. To satisfy due process, service by publication should be a last resort. Due process prevails over a state law time limit, even one imposed on challenges to termination of parental rights or adoptions. The Texas Supreme Court strictly construes involuntary termination statues in the parent's favor. When judgment is rendered on service of process by publication, a party may move for a new trial (within

two years if a civil case [Tex. R. Civ. P. 329(a)] and within six months if a termination case [Tex. Fam. Code Ann. § 161.211]) by showing good cause; but if service was invalid, a party is entitled to a new trial without showing good cause. Before granting judgment on service by publication, the trial court must inquire into the diligence exercised in attempting to find the defendant. A diligent search must include inquiries that someone who really wanted to find the defendant would make, and diligence is measured not by the quantity of the search but by its quality.

Here, the evidence established a lack of diligence. The Caseworker never contacted Mother's own mother to inquire as to Mother's whereabouts, did not try other forms of substitute service, and did not attempt service by mail to obtain a forwarding address. However, Caseworker had contact with Mother via telephone and in person during the relevant time period. Caseworker could have informed Mother of the impending termination hearings during any of these contacts, and therefore service by publication was constitutionally inadequate. A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction. Therefore, the resulting judgment was void and may be challenged at any time.

Editor's Comment: *Whether you agree with this decision or not, the Chief Justice's opinion is worth a read simply to try to pick up a few tricks on how to write a clear, concise, and persuasive legal brief. R.T.*

TO RECOVER ATTORNEY'S FEES AUTHORIZED BY CONTRACT, A CLAIMANT MUST DELINEATE RECOVERABLE FEES FROM UNRECOVERABLE FEES

¶12-4-53. ***In re B.N.L.-B,*** -- S.W.3d --, 2012 WL 3104593 (Tex. App.—Dallas 2012, no pet.) (07/11/12).

Facts: Donor agreed to be a sperm donor so that Mother could be artificially inseminated. Donor, Mother and Mother's Partner signed an agreement that said Donor would not "seek to establish a legal relationship with the Child(ren)," but if he did, he would indemnify Mother and Partner and pay for all costs incurred in defending against such a lawsuit. After Mother successfully conceived and gave birth to the Child, Donor, Mother and Partner entered into an agreement regarding visitation. This second agreement gave Donor the visitation rights for the Child. The agreement was incorporated by the court into a "Consent Order." The Consent Order provided that "[t]he parties agree that any costs, including but not limited to counsel fees, incurred by a party in the successful enforcement of any of the agreements, covenants, or provisions of this Agreement through litigation or to enforce compliance herewith shall be borne by the breaching party." Donor filed suit requesting the court construe and clarify the terms of the Consent Order. Mother and Partner later separated, and Mother filed a SAPCR, in which Donor intervened. The parties settled on all issues, except the award of attorney's fees. Trial court ordered Donor to pay Partner's attorney's fees, pursuant to the first agreement in which the parties stipulated that Donor would indemnify Partner for all costs in defending lawsuits filed by Donor. Donor appealed, challenging the sufficiency of the evidence showing the attorney's fees were reasonable and necessary.

Holding: Affirmed in Part, Reversed and Remanded in Part

Opinion: A second agreement substitutes for a prior agreement when the later agreement is so inconsistent with the prior that the two cannot subsist together. Here, that is not the case. The Consent Order adopted by the court incorporated the parties' agreement which addressed Donor's visitation rights and did not invalidate the prior agreement. Therefore, the provisions regarding attorney's fees that were agreed to were still in force.

Attorney's fees are only recoverable when authorized by statute or contract. When presenting evidence of attorney's fees, a claimant must segregate recoverable fees from unrecoverable fees. Here, Partner's attorney presented a bill for "professional services" that included work pre-dating Donor's intervention into the suit and did not distinguish fees related to the intervention from other non-intervention issues. The "Detail Transaction File List" did not distinguish between the fees paid separately by Mother and Partner. In short, the evidence presented did not delineate or segregate the fees incurred solely in defending Donor's lawsuit from fees incurred litigating other issues between the parties.

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HUSBAND'S MOTION FOR NEW TRIAL WAS DENIED BECAUSE HUSBAND, USING A PRE-PRINTED FORM, WHICH HE FAILED TO COMPLETELY FILL IN, DID NOT ESTABLISH ALL THREE ELEMENTS OF CRADDOCK TEST.

¶12-4-54. ***Friedman v. Friedman*,** No. 05-11-00034-CV, 2012 WL 3017073 (Tex. App.—Dallas 2012, no pet. h.) (mem. op.) (07/24/12).

