SECTION REPORT
FAMILY LAW

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MESSAGE FROM THE CHAIR

Season's Greetings!

The holiday season seems to come faster and faster every year. I hope that everyone is able to take some time off to spend with family and reflect on the past and rejuvenate for 2013.

As you all must have heard by now the Supreme Court approved the Forms in 5-3 opinion with Justices Lehrmann, Johnson and Willett dissenting. The Court is publishing the forms in the December Bar Journal and will be taking comments until February 1, 2012. The Family Law Council will be submitting formal comments to the Court and I invite each and every one of you to comment as well as well as I believe the Court will review the comments, discuss them and vote whether any changes should be made. There will be two new Justices on the Court after the first of the year so our input is very important. I will be updating all of you as more information becomes available.

The legislative session is right around the corner. Foundation Lobbyist, Steve Bresnan and I will be reporting on events and our progress to the Section as the session begins January 8, 2013. It should be interesting as there are new Chairs of the Committees and many new legislators.

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

- **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.

I wish everyone a safe and happy holiday season and a prosperous, healthy New Year!

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

EDITOR'S NOTE

I wish to thank all of my dedicated column writers: Jimmy Verner, John A. Zervopoulos, Christi Adamcik Gammill, and various paralegals throughout the state. I invite any of you out there to volunteer to write a regular column that would be of particular interest to the membership. Just send me an email. I am also always looking for articles. If any of you see an article in your local bar newsletter, please forward it to me, and I will take care of it from there so that the information can be shared with all.

The bibliography edition covering years 2007-2012, along with the 2013 Child Support Tax Reports will be posted on January 15, 2013.

Happy Holidays to all.

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

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ASK THE EDITOR

***Dear Editor*:** A new client came into my office yesterday wanting to get a divorce after she learned that her husband had never divorced his first wife. They have been "married" for six years. Since her husband was never divorced from the first wife, was my client every legally married and can I now get her a divorce and, if so, what would she be entitled to receive in a property division? *Double Trouble in Dublin*

***Dear Double Trouble in Dublin*:** Your client appears to be involved in what is called a putative marriage. A putative marriage is one that was entered into in good faith by at least one of the parties, but which is invalid by reason of an existing impediment on the part of one or both parties. *Garduno v. Garduno*, 760 S.W.2d 735, 738 (Tex. App.—Corpus Christi 1988, no writ); *Dean v. Goldwire*, 480 S.W.2d 494, 496 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.). A putative marriage may arise out of either a ceremonial or common law marriage. *Garduno*, 760 S.W.2d at 738. The effect of a putative marriage is to give the putative spouse who acted in good faith the same right in property acquired during the marital relationship as if he or she were a lawful spouse. *Davis v. Davis*, 521 S.W.2d 603, 606 (Tex. 1975). However, there being no legally recognized marriage, property acquired during a putative marriage is not community property, but jointly owned separate property. *Garduno*, 760 S.W.2d at 739.

THERAPY TO GO

Dear TTG:

I have a client who, quite frankly, I am afraid of. I am unable to read him during our time together and I find myself guarded in what I say. This is a first for me. Oh yeah, he is a veteran of Operation Enduring Freedom. He has been home from Afghanistan for about a year, suffers from combat related PTSD, and has severe burns to his right hand and arm. He seems mad at me all the time, has an explosive temper, and oh yeah, he knows how to use a gun! This is a family case and potentially a criminal case. Should I be worried? Am I missing something? – Thanks, Guarded Galene

Dear GG,

Take a deep breath and relax.

You are not missing something. Rather, you are misunderstanding something. It is a good thing that you are listening to your instincts, because something beyond your experience and understanding is going on. Welcome to the world of caring for our veterans.

This very same feeling is what our veterans struggle with every day in the world that they have returned to – a world which was once normal to them but in which they now feel like outsiders. Consider this perspective from veteran Scott Lee, "A common aspect of our mental wound, the defensive state of mind, when understood in this context may help facilitate communication. If I am not completely zoned out, my hyper vigilance is zapping my energy on purely defensive matters. Whether from fighting my delusions rendering reality obsolete, [I'm] dodging my many triggers so that I may not hallucinate."

This population struggles with many situations, events, stimuli, and circumstances that put them right back in the war zone. While it can be very easy to take the wounded vet's demeanor personally, the fight is not with you. It is a war they rage with themselves.

When we are talking about these men and women, we are talking about volunteers. When the wounds seep in and take root, it can be a difficult dichotomy to reconcile. The psychological and physical wounds may seem like accidents, but they are the result of war, of something they volunteered for. This is an internal battle that they didn't account for when they signed up to serve their country in the US military.

War, and training for war, breaks a person down and builds them back up as a warrior. When the veteran returns home, there is no place for that skill-set. There is no nest of comfort for the warrior's frame of mind. Veterans often feel lost and out of place in a civilian population who, while grateful for their service, has no

idea how to interact with the veteran's experiences. 24 million military veterans live in the United States. 53% of veterans are ages 35-64. These are folks who have legal needs in addition to psychological needs. These are your future clients.

Some of these veterans may not be easy to spot. Many of today's veterans do not possess visible wounds. Traumatic Brain Injury (TBI) and Post Traumatic Stress Disorder (PTSD) are often invisible injuries. Some wise advice from Mary Ellen McCarthy, a former legal services advocate, now Counsel to the Senate Committee on Veterans Affairs: "Often I hear that legal aid advocates 'don't see many veteran's issues.' I believe that this occurs because advocates often fail to ask if the client is a veteran or a family member of a veteran." This may be an uncomfortable question to ask because of all of the potential answers.

In the case of your client, ask questions. Questions about a veteran's current state are welcome and show a genuine interest in helping. Avoid direct questions about their combat experience. Being inquisitive can put the veteran in a difficult spot. They have a story that explains their wounds and their difficulties, but because they lived it, it can be very hard to understand why any person would want to hear it. Their story often exists in G, PG, PG-13, R, and NC-17 versions, and none of those versions can compare to detailed account.

Simply put, what your client needs from you are a genuine interaction, respect, and an upholding of his dignity. Take some time to educate yourself on your client's injuries and the nature of legal issues regarding our American Heroes. I believe he will begin to trust you as you begin to understand him.

Serving our veterans is a very rewarding endeavor and a chance to become part of their squad back home. As they say in the Navy Seals, "The only easy day was yesterday."

Jeremy J. Lanning, MA, LCDC-Intern, LPC-Intern
Former Petty Officer in the United States Navy, Hospital Corps / Field Medicine

IN BRIEF

Family Law From Around the Nation

by
Jimmy L. Verner, Jr.

Adoption: A North Dakota couple's dismissed petition to adopt a child did not become moot when the trial court allowed another couple to adopt the child during the pendency of the dismissal's appeal because the lower court had no authority to render a judgment or order that would affect an issue properly before the higher court. *In the Matter of the Adoption of S.E.*, 820 N.W.2d 389 (N.D. 2012). A West Virginia court's decision to allow foster parents to adopt a child even though the child's grandfather wanted to adopt him was not clearly erroneous because the grandfather failed to provide adequate information to a social worker in time to prepare a social study plus the grandfather had no fixed residence. *In re Aaron H.*, 2012 WL 5478997 __ S.E.2d __ (W. Va. 2012). A Wyoming court did not abuse its discretion when it allowed a stepparent adoption to go forward despite the father's claim that he had not "willfully" failed to support his child when he had quit his job, failed to exercise diligence in finding work, been unemployed for over a year and failed to support his child even after enlisting in (and being paid by) the United States Air Force. *In the Matter of the Adoption of AMP*, 286 P.3d 132 (Wyo. 2012).

Experts: Over the Department of Veterans Affairs' objections, some of which a New York family court found "puzzling and disturbing" - the court refused to quash a subpoena for the father's VA psychiatrist in a child custody case when both parents and the child's attorney agreed to the subpoena and the child's father signed a medical release allowing the doctor to testify, the court observing, "It comes down to the safety of a child as balanced against the convenience of an organization." *In the Matter of S.P.*, 951 N.Y.S.2d 347 (N.Y. Fam. Ct. 2012). An Arkansas court did not abuse its discretion by refusing to hear the testimony of a parental alienation expert when the expert had not interviewed either the child or the allegedly alienating foster parents. *Young v. Arkansas Department of Human Services*, 2012 Ark. 334 (Ark. 2012). A Utah court should have admitted Facebook screenshots that a mother claimed would have evidenced the friendship between a

custody evaluator and one of the father's attorneys because that evidence might have shown bias or a motive to testify. *Black v. Hennig*, 286 P.3d 1256 (Utah App. 2012).

Imputed income: An Alaska court did not err when it imputed eight hours of work per week as income to a wife who chose to work 32 hours per week "to be available for the children and to reduce the risk of repetitive use injuries that can result from working as a sonographer." *Helen S. K. v. Samuel M. K.*, 2012 WL 5659703, __ P.3d __ (Alaska 2012). But a Florida court erred when the judge did a "sort of a pro rata ratio-type thing in my mind" and concluded that the ex-husband, who earned the equivalent of $923 per month in yuan from teaching in the People's Republic of China, actually received "the equivalent of earning in the U.S. $3,000 per month." *Hoffman v. Hoffman*, 98 So.3d 196 (Fla. App. 2012). A Kentucky court erred when it imputed, without explanation, the ability of an ex-husband with a part-time job to earn the same as his schoolteacher ex-wife. *Hempel v. Hempel*, 2012 WL 4209004 __ S.W.3d __ (Ky. App. 2012).

Realty: An Arkansas ex-wife, who filed a lis pendens pursuant to an agreed divorce decree, preserved the priority of her lien on property awarded to her ex-husband as against a later lender because, even though an Arkansas court cannot order an involuntary lien to secure the payment of alimony, a court can impose such a lien with the consent of the parties. *Benefit Bank v. Rogers*, __ S.W.3d __, 2012 Ark. 419 (Ark. 2012). A D.C. appellate court held that a divorce court may not equitably distribute the marital home when it is titled in the name of the wife and her father unless the father is joined as a party to the divorce proceeding. *Graves v. Graves*, 51 A.3d 521 (D.C. App. 2012).

School: In *Odom v. Odom*, 2012 WL 5289673 __ S.E.2d __ (Ga. 2012), the Georgia Supreme Court affirmed a trial court that, one year after divorce, ordered an ex-husband to pay increased child support to cover the children's private school expenses even though the parties' agreed divorce decree stated that the ex-husband would pay those expenses for only one year and would not otherwise be responsible for private school expenses. In *Hamilton v. Hamilton*, 2012 WL 5832550, __ S.E.2d __ (Ga. 2012), when faced with a divorce decree that required an ex-husband to pay $6,000 per month in alimony (rather than $4,000 per month) so long as the parties' child remained enrolled in college, the court held that the ex-husband must resume the $6,000 payments after the child dropped out of college but later enrolled in a different college.

Sparring: A New York appellate court sanctioned an ex-husband when he sued his ex-wife for "negligent infliction of emotional distress allegedly caused by the defendant's bad parenting of their child," holding that "[a] parent's obligation in raising a child is owed to the child, not to the other parent." *Anonymous B. v. Anonymous R.*, 951 N.Y.S.2d 370 (N.Y. App. 2012). The North Dakota Supreme Court upheld dismissal of a suit for negligent infliction of emotional distress brought by an employee against his boss for sending the employee out of town so the boss could have sex with the employee's wife, reasoning that the suit actually was a "masked" claim under the abolished tort of alienation of affections. *Moseng v. Frey*, 2012 WL 5205746, __ N.W.2d __ (N.D. 2012). But the Second Circuit reversed a district judge who "refuse[d] to be pulled into this vitriolic tug-of-war" by dismissing an ex-wife's suit against her ex-husband for battery and related torts that allegedly occurred during their marriage. *West v. West*, 694 F.3d 904 (U.S. 7th Cir. Sept. 17, 2012).

Splitting the baby: Veronica Goudreau named her son Alexander Bailey Goudreau. The child's father, Andrew Lemieux, petitioned a New Hampshire court to change the child's name to Alexander Bailey Lemieux. The New Hampshire Supreme Court found no abuse of discretion when the trial court named the child "Alexander Goudreau Lemieux." *In re Name Change of Alexander Goudreau*, 2012 WL 5351145 __ A.3d __ (N.H. 2012).

Weird: The Sixth Circuit affirmed a father's conviction for transmitting threats via interstate commerce when the father, prior to a custody hearing, made a YouTube video of himself playing a guitar adorned with an American flag in which the father sang of his love for his daughter and that if the judge didn't "do the right thing," the father would kill him. *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012). Said the court, "The style is part country, part rap, sometimes on key, and surely therapeutic." But the father shouldn't have uploaded the video to YouTube.

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COLUMNS

WHY MENTAL HEALTH EXPERTS' RECORDS MATTER

by John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Review the records that support a mental health expert's evaluation or social study report. It may make the difference in your case. Evaluation records often reveal key problems that an expert's report does not show—even if the report reflects an evaluation conducted with generally accepted procedures. But too often, lawyers question an expert from the report without having carefully examined the underlying records. Don't make this mistake. Records reveal the quality of the methodology and reasoning that support an expert's opinions, and, thus, provide a roadmap—not evident in the report—to biases or deficiencies that may have compromised the reliability of those opinions.

Consider three cases that included evaluations. In an employment discrimination case in which the plaintiff sought emotional damages, the evaluation report noted that the evaluator administered generally accepted psychological tests to the plaintiff. The test profiles showed significant emotional problems. The records, however, revealed that the evaluator had allowed the plaintiff to complete the tests at home, counter to standardized procedures that require the tests to be administered in the evaluator's office free of distractions or aid from others. The evaluator acted improperly and unethically when she interpreted the test results as if she had followed proper test procedures—a problem that raised sharp questions about the reliability of the evaluator's testimony.

In a child custody case, the report showed that the psychologist met with each parent four times, implying proper interview balance. But, upon review of the records, construction of a methods timeline—when did the interviews take place; when was the testing administered; when were interested third parties contacted and interviewed; when were relevant school and medical records received and reviewed—exposed a key problem: The evaluator saw the father three times and administered psychological testing to him before she interviewed the mother for the first time. The evaluator's opinions favored the father. Recognition of this unbalanced interview schedule opened the door to cross-examination questions about whether the evaluator had been biased by her extensive contact with the father in the evaluation's early phase.

In addition, the methods timeline revealed the evaluator's "decision-path." In the above example—the unbalanced parent interviews and the added fact that the evaluator did not contact interested third parties until one day before submitting her long written report—the evaluator's opinions might have been different (a different decision-path) if the evaluator would have ordered her procedures differently. That is, the evaluator might have gained different information if she would have alternated her interviews between the parents instead of settling on her unbalanced interview schedule, and if she would have conducted the third-party interviews in the middle of the evaluation period instead of at the evaluation's very end when the report had mostly been written.

In a dependency/child welfare case, the evaluation report stated that father, "based on test results," had a personality disorder that compromised his parenting. Review of the test results in the records revealed that the test profiles did not accurately reflect the evaluator's significant concerns of the father. When an evaluator relies on psychological testing to inform her opinion, an obvious concern is whether she interpreted the test results properly. If she interpreted the test result improperly, did she exaggerate or minimize the results or clearly misinterpret the results? Improper test interpretation may suggest that the evaluator is trying to shoehorn test results into her biased view of the examinee.

Texas caselaw emphasizes the importance of careful review of evaluation records to examine the foundation of an expert's testimony. *Havner* holds: "If the foundational data underlying opinion testimony are unre-

[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.

liable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

In sum, insist on obtaining all records that the mental health expert gathered and developed during a forensic evaluation. Then have your consultant review the records for the quality of the evaluation's methods and the reasoning that supports the expert's opinions. Taking these steps will enrich your examination of the expert and sharpen your arguments to the court regarding the quality of the expert's testimony.

WERE YOU SURPRISED BY YOUR TAX EXPOSURE THIS YEAR?
by Christy Adamcik Gammill, CDFA[2]

Undoubtedly, you've heard that the need for tax planning is critical. However, most investors earnestly deal with this subject after the ball drops in Times Square on New Year's Eve. If the amount of taxes you owed last year was a great concern, and if you're worried about your potential liabilities this year, consider approaching taxes as many affluent investors do.

Typically, they make investment decisions with tax implications in mind all year long.

Often, they often keep a record of their transactions during the year and pay close attention to tax-saving opportunities towards the end of the year, once they learn what they will likely owe in taxes.

In virtually every portfolio, there are capital gains and losses. The goal is to determine how to best manage the tax implications in yours. With your financial and tax professionals' help, you can take positive action and better manage your capital gains taxes on profitable stock transactions. In many cases, you must act by **December 31, not April 15**, to receive tax advantages for the year.

When it comes to connecting stocks and taxes, know the basics.

First and foremost, certain dividends on stocks qualify for special tax rates and others do not.

- *Interest income* is taxed at a person's highest marginal tax rate and, of course, can increase your taxes.
- *Qualified dividends* are taxed at a lower rate, as a result of the Jobs and Growth Tax Relief Reconciliation Act (JGTRRA) of 2003.
- *Short-term capital gains* are taxed at a person's highest marginal tax rate.
- *Long-term capital gains* are taxed at a lower rate.
- Here is a little more explanation.
- *Ordinary dividends* are distributed by mutual funds from their profits and earnings.
- They must be included as dividend income on your tax return. However, many ordinary dividends are classified as qualified dividends, which are taxed at lower rates. The general rule is that the reduced rates apply to dividends received from a domestic corporation or a qualified foreign corporation (a stock traded on a U.S. stock exchange). Dividends on preferred stocks, for example, are taxed as ordinary income.
- The reduced tax rate applying to *qualified dividends* are 15% if you are in the 25% tax bracket or higher (5% for those in the 10% or 15% tax brackets). To qualify for the 15% rate, you must
  - Hold the stock for at least 61 days during the 120-day period beginning 60 days before the stock's *ex-dividend date*. This is the trading date after which investors who purchase the stock do not get the most recently declared dividend.
- What can you do now to potentially reduce your taxes later?
  - Consider the potential advantage of qualified dividend-paying stocks that are taxed at lower rates.

[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. AGE-81890 (11/2014))

- When buying stocks that pay qualifying dividends, hold them for at least 61 days to qualify for the 15%/5% rate.
- By understanding and managing qualifying dividends, which is just one part of the tax spectrum, you can take more control over your taxes.