Facts: Wife filed for divorce. Husband was served in Arizona, and on the advice of Texas counsel, did not file an answer. Wife obtained a no-answer default, and trial court granted the divorce and divided the marital property. Husband filed a motion for new trial claiming that his failure to answer was the result of an accident or mistake because he was misinformed regarding the procedures he should follow. Trial court denied Husband's motion. Husband appealed.

Holding: Affirmed

Opinion: Under the Craddock test, a trial court should set aside a default judgment and order a new trial in any case in which: (1) the failure of the respondent to answer before judgment was not intentional or the result of conscious indifference, but was due to a mistake or an accident; (2) the motion for a new trial sets up a meritorious defense; and (3) the granting of the motion for new trial will occasion no delay or otherwise injure the petitioner. Here, Husband used a pre-printed form for his motion for new trial. Husband's motion included a statement that after receiving the divorce petition and contacting a Texas attorney, he was advised not to respond, and that had he known the proper procedures, he would have arranged to either appear personally or retain an attorney. However, Husband left two sections of the form blank: the section where he should have described the accident or mistake that prevented him from filing an answer, and the section where he should have described his meritorious defense to the judgment. Because Husband did not meet his burden of proving all three elements of the Craddock test, trial court did not abuse its discretion by denying his motion for new trial. Further, Husband conceded he received notice of the divorce petition but failed to answer. When Husband failed to answer, Wife's attorney had no duty to notify Husband before taking a default judgment. Finally, Husband argued that the divorce was obtained based on deceptive or false statements. However, because he did not raise this issue in his motion for new trial, there was no evidence in the record before the trial court regarding this allegation.

Editor's Comment: *This case is illustrative of the dangers of a pro se litigant using a pre-printed form and not consulting with an attorney. J.A.V.*

Editor's Comment: *Husband also claimed that he had not, contrary to wife's testimony, agreed to the property division in the divorce decree. But he failed to raise this issue in his motion for new trial. "As a result, there was no evidence in the record before the trial court as to this allegation." J.V.*

HUSBAND'S FAILURE TO DISCLOSE HIS PENDING BUSINESS INTEREST AND SUBSTANTIAL COMPENSATION FROM HIS COMPANY'S SALE AT THE TIME OF HIS DIVORCE WAS EVIDENCE OF EXTRINSIC FRAUD

¶12-4-55. ***Hester v. Prickett*,** No. 13-11-00677-CV, 2012 WL 3252721 (Tex. App.—Corpus Christi 2012, no pet. h.) (mem. op.) (08/09/12)

Facts: Husband and Wife divorced after seven years of marriage. Wife alleged that Husband had consistently verbally abused her. One year before their divorce, Husband was hired as a crane operator. In his employee contract was a provision that Husband could become a limited partner with his employer in a future business project, and at some point during the marriage Husband disclosed that they were undertaking a new business venture together. During the divorce proceedings, Wife twice requested information regarding Husband's fi-

nancial statements and stock ownership, specifically in his employer's company, but Husband failed to respond to the requests. Wife alleged that Husband verbally threatened her on the phone, saying he had no ownership interest in the company, and that Wife would be sorry if she forced him to waste money on an attorney. Shortly before the divorce was finalized, Husband learned that his company was for sale and that he would receive $1 million in compensation. Other employees from the company gave affidavits saying that Husband told them he was keeping his interest in the company a secret from his wife. The final divorce decree made no mention of the $1 million. Six weeks after the divorce was finalized, Husband received his $1 million. Wife was not aware of Husband's concealment and compensation until approximately four years after the divorce. Husband moved for summary judgment, alleging that Wife produced no evidence of extrinsic fraud unmixed with any negligence on her part, and summary judgment was granted in his favor. Wife filed a bill of review to rescind the property agreement in the final divorce decree.

Holding: Reversed and Remanded

Opinion: To obtain relief by bill of review, the movant must show: (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which movant was prevented from making by the fraud, accident, or wrongful act of the opposite party, (3) ummixed with any fault or negligence of her own. Extrinsic fraud denies a party the opportunity to fully litigate all the rights or defenses the party was entitled to assert.