Plan ahead. Talk to your financial advisor and CPA now.
Review your options, determine your strategy and put your tax savings plan into action.

JUDGMENTS FOR ATTORNEY FEES AND INTEREST: What Should Not "Go Bump in the Night," Often Does

By Jeff Coen[3]

Yes, Virginia, there may be a Santa Claus, but the Family Code doesn't automatically authorize attorney fees in family law matters without some time and effort spent on the part of the attorneys. And no, Virginia the 6% post-judgment interest rate isn't correct in all family law matters.

As this is the Holiday Season and all of us look to the end of the year hoping that clients and judgment debtors settle up old bills before the beginning of the new one, it is appropriate to talk about what makes us so jolly - payment of attorney fees. And what is the ribbon on the fee present we are all hoping is under the tree? Post-judgment interest. So let's begin there.

I. INTEREST RATES ON JUDGMENTS

Interest refers to "compensation for the use, forbearance, or detention of money." *Carl J. Battaglia, M.D., P.A. v. Alexander*, 177 S.W.3d 893, 907 (Tex. 2005). In the context of judgments, it is the cost of forgoing the immediate payment of the amount of the judgment to the successful party. Many family law practitioners who haven't done collection or commercial litigation simply take the accrual of interest on final judgments for granted. After all it is in the practice manual and most of us don't give it a second thought.

The accrual of post-judgment interest while known at common law is now governed by specific statutes. All money judgments (except exemplary damages) are entitled to post-judgment interest. The rate of post-judgment interest is dictated by Texas Finance Code § 304.003(c) and published at http://www.occc.state.tx.us/pages/int_rates/judg.html. The rate has been at 5% since December 2009, and the highest rate was 10.99% in August 1984, when home mortgages and the prime lending rate were north of 15%.

II. INTEREST RATES ON CHILD SUPPORT

Texas Family Code § 157.265 provides a different interest rate on child support as it becomes delinquent. It accrues at the rate of 6% for all payments due after September 1, 2002, and 12% for all child support due prior to that date. Further § 157.265(c) states that interest accrues "...on a money judgment for a retroactive or lump sum child support" at 6%. As an observation, this provision is contained in Section 157, which deals exclusively with enforcement of child support, not the establishment or modification of Title V child elated issues. If *Tucker v. Thomas*, which is described in detail under attorney fees in this column, is affirmed by the Texas Supreme Court sometime next year, then conceivably the award of attorney fees in a non-enforcement action could be considered a judgment for lump sum child support and bear 6% interest. But all other money judgments, including attorney fees and costs in a Title I property decrees/judgments are governed by Finance Code § 304, which currently remains at 5%.

III. JUDGMENTS CONTAINING INCORRECT INTEREST RATES

If all this sounds confusing, trial courts have been inserting incorrect post-judgment interest rates for decades. Perhaps it is simply an oversight. If a decree is submitted to the court with signatures approving the form of the order, few judges review each and every page. So the fault is more likely that of the drafters than

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the court, but not always. Although the minimum rate in the statue is 5%, one appellate court incorrectly stated that the interest rate in the appealed judgment should have been 4%. *Hinojosa v. Hinojosa*, 2007 WL 1933586 (Tex. App.—Corpus Christi 2007, no pet.). That judgment had a 6% rate, probably because of the mistaken belief that all family law judgments carried the child support enforcement rate.

Allright, Inc. v. Pearson, 735 S.W.2d 240, 240 (Tex. 1987) holds that an error in the post-judgment interest rate is substantive and not subject to a *nunc pro tunc* judgment or other collateral attack.

In fact, it is better to leave out post-judgment interest all together than get it wrong, as the Supreme Court has held that post-judgment interest accrues as a matter of law and if not stated, will be presumed to be computed at the lawful rate. *Office of Attorney Gen. of Tex. v. Lee*, 92 S.W.3d 526, 528 (Tex. 2002)

So why is this even mildly important? If a growing number of practitioners of the dismal science (economics) are correct and the esteemed Federal Reserve continues with its policy of "QE III to Infinity" a sudden rise in the prime rate due to inflation may cause post judgment rates to rise dramatically in a short period of time as they did in the 1980's.

Which brings us back to the most recent legal developments in the awarding of attorney fees in family law matters.

IV. ATTORNEY FEES AWARD IN FAMILY LAW MATTERS

In virtually every case where appellate courts are asked to address attorney fees issues, the opinions begin with the premiss that compensation for attorney fees are unknown at common law and are purely creatures of statute. This is known as the "American Rule," which was coined by the U.S. Supreme Court and has been followed for over 100 years in Texas. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). The rule applies to all civil actions except family law matters, which should be no great surprise.

Attorney fees arise from two separate, but often related causes of action under the Texas Family Code: 1) division of property and related issues (Title I); and, 2) SAPCRs (Title V). Attorney fees are also authorized in Title III and Title IV proceedings, but they are limited and will not be dealt with here.

V. ATTORNEY FEES IN DIVORCE AND ANNULMENT

There is no statutory basis for attorney fees in Title I cases. The award of attorney fees on an interim basis or at final judgment is dictated by case law. There are two rationales for the ability of the court to award attorney fees in a divorce. One is to obtain a "just and right" division of the community estate and the other is because attorney fees to represent a spouse in a divorce are a necessity or necessary.

VI. ATTORNEY FEES AWARD BASED ON JUST AND RIGHT DIVISION

Texas Family Code § 7.001 requires the trial court to divide the "estate" of the parties in a "just and right" manner giving due regard to the rights of each party and any children of the marriage. This is often referred to as a "fair and equitable" division. The portion of the statute requiring the court to take due regard of the rights of each party prohibits the court from dividing the separate property of a party. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977); *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).

Attorney's fees have been awarded in divorces based on fair and equitable division standards long before the Texas Family Code came into existence. *Carle v. Carle*, 234 S.W.2d 1002 (Tex. 1950). An internet search of over the last two-year period yields over one hundred references to this legal principle. In fact, a reversal of an attorney fee award usually requires that the entire division of the estate be remanded to the trial court because of its effect on the fairness of such division.

Several courts have held that the award of attorney's fees in a divorce action, not involving the parent-child relationship, cannot exceed the value of the community property at issue before the court. *Toles v. Toles*, 45 S.W.3d 252, (Tex. App.—Dallas 2001, pet. denied); *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 847 (Tex. App.—Texarkana 1996, writ denied); *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (reversed on other grounds).

VII. ATTORNEY FEES AS NECESSARIES IN TITLE I CASES

Conversely, there is a line of cases holding that a judgment for attorney fees against a spouse is based on the theory of necessaries. Spouses are required to pay for the basic requirements or needs of the other spouse

and are liable to third parties who provide such needs. Tex. Fam. Code § 2.501 states, "Each spouse has the duty to support the other spouse." Prior to the enactment of the 1963 Marital Property Act, women were prohibited from contracting for anything without the consent of their husband, except in the case of necessaries. Therefore, the rule regarding necessaries was required in order for attorneys to represent wives and expect to be paid. *See* McKnight, Family Law, Annual Survey of Family Law, 30 Sw. L. R. 85 (1976).

The Texas Supreme Court heard oral argument on November 7, 2012, in the case of *Tedder v. Gardner Aldrich LLP*, Cause No. 11-0767, (http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=32907). This appeal involves whether the attorney fees for the spouse who sued for divorce were necessities and, if so, whether the other spouse failed to discharge his support duty and therefore he was personally liable for the fees. The trial attorneys for the wife withdrew and intervened after a jury trial by filing a suit on a sworn account against both parties. The final judgment assessed liability only against the wife, but awarded her property to satisfy her obligation. She subsequently filed bankruptcy and the law firm appealed. The law firm's brief states that the legal theory holding that attorney fees are necessities and can be ordered paid by the husband is "... so well settled that it does not need to be labored." *Couch v. Couch*, 315 S.W.2d 64, 67-8 (Tex. Civ. App.—Austin, 1958 writ dis'm w.o.j). While it may have been well settled in 1958, the intervening family code and case law has apparently caused the Supreme Court to revisit the issue.

VIII. PAYMENT OF INTERIM ATTORNEY FEES IN TITLE I CASES

The competing theories for awarding attorney fees in final divorce decrees seemed to harmonize or at least co-exist until the enactment in 1981 by the Legislature authorizing interim attorney fees awards in what is currently Texas Family Code § 6.502(a)(4). In 2011, the Texas Supreme Court accepted a writ of mandamus and later denied it, but did not answer the question of whether a court can order interim fees payable by the husband to the wife where a pre-nuptial agreement prohibited the parties from accumulating any community property. In that case the two legal theories of just and right division clashed with necessities and the Court left the resolution until another day, if the final judgment was appealed. *See In Re H. D. V.*, Cause No. 11-0064, (Tex. 2011, orig. proceeding).

Interestingly the 1981 statute, originally Texas Family Code § 3.58(b)(4), allowed for the payment of interim fees to preserve the estate and protect the parties including ". . .ordering payment of reasonable attorney's fees and future expenses properly chargeable as court costs, on proof of necessity." (emphasis added). The necessity language was dropped in 1995, when the entire family code was re-codified. One could presume that based on statutory construction the removal of such language was significant as a change in the wording of a statute is never considered to simply be an oversight on the part of the Legislature.

The Supreme Court's resolution of the basis for an award of attorney fees in a final divorce decree will probably resolve the same issue in the award of interim attorney fees.

IX. ATTORNEY FEES IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

Thankfully litigants and their counsel don't have to rely on divergent appellate decisions to justify an award for attorney fees in SAPCRs. All Title V actions are governed by statute. Tex. Fam. Code § 106.002. Therefore there is no controversy regarding the trial court's ability to grant a judgment for fees. The question arises not as to the court's power to award, but how the fees may be enforced.

As all of us know, there is no debtor's prison in the United States and anything close to "imprisonment for debt" is strictly prohibited by Article I, §18 of The Texas Constitution. Child support is an exception because there is a common law and statutory duty to support your children. Tex. Fam. Code § 151.001(3) (duty to support children, including providing the child with food, clothing, shelter, medical and dental care, and education.) Further the state has an interest to insure that the duty to support is fulfilled, otherwise the state must provide the needs.

Texas Family Code § 157.001, et seq. provides the statutory frame work for enforcement of child support (including medical support and possession). Appellate decisions have long held that attorney fees and costs of enforcement of child support may also be enforced by contempt. Parents found guilty of contempt for failure to pay child support can be held in jail until they pay the support and all attorney fees and costs. Also, if ordered to pay attorney fees for enforcement actions and a parent later fails to satisfy the order, they can be held in contempt and committed for that future violation.

None of these precepts have been successfully challenged on appeal and an untold amount of attorney

fees have been paid to obtain release from incarceration. A good discussion is contained in *Tucker v. Thomas*, 2011 WL 6644710, ___ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2011, pet. granted). But, in that case, the Court went much further.

Tucker is an *en banc* decision holding that not only are attorney fees for enforcement actions enforceable as child support, but that all SAPCR attorney fees awards may be enforced as child support. The rationale for the holding is based on the obligation that parents are required to provide necessaries for their children. Since attorney fees are necessary to prosecute SAPCRs for the safety and welfare of the children, they fall into the category of "support" required in Texas Family Code § 151.003(1).

The *Tucker* decision goes to great lengths to justify the holding and it is a decision that any practitioner venturing into the murky waters of attorney fee enforcement by contempt should carefully read because it discusses, then rejects a long history of holdings to the contrary, including two decisions of its own. According to *Tucker* eight of the 14 Texas Appellate Courts, (including its sister court, the Houston 1st District) have held that enforcement of an award of attorney fees in any SAPCR case, other than for child support enforcement, is prohibited as imprisonment for debt.

The dissent in *Tucker* and a majority of other intermediate appellate courts rely on Texas Family Code § 106.002(b), which states that an award of fees in a Title V action may be enforced as a judgment for debt. Under this reasoning, attorney fees are a "debt" within the meaning of the Texas Constitutional prohibition for imprisonment. The *Tucker* majority disagrees finding that § 106.002(b) is merely one avenue of collection, but not the exclusive remedy.

The majority cites as supportive of the ability to enforce attorney fees as child support Texas Family Code §§ 151.001, 154.001(a), 156.401(a), and 107.023. But only § 107.023 actually uses the word "necessity" in describing a judgment for attorney fees to an amicus attorney. The comment to § 107.023 in Sampson & Tindall's 2012 Edition specifically states that enforcement by contempt is not available even though said fees are necessities.

The 1st and 14th appellate courts are hopelessly at odds on this issue. The *Tucker* decision not only acknowledges the divergence, but literally cries out for the Texas Supreme Court to resolve this issue. In November 2012, the Supreme Court did just that. It granted petition for review and scheduled oral argument on February 5, 2013. *See* Tucker v. Thomas, Cause No. 12-0183.

Should the Texas Supreme Court affirm the Court of Appeals decision, the collectability of attorney fees judgments will be greatly enhanced. Average judgment debtors will no longer be unreachable because of debtor property exemptions and the constitutional prohibition against garnishment of wages. The threat of contempt jail time should bring the most recalcitrant debtor to the bargaining table. Spouses without the liquidity of funds to pay an attorney might find such a decision opening more law firm doors for representation (something weighing greatly on the minds of the Supreme Court justices these days). On the other hand, under the heading of be careful what you ask for, an affirmation of *Tucker* will require a lot of extra thought and trial preparation. Because of the potential jeopardy to clients, the presentation and refuting of attorney fees claims will be highly scrutinized. Discovery will increase and even the usual redacting of statements will be challenged.

Finally, there may also be the requirement to segregate fees into what is attributable to "necessaries" for the children's safety and welfare from attorney fees for everything else. See *Wright v. Wright*, 280 S.W.3d 901 (Tex. App.—Eastland 2009, no pet.); *Henry v. Henry*, 48 S.W.3d 468 (Tex. App.—Houston [14th Dist.] 2001, no pet.). There is a general exception that segregation of fees is not required if the separate causes of action are so intertwined that it is too difficult to do so. The Fort Worth Court of Appeals recently found that attorney fees for both a modification and enforcement actions need not be segregated because they require proof of the same facts at trial. *In re W.M.R.*, 2012 WL 5356275, 02-11-00283-CV (Tex. App.—Fort Worth Nov. 1, 2012, no. pet. h.). But that involved the award of fees, not an enforcement by contempt and incarceration.

X. CONCLUSION

The fact that the Texas Supreme Court has considered three cases involving attorney fees arising out of family law matters in the last year indicates that there is a growing interest on the part of the Court to clear some otherwise muddy waters. The common thread in all three cases is the use of the "necessity" theory as a means of

obtaining payment of fees for the benefit of spouses and children. *H. D. V.* was a writ denied case and shed little light on the subject though "necessity" was central theme of the argument. The other two cases are pending and hopefully we will get some clarification from the Supreme Court by the end of 2013. What began decades ago with simply characterizing an award of attorney fees "in the nature of child support" or "for the benefit of children" to avoid discharge in bankruptcy has mushroomed into an issue that could have a dramatic effect on the practice of family law in Texas. Of course, it is not too late for the Legislature to act in its upcoming session and thereby clear up the entire issue whichever way it chooses, but that would take an interest that does not appear to be present at this time.

THE ETHICS OF CORRESPONDENCE WITH CLIENTS

By Ellen Lockwood[4]

Most paralegals spend much of their time corresponding with clients, via email and hard copy letters. Of course, properly identifying yourself as a paralegal in all correspondence is required, but paralegals should also carefully consider the contents of your correspondence.

If the correspondence is only a transmittal letter sending documents or other materials to a client there should not be any issues. Even if the transmittal letter includes instructions, such as to sign a document in the presence of a notary, or to review a deposition transcript, sign, and return the errata sheet, such standard correspondence is acceptable for a paralegal to send over the paralegal's signature.

Sometimes the correspondence contains updates regarding the matter being handled for the client. While it is appropriate for a paralegal to send this type of correspondence to the client, it is strongly recommended that such correspondence be previously drafted and approved by the attorney. Not only does standardized correspondence reduce the risk of leaving out important points, it also reduces the likelihood that there will be a miscommunication due to different writing styles and other variables.

Client correspondence that includes instructions or recommendations in addition to matter updates should always be either standardized and approved by the attorney, or approved by the attorney each time this type of correspondence is sent. Although instructions and recommendations are not legal advice, clients will rely on this information for their future actions and therefore the attorney should approve the text of the correspondence.

Correspondence to clients forwarding agreements for the client to review and approve is sometimes a special situation. Before sending this type of client correspondence, paralegals should verify that the attorney has reviewed and approved the agreement. It is best if the attorney has previously discussed the agreement with the client but regardless, the correspondence should include a conspicuous statement that if the client has any questions or concerns regarding the agreement, he should contact the attorney.

If the correspondence includes legal advice, the correspondence should come directly from the attorney and not the paralegal. Although paralegals may draft correspondence including legal advice, paralegals should not sign such correspondence, even by permission. Even if the correspondence makes clear that the legal advice is coming from the attorney and not the paralegal, it is still inappropriate for a paralegal to sign such correspondence.

As stated above, the best way to minimize errors, misstatements, and misunderstandings is to use standardized language, drafted and approved by the attorney, for frequently used client communications. This will also increase paralegal, legal assistant, and attorney efficiency and productivity. Of course, any standardized language must be revised for the current matter. The next best option would be to have the attorney approve the correspondence before the paralegal sends it to the client.

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While paralegals may handle much of the correspondence to clients, they must be sure it is proper for a paralegal to send that type of correspondence and seek attorney review and approval of correspondence when appropriate.

ARTICLES

CASES STATING A MEDIATOR CAN TESTIFY

By Michael Gregory[5]

The general rule is any type of alternate dispute resolution procedure, including a mediation, is confidential and a statement made by a participant may not be used as evidence against the participant in any judicial proceeding. Courts have ruled that an impartial third party, including a mediator, cannot testify in a judicial proceeding. The basis of this rule is found in the Texas Civil Practice and Remedies Code, sections 154.035 and 154.073.

Section 154.053 states, in part:

Standards and Duties of Impartial Third Parties.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the **settlement process**, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code and Subchapter C, Chapter 48, Human Resources Code.

Tex. Civ. Prac. & Rem. Code Ann. 154.053(c), (d) (2005) (emphasis added).

Section 153.073 states in part:

Confidentiality of Certain Records and Communications.

(a) . . . a communication **relating to the subject matter** of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding. (Emphasis added).

(b) …the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

Tex. Civ. Prac. & Rem. Code Ann. 154.073 (2005) (emphasis added).

In re Daley, 29 S.W.3d 915,918 (Tex. App.—Beaumont 2000, orig. proceeding) interpreted Texas Civil Practice and Remedies Code Sections 154.053 and 154.073 narrowly and allowed the mediator's testimony into evidence. Daley wanted to have the testimony of his actions during a mediation protected by 154.053 & 154.073. Court of Appeals held § 154.053 restricts only the disclosure of matters that occur during the "settlement process" and testimony that Daley left the mediation without the mediator's permission was allowed as it was unrelated to the settlement process. The Court further held at page 918 that "§ 154.073 is not so

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broad as to bar all evidence regarding everything that occurs at mediation from being presented to the trial court. Rather than a blanket confidentiality rule for participants, the statute renders confidential 'a communication relating to the subject matter of the dispute of any…dispute' made by a participant in an ADR procedure." The Court then found that testimony as to the actions of a participant during mediation that did not involve the subject matter of the dispute were admissible.

Under the offensive use doctrine a person waives confidentiality of privileged information if: (1) the party asserting the privilege is seeking affirmative relief; (2) the privileged information sought is such that, if believed by the fact finder, in all probability it would be outcome determinative; and (3) disclosure of the confidential information is the only means by which the aggrieved party may obtain the evidence. *Republic Ins. Co. v Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding).

The Court in *Alford v. Bryant*, 137 S.W.3d 916, 921 (Tex. App.—Dallas 2004, pet. denied), specifically held that "the offensive use doctrine should apply….to the mediation confidentiality statutes." When a party asserts a privilege in an offensive manner they have exceeded the scope of the privilege. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985).

In *Alford* a contract dispute settled in mediation. *Id* at 919. The original defendant then sued her attorney for failure to advise her of the risks and benefits of settlement. *Id.* In defense the mediator was called to testify about the substance of the disclosure made by the attorney to the client. *Id.* The trial court did not allow the mediator to testify on the basis of Section 154.053 Tex. Civ. Prac. & Rem. Code. *Id.* at 921. The Court of Appeals reversed under the offensive use doctrine. *Id* at 922. First, the original defendant had sought affirmative relief from the court. *Id.* Second, the mediator's testimony would have likely been outcome determinative as the only other evidence would have been "a veritable swearing match" between the two litigants. *Id.* Third, the mediator was the only other person present when disclosure of the risks and benefits of settlement was made and could present this critical evidence to the court. *Id.*

WHAT EVERY LAWYER SHOULD KNOW ABOUT DRUG AND ALCOHOL TESTING

By Sarah Darnell[6]

INTRODUCTION

Most Texas lawyers know that in a large number of family law cases use and/or allegations of use of illegal drugs or excessive consumption of alcohol is often an issue in child custody and/or divorce cases. Therefore, it is important for lawyers to be informed about the common types of testing order by Texas Courts. It is also important to know what the test results prove.

There are many myths regarding drug/alcohol testing that all lawyers should be aware of, no matter what party that the lawyer represents.

URINALYSIS DRUG TESTING

Urinalysis drug and/or alcohol testing is a form of testing that is frequently ordered by courts in Texas in family law cases. Urinalysis drug and/or alcohol testing can detect a broad range of drugs. Urinalysis drug and/or alcohol testing can detect use from 3 days up to a week depending on the frequency and/or quantity of use. The type of substance consumed can also impact the detection window. For example, if a person consumes marijuana on a daily or regular basis, a urinalysis drug and/or alcohol test could detect use up to 40 to 45 days. A person's body type can also impact how long a substance remains detectible in a urine sample. For example, there are certain drugs, like marijuana that remain detectible for longer periods in individuals that weigh more because the THC in marijuana sticks to a person's body fat. A substance like cocaine is usually only detectible in a urine sample for a much shorter time period, generally 3 to 7 days.

There are many myths regarding how to "beat" a urinalysis test. There are many products on the market that purport to guarantee that a person will "pass" a urinalysis drug and/or alcohol test. There are also some home remedies that also claim to help a person "pass" a drug and/or alcohol test. The most common methods

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that many people attempt when it comes to urinalysis drug and/or alcohol testing is to consume excessive amounts of water, to mix household ingredients such as bleach with the water that is being consumed, or by consuming products that are sold by companies that claim to be able to assist them with "passing" a test. Some people even attempt to use someone else's urine when submitting a sample for a test.

If you have a client that has been or may be ordered to submit to a urinalysis drug test it is important to advise them that these antics won't work. It would also be helpful to advise them of the following:

- Many drug and/or alcohol testing facilities used by courts in Texas have personnel that supervise the urinalysis testing. Therefore, attempting to use another person's urine sample will likely not be successful and they will more than likely be "caught in the act."
- Consuming excessive amounts of water and/or other products will more than likely cause their creatinine level to be extremely low. Creatinine is metabolic waste found in urine. When a person consumes excessive amounts of liquid their creatinine levels decrease drastically. The normal range of a person's creatintine level differs for men and women. However, the general rule of thumb is that if the creatinine level is below 20 mg, then the sample is considered to be diluted.
- Most courts in Texas consider a diluted sample as the equivalent of a "positive" result.

HAIR TESTING

Another common method of drug testing used by Texas courts during divorce matters and custody matters is hair testing. Generally, a 5-panel hair test is conducted by the testing facility unless other drugs are specifically requested to be tested.

A 5-panel hair test will test for use of the following substances:

1. Cocaine;
2. Methamphetamines, amphetamines, ecstasy;
3. Heroin, morphine, codeine;
4. PCP; and
5. Marijuana.

The main difference between a urinalysis drug test and a hair test is that a hair test can test for a longer period of use. Hair tests are generally used to test for use with someone that is believed to have used drugs for a longer period of time rather than occasional use. Generally, a standard head hair test can detect use for 90 days or 1.5 inches of hair closest to the scalp. Therefore, it is possible that a person could test negative on a urinalysis drug screen, but test positive on a hair test.

Just like there are myths about how to "beat" a urinalysis drug test there are also myths regarding how to "beat" a hair test as well. A common method of attempting to avoid having to take a hair test is for a person to shave his/her head hair, cut their hair extremely short, and/or to color or bleach their hair prior to submitting to a hair test. It is important to be aware that if a person shaves and/or cuts their head hair, then their body hair can be tested instead. Head hair generally tests for use for 3 months. The growth rate of the head hair is approximately ½ inch per month. Body hair however can test for use from 7 to 12 months because the rate of growth for body hair is much slower, and then the hair is dormant.

Another common method of attempting to "beat" a hair test is to use shampoos and/or to bleach and/or color the hair prior to a test. Some of the shampoos on the market can reduce the level of drugs in the hair, but generally they will not reduce the level enough to test negative. Coloring and/or bleaching the hair can reduce the level of drugs in the hair, but will not reduce the level enough to pass a hair test.

NAIL TESTING

Nail testing is the newest form of drug testing being used by courts in Texas in divorce and child custody cases. Either fingernails and/or toenails can be tested to detect drug use. Like hair testing, nail testing has a longer detection period than a urinalysis drug screen. Nail testing can detect drug use for a period of 3 months up to 8 months.

When submitting to a nail test the nail is either clipped or shaved/scraped. All nail polish and/or acrylic nails must be removed prior to submitting to a nail test. Nail testing is generally used in cases where a person has no hair to test and/or if use of shampoos or other products that intend to alter hair or urinalysis test results

are suspected. There are not many products on the market that claim to assist someone with passing a nail test.

A lawyer should advise their client that if they test positive on any kind of drug and/or alcohol test, it will likely have a negative impact on their divorce and/or child custody case in Texas. The lawyers should advise the client that they will likely be awarded only supervised visitation with their children for an extended period of time. The client will also likely be required to submit to random alcohol and/or drug testing for an extended period of time.

It is also important to advise the client of the cost associated with random drug/alcohol testing. A urinalysis alcohol and/or drug test can range is cost from $50.00 to $100.00 per test. A hair test and/or nail test can range in cost from $100.00 to $200.00 per test. Some courts order testing to occur at least once every thirty days. Other courts order random testing to take place more frequently. If random testing is ordered they will generally be allowed anywhere from as little as 3 hours to as many as 24 hours to submit to a test upon receipt of notice that a test is being requested.

RULING PUTS 401(K) PLAN BENEFICIARIES ON NOTICE: REMARRIAGE CAN OVERTURN INHERITANCE

By Wade H. Chessman, CFP[7]

The name on the beneficiary form of a 401(k) plan is the final determinant of who inherits the account assets… or is it?

A recent U.S. district court ruling illustrates the dangers of assuming that beneficiary forms always take precedence. Given the right set of circumstances, remarriage can thwart a plan participant's intentions.

When a Leonard Kidder's longtime wife died, he amended his 401(K) beneficiary form so that his three adult children would inherit the account assets upon his death. Kidder remarried and then died just six weeks into his second marriage, at age 66. Kidder's second wife claimed she had the sole right to the assets under the terms of the plan, which specified that a deceased employee's spouse is the automatic beneficiary unless the spouse waives that right, which she had not.

The children argued that because ERISA (Employee Retirement Income Security Act) laws do not require a living participant to seek spousal consent for non-spousal distributions until after the first year of marriage – consistent application of the law would require that a couple be married for at least a year before the participant's death in order for the waiver requirement to take effect.

The company asked the court to rule. The judge in *Cajun Industries LLC v. Robert Kidder*, No. 09-267-BAJ-SCR (M.D.La.Apr.26, 2011, sided with Kidder's widow, awarding her the entire $250,000 in the account and disinheriting the children.

The court held that Kidder's 401(K) plan clearly stated that the employee's spouse is the beneficiary unless he or she waives that right. ERISA laws governing 401(K) plans allow companies to specify that spousal rights take effect at any point up to a year after the marriage takes place. Because Kiddereplan did not specify that spousal rights would commence at a particular time, the spousal rights of Kidder's widow took effect as of the day the couple married.

Further, the court noted that ERISA rules allow individual 401(K) plans to decide whether to require spousal consent when a living participant has been married less than a year. Therefore, limiting the definition of "spouse" to apply only to those who have been married for at least a year is not, as the children claimed, necessary to ensure consistency between the plan and the ERISA provisions.

This case is a real wake-up call for families, especially in light of the growing popularity of 401(K) plans and the prevalence of second marriages.

Clearly, participants should not assume that those they list as beneficiaries will inherit their plan assets under every scenario. Plan participants must understand the provisions of their plan, especially if their life situation or marital status changes.

Not all plans, for instance, specify that spousal rights take effect immediately upon marriage.

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If your client has an individual retirement account, in most cases the spouse is not automatically specified as the beneficiary. So if Kidder had rolled his 401(K) assets into an IRA *before* entering the second marriage, there would have been no dispute and his children would have inherited the funds. The timing of the rollover is key.

Clients who roll over their 401(K) plan assets into an IRA after remarrying cannot avoid the spousal consent rule. That's because distributions from 401(K)s and other ERISA plans, including direct rollovers to IRAs, require spousal consent.

The bottom line is that you need to be aware that a remarriage can drastically affect any provisions clients have made regarding the distribution of their assets. You can provide a valuable service by ensuring that both the plan participant and the new spouse understand their rights and responsibilities before the new marriage takes place.

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VIRTUALLY POSSIBLE-USING THE INTERNET TO FACILITATE CUSTODY AND PARENTING BEYOND RELOCATION

Jason LaMarca[8]

Child custody problems in divorce judgments are an unfortunately common issue in American society. In 2009 there were 6.8 million marriages and 3.4 million divorces.[1] This equates to a divorce rate of 50%.[2] The destruction of a family unit in divorce, and the subsequent resolution of custody issues afterward, have profound effects on the children of a dissolved marriage.[3] The courts and state legislatures have recognized the need of children to continue relationships with and have support from both parents following a final judgment of divorce[4] and have created numerous support systems and shared parenting arrangements to serve this need.[5]

The legislative and judicial systems have, in the relatively recent past, adopted new policies to support the interests of children, such as the abandonment of the tender years doctrine[6] and stricter enforcement of child support obligations.[7] A recent addition to child custody resolution is virtual visitation.[8] "Virtual visitation, also called Internet visitation, refers to the use of e-mail, instant messaging, webcams, and other Internet tools to provide regular contact between a noncustodial parent and his or her child."[9] The tools available today via the Internet can maximize the welfare of children by substantially increasing the ability of parents to exercise both their custodial and legal rights.[10]

Part I of this article begins with a short explanation of child custody arrangements and issues in America and a brief review of social science literature to show why such modernization is beneficial. Next, Part II will review court decisions and legislative acts that states have used to facilitate custody arrangement and parenting with Internet tools. Finally, Part III will suggest new uses for existing remedies and suggest new applications that courts or legislatures could add to a judicial "toolbox" in order to maximize the interests of children and their parents.

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I. Child Custody Arrangements

A. Typical Custody Arrangements

There are two types of custody a parent can be awarded. One is legal custody, which encompasses a parent's right to make major decisions for a child, to legally advocate for the child,[11] and to otherwise have the privileges afforded to parents by law.[12]

The second type of custody, and the more relevant one for the purposes of this note, is residential custody. A parent with residential custody is the main caretaker of and provides the primary residence for the child.[13]

There are several ways a court can assign custody. One method is to assign joint primary residential and legal custody. This situation can occur in two ways: the unlikely situation where the former spouses continue to cohabitate in the same household, or the more likely scenario where both parents reside near each other and have equal amounts of parenting time.[14] A more common custody arrangement is where one parent has residential and legal custody while the other parent has legal custody and visitation rights.[15] Although, the current vogue is to refer to the parent with visitation rights as possessing secondary residential custody of the child.[16] This scenario is favored because traditional family law doctrine presumes that it is in the best interests of the child to have regular contact with both parents.[17] Finally, one last common custody arrangement is sole custody, where one parent has full residential and legal custody of a minor child.[18] This custody arrangement is most often used in cases where one parent is either unwilling or unfit to care for their child or where there is such animosity between the parents that the child would be adversely affected by those parents having any contact with each other.[19]

The custody plan used in any divorce is intensely fact specific.[20] The judicial determination is guided, in virtually all states, by applying the underlying circumstances surrounding both parents to an assessment of what custody arrangement is in the best interest of the child based on those facts.[21] While many States have specific statutory factors that judges are supposed to consider in their grants of custody, the factors they use are approximations for determining the best interests of the child.[22]

B. Relocation Jurisprudence

Parental relocation is a typical scenario where virtual visitation is ordered.[23] A parent granted primary residential custody of a child who wishes to move to a new state following a divorce may not simply do so if they wish to take their child with them. That parent must go before a court and receive permission to relocate because of the effect it will have on both the child and the noncustodial parent.[24] It requires a balancing of the custodial parent's ability to pursue their life and interests against the noncustodial parent's interest in participating in their child's life.[25] Parents who wish to move often do so for the following reasons: a new spouse, a job opportunity, an escape from the shame associated with a divorce, or the desire to live closer to extended family.[26] Courts seriously consider these requests because, beyond equity requiring a court to respect a parent's life decision, research has shown that one of the strongest circumstances correlated to a child's post-divorce adjustment is the economic condition of the custodial parent.[27] Even when a child support order is complied with in full by the noncustodial parent, there is often a steep decline in the standard of living of a recipient spouse and their children.[28] Thus, if the basis for a move improves financial circumstances for the custodial parent, the child's best interest may be advanced by allowing it.[29] Additionally, the emotional health of the custodial parent highly correlates with a child's post-divorce well-being as it "ranks as one of the most powerful predictors of children's adjustment following divorce."[30] Thus even if the purpose of the move is for the custodial parent to relocate closer to family or a new spouse, it still may favor the child's best interest.[31]

However, social science research also shows that a child's best interest is served by maintaining a joint custody relationship with both parents following a divorce.[32] Allowing a custodial parent to relocate to a distant state is detrimental to the relationship between a noncustodial parent and the child.[33] Additionally, relocation is often detrimental to a child's well-being by further disrupting the routine previously possessed and by removing support from their peer group.[34] These competing interests prove difficult to reconcile for family court judges when considering relocation motions.

States often come up with complex multi-factor balancing tests to guide judges in this type of decision.[35] The common threads in these relocation standards is that they try to find a balance between the benefits of improved circumstances for custodial parents and the benefits of maintaining the relationship of noncustodial parents.[36] The obvious new obstacle for the noncustodial parent in these cases is the inability to interact with

their child regularly. The inherent difficulty involved with weighing the factors both for and against such a move has often prompted judges from a wide variety of jurisdictions to become creative and improvise new remedies not contemplated by their legislatures or prior generations of jurists.[37] The creative remedy which they found and favored in an effort to increase custodial welfare while providing maintenance to the noncustodial relationship was to use modern telecommunications, specifically Internet visitation to reconcile these interests.

II. Virtual Visitation

A. Judicially created Internet visitation

New Jersey - Virtual visitation in New Jersey received its first endorsement in 2000.[38] Chen v. Heller involved a plaintiff mother requesting permission to relocate with her child. In response, the father objected to the petition for relocation and submitted a cross-motion for enhanced visiting time.[39] The trial court denied the mother's request to relocate, but ordered "that each party set up computer-assisted video conferencing in their respective homes at their own cost 'to facilitate continued contact for the children with each [parent] . . .'"[40] The appellate division reversed the denial of the plaintiff's motion for relocation, however continued the order for both parents "to set up video conferencing in their respective homes at their own cost."[41]

The original judge's use of video conferencing software as an in-state remedy is unusual, as the majority of cases and statutes involving Internet visitation implicate a move across state lines.[42]

The next major New Jersey case related to Internet visitation was McCoy v. McCoy.[43] McCoy was a relocation case where a mother sought to move her special needs child from New Jersey to California in order to take a position as a web designer.[44] In the mother's visitation plan she said that she would design a website "which would include the use of camera-computer technology to give defendant [and] his family and friends, the ability to communicate directly with [the child] on a daily basis and review her school work and records."[45] The trial court denied the relocation petition stating that, among other reasons, the visitation schedule was insufficient to maintain the relationship between father and daughter.[46] The appellate court overturned the relocation denial, specifically stating that the "plaintiff's suggested use of the Internet to enhance visitation was both creative and innovative" and that the "judge failed to adequately consider alternative visitation plans."[47]

The supplement of traditional visitation with virtual visitation adopted in McCoy has since been used in more recent cases;[48] however it's hard to determine its overall pervasiveness as New Jersey, like many other states, declines to publish the majority of its family law cases.

North Dakota - Another jurisdiction where appellate courts promulgated the use of virtual visitation as a tool for judges to supplement physical visitation in relocation cases is North Dakota.[49] As early as 1999, courts in North Dakota limitedly embraced modern communications technologies as tools to facilitate child visitation.[50]

In Gilbert v. Gilbert, a mother sought to relocate with her child from North Dakota to West Virginia to pursue enhanced job opportunities and to be closer to her new husband.[51] The trial court denied the relocation.[52] The appellate court overturned that decision and specifically directed, on remand, that the lower court consider virtual visitation tools.[53] It stated that the trial court could use "the telephone, Internet, web-cam, and other wireless or wired technologies to ensure the child has frequent and meaningful contact with the noncustodial parent."[54] Moreover, the appellate court felt, as a national trend, that "[v]irtual visitation is becoming more widely recognized as a way to supplement in-person visitation."[55] The acceptability of using Internet visitation in North Dakota law was further supported in a similar subsequent case.[56]

New York - New York was the first state to address Internet visitation in the United States.[57] In Lazarevic v. Fojelquist, a mother sought to relocate with her son to Saudi Arabia.[58] After conducting a best interest analysis, the court granted the motion for relocation.[59] However, as a condition of the relocation the court also ordered that [R]espondent shall hire, at her expense, a computer consultant in both New York and Dhahran to select, purchase and set up compatible computer systems with laser printers in both Petitioner's residence in New York and in [the son's] new residence in Dharhan to enable Petitioner and son to communicate on the Internet and by fax. [The son's] computer system shall be placed in his bedroom which will be accessed through a dedicated phone line. In addition, [the son's] room shall have a telephone with answering machine

also with a separate dedicated phone line for Petitioner and [his son] to utilize.[60]

This ruling is unique insofar as it places the full burden of costs for the necessary equipment on the custodial parent.[61] This was not an isolated ruling as there have been examples as recently as 2009 of New York judges issuing virtual visitation orders.[62]

Connecticut - The first appearance of virtual visitation in Connecticut law was the relocation case of Armstrong v. Armstrong.[63] Here, the judge made note of the New Jersey decision in McCoy and suggested virtual visitation as an additional way for the father to spend time with his child.[64] The court suggested the possible use of technology for video chat, homework help, and to allow the parent to witness recordings of the child's activities.[65] Next, in the relocation case Arriaga v. Gambardella, the court mentioned that technologies used in long distance visitation could support a father-child bond in the future.[66] The acceptability of the use of Internet visitation in Connecticut appears to be fully established, as the more recent cases involving Internet visitation do not have poetic discussions of its appropriateness or novelty.[67]

Massachusetts - Virtual visitation first appeared in Massachusetts in 2002.[68] Cleri v. Cleri involved a mother who wished to relocate with her child to New York in order to be closer to her family.[69] The trial court in Massachusetts allowed the mother to relocate to New York with her child, but ordered the father to have two weekend visits a month and one hour of virtual visitation two nights a week.[70] This decision was later upheld by an appellate court panel.[71]

Idaho - In a 2009 case, Danti v. Danti, a mother sought to relocate from Idaho to California with her two minor children.[72] The trial court granted the relocation and, as part of the visitation schedule, ordered regular virtual visitation.[73] The father challenged the visitation schedule in full as being an abuse of the judge's discretion.[74] The appellate court upheld the judge's visitation decision as legitimate.[75]

Tennessee - In 2001, a trial court ordered Internet visitation in the divorce case Burke v. Burke.[76] On appeal, the appellate court approved of the trial judge's order that Mr. Burke pay for the installation and maintenance of the necessary software on his former spouse's computer.[77] The appellate court specifically stated that "[w]e agree with the trial court that Mr. Burke's proposal of Internet-based communications is a unique, forward thinking and viable communication alternative."[78] What separates this case from the majority of other published cases using Internet visitation is its application of Internet visitation to an in-state visitation plan.[79]

Utah - In 2002, Michael Gough's[80] ex-wife sought to relocate with their child to Wisconsin.[81] Mr. Gough proposed webcam visits with his daughter as part of a visitation plan, which the judge later ordered over his ex-wife's objection.[82]

B. Statutes

Utah - In 2004, Utah's legislature became the first in the nation to directly address the issue of virtual visitation in divorce cases.[83] The law, H.B. 82, was prompted by the Mr. Gough's advocacy of Internet visitation.[84] The bill changed Utah statutory law defining virtual parenting-time:

> [P]arent-time facilitated by tools such as telephone, email, instant messaging, video conferencing, and other wired or wireless technologies over the Internet or other communication media to supplement in-person visits between a noncustodial parent and a child or between a child and the custodial parent when the child is staying with the noncustodial parent.[85]

Interesting is that they addressed the often repeated argument against virtual visitation, that it would be used replace traditional parenting time, in the definition section by adding that "[v]irtual parent-time is designed to supplement, not replace, in-person parent-time," rather than putting in the applications sections.[86] The law only considers virtual parenting time if the equipment necessary for it is "reasonably available".[87] This inclusion was likely designed to prevent courts from disadvantaging indigent parents by creating a plan which includes virtual visitation that could not actually occur. However, such concerns are likely less relevant today because the costs associated with such technology have decreased. Also notable is that the law does not limit the use of the visitation to circumstances involving relocation.[88]

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Wisconsin - Wisconsin is another state with a specific Internet statute. In 2005, Wisconsin passed Senate Bill 244 which amended the child custody rules in that state by adding language such that:

> If the court grants periods of physical placement to more than one parent, the court may grant to either or both parents a reasonable amount of electronic communication at reasonable hours during the other parent's periods of physical placement with the child. Electronic communication with the child may be used only to supplement a parent's periods of physical placement with the child. Electronic communication may not be used as a replacement or as a substitute for a parent's periods of physical placement with the child. Granting a parent electronic communication with the child during the other parent's periods of physical placement shall be based on whether it is in the child's best interest and whether equipment for providing electronic communication is reasonably available to both parents. If the court grants electronic communication to a parent whose physical placement with the child is supervised, the court shall also require that the parent's electronic communication with the child be supervised.[89]

The statute contains specific language stating that virtual visitation is not to be used as a replacement for traditional visitation.[90] However, this statute also authorizes virtual visitation for in-state custody cases as the statute governs all custody determinations, not just out-of-state relocation.[91] The law's impact is difficult to determine as Wisconsin lawyers have noticed an increase in the use of virtual visitation methods, but not necessarily pursuant to a court order.[92]

Texas - In 2007, Texas passed a statute that authorized the use of electronic communications in certain circumstances. The law allows a judge to order virtual visitation based on findings of "(1) whether electronic communication is in the best interest of the child, (2) whether equipment necessary to facilitate the electronic communication is reasonably available to all parties subject to the order, and (3) any other factor the court considers appropriate."[93] This statute is also generally applicable to both in-state and interstate arrangements.[94] It also contemplates wide usage by issuing a broader disclaimer than the other statutes, stating "[t]he court may not consider the availability of electronic communication as a factor in determining child support. The availability of electronic communication under this section is not intended as a substitute for physical possession of or access to the child where otherwise appropriate."[95]

Illinois - On August 21, 2009, Illinois amended their civil code to allow for virtual visitation.[96] The new provisions in the code allowed parents to petition for electronic communication with "electronic communication" defined as:

> [The] time that a parent spends with his or her child during which the child is not in the parent's actual physical custody, but which is facilitated by the use of communication tools such as the telephone, electronic mail, instant messaging, video conferencing or other wired or wireless technologies via the Internet, or another medium of communication.[97]

The language used is broad enough to apply to most conceivable digital advances for the near future, preventing the code from having to be further amended to accommodate change. The legislation also altered a different section of the code that governs child relocation and added the condition that "[t]he court may not use the availability of electronic communication as a factor in support of a removal of a child by the custodial parent from Illinois."[98] It is too early to gauge judicial and public usage of the act as it has only been in effect since January 1, 2010.[99]

North Carolina - In 2009, North Carolina amended their general statutes to allow virtual visitation.[100] The amendments to their code closely mirror the changes of previous states.[101] North Carolina's custody statute now allows a judge to authorize electronic visitation if certain predicate findings are reached[102] and to establish the parameters of such visitation.[103] The statute also contains the standard usage disclaimer.[104]

Florida - Florida amended its statutes relating to child custody in 2007 to allow virtual visitation.[105] Florida law has the same basic provisions on the determination of its use as Texas and North Carolina, however it

also requires a judge to look at "[e]ach parent's history of substance abuse or domestic violence."[106] Finally, this statute also contains an explicit disclaimer stating: "[e]lectronic communication may be used only to supplement a parent's face-to-face contact with his or her minor child. Electronic communication may not be used to replace or as a substitute for face-to-face contact."[107]

Hawaii - Hawaii law contains a statute that specifies the service contract purchases its director of public safety may authorize for adult prison reentry programs.[108] That statute specifically authorizes the use of funds to "[d]evelop programs and activities that support parent-child relationships, such as: . . . [u]sing videoconferencing to allow virtual visitation when incarcerated persons are more than one hundred miles from their families"[109] This type of program is the exception rather than a trend and is discussed in Part III of this Note.

Part II of this article was designed to be as comprehensive as search utilities would allow, however there exists difficulty locating records of many family court cases, as they are often unpublished for reasons relating to privacy. There are eight states across the country where courts, in public opinions, have established the use of Internet visitation.[110] Additionally, there are seven states which have authorized the use of virtual visitation by statute.[111] Due to Utah's categorical inclusion within caselaw and statute states, fourteen regionally diverse jurisdictions established some form of virtual visitation within the last fifteen years, indicating a growing trend that will likely continue to spread.

III. Possible Solutions

A. Moving beyond traditional usages. Part II detailed the current state of the Internet usage relating to issues of child custody. The Internet has been authorized for use by courts primarily to provide videoconferencing for noncustodial parents when the custodial parent relocates and by state legislatures in all divorce scenarios.[112] When the statutory law and case law is viewed together it shows that virtual visitation is a national trend. While this progress is laudable, there are still more situations and new methods by which Internet technology could be used in order to improve custody regimes.

B. Wider spread adoption of Traditional Virtual Visitation statutes. Traditional virtual visitation statutes would be exceedingly beneficial to children and noncustodial parents in states without such legislation. The provisions that such states have enacted can serve as a model for legislators as it addresses concerns of abuse and the effects of their legislation can be reviewed. States where virtual visitation has been created by judicial fiat could still benefit from the introduction of legislation. Virtual visitation statutes provide greater guidance to judges about what criteria to evaluate.[113] Additionally, the passage of virtual visitations statutes could expand its use due to increased public awareness of the tool and decreased concerns related to judicial restraint.

C. Supplementing In-state Parenting Arrangements. Judicially created virtual visitation is predominantly used in relocation cases.[114] However, if the purpose of Internet visitation in relocation cases is to advance the best interest of the child by increasing the noncustodial parent's role in a child's life,[115] then it would be equally beneficial within state lines when applicable. Additional judicial expansion or, more preferably, statutory authorization could bring this tool within state lines. For instance, a custodial parent moving to northern Florida, and leaving a noncustodial parent in southern Florida, has placed far more distance between themselves then in cases of a custodial parent moving from the southern border of New Jersey to northern border of Delaware. The Internet and modern telecommunications could be used to foster stronger relationships between a child and a noncustodial parent who reside within the same state.

D. Acrimonious Divorces. There are issues other than distance which can prevent a noncustodial parent from having regular visitation with their child. One situation where judges are disinclined to award joint custody or visitation is when there is extreme animus between the divorced parents.[116] Here, research indicates that contact between parents is more detrimental than the positive impact of the maintained relationship.[117] However, if a judge is empowered to use virtual visitation within the borders of the state, it could maximize the child's best interest by allowing the child to maintain the relationship with the parent while not having to experience bitter conflicts caused by parental conflict.[118]

E. An Opportunity: Visitation for Incarcerated Parents. Visitation is an even more complicated issue when it comes to ordering a child to visit a parent who is currently incarcerated for a criminal offense. As of 2008, "809,800 of the 1,518,535 individuals held in the nation's prisons at midyear 2007 were a parent of a minor children."[119]

At the core of such visitation determinations is the judge's opinion of whether or not such visitation is in the child's best interest.[120] There is a general presumption in the law that it is in a child's best interest to maintain contact with a noncustodial parent.[121] Studies show that children with incarcerated parents experience a broad array of negative emotions, exhibit disruptive behaviors in school, and experience academic deterioration.[122] However, contact with incarcerated parents can improve a child's welfare by relaxing their fears associated with their parent's detention while fostering their relationship with that parent, thus improving the chances of successful post incarceration reunification.[123] Additionally, many states have held that incarceration in itself is not grounds to deny child visitation.[124]

However, many judges do not consider sending a child to visit a parent in prison to be in the best interest of the child due to the trauma of seeing such a parent in a prison environment.[125] Additionally, the practicality of such an arrangement can make visitation impossible when an inmate is sent to a distant or out-of-state prison.[126]

Internet visitation could provide judges with a tool to maintain visitation orders without unduly burdening the custodial parent and inflicting a child with the traumas associated with penitentiary visits. Thus, the positive benefits of substantial maintained parental contact could remain intact with a major diminishment of the adverse consequences.

This would necessarily need to be a legislative or administrative initiative because of the requirements of such a project. While a judge could order the custodial parent to make a child available for such visitation, actually making such an action occur would require prison policies which allow compliance. Additionally, there would need to be a non-trivial resource allocation for communications hardware, software, and personnel training to penitentiaries.

Additionally, there are policy benefits unrelated to the child's welfare in implementing a virtual visitation system such as: diminished safety concerns from having fewer children and members of the general public present in prisons; cost savings associated with the diminished safety concerns;[127] and lower recidivism rates.[128]

There are some states which already possess a certain level of telecommunications infrastructure as they have video conferencing software deployed at prisons for telemedicine programs, which provide remote doctor visits.[129]

More directly, there have been efforts to implement this type of system in certain states by non-profit groups. A program was started in 2001 by the Pennsylvania Department of Corrections and the Pennsylvania Prison Society to provide virtual visitation at eight Pennsylvania penitentiaries.[130] Their program allows a prisoner to schedule a 55-minute video-conference with family members for a twenty dollar fee.[131] Another initiative is in the state of Illinois where the non-profit Illinois Council on Responsible Fatherhood is working to implement the "creation of a virtual visitation program for incarcerated fathers."[132]

With proper legislation, and logistical support, an incarcerated parent would be able to petition the court for a virtual visitation order. Virtual visitation removes most of the detriments associated with visiting an incarcerated parent while maintaining the benefits of parental contact.[133] When visitation is requested, that scenario, combined with precedents stating that visitation cannot be denied solely on the grounds of incarceration, would allow judges to maximize the best interests of the child by ordering virtual visitation for incarcerated parents.[134]

F. Possible use: Homework Help. One of the traditional parenting activities of the modern era is a parent helping their child complete homework. Certain studies suggest that there is a positive correlation between parental involvement with homework and positive student achievements and attitude towards homework and learning.[135] Before the advent of modern Internet technology, a parent separated from their child could only be minimally involved in helping because of the limits on long distance communication. However, technological advancements have provided tools that can provide solutions.

One aspect of the original website proposal in the early New Jersey virtual visitation case, McCoy, was the creation of a website where the child could upload his homework for the distant parent to review.[136] The appellate decision was in a relocation case where more creative measures to maintain the parent-child relationship are required, however there is no logical barrier-- although perhaps there is a financial one--to the application of this concept in non-relocation contexts.[137] The interest of noncustodial parents in aiding their child's education is the same regardless of whether they are several towns away or across the country.

Using the Internet to facilitate homework help is easier and more accessible than it was when McCoy was decided. The parent in that case was a Web designer who volunteered to build a custom website for that purpose.[138] Today there are free services, such as Google docs, which allow users to create, share, and edit files in real-time over the Internet.[139] A parent could use this technology jointly with Skype to do homework with their child over an extended distance.[140] This would provide both parties involved with a more traditional parent-child interaction. Judges could use such an order to relieve acrimony raised by a parent who believes their counterpart is not adequately contributing to their child's education.

Courts in relocation cases have already granted this type of order[141] and it could also be an effective tool for judges in regular custody disputes. While legislative change is generally a more effective method for establishing a new normal for court orders, there are no barriers from preventing judges from implementing this system by fiat. The judges could use their equitable powers and jurisdiction over the custody issue to order that homework be uploaded for review the same way they began ordering video-teleconferencing.[142]

G. GPS Monitoring. While the previous recommendations have focused on facilitating the communication and interaction of noncustodial parents with their children, there are also tools available that would enable noncustodial parents to exercise legal custody. One such tool is cell phone GPS systems.[143] In non-judicial contexts, parents have been able to activate cell phone services that allow them to monitor a child's location online.[144] The software also provides tools such as "virtual fencing," which sends an alert to parents if a cell phone breaches certain preset geographical boundaries.[145] This tool allows noncustodial parents to know if their children are receiving previously agreed to religious education,[146] if they are in the hospital, or if they are attending school.

There are certain problems with using this type of tool. For example, this would not be appropriate in divorces where heightened levels of animosity exists, as it first may create an abduction risk, and second it would not be useful if the custodial parent and noncustodial parent could not work together in creating and enforcing rules for the child. However, this problem could be mollified by requiring a judge to make findings similar to those required in the legislation authorizing virtual visitation as to the best interest of the child, the financial capacity of the parents, the ability of the parents to work together, and any history of spousal abuse or custodial interference.[147]

Additionally, GPS orders could be useful in situations involving less-scrupulous parents or where a party has a documented record of custodial interference. In those circumstances, the court could order GPS monitoring during visitation.[148] Mobile tracking devices similar to phones exist that can send text messages with embedded GPS locations.[149] A court could order that the unreliable parent send a text message through the device at certain intervals or be subject to contempt and immediate police action.

While a judge being able to create either of these orders sounds radical, there are examples of judges using GPS technology to monitor juveniles. The second scenario would not likely cause controversy because it would be predicated on a finding of previous custodial interference, and in essence is tracking the misbehaving parent rather than the child. The former suggestion, although more controversial, is not without some precedent. One example is school districts that issue small GPS devices to students who are habitually truant.[150] Generally, parental consent would be required if that were done on a school's authority, but there are some instances where it is done under court order.[151]

H. Concerns about Virtual Visitation. One major concern with virtual visitation is that judges will use it to either allow a more permissive standard in relocation cases[152] or use it to supplant more traditional visitation time.[153] However, almost every ruling and statute concerning virtual visitation addresses this problem by inserting a specific disclaimer that it is not to be used to replace traditional visitation.[154] While it is possible that a judge may use it inappropriately as a deciding factor in a relocation case, you cannot craft policy based on the assumption that a judge is going to disregard the law.

An additional concern in more contentious divorces is the potential for visitation interference due to false technical difficulties or the custodial spouse claiming conflicts with the child's schedule.[155] The potential for this type of abuse is real, though not insurmountable, if the judiciary is willing to enforce sanctions and possibly modify custody arrangements against obstructing parents.

Lastly, another problem is that it would be extremely difficult or impossible to maintain virtual visitation when the child is opposed or disinterested. With a physical change in custody, the parent does not require the child's full attention in order to spend quality time with them. The parent can take meals with their child, play with their child, and watch them perform everyday activities. None of these opportunities, which require less effort of the child, are available in Internet visitation. This problem underlies the importance of only using virtual visitation as a supplemental tool rather than a replacement. A possible remedy for this is additional modifications to parenting schedules if the court finds the visitation regime frustrated despite best efforts to make it work.

IV. Conclusion. Virtual visitation has established a strong foothold in American jurisprudence. This is a beneficial development because of the positive impact its implementation can have on the welfare of children. However, there are still many jurisdictions that can benefit from its adoption into their jurisprudence. Additionally, advances in technology also have created new ways that Internet visitation can supplement and enrich a noncustodial parent-child relationship. There may be new problems that arise with the use of virtual visitation, however, its benefits outweigh the possible weaknesses which can be overcome by stringent judicial monitoring and enforcement.

Footnotes

1 Cntrs. for Disease Control and Prevention, 58 Nat'l Vital Stat. Rep. 25 (2010), available at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf.

2 See id.

3 Andrew J. Cherlin et al., Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States, 252 Science 1386, 1386 (1991), available at http://www.sciencemag.org/content/252/5011/1386.full.pdf ("The research literature leaves no doubt that, on average, children of divorced parents experience more emotional and behavioral problems and do less well in school than children who live with both biological parents.").

4 David D. Meyer, Family Ties: Solving the Constitutional Dilemma of the Faultless Father, 41 Ariz. L. Rev. 753, 797 (1999) ("courts typically ... presume ... a substantial benefit to a child of being reared by her own 'natural parent.'").

5 See infra Part I.

6 This abandonment of the principal that in their "tender years" a child should be in the mother's custody is nearly complete in law. See Principles of Family Law and Dissolution § 2.12 cmt. c (2002). However, there are still judges who use the concept to inform their rulings. See, e.g., Julie E. Artis, Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine, 38 Law & Soc'y Rev. 769, 771 (2004).

7 See Irwin Garfinkel et al., Fathers Under Fire: The Revolution in Child Support Enforcement in the USA, Centre for Analysis of Social Exclusion (Aug. 1998), http://eprints.lse.ac.uk/6513/1/Fathers_under_fire.pdf (think tank report linking increased enforcement in child support obligations to an increase in the noncustodial parent's desire for visitation and decision-making authority).

8 Id.

9 Elisabeth Bach-Van Horn, Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?, 21 J. Am. Acad. Matrimonial L. 171, 172 (2008).

10 See infra Part I.

11 An interesting effect in American jurisprudence of the importance afforded to determinations of legal custody recently manifested before the Supreme Court. In 2004, the Court declined to reach the core issue in an establishment clause challenge to the inclusion of the phrase "under God" in the pledge of allegiance. The case was dismissed for lack of standing because the parent who litigated the case did not have legal custody of his child on whose behalf the case was being litigated. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004).

[12] Legal custody is defined as "[t]he authority to make significant decisions on a child's behalf, including decisions about education, religious training, and healthcare." Legal Custody Definition, Black's Law Dictionary 412 (8th ed. 2004).

[13] Physical Custody Definition, id. at 1183.

[14] See Joint Custody Definition, id. at 412. However, this method is disfavored because it is usually "found not to be in the best interests of the child." Id.

[15] "A noncustodial parent's ... court-ordered privilege of spending time with a child ... who is living with another person[.]" Visitation Rights Definition, id. at 1603.

[16] The change from visitation rights to secondary residential custody is semantic and was done in order to soothe parents who felt only having visitation rights relegated them to a second class status. Doreen Halickman, Florida Adopts New Custodial Terms and Concepts, Divorcenet, http:// www.divorcenet.com/states/florida/florida_adopts_new_custodial_concepts (last visited Jan. 12, 2012).

[17] Joint Custody Definition, supra note 12, at 412.

[18] Sole Custody Definition, id. at 413.

[19] See Joint Custody Definition, id. at 412.

[20] See Best Interest of the Child Definition, id. at 170.

[21] Id.

[22] See N.J. Stat. Ann. § 9:2-4 (West 2011). New Jersey's statute is typical of similar statutes in other states and lists over fifteen factors. See, e.g., Va. Code Ann. § 20-124.3 (West 2011). These include the ability of the parents to cooperate, the child's preference, and distance between parental residences, which a judge is supposed to consider before determining a custody arrangement. See N.J. Stat. Ann. § 9:2-4.

[23] See infra Part II. Long distances between parents require creative solutions to make shared custody arrangements manageable.

[24] See Ann M. Driscoll, In Search of a Standard: Resolving the Relocation Problem in New York, 26 Hofstra L. Rev. 175 (1997) (summarizing various methods which states use in order to determine if a parent will be allowed to relocate).

[25] Baures v. Lewis, 770 A.2d 214, 217 (N.J. 2001) (discussing the difficulties of weighing the interests of both the custodial and noncustodial parents).

[26] Kenneth Waldron, A Review of Social Science Research on Post-Divorce Relocation, 19 J. Am. Acad. Matrimonial Law. 337, 337 (2005).

[27] Michael E. Lamb, Kathleen J. Sternberg & Ross A. Thompson, The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment, 5(3) Expert Evid. 83, 86 (1997), available at http://www.springerlink.com/content/w2701p23313k4882/fulltext.pdf (noting that "[c]entral to [the] achievements [of the child] are the economic conditions of the residential parents immediately following the divorce, and in the years thereafter").

[28] Id.

[29] See id.

[30] Id. at 84.

[31] See id.

[32] Id. at 85-86. This is discounting those cases where visitation brings together two highly hostile and combative parents. In such cases, visitation may be in the child's best interest. Id. at 85.

[33] Waldron, supra note 26, at 357.

[34] Lamb et al., supra note 27, at 86-87.

[35] For example, the factors that New Jersey judges must consider when hearing a relocation motion are:
(1)the reasons given for the move; (2) the reasons given for the opposition; (3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; (4) whether the child will receive educational, health and leisure opportunities at least equal to what is available here; (5) any special needs or talents of the child that

require accommodation and whether such accommodation or its equivalent is available in the new location; (6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; (7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed; (8) the effect of the move on extended family relationships here and in the new location; (9) if the child is of age, his or her preference; (10) whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent; (11) whether the noncustodial parent has the ability to relocate; (12) any other factor bearing on the child's interest. Baures, 770 A.2d at 229-30; see also Tropea v. Tropea, 87 N.Y.2d 727, 740-41 (N.Y. 1996) (listing factors that are similar to those in found by the court in Baures); Gruber v. Gruber, 583 A.2d 434, 439-40 (Pa. Super. Ct. 1990) (listing factors that the court must consider when dealing with a relocation hearing).

[36] See Tropea, 87 N.Y.2d at 740-41; Gruber, 583 A.2d at 439-40.

[37] See infra Part II.

[38] Chen v. Heller, 759 A.2d 873 (N.J. Super. Ct. App. Div. 2000).

[39] Id.

[40] Id. at 881.

[41] Id. at 886.

[42] See id. at 881; McCoy v. McCoy, 764 A.2d 449 (N.J. Super. Ct. App. Div. 2001); Gilbert v. Gilbert, 730 N.W.2d 833 (N.D. 2007); Hruby v. Hruby, 776 N.W.2d 530, 537 (N.D. 2009); Lazarevic v. Fojelquist, 668 N.Y.S.2d 320 (N.Y. Sup. Ct. 1997).

[43] McCoy, 764 A.2d 449. Interestingly, this case is frequently cited for being the ground breaking New Jersey virtual visitation case despite it occurring after and having a narrower application than Chen. See Elisabeth Bach-Van Horn, supra note 9, at 174; Anne LeVasseur, Note, Virtual Visitation: How Will Courts Respond To a New and Emerging Issue?, 17 Quinnipiac. Prob. L.J. 362, 373 (2004).

[44] McCoy, 764 A.2d at 450-51.

[45] Id. at 451.

[46] Id. at 453-54.

[47] Id. at 454.

[48] See Williams v. Williams, No. A-0754-09T4, 2010 N.J. Super. Unpub. LEXIS 1062, at *15 (N.J. Super. Ct. App. Div. May 18, 2010).

[49] Gilbert, 730 N.W.2d 833.

[50] Tibor v. Tibor, 598 N.W.2d 480, 487 (N.D. 1999) (identifying the "use of e-mail messages, making frequent telephone calls, and sending video tapes" as methods by which a noncustodial parent living in another state could maintain a relationship with their child).

[51] Gilbert, 730 N.W.2d at 835-36.

[52] Id. at 840.

[53] Id.

[54] Id.

[55] Id.

[56] Hruby, 776 N.W.2d at 537 ("Virtual visitation, using the telephone, Internet, and other technologies, can also ensure the child has frequent meaningful contact with the noncustodial parent and can be helpful to supplement in-person visitation.").

[57] Lazarevic, 668 N.Y.S.2d 320.

[58] Id. at 321.

[59] Id. at 328.

[60] Id.

[61] See id.

[62] Correy Stephenson, Virtual Visitation Heats Up, Lawyers USA (Sept. 11, 2009), http://lawyersusaonline.com/blog/2009/09/11/virtual-visitation-heats-up/ (discussing the necessity of virtual visitation where a father used sign language to communicate with is deaf daughter); Anita Ramasastry, Parenting in Cyberspace? Virtual Visitation and the Court-Ordered Use of Technology Become Realities In Tough Economic Times, Findlaw (Nov. 2, 2010), http://writ.news.findlaw.com/ramasastry/20101102.html. (discussing New York family court decision requiring Skype visitation with the noncustodial father as a condition of the mother's relocation to Florida).

[63] Arriaga v. Gambardella, 2002 WL 3108577 at *7 n.4 (Conn. Super. Ct. Aug. 6, 2002) (citing Armstrong v. Armstrong, No. FA 01-0728168-S, slip op. at 10 n.8 (Conn. Super. Ct. July 25, 2002)).

[64] Id.

[65] Id.

[66] Id. at *20, *26.

[67] See, e.g., Wilcox v. Witt, 2008 WL 1823043, at *2 (Conn. Super. Ct. Apr. 7, 2008); Disney v. Palliardi, 2008 WL 726201, at *1 (Conn. Super. Ct. Feb. 29, 2008); In re Nyasia R., 2006 WL 2130435, at *4 (Conn. Super. Ct. July 18, 2006); Falk v. Falk, 2005 WL 2210648, at *5 (Conn. Super. Ct. Aug. 17, 2005); Zimmerman v. Zimmerman, 2004 WL 1664265, at *1 (Conn. Super. Ct. June 30, 2004).

[68] LeVasseur, supra note 43, at 375.

[69] Id. at 375-6.

[70] Lee Rosen, Commentary: Virtual Visitation: Technology Hits Home, North Carolina Lawyers Weekly (Mar. 19, 2007), http://nclawyersweekly.com/2007/03/19/virtual-visitation-technology-hits-home/.

[71] Noah Bierman, '02 Ruling an Amblem for SJC Pick; Duffly, Facing Confirmation Hearing Today, Drawn to Complexity of Family Law, Bos. Globe, Jan. 11, 2009, (Metro) at 1.

[72] Danti v. Danti, 204 P.3d 1140, 1144 (Idaho 2009).

[73] Id.

[74] Id.

[75] Id. at 1155.

[76] Burke v. Burke, 2001 WL 921770 at *1 (Tenn. Ct. App. Aug. 7, 2001).

[77] The court, however, disagreed with the trial courts order that Mr. Burke be the person to train his wife in its usage, suggesting that a professional would be better suited for the task. Id. at *21.

[78] Id. at *20.

[79] Compare id., with Chen, 759 A.2d 873 (relocation); McCoy, 764 A.2d 449 (relocation); Gilbert, 730 N.W.2d 833 (relocation); Hruby, 776 N.W.2d at 537 (relocation); Lazarevic, 668 N.Y.S.2d 320 (relocation); Arriaga, 2002 WL 3108577 at *7 n.4 at *20 n.4 (relocation).

[80] Mr. Gough has become a crusader for the use of Internet visitation, founding the website Internetvisitation.org, which serves as a resource for compiling much of the statutory and case law on the topic for parents to use. About us, Virtual Visitation, http://www.Internetvisitation.org/web_ pages/about_us.html (last visited Mar. 10, 2011).

[81] See Nora Lockwood Tooher, Divorced Dad Leads Drive for 'Virtual Visitation', Lawyers WEEKLY USA (Dec. 15, 2005), http://www.Internetvisitation.org/pdf/Lawyers%20Weekly%20USA_Dec_05.pdf.

[82] Id.

[83] Bach-Van Horn, supra note 9, at 181.

[84] H.B. 82, 56th Leg., Gen. Sess. (Utah 2004).

85 Utah Code Ann. § 30-3-32(1)(d) (LexisNexis 2011).

86 Id.; see Gilbert, 730 N.W.2d at 840.

87 Utah Code Ann. § 30-3-35(o) (West Supp. 2005); id. § 30-3-35.5(c)(iv).

88 See id. §§ 30-3-32 to 30-3-35.5.

89 Wis. Stat. Ann. § 767.41(4)(e) (West Supp. 2010).

90 Id.

91 Id.

92 Jane Pribek, Electronic Communication on the Rise in Custody Cases, Wis. L.J. (Sept. 21, 2009), http://www.wislawjournal.com/2009/09/21/8216electronic-communication8217-on-the-rise-in-custody-cases/..

93 Tex. Fam. Code Ann. § 153.015(b)(1)--(3) (West 2007).

94 See id. § 153.015.

95 Id. § 153.015(d).

96 Tresa Baldas, Virtual visitation Wins Approval in Sixth State, The Nat'l L.J. Online (Aug. 24, 2009), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433302548.

97 750 Ill. Comp. Stat. 5/607(a)(2) (West Supp. 2011).

98 750 Ill. Comp. Stat. 5/609(c) (West Supp. 2011).

99 See Jeremy Hubbard & Jessica Hopper, Virtual Visitation Redefines Shared Child Custody, ABC News.com (Jan. 30 2010), http://abcnews.go.com/Technology/virtual-visitation-shared-child-custody/story? id=9708413.

100 N.C. Gen. Stat. § 50-13.2(e)(1-3)(2011).

101 See Utah Code Ann. § 30-3-32(1)(d) (West 2011); Wis. Stat. Ann. § 767.41(4)(e) (West Supp. 2010); Tex. Fam. Code Ann. § 153.015(b)(1)--(3) (West 2007); 750 Ill. Comp. Stat. 5/607(a)(2) (West Supp. 2011).

102 N.C. Gen. Stat. § 50-13.2(e)(2011). The factors considered by the court are as follows: "Whether electronic communication is in the best interest of the minor child, [w]hether equipment to communicate by electronic means is available, accessible, and affordable to the parents of the minor child [and] [a]ny other factor the court deems appropriate in determining whether to grant visitation by electronic communication." Id. This language is exactly the same as that used in the Texas statute. See Tex. Fam. Code Ann. § 153.015(b)(1)-(3).

103 N.C. Gen. Stat. § 50-13.2(e)(3) ("The court may set guidelines for electronic communication, including the hours in which the communication may be made, the allocation of costs between the parents in implementing electronic communication with the child, and the furnishing of access information between parents necessary to facilitate electronic communication.").

104 Id. ("Electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication may not be used as a replacement or substitution for custody or visitation.").

105 Fla. Stat. Ann. § 61.13003 (West Supp. 2012).

106 Compare id. § 61.13003(1)(a), with Tex. Fam. Code § 153.015(b) (West 2008 & Supp. 2010), and N.C. Gen. Stat. § 50-13.2(e) (2009).

107 Fla. Stat. Ann. § 61.13003 (4).

108 Haw. Rev. Stat. Ann. § 353H-31(a) (West 2011).

109 Id. §§ 353H-31(b)(19)-(19)(B).

110 New Jersey, North Dakota, New York, Connecticut, Massachusetts, Idaho, Tennessee, and Utah. See McCoy, 764 A.2d 449; Gilbert, 730 N.W.2d 833; Hruby, 776 N.W.2d at 537; Lazarevic, 668 N.Y.S.2d 320; Arriaga, 2002 WL 3108577 at *7 n.4; Danti, 204 P.3d at 1144; Burke, 2001 WL 921770, at *1; LeVasseur, supra note 43, at 375 (discussing Massachusetts court decision Cleri v. Cleri); Lockwood Tooher, supra note 81 (discussing Utah family court opinion authorizing use of virtual visitation).

111 Utah, Wisconsin, Texas, Illinois, North Carolina, Florida, and Hawaii. See Utah Code Ann. § 30-3-32(1)(d) (West 2011); Wis. Stat. Ann. § 767.41(4)(e) (West Supp. 2010); 750 Ill. Comp. Stat. 5/607(a)(2) (West Supp. 2011); Tex. Fam. Code § 153.015(b) (West 2008 & Supp. 2010); N.C. Gen. Stat. § 50-13.2(e) (2009); Fla. Stat. Ann. § 61.13003(4) (West Supp. 2012); Haw. Rev. Stat. Ann. § 353H-31(a) (West 2011).

112 See supra Part II.

113 See, e.g., N.C. Gen. Stat. § 50-13.2(e)(3) ("The court may set guidelines for electronic communication, including the hours in which the communication may be made, the allocation of costs between the parents in implementing electronic communication with the child, and the furnishing of access information between parents necessary to facilitate electronic communication.").

114 See Chen, 759 A.2d 873; McCoy, 764 A.2d 449; Gilbert, 730 N.W.2d 833; Hruby, 776 N.W.2d at 537; Lazarevic, 668 N.Y.S.2d 320; Arriaga, 2002 WL 3108577 at *7 n.4.

115 See, e.g., Gilbert, 730 N.W.2d at 841 ("Virtual visitation is another option the district court can consider to help maintain and foster the relationship the child has with Gilbert and her extended family"); McCoy, 764 A.2d at 451-52; Arriaga, 2002 WL 3108577 at *7 n.4.

116 See Joint Custody Definition, supra note 12, at 412.

117 See Lamb et al., supra note 27, at 86.

118 Id.

119 U.S. Dept. Of Justice, Bureau of Justice Statistics, Special Report, Parents in Prison and Their Minor Children, available at http:// bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.

120 Rachel Sims, Can My Daddy Hug Me?: Deciding Whether Visiting Dad in a Prison Facility is in the Best Interest of the Child, 66 Brook. L. Rev. 933, 949 (2001).

121 Id. at 934.

122 Cynthia Seymour, Children with Parents in Prison: Child Welfare Policy, Program and Practice Issues, 1-20 (Cynthia Seymour et al. eds., 8th ed. 2001).

123 Id.

124 Sims, supra note 120, at 942.

125 See id. at 950-59.

126 See, e.g., Neil Nisperos, Prisoners to be Sent Out of State, Inland Valley Daily Bulletin (Nov. 3, 2009), http://lapd.com/news/headlines/prisoners_ to_be_sent_out_of_state; Overcrowding Forcing Pennsylvania To Move Prisoners, WTAE (Nov. 17, 2009), http://www.wtae.com/r/21637276/detail.html (explaining that overcrowding in incarceration facilities is a problem and many inmates are being transferred out of state).

127 P.J. Reilly, To Cut Costs, Lancaster Prison Considers Dropping Contact Visits, York Daily Rec. (Feb. 22, 2011), http://www.ydr.com/ci_ 17450611 (noting that approximately five guards are employed to facilitate contact visits and that many prisons are shifting to video visits to save money on guards).

128 See Sims, supra note 120, at 943 n.66 ("There is a growing body of research that shows maintaining family ties while in prison leads to lower rates of re-arrest for the fathers and makes a difference in the lives of their kids") (internal citations omitted).

129 John Gramlich, States expand video conferencing in prisons, Stateline (May 12, 2009), http://www.stateline.org/live/details/story?contentId=399298.

130 Virtual Visitation, The Pa. Prison Soc'y (Dec. 10, 2011 at 10:50 AM), http://www.prisonsociety.org/progs/ifs_fvv.shtml.

131 Id.

132 Jeffery M. Leving, Illinois Virtual Visitation for Incarcerated Fathers, Men's News Daily (Apr. 1, 2009), http:// mensnewsdaily.com/2009/04/01/illinois-virtual-visitation-for-incarcerated-fathers.

133 See supra text accompanying notes 125-31.

134 See Sims supra note 120.

[135] Kathleen V. Hoover-Dempsey et al., Parental Involvement in Homework, 36(3) Educ. psychologist 195, 204 (2004).

[136] McCoy, 764 A.2d at 451-52.

[137] See id.

[138] Id. at 451.

[139] Documents from Google, Google Docs (Dec.3, 2011, 11:47 AM), http:// www.google.com/google-d-s/documents.

[140] Skype is a free and easy to use program that allows for unlimited real-time high definition video chatting. Video calling on Skype, Skype, http://www.skype.com/intl/en-us/features/allfeatures/video-call

[141] See McCoy, 764 A.2d 449.

[142] Family courts are courts of equity. Equity allows judges to "supplement the law as applied to particular circumstances." Equity Definition, supra note 12, at 579. In jurisdictions which have statutes or prior case law establishing virtual visitation through video-conferencing or email, requiring the use of scanners or web-based technology is not a large judicial step.

[143] GPS stands for Global Positioning System. GPS units work by establishing contact with four of twenty-seven satellites that orbit the earth and using location of those satellites and its distance from there to calculate a location. Marshall Brain & Tom Harris, How GPS Receivers Work, How Stuff Works (Dec. 10, 2011, 12:15 PM), http:// electron-ics.howstuffworks.com/gadgets/travel/gps.htm.

[144] Melissa J. Hipolit, GPS Technology Helps Parents Track Teens, PBS Newshour (Feb. 19, 2007), http://www.pbs.org/newshour/extra/features/jan-june07/gps_2-19.pdf.

[145] Id.

[146] This means the GPS registers the child physically in temple, church, mosque, etc. at the appropriate time.

[147] See supra Part II.

[148] See, e.g., Ismail v. Aboubakr, No. FM-12-2160-01E, 2010 WL 2696671, at *1 (N.J. Super. June 29, 2010); The court's primary concern in proceedings involving the custody of minors is the so-called "best interests" of the child. See Terry v. Terry, 636 A.2d 579, 580 (N.J. Super. App. Div. 1994), Pogue v. Pogue, 370 A.2d 539, 539 n.1 (N.J. Super. Ch. Div. 1977).

[149] Eric Carpenter, Skipping School Becoming a Habit? GPS Might Wind up Tracking You, Buffalo News, Feb. 27, 2011, at A5.

[150] Id.

[151] See Gabriel Perna, Student GPS Tracking Company: We're not Big Brother, Int'l Bus. Times (Feb. 22, 2011), http://m.ibtimes.com/gps-student-tracking-student-tracking-gps-aim-truancy-big-brother-115093.html.

[152] See Bach-Van Horn, supra note 9, at 171.

[153] See also Lisa Belkin, Visitation via Skype, N.Y. Times (Apr. 15, 2009), http://parenting.blogs.nytimes.com/2009/04/15/visitation-via-skype. ("A screenful of Daddy is not the same as a weekend with Daddy; nor is holding a soccer trophy up to the camera for Mommy to see the same as having Mommy at the game.").

[154] See supra Part II.

[155] Glenn Sacks & Dianna Thompson, Op-Ed., No Virtue in Virtual Visitation, Bos. Globe (July 12, 2002), at A15.

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Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Jimmy A. Vaught (*J.A.V.)*

DIVORCE

STANDING AND PROCEDURE

SOLDIER DID NOT BECOME A DOMICILIARY OF TEXAS BY MERELY BEING STATIONED HERE FOR TWO SIX-MONTH PERIODS AND THEN MOVING ELSEWHERE; BECAUSE NEITHER HUSBAND NOR WIFE INTENDED TO RETURN TO TEXAS, DIVORCE SUIT COULD NOT BE MAINTAINED HERE AND SHOULD HAVE BEEN DISMISSED

¶12-5-01. ***In re Green,*** -- S.W.3d --, 2012 WL 3985091 (Tex. App.—San Antonio 2012, orig. proceeding) (09/12/12).

Facts: Husband and Wife filed for divorce in Bexar County, Texas. At that time, Husband was serving in the Army, and both parties had been living in Germany for three years, where Husband was stationed. Husband had lived in Texas for military training for four months in 1992 and again for six months in 1995-1996. Husband and Wife were married in Belgium before Husband returned to Texas for his second training period. Husband had a bank account in San Antonio, but otherwise had few Texas connections, aside from listing Texas on his military leave and earnings statement as his residence. Husband had a Virginia driver's license, was registered to vote in Virginia, and owned two homes in Virginia. Wife was a citizen of Belgium and had never lived in Texas. Prior to this suit, COA had granted mandamus relief ordering trial court to dismiss a SAPCR because trial court lacked jurisdiction. After mandamus was granted, Husband moved to dismiss the divorce proceeding. Trial court denied his motion. Husband moved to reconsider because neither party was domiciled in Texas. Trial court denied the motion. Husband filed a petition for writ of mandamus.

Holding: Petition for Writ of Mandamus Granted

Opinion: Under TFC 6.301, a suit for divorce may not be maintained in Texas unless, at the time the suit is filed, one of the parties has been a domiciliary of Texas for the preceding six-month period and has been a resident of the county in which the suit is filed for the preceding 90-day period. When determining where a person resides, volition, intention and action are equally considered. There must be intent to establish a permanent domicile accompanied by some act done in execution of the intent. A soldier does not acquire a new domicile merely by being stationed in a particular place. A soldier's domicile remains the same as when he or she entered the service, unless proof of clear and unequivocal intention to change domicile is shown.

Here, Wife claimed Husband became a domiciliary of Texas when he lived in San Antonio for military training in 1992 and again from 1995-1996. Wife asserted Husband took steps to change his legal residence to Texas when he designated Texas as his residence on his military leave and earnings statement. Wife claimed Husband told her he intended to return to Texas once he retired, and that once he became a domiciliary of Texas in 1992, his subsequent absence due to military service did not change his domicile. However, Husband only lived in Texas while he was temporarily stationed there. Since the couple married in 1995, Husband had been stationed in Korea, Virginia, and Germany. Although Wife asserts that Husband claimed he was going to return to Texas, Husband denied ever saying this. Even if Husband had in fact said he was going to return to Texas, his intent would not be enough without an accompanying act showing his intent. Therefore, the residency requirements of 6.301 were not met. Additionally, there was no evidence that either Husband or Wife intended to move to Texas from Germany, and therefore neither party will likely ever meet the residency requirements. Because the divorce proceeding could not be maintained in Texas, and neither party was likely to move back to Texas, Husband lacked an adequate remedy by appeal, and mandamus relief was warranted.

Editor's comment: *The court employed a balancing test to determine whether the relator had an adequate remedy by appeal. Reasoning that the divorce proceedings eventually would be reversed on appeal because neither party ever would meet Texas' residency requirement to obtain a divorce, the court granted the petition for writ of mandamus. J.V.*

MOTHER'S CERTIFIED LETTER TO TRIAL COURT INDICATING SHE WOULD NOT CONTEST THE CUSTODY SUIT BUT WOULD BRING RECORDS TO SUPPORT HER ALLEGATIONS TO COURT QUALIFIED AS AN ANSWER IN FATHER'S SAPCR

¶12-5-02. ***Beard v. Uriostegui,*** -- S.W.3d --, 2012 WL 4841609 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (10/11/12).

Facts: Father and Mother's divorce decree appointed them JMCs of their two children, and Mother had exclusive right to establish residence. Four years after the divorce, Father filed a SAPCR alleging that Mother had voluntarily allowed one Child to live with him full-time for more than six months and requested the exclusive right to designate that Child's primary residence, child support, and attorney's fees. Mother was properly served, and in response, sent a certified letter to the trial court, which identified the case number, style of the case, and the parties. The letter stated that she did not wish to contest the suit because the legal and court fees would outweigh the child support gained. Mother further alleged that Father did not provide health insurance for their other child as ordered in their divorce decree, that he owed her child support, and that she would "bring all the according records to support all the above facts" with her to court when the case was settled. Father's petition was heard, but Mother was not given notice of the trial. The judge noted that Mother's letter was on file saying she did not wish to contest the suit. Father testified that modifying the decree to allow him to establish the Child's residence was in the Child's best interest. He further testified that based on his and his attorneys' Internet research regarding Mother's job, he proposed $730 monthly child support payment. The visiting judge did not approve the child support request, but later that day the presiding judge sign an agreed order to modify the parent-child relationship. The order stated that Mother "failed to file an answer or otherwise enter an appearance" and that as a result, she defaulted. Trial court awarded custody of the Child to Father, and awarded Father monthly child support, including retroactive amounts. Mother filed a restricted appeal.

Holding: Reversed and remanded.

Opinion: Mother argued that her letter to the trial court should have been construed as an answer, which would render the granting of default judgment error. Trial court was clearly aware of the letter, as they made reference to it on the docket sheet, and her letter stated a clear intention to be present at any hearing by writing that she would "bring all the according records to support all of the above facts" to court." The Texas Supreme Court has previously held that "a defendant who timely files a pro se answer by a signed letter that identifies the parties, the case, and the defendant's current address, has sufficiently appeared by answer and deserves notice of any subsequent proceedings in the case." Mother's letter was in an envelope that showed her return address, and the letter reflected that she planned to present evidence related to Father's alleged failure to meet his financial obligations to her.

Editor's comment: *Be wary of taking a default judgment if the pro se respondent has filed anything with the court. J.A.V.*

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DEFAULT JUDGMENT AGAINST HUSBAND WAS VOID WHEN ALTERNATIVE SERVICE WAS PERFORMED AT AN ADDRESS LISTED AS HUSBAND'S, BUT A WOMAN RENTING THE RESIDENCE FILED AN AFFIDAVIT SWEARING HUSBAND DID NOT LIVE THERE AND HAD NOT LIVED THERE FOR SEVERAL MONTHS

¶12-5-03. ***Sozanski v. Plesh,*** -- S.W.3d --, 2012 WL 5360977 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (11/08/12).

Facts: Husband and Wife divorced. Wife's petition gave an address in Humble where Husband could be served with process. According to the record, the address was Wife's residence, and Husband was no longer living there. However, Wife would contact the Process Server whenever Husband was spotted near the house. These attempts were unsuccessful. Wife filed a motion for alternative service, and included an affidavit from the Process Server identifying his unsuccessful attempts to serve Husband at the Husband address. The Process Server had also attempted service at an address in Tomball where Wife thought Husband might be staying. Public records identified Husband as the owner of the residence. The Server noticed three cars in the driveway, two of which were registered to Husband, but no one answered when the Server knocked. The Server returned the next day and saw one of the vehicles filled with "junk," but again, no one answered when he knocked. Wife moved for alternate service, requesting that the petition be taped to the door of the Tomball residence, and trial court granted the motion. A few weeks later, a woman filed an affidavit swearing that she was the resident of the Tomball residence and had been renting the property for a few months. She returned the petition to the court with the affidavit, asserting that neither party listed on the petition lived at that address. Husband never made an appearance in the case, and trial court entered a default judgment. Trial court awarded the Tomball residence to Husband and assigned certain debts to him. Husband filed a motion for new trial, asserting he was not aware of the suit prior to the judgment, the Tomball residence was not his address, and he did not receive notice of the suit. He included a copy of his commercial driver's license, which indicates an address down the street from the Tomball residence as his home address. However, the driver's license was not issued until after the alternative service was performed. Trial court denied the motion for new trial. Husband appealed.

Holding: Reversed and Remanded

Opinion: Judgment cannot be rendered against a defendant unless he has been properly served, accepted or waived service of process, or made an appearance. The record must affirmatively show strict compliance with the rules of service of process. A party claiming ineffective service of process bears the burden of proof by a preponderance of the evidence. No errors in the order or the return of service were identified. However, the affidavit explaining that Husband did not live at the address, filed by the woman renting the residence, rebutted the presumption that service was successful. Without some proof of successful service, trial court lacked personal jurisdiction over Husband and any judgment rendered against him was void.

Editor's comment: *Everything about the facts of this case are fishy – public records indicated that the Husband was the owner of the residence, two cars at the residence were registered to Husband and Husband acquiring the commercial driver's license after the alternative service. While I agree with the result, it is illustrative of the difficulties in serving a party who is intent on avoiding service. J.A.V.*

Editor's comment: *The court does not state what evidence, if any, the husband presented at the hearing on the motion for new trial. So far as we know, the court overturned the default judgment based on an affidavit by a woman who lived in a house owned by the husband with two cars registered to him parked in the driveway, yet claimed not to know how to contact him, plus an affidavit by the husband swearing that he lived two houses down and across the street from the woman. J.V.*

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TRIAL COURT ERRED IN DENYING HUSBAND'S MOTION FOR CONTINUANCE BECAUSE HUSBAND'S ATTORNEY FELL ILL AND BECAME UNREACHABLE AFTER RECEIVING LARGE VOLUMES OF HUSBAND'S DOCUMENTS RELEVANT TO DIVORCE PROCEEDINGS

¶12-5-04. ***McAleer v. McAleer,*** -- S.W.3d --, 2012 WL 5457549 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (11/08/12).

Facts: Husband and Wife divorced. In three months, Husband had retained and terminated three attorneys. Husband retained a fourth attorney, who was subsequently diagnosed with cancer. Husband began having trouble communication with the attorney. Attorney gave Husband discovery requests sent by Wife and Husband obtained the necessary documents and gave them to Attorney. Attorney never gave the documents to Wife and never returned them to Husband. Husband contacted a second Attorney, who attempted to contact Husband's first Attorney. Husband's first Attorney acknowledged his health problems, acknowledged that discovery deadlines were approaching, and explained his plan to resolve the deadline issues. Husband's first Attorney attended a hearing with Husband, where trial court ordered Wife to produce certain documents to Husband. Trial court also closed the discovery period "other than the duty to supplement." Trial court set a trial date for one week after Attorney's doctor's appointments. The Attorney was not heard from after this hearing. After several failed attempts to reach him, Husband retained the second Attorney, who filed a motion to substitute counsel. The second Attorney also filed a motion for continuance, explaining that he had just been retained, had unsuccessfully contacted the first Attorney several times for Husband's case file, and was unable to issue subpoeanas for necessary documents because the motion to substitute had not yet been granted. The second Attorney filed a motion to reconsider the motion for continuance. Trial court granted the motion to substitute counsel, but the record did not show whether trial court ruled on the motion for continuance. The second Attorney re-urged his motion to reconsider the motion for continuance, stating that he had been unable to contact the first Attorney to obtain discovery documents. Trial court denied the continuance, and found, in part, that Husband failed to designate an expert witness in response to discovery requests and failed to establish good cause for his failure to do so; that he failed to timely respond to discovery requests; that he failed to take necessary steps to secure a current fair market value appraisal on the couple's home; and that he had generally abused the discovery process. Husband appealed.

Holding: Reversed and Remanded

Opinion: When a motion for continuance is based on the lack of counsel, the movant "must show that the failure to be represented at trial was not due to their own fault or negligence." The simple number of times Husband changed attorneys did not support the denial of the motion for continuance, as there was no evidence that Husband's changes in representation were done for the purpose of delaying the proceedings. There was also no indication that Husband knew of his ill Attorney's diagnosis before retaining him. Rather, once Husband knew of his Attorney's illness, he retained a second Attorney to actively attempt to maintain contact. The ill Attorney was in possession of a large number of Husband's documents, which had never been produced to Wife. When the second Attorney officially became Husband's counsel, trial court's order precluded any further production of records, which effectively barred Husband from using the documents he had been trying to obtain duplicates of.

A court should consider three factors in a motion for continuance based on the need to perform more discovery: (1) the length of time the case has been on file; (2) the materiality of the discovery sought; and (3) whether due diligence was exercised in obtaining discovery. Although the discovery period had been open for almost nine months, for the final two months, Husband had an Attorney who was not issuing or responding to discovery requests, and became completely unreachable. Husband was forced to hire another Attorney and attempt to prepare for trial despite his inability to file the missing documents late, once duplicates had been obtained. The documents were relevant to the main issues in the divorce proceedings, and their lack of production was no attributable to any fault in Husband's conduct.

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Editor's comment: *I'm glad to see a court of appeals taking action on a motion for continuance. Some trial courts have gone too far in prioritizing their docket control over the best interest of the child the subject of this suit. Maybe this opinion will encourage trial courts to have better balance. M.M.O.*

DIVORCE
DIVISION OF PROPERTY

MERELY ASSERTING ON A SWORN INVENTORY THAT ITEMS ARE SEPARATE PROPERTY IS INSUFFICIENT TO ESTABLISH THAT FACT, ADDITIONAL EVIDENCE IS REQUIRED.

¶12-5-05. ***Warriner v. Warriner,*** -- S.W.3d --, 2012 WL 3834916 (Tex. App.—El Paso 2012, no pet. h.) (09/05/12).

Facts: Husband and Wife divorced. At trial, Husband did not testify, but did call Wife to testify. Wife introduced Husband's handwritten property inventory for the limited purpose of establishing that Husband's and Wife's inventories were consistent with one another, rather than for the truth of the declarations contained in Husband's inventory. Husband did not object to his inventory only being introduced for this limited purpose, he did not offer it for any other purpose, or as a summary of his testimony. Wife testified that all other property owned at the time was community property. Wife testified that during the course of their marriage, Husband inherited land, cash, jewelry, cemetery plots, and vehicles from his mother. Wife was not aware of any other property that Husband had inherited. Wife further testified that she had little knowledge of the couple's finances. Evidence was introduced that Husband did business under the name "Ellis Properties" and received more than $183,000 in income from the sale of stock the year Husband and Wife divorced. There was also evidence showing several bank accounts held by Husband; some of these were joint accounts with Wife, some had Husband's mother's name on them, and some were in the name of "Ellis Properties." Trial court granted the divorce. On Husband's request, trial court prepared findings of facts and conclusions of law, adopting Wife's proposed findings. Husband appealed

Holding: Affirmed

Opinion: Trial courts have broad discretion in dividing the marital estate. Property possessed by either spouse on dissolution of the marriage is presumed to be community property. A spouse who asserts that certain property is separate property bears the burden of proving the property's separate character by clear and convincing evidence.

Here, based upon his inventory, Husband argued that the TCU tickets and gold coins should have been characterized as separate property. Husband's inventory listed the gold coins as being inherited and gifted from Husband's parents, and listed the TCU tickets as separate property without indicating their source. A sworn inventory is simply another form of evidence and such testimony must be supported by other evidence. Aside from the attached inventory, there was no evidence to support that the gold coins were inherited by Husband nor was there any attempt to trace the TCU tickets. Additionally, Wife testified that the coins and the tickets may have been acquired during the course of the marriage. Further, the inventory claimed "Ellis Properties" and the bank accounts as Husband's separate property. Husband made no effort to trace the source of the funds or any assets purchased with funds from the account. Husband claimed that "Ellis Properties" was a name assigned to him by the Tarrant County Clerk, and although Wife indicated that Husband may have inherited the name, Husband did not prove by clear and convincing evidence that he inherited the name.

Editor's comment: *A welcome holding: Just saying it's so - even under oath - doesn't necessarily make it so. J.V.*

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TRIAL COURT ERRED IN GRANTING EQUITABLE LIEN WHERE FATHER LENT MONEY TO HUSBAND AND WIFE FOR THE PURCHASE OF A HOME, BUT NO EVIDENCE INDICATED THAT THE HOME WAS INTENDED AS SECURITY FOR THE LOAN

¶12-5-06. ***In re Christodolou,*** -- S.W.3d --, 2012 WL 4814606 (Tex. App.—Amarillo 2012, no pet. h.) (10/10/12).

Facts: Husband and Wife divorced. Early in their marriage, Husband's Father loaned the couple $201,000 to buy a home, and the couple agreed to repay the loan with monthly payments plus interest. The home that was purchased became the couple's homestead. Soon after, Wife became pregnant, and Father allegedly informed the couple that they could suspend their monthly payments. Several payments had already been made, but no more payments were made after that time. A few years later, Father died, and a few years after that, the couple divorced. Trial court determined their community estate consisted mostly of their homestead. Trial court awarded the house to Husband and ordered him to execute a promissory note representing Wife's one-half of the equity in the homestead, plus her community share of income earned in Husband's separate financial account. The note was to be paid in monthly installments and was secured by an owelty lien placed on the house. During the pendency of the divorce, Father's estate became aware of the outstanding loan to the couple. To avoid litigation, counsel for the estate's executor said no suit would be filed, but collection of the debt would probably occur via an offset against Husband's inheritance. Trial court granted Husband an equitable lien against the promissory note and granted Wife an equitable lien on the homestead. Trial court further ordered that both liens be treated as "superior liens, equivalent to a purchase money lien," which supercedes any homestead claim Husband may have had in the house and Wife may have had in the note representing proceeds from the house, as well as Wife's owelty lien. Wife appealed.

Holding: Reversed in Part and Remanded

Opinion: Trial courts have great discretion in dividing community assets and liability. However, under the Texas Constitution, "the homestead of a family…shall be, and is hereby protected from forced sale, for the payment of all debts." There are some exceptions to this edict, but none includes "equitable liens." Equitable liens are contractual in nature and arise from express or implied agreements. Purchase money liens denote a transaction wherein a person who loans money to another person to acquire property obtains a lien on the property purchased.

Here, there is no evidence to suggest that Father, Husband, or Wife intended to secure repayment of Father's loan by imposing a lien on the realty. Trial court essentially awarded a purchase money security interest to individuals who did not provide the loan, in a transaction where no one intended that the home stand as security to assure repayment although the lender could have demanded this, and under circumstances suggested the lender lost or opted to relinquish his right to repayment by cancelling their monthly payments and not seeking to collect the debt. This evidence does not support the imposition of an equitable lien. The lien was intended to insulate the couple from bearing more than their proportionate share of potential debt owed to a third party, which is not equivalent to a purchase money lien.

Editor's comment: *Chief Justice Quinn begins the opinion by observing, "Sometimes you try to do right, but the law gets in the way. This is one of those times." J.V.*

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DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

WIFE WAS NO LONGER ENTITLED TO HALF OF HUSBAND'S RETIREMENT BENEFITS AS PROVIDED IN THE DIVORCE DECREE AFTER SHE AGREED IN WRITING TO WAIVE HER RIGHTS TO THE BENEFITS

¶12-5-07. ***Brauer v. Brauer,*** No. 02-11-00109-CV, 2012 WL 4121120 (Tex. App.—Fort Worth 2012, no pet. h.) (mem. op.) (09/20/12).

Facts: Husband and Wife divorced. Trial court awarded Wife half of Husband's civil service retirement benefits. The decree provided that Husband would be the trustee of the payments intended for Wife. Eight years after the divorce but before any retirement benefits had been paid out, Husband and Wife altered their agreement in writing. Husband agreed to pay Wife $42,000 for a down payment on a home, and Wife in turn agreed to waive her right to the retirement benefits. However, ten years later, Wife applied for her share of the retirement benefits provided in the decree and began receiving payments. Husband sued for declaratory judgment, seeking ratification of their written modification of the divorce decree and raised unjust enrichment and fraud claims and sought damages and attorney's fees. Trial court rendered judgment for Husband, named Barbara as trustee of any retirement benefits she received and ordered her to turn any benefits received over to Husband immediately upon receipt. Trial court granted Husband a judgment in an amount equal to the payments that had already been received by Wife, plus attorney's fees. Wife appealed.

Holding: Affirmed

Opinion: Wife argued that no evidence supported trial court's imposition of a constructive trust designating her as a trustee regarding the disputed retirement benefits for the benefit of Husband. To establish that a constructive trust exists, the proponent must prove (1) breach of a special trust or fiduciary relationship, or actual or constructive fraud; (2) unjust enrichment of the wrongdoer; and (3) tracing to an identifiable res. A party commits fraud by (1) making a false, material misrepresentation (2) that the party either knows to be false or asserts recklessly without knowledge of its truth (3) with the intent that the misrepresentation be acted upon, (4) and the person to whom the misrepresentation is made acts in reliance upon it (5) and is injured as a result.

Here, Wife expressly waived her right to the retirement benefits she had been awarded in the divorce decree, and Husband relied on Wife's waiver in providing her the down payment for a house. Wife reneged on the agreement by applying for the retirement benefits and receiving and keeping the money, forcing Husband to sue for recovery. Wife never offered to return the down payment money, testified she never received it because it went to the bank for the down payment, and submitted the divorce decree to the office that disbursed the retirement benefits years after signing the subsequent agreement with Husband. These events indicate some evidence of actual fraud. Wife received payments from the retirement benefits despite her having waived her rights to them, which shows that she had been unjustly enriched.

WIFE WAS NOT ENTITLED TO HER PORTION OF DECEASED HUSBAND'S IRA AS A BENEFICIARY BECAUSE DIVORCE DECREE UNAMBIGUOUSLY DIVESTED HER OF ANY RIGHT TO THE FUNDS

¶12-5-08. ***Olmstead v. Napoli,*** -- S.W.3d --, 2012 WL 3860448 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (09/06/12).

Facts: Before Husband and Wife married, Husband opened an IRA and designated Wife and his father as the beneficiaries. The account specified that upon Husband's death, the balance would be paid out equally to each

beneficiary, or completely to one beneficiary if the other did not survive. Husband and Wife married, then divorced four years later. The final decree awarded the IRA to Husband as his separate property and divested Wife of "all right, title, interest, and claim in and to" the funds in the IRA. Husband died, and the bank refused to distribute the IRA funds because Wife was listed as the beneficiary. Trial court granted summary judgment in favor of the estate. Wife appealed.

Holding: Affirmed

Opinion: Courts interpret marital property agreements in divorce decrees under the law of contracts. Here, the couples' agreement provided that Husband was awarded the IRA as his sole and separate property, and Wife was divested of all "right, title, interest, and claim in and to…any and all sums" related to the IRA. The language unambiguously terminated not only Wife's community property interest in the IRA, but also any right or claim Wife might have had relating to the IRA including any unmatured claim to future proceeds she might have received as a beneficiary.

Editor's comment: *The result in this case is a testament to careful drafting (and perhaps some luck). J.A.V.*

Editor's comment: *The court rejected the wife's argument that the husband "could have removed her as a beneficiary after the divorce, but he did not do so." J.V.*

DIVORCE
POST –JUDGMENT/APPEAL

HUSBAND COULD NOT CHALLENGE PROPERTY DIVISION WHEN HE HAD ACCEPTED FUNDS FROM HIS WIFE AFTER THE DIVORCE DECREE WAS SIGNED; EVIDENCE DID NOT SHOW THAT HUSBAND WAS ENTITLED TO SPOUSAL MAINTENANCE BECAUSE DESPITE MULTIPLE SURGERIES, MEDICAL RECORDS DID NOT SHOW THAT HE WAS UNABLE TO WORK

¶12-5-09. ***Tomsu v. Tomsu,*** -- S.W.3d --, 2012 WL 4459445 (Tex. App.—Beaumont 2012, no pet. h.) (09/27/12).

Facts: Husband and Wife divorced. The divorce decree divided the parties' nine checking accounts, an annuity, four IRA, and an employment retirement account. Husband appealed, claiming trial court disproportionately divided the community estate and erred in granting appellate attorney's fees without sufficient evidence supporting the award.

Holding: Affirmed in Part, Reversed and Remanded in Part

Opinion: A litigant cannot treat a judgment as both right and wrong, and if he has voluntarily accepted the benefits of a judgment, he cannot afterward prosecute an appeal of the judgment. The record showed that after trial court rendered judgment, Husband deposited a check for more than $6,700 into his account that would have been community property without trial court's decree. Husband also received a check from Wife for $37,000 and deposited it into his account. Because Husband received significant benefits under the decree by accepting the transfer of assets from Karen's control, Husband was estopped from challenging the property division.

To recover attorney's fees, a party must prove the reasonableness of the fees. Wife's attorney stated her hourly charge and requested that trial court order Husband to pay $15,000 in fees without stating what work

would be necessary for the appeal. The record supporting attorney's fees for the appeal was too conclusory to support the amount trial court awarded.

Editor's comment: *A party cannot both challenge a property division and receive the benefit of that property division. There is an exception to this rule if the party that accepted the benefits did so out of necessity for living expenses. M.M.O.*

HUSBAND COULD NOT BE HELD IN CONTEMPT FOR VIOLATING TEMPORARY ORDERS WHEN THOSE ORDERS WERE RENDERED MORE THAN 30 DAYS AFTER HSUBAND'S PERFECTED APPEAL OF HIS DIVORCE DECREE

¶12-5-10. ***In re Saldana,*** -- S.W.3d --, 2012 WL 4504591 (Tex. App.—Waco 2012, orig. proceeding) (09/27/12).

Facts: Husband and Wife divorced. And trial court signed a final divorce decree. Husband filed a motion for new trial, which was overruled. Husband appealed in January. Wife filed a motion for temporary orders pending appeal, and in March, the trial court signed the temporary orders, requiring Husband to pay monthly spousal support under further order. Subsequently, Wife filed a motion for enforcement of the temporary orders, alleging Husband had not paid. In August, trial court signed orders finding that Husband had not paid and found him guilty of contempt. As punishment, Husband was fined and ordered to serve 90 days' confinement in the county jail. Husband filed a petition for mandamus relief, asserting that trial court's March order was void under TFC 6.709(a) because the order was rendered more than 30 days after his appeal was perfected.

Holding: Petition for Writ of Mandamus Granted

Opinion: Because trial court's March temporary order pending appeal was rendered more than 30 days after Husband had perfected his appeal of the January divorce decree, the March order was void. Husband could not be held in contempt for violating a void order.

Editor's comment: *The Motion for Temporary Orders Pending Appeal must be heard, rendered and an order signed by the Court within 30 days after the appealing party perfected his or her appeal. J.A.V.*

Editor's comment: *This case is a good reminder to the attorneys out there who seek temporary support pending appeal. The 30-day deadline really means 30 days! Have it heard* and signed *within 30 days or you lose the award. M.M.O.*

SAPCR
STANDING AND PROCEDURE

FATHER WAS ENTITLED TO PRESENT EVIDENCE REGARDING HIS CHILD'S HOME STATE BEFORE A FOREIGN COURT ESTABLISHED THAT THE CHILD'S RESIDENCE WAS IN ANOTHER COUNTRY; FOREIGN COURT'S JUDGMENT DID NOT ALLEGE THAT IT HAD CONTINUING AND EXCLUSIVE JURISDICTION OF THE CHILD

¶12-5-11. ***In re A.S.C.H.,*** -- S.W.3d --, 2012 WL 4712213 (Tex. App.—Dallas 2012, no pet. h.) (10/04/12).

Facts: The Child was born in Texas to her American Father and her British Mother. Parents brought the Child back and forth to England frequently during the first ten months of the Child's life. On their last trip to Eng-

land, in September 2009, Mother and the Child were permitted to enter the country, but Father was not. Father returned to the United States, and Mother and the Child remained in England. A few months later, Father began proceedings through the Hague Convention on the Civil Aspects of International Child Abduction, alleging Texas was the place of the Child's habitual residence and seeking the Child's return to Texas. Father then filed a SAPCR in Texas alleging that Mother had taken the Child in violation of his right of possession or access, that no court had continuing jurisdiction of the suit or of the Child, and that Mother had resided in Texas with the Child from the Child's birth until their last trip to England. The High Court in London denied Father's application for the Child's return to Texas. The court determined the parties were habitually resident in England by the time of their last trip. The court also found that the Child had lived in England since June 2009 and that the parties had lived there as part of a planned move. Father appealed, seeking to present further evidence, but his appeal was denied. Mother filed a motion to dismiss Father's Texas SAPCR for lack of jurisdiction, claiming that the United Kingdom had jurisdiction. Father argued that the foreign judgment could not be recognized because it was obtained by fraud. Trial court dismissed Father's suit with prejudice, concluding that it lacked subject-matter jurisdiction because when Father filed his SAPCR, the Child had habitually resided in the U.K. for eight months, and that the foreign judgment was not obtained by fraud, but that Father was afforded due process by the U.K. court. Father appealed.

Holding: Reversed and Remanded

Opinion: Whether a court had subject-matter jurisdiction is a question of law, which is reviewed de novo. Jurisdiction for making a child custody determination is governed by Texas Family Code § 152.201(a) (UCCJEA), which states that "a Texas court has jurisdiction to make an initial custody determination only if (1) Texas is the home state of the child on the date of commencement of the proceeding, (2) a court of another state does not have "home state "jurisdiction or the court having 'home state" jurisdiction has declined to exercise jurisdiction on the ground that Texas is the more appropriate forum and the child or his parents have a significant connection with the state, or (3) all courts otherwise having jurisdiction have declined jurisdiction on the ground that Texas is the more appropriate forum to determine the matter." A child's home state is the state in which she lived with a parent or a person acting as a parent for at least six consecutive months, including temporary absences, before commencement of a child custody proceeding. The Hague Convention "establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained." The federal implementing statute confers concurrent jurisdiction in state and federal courts over actions arising under the Hague Convention, but jurisdiction is granted only as to the merits of the abduction claim and does not grant jurisdiction to decide the merits of any underlying custody dispute.

Mother sought dismissal under Texas Family Code § 155.102 because she alleged that the High Court had continuing and exclusive jurisdiction of the Child. However, the High Court did not purport in its judgment to have continuing and exclusive jurisdiction of the Child. That court only determined Father's suit for the return of the Child to Texas under the Hague Convention, which was a decision on the merits of abduction. The court did not make a child custody determination. Further, Father alleged and verified that the Child and Mother had lived with him in Texas until September 2009. If this verification were accepted as true, it would establish that Texas was the Child's home state, pursuant to Texas Family Code § 152.201(a)(1). This verification shows the existence of a disputed fact regarding the length of time the Child lived in Texas, a determination that is critical to the question of the Child's home state. Father was entitled to have this issue decided by the fact finder and not as a matter of law, and therefore was entitled to present evidence for the determination of the Child's home state.

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★★★TEXAS SUPREME COURT ★★★

COA SHOULD NOT HAVE PRECLUDED GRANDMOTHER FROM BEING CONSIDERED FOR CONSERVATORSHIP OR ACCESS TO THE CHILD, EVEN THOUGH SHE WAS PREVIOUSLY UNABLE TO OVERCOME THE PARENTAL PRESUMPTION

¶12-5-12. ***Shook v. Gray,*** -- S.W.3d --, 2012 WL 4746236 (Tex. 2012) (10/05/12).

Facts: The Child and Mother moved into Grandmother's house shortly after the Child was born. Mother moved out three years later to live on her own. Father lived in several different states for the first five years of the Child's life. When the Child was three and a half years old, Father filed a SAPCR, requesting that he and Mother be appointed JMCs and that Mother have the primary right to establish the Child's residence. Grandmother intervened under TFC 102.003(a)(9), claiming she had "actual care, control, and possession of [the Child] for more than 6 months ending no more than 90 days preceding the date of filing of [the] petition." Grandmother requested she and Mother be appointed JMCs and that she have exclusive right to designate the Child's primary residence. Father amended his petition to request appointment as JMC with exclusive right to establish the Child's residence. Trial court appointed Grandmother SMC and named Mother and Father possessory conservators. Father appealed Court of appeals reversed, holding that because Grandmother failed to present any evidence that could overcome the presumption that a parent should be named managing conservator, trial court abused its discretion in naming Grandmother SMC. COA remanded the case for the trial court to reconsider the conservatorship and access rights between Mother and Father only. Grandmother sought a petition for review.

Holding: Affirmed in Part, Reversed in Part

Opinion: Under TFC 153.002, "the best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession of and access to the child." By foreclosing the trial court from considering Grandmother as a managing conservator on remand, trial court may be unable to protect G.W.'s best interest. COA admitted it lacked the ability to determine the present circumstances of the parties and over four years had passed since the trial court issued its order. Even though Grandmother previously failed to present evidence capable of overcoming the parental presumption, that does not necessarily mean she would be unable to overcome that presumption four years later. Further, Grandmother's inability to overcome the presumption does not deprive her of standing to be considered for conservatorship or access.

Editor's comment: *This opinion resulted from a rare grant of a motion for rehearing of a petition for review. What did the petitioner say in her motion for rehearing that she didn't say in her petition for review? J.V.*

UNDER UCJEAA, JAPAN HOME STATE OF CHILD, AND FATHER FAILED TO ESTABLISH THAT JAPANESE LAW VIOLATED FUNDAMENTAL PRINCIPALS OF HUMAN RIGHTS SUCH AS TO ALLOW TEXAS ASSUME SUBJECT-MATTER JURISDICTION

¶12-5-13. ***In re Hickman,*** No. 01-12-00572-CV, 2012 WL 4858070 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (mem. op.) (10/11/12).

Facts: Husband was a United States citizen, and Wife was a Japanese citizens. They met in graduate school, married, and had two Children. When Wife was pregnant with her second Child, Husband and Wife decided she should return to her family in Japan to ensure that she had proper care and support during her pregnancy. They planned for Wife to return to Texas after the birth of the second Child. However, the Child was diagnosed with serious medication condition requiring continuing medical attention. Wife and both Children remained in Japan, and Husband traveled back and forth between Texas and Japan visiting the Children. After three years of this arrangement, Husband filed for divorce in Texas and asked for joint conservatorship of the

oldest Child. Wife filed a plea to the jurisdiction in Texas, claiming Texas lacked subject-matter jurisdiction under the UCCJEA because Texas was not the Child's home or that Texas was an inconvenient forum. Husband alleged that the child-custody law of Japan violated fundamental human rights and urged trial court to enforce the UCCJEA home-state-jurisdiction requirement. Husband allege that Japanese law does not contemplate joint custody arrangements and rarely affords fathers and non-Japanese citizens equal treatment under the law, which would therefore interfere with Husband's ability to secure his fundamental right to parent his Child. The trial court assumed subject-matter jurisdiction over the Child and ordered an abatement of the Texas action so that Husband could seek relief from a Japanese court. Nothing in the record showed that Husband filed a Japanese child-custody proceeding during the abatement period. The abatement was lifted, and Wife filed a mandamus proceeding challenging trial court's assumption of subject-matter jurisdiction.

Holding: Petition for Writ of Mandamus Granted

Opinion: Here, it was undisputed that the oldest Child lived with Wife in Japan for three years preceding commencement of the Texas child-custody proceeding. Thus, Japan was the Child's "home state," not Texas, and Japan had primary jurisdiction to make the initial custody-determination. TFC 152.105(c) provides that "[a] court of this state need not apply [the UCCJEA] if the child custody law of a foreign country violates fundamental principles of human rights." The text is silent as to what constitutes a violation of "fundamental principles of human rights," and few Texas courts have discussed the provision. Husband cited one provision of the Japanese Civil Code, along with a law journal article discussing child custody and visitation in Japan. However, the record did not contain any copies of these authorities to the trial court, and Husband did not submit any witness testimony or affidavits from a Japanese family-law expert. Further, assuming the provision of the Japanese Civil Code was accurately translated, nothing in the plain language immediately severed Husband's rights to parent the Child in favor of Wife. Rather, the provision prioritizes the agreement of the parents regarding custody, visitation and other means of contact between parent and child, and places a child's interest as the highest priority. COA refused to speculate on how a Japanese court would respond to a custody challenge by Husband, and ordered trial court to vacate its order assuming subject-matter jurisdiction over the Child.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

WHEN AN MSA IS INVOLVED, COURT ONLY HAS 2 OPTIONS RENDER JUDGMENT ON MSA OR DECLINE TO DO SO DUE TO FAMILY VIOLENCE. COURT, HOWEVER CANNOT ENTER JUDGMENT AND THEN MODIFY THE DECREE

¶12-5-14. ***Williams v. Williams,*** -- S.W.3d --, 2012 WL 5942878 (Tex. App.—El Paso 2012, no pet. h.) (11/28/12).

Facts: As part of their divorce, Mother and Father entered into an MSA in which they agreed to a standard possession order. The final decree incorporated the MSA. Father had planned a trip to Yellowstone with the Child for the upcoming summer, and Mother disputed where the exchange of the Child should take place. Mother argued that the exchange should occur at Father's residence, while Father countered that Mother should pick the Child up from Yellowstone. Within 8 days of the Court's signing of the decree, Mother filed a motion to clarify the decree as to where she had to pick up the Child. Trial court granted her motion, and issued an order containing specific locations for future exchanges of the Child including a specific location for exchanges occurring during Father's extended summer possession. Father appealed, stating that the clarification was improper because the decree was unambiguous and that the clarification order made an impermissible substantive change.

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Holding: Reversed and Remanded

Opinion: If the decree is ambiguous, a court may not change the substantive provisions of an order to be clarified, and any substantive changes are unenforceable. Here, the decree/standard possession order was not ambiguous, therefore a clarification was improper. Pursuant to the Family Code, the trial court had two options. It could accept the MSA and render judgment thereon, or it could decline to enter judgment upon a finding that the MSA was not in the best interest of the Child due to family violence. The court could not render judgment and then modify it.

Editor's comment: *We have all had clients who have complained about having to pick up and drop off a child where the other parent has taken the child during their extended summer possession. However, it is hard to believe that the trial court granted the Mother's motion to clarify and substantively changed the unambiguous terms of a decree that resulted from a mediated settlement agreement. J.A.V.*

Editor's comment: *Although the court retained plenary power to modify its judgment, it erred by exercising that power because Tex. Fam. Code § 153.0071 prohibited that act. J.V.*

Editor's comment: *This case is a good reminder of the imperviousness of MSA in child cases. A trial court cannot modify the terms, but only enter judgment on the MSA* or *refuse to enter judgment based on a family violence finding. That's it. M.M.O.*

SAPCR
CONSERVATORSHIP

A HISTORY OF ABUSE BETWEEN SPOUSES PRECLUDES A JURY FROM APPOINTING SPOUSES AS JOINT MANAGING CONSERVATORS UNDER TFC 153.004(b)

¶12-5-15. ***Watts v. Watts,*** -- S.W.3d --, 2012 WL 5351135 (Tex. App.—San Antonio 2012, no pet. h.) (10/31/12).

Facts: During trial, evidence was presented from which the jury could find either Husband or Wife, or both, had a history or pattern of physical abuse against the other. The jury was instructed under Tex. Fam. Code § 153.004(b) that "A person may not be appointed a joint managing conservator if that person has a history or pattern of past or present child neglect or of physical or sexual abuse directed against a parent, a spouse, or a child." During deliberations, the jury sent the trial court the following question: "If the jury finds there is a history or a pattern of past physical abuse against both spouses, can we still name both as joint managing conservators?" The trial judge responded that she believed answering "yes" or "no" to the question would be a comment on the case or would change the instructions already provided. The trial court decided not to provide any further instructions but instead instructed the jury to re-read the court's charge. The jury appointed Wife as sole managing conservator of the couple's two children. Husband appealed, stating that trial court erred in not providing further instructions to the jury.

Holding: Affirmed

Opinion: Tex. Fam. Code § 153.004(b) states that "[t[he court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present . . . physical . . . abuse by one parent directed against the other parent." Joint managing conservators may not be appointed where a history or pattern of abuse between two parents exists, regardless of whether the abuse was against one spouse by the other, or inflicted by each spouse against the other. Here, because the jury found that there was a history of physical

abuse against both spouses, the jury properly applied TFC 153.004(b) in appointing Wife as sole managing conservator, and trial court did not err in refusing to provide further instructions to the jury.

SAPCR
MODIFICATION

COURT WAS ENTITLED TO MODIFY CONSERVATORSHIP ORDER WHERE EVIDENCE SHOWED THAT, AFTER DIVORCE, WIFE HAD TO REQUEST FINANCIAL SUPPORT FROM HUSBAND TO BUY FOOD FOR CHILDREN AND CHILDREN'S HEALTH AND HYGIENE HAD DECLINED

¶12-5-16. ***In re M.S.F.,*** -- S.W.3d --, 2012 WL 4511303 (Tex. App.—Amarillo 2012, no pet. h.) (10/02/12).

Facts: In the divorce decree, Father and Mother were appointed JMCs of their two Children, and Mother given the right to designate the Children's primary residence. Father was ordered to pay child support. Almost three years later, Father filed a SAPCR seeking the right to designate the Children's primary residence. At trial, evidence was presented that, since the divorce, Mother had delivered two more children without being married to the father of those children, but while they were living together. After those children's father moved in with Mother, Father alleged that his two Children became "closed off and confused, less playful and joyful, more quiet and reserved." Additionally, Father alleged that their hygiene had suffered, and that Father had to transport the Children to their doctors when they needed medical attention. Further, Father stated that even though he was current on his child support, Mother still requested money to buy food for the Children. Mother presented testimony from the Children's teachers that they were bright, happy, and well cared for. Mother denied there were any issues regarding medical treatment for the Children and denied the Children had any hygiene issues. The trial court appointed Father as JMC with the right to designate the Children's primary residence. Wife appealed.

Holding: Affirmed

Opinion: A trial court may consider the effect of a parent's lifestyle and lifestyle choices upon children when deciding matters of custody. The record reflects that, on at least one occasion since the divorce, Mother had to request financial assistance from Father to provide food for the Children. On several occasions, Father had to ensure the Children received proper medical care. Evidence demonstrated that, since the divorce and the birth of two additional children, the level of attention and care shown by Mother to the Children had suffered. Mother contested all these matters, but it was the responsibility of the trial court to observe the witnesses and evaluate the witnesses' demeanor and credibility. The evidence supported both contentions that there had been a material and substantial change in circumstances, and that modification of the order was in the Children's best interest.

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MODIFICATION OF CONSERVATORSHIP WAS APPROPRIATE WHERE MOTHER MOVED HER CHILD TO MEXICO WITHOUT TELLING THE CHILD'S FATHER; HOWEVER, TRIAL COURT'S INJUNCTION AGAINST MOTHER'S ABILITY TO TRAVEL OUTSIDE CONTINENTAL U.S. WAS TOO RESTRICTIVE, SINCE INJUNCTION WAS UNRELATED TO THE CHILD'S BEST INTEREST

¶12-5-17. ***Arredondo v. Betancourt,*** -- S.W.3d --, 2012 WL 14-11-00742-CV (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (10/11/12).

Facts: Father and Mother's divorce decree appointed them JMCs of the Child and awarded Mother exclusive right to establish the Child's primary residence with no geographic restrictions. Father was awarded standard possession, which included alternative possession periods of Mother and the Child moved more than 100 miles from Father's residence. A year after the divorce, Mother remarried. Six years later, Mother drove to Mexico with her new husband and Child, after which she sent a text message and email to Father telling him they were in Mexico. Father claimed this was the first time he learned of the trip, while Mother claimed Father knew well in advance that she planned to move to Mexico. Father filed a SAPCR seeking to modify the divorce decree to award him exclusive right to determine the Child's primary residence, require Mother to pay child support, and obtain a temporary restraining order requiring Mother to return the Child to Harris County. Father requested the modifications because Mother "secretly fled the county with the child without notice. Mother filed a counter-petition requested that she be designated SMC. Trial court signed temporary orders requiring Mother to return the Child to Harris County and awarding Father exclusive rights to designate the child's primary residence within the county. Mother was also ordered to surrender the Child's passport; she also voluntarily surrendered her own passport. At a jury trial, the jury determined the decree should be modified to award Father exclusive right to designate the child's primary residence with a restriction to Harris County and contiguous counties. Trial court additionally permanently enjoined Mother from traveling outside the continental United States without Father's written consent, and denied Mother's post-trial motion requesting that the court return her passport. Mother appealed.

Holding: Affirmed as Modified

Opinion: To prevail on his petition to modify the parent-child relationship, Father had to establish that modification would be in the child's best interest, and the circumstances of the child, a conservator, or other party affected by the order had materially and substantially changed since the date of the divorce decree. Material changes may include (1) the marriage of one of the parties, (2) poisoning of a child's mind by one of the parties, (3) change in the home surroundings, (3) mistreatment of a child by a parent or step-parent, or (5) a parent's becoming an improper person to exercise custody. Additionally, a course of conduct pursued by a managing conservator that hamper's a child's opportunity to favorably associate with the other parent may suffice as grounds for re-designating managing conservators. Under *Bates v. Tesar*, relocation does not suffice to establish a material and substantial change in circumstances, "but if the custodial parent moves a significant distance, a finding of changed circumstances may be appropriate." *Bates* identified several factors for a court to consider, including the distance involved, the relationship between the Child and non-custodial parent and the impact of the move on that relationship, and the motive for the move, among others.

Mother argued that her moved to Mexico with the Child was the only basis for Father's petition to modify the decree, and that this was insufficient to support modification because the decree gave her the exclusive right to designate the child's residence without geographic restrictions. However, the evidence provided more than a scintilla of evidence supporting modification using *Bates* factors. Mother took the child to another country without telling Father beforehand. Mother disenrolled the Child from his school in the middle of a term, then moved him to Mexico without having arranged for a job, a home, or a school for the Child. Mother did not allow the Child to visit Father, per the terms of their divorce decree. Because her new husband's job relocated her husband frequently, Mother wanted to be able to move wherever her husband was working, which would impair Father's ability to visit the Child.

Additionally, Mother argued that the permanent injunction forbidding her from traveling outside the continental United States infringed on her Constitutional right to travel. Trial court cited TFC 153.001, which

provides that the public policy of Texas is to ensure frequent and continuing contact between parents and children, provide a safe and stable environment for the child, and encourage parents to share rights and duties of raising a child. However, the injunction was overly broad, as it only restricted Mother's right to travel and did not even mention the Child. The injunction had nothing to do with encouraging Mother to prioritize the Child's best interest. Father argued that the injunction was also supported by TFC 153.503, which addresses the types of measures the trial court may take when presented with credible evidence of a potential risk of international abduction of a child by a parent. However, that statute lists measures to be taken to control the Child's whereabouts or documents, not the parent's. Trial court enjoined Mother's ability to travel, even without the child, which was unreasonably restrictive.

SAPCR
TERMINATION OF PARENTAL RIGHTS

TERMINATION WAS APPROPRIATE WHERE MOTHER TESTED POSITIVE FOR COCAINE THREE WEEKS AFTER THE BIRTH OF HER THIRD CHILD, AND HER THERAPIST INDICATED SHE WAS NOT READY TO BE REUNITED WITH HER TWO OLDEST CHILDREN BECAUSE SHE LACKED JUDGMENT AND IMPULSE CONTROL

¶12-5-18. ***In re C.J.S.,*** -- S.W.3d --, 2012 WL 4127280 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (09/20/12).

Facts: Mother and Father had two Children. The Department received a report from Mother that Father had taken the older Child to Father's home that he shared with Sister, and while there, Father and Sister used marijuana and cocaine and sold marijuana. When the Department went to investigate, Sister said Child had already been returned to Mother. The Department attempted unsuccessfully to contact Mother several times for the next three months. When Mother was finally reached, she said she thought the case had been closed once Child had been returned to her. Two days later, the younger Child was admitted to the hospital with bronchitis. When the Child was ready to be discharged, the hospital could not locate mother for two days, and the hospital's social worker notified the Department. The next day, the Department took both children into custody and filed a petition to terminate the parent-child relationship as to both Children. Trial court named the Department temporary SMC of the Children, who were placed in foster care. Mother was ordered to comply with a family service plan that included counseling, domestic violence and anger management classes, and drug tests. The plan stipulated that a missed drug test would be considered a positive. One year later, Mother gave birth to her third Child. Three weeks after the birth, Mother tested positive for cocaine in an amount indicating that she had used cocaine more than once in the 90 days before the test. Mother also admitted she had missed four or five scheduled drug tests. At trial, Mother wanted to continue attending parenting classes while the Department maintained custody of the Children. Trial court terminated Mother's parental rights. Mother appealed.

Holding: Affirmed

Opinion: 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 TFC 161.001(1) *and* termination is in the best interest of the child. Subsection (E) permits termination of parental rights when the parent has either personally engaged in conduct that endangers the child or knowingly placed the child with another person who engaged in dangerous conduct. But there is a strong presumption that the best interest of the child is served by keeping the child with his or her natural parent, and the burden is on the Department to rebut that presumption