Husband's trial counsel asserted that Wife's only discovery request was a set of interrogatories and requests for production, and that therefore Wife's negligence was the cause of her failure to learn of the large compensation paid to Husband. However, Wife's attorney alleged he had inadequate time to perform discovery and he believed more discovery was needed concerning Husband's concealment of his partnership interest in the company. Further, Wife submitted an affidavit in which she stated that Husband called her to tell her he had no ownership interest in the business, and threatened to make her sorry if she made him waste his time and money. Wife also submitted an affidavit from Husband's coworker, who said Husband told him multiple times that he was going to get $1 million from the sale and that he was keeping it a secret from Wife so she did not get any of the business in the divorce. Wife's evidence of Husband's violent nature coupled with his misrepresentation of community assets constituted evidence sufficient to raise a fact issue on extrinsic fraud. Finally, Husband had a duty to disclose this information to Wife at several points during the proceedings and failed to do so, particularly since he had already made a representation regarding his financial assets and then failed to disclose the new information that made the earlier representation misleading or untrue.

HUSBAND COMMITTED EXTRINSIC FRAUD WITH HIS THREATS TO DISSOLVE HIS BUSINESS AND LEAVE WIFE WITH NOTHING IF SHE TRIED TO ASSERT A COMMUNITY PROPERTY INTEREST IN THE BUSINESSES; HUSBAND'S FRAUD INDUCED WIFE TO SIGN AN UNFAIR PROPERTY SETTLEMENT AGREEMENT

¶12-4-56. ***In re Stroud,*** -- S.W.3d --, 2012 WL 3525558 (Tex. App.—Dallas 2012, no pet. h.) (08/16/12).

Facts: Husband and Wife divorced after 23 years of marriage. Shortly after filing for divorce, they negotiated a settlement agreement, which was incorporated into the final decree. Wife was awarded cash, her physical assets, and an employment contract at Husband's company for three years. Husband received the home, his assets, and "all partnership and business ownership," as well as any "money, investments, and business interests" not specifically awarded to Wife. Husband and Wife also signed a "Waiver of Disclosure of Financial Information" and an "Instruction Not to Investigate Assets and Liabilities and Waiver of Disclosure of Financial Information." The documents stated that both parties had been provided a fair and reasonable disclosure of the other's property and financial obligations, waived any "further disclosures of the property, including its value," and instructed their attorneys not to perform discovery and to finalize the case. After the divorce was finalized, Wife learned about the success of Husband's business, and believed Husband had used threats and intimidation to cheat her in the divorce. Wife hired an accountant to review the financial information of Husband's business, and the accountant discovered that Husband owned half the company and had three affiliated

partnerships. Accountant revealed that the businesses were worth a substantial amount of money. Husband had previously testified that the partnerships were separate businesses, and the documents Husband had provided redacted financial information regarding the partnerships. Wife filed a bill of review seeking to set aside the property settlement as being grossly disproportionate. Wife stated that at the beginning of divorce proceedings, Husband had threatened that if she tried to assert a community property claim against his ownership interests in the companies, he would close down the companies and she would get nothing. Wife further stated that Husband made these misrepresentations so that she would acquiesce and agree to a settlement she otherwise would not have accepted. Husband claimed Wife had access to their personal finance information because she wrote checks from their joint checking account and paid the bills, and their home safe contained copies of the partnership agreements. Wife said she only had access to their personal checking account and not the business account, and was not allowed to open mail addressed only to Husband, including statements regarding their retirement, investment and bank accounts. Husband wrote the settlement proposal from which their attorneys drafted the paperwork. Husband claimed Wife knew the values of the assets and said he did not recall telling Wife anything related to the property division or whether she asked about the value of the business interests. Trial court granted Husband's summary judgment motion. Wife appealed.

Holding: Reversed and Remanded

Opinion: Only extrinsic fraud entitles a petitioner to bill-of-review relief. Extrinsic fraud if "fraud which denies a losing litigant the opportunity to fully litigate his rights or defenses at trial." Wife argued that Husband's fraud and pressure prevented her from discovering the value of their assets, which resulted in an unfair division of their community estate. Husband said Wife was aware of their financial situation and that she had opportunities to discover the values of the properties. However, Wife presented evidence that Husband threatened to dissolve the companies if she "tried to touch the company." Because of these threats, Wife told her attorney not to perform discovery on the value of the companies, and therefore she believed she could not litigate her interest in the companies without putting her future at risk.

Husband argued estoppel, claiming that Wife was adopting a position inconsistent to the position she took during the divorce proceedings. However, Wife's prior inconsistent statements were due to mistake, fraud, or duress, and therefore estoppel did not apply. Wife was led to accept the benefits of the terms of divorce because of Martin's fraud and threats.

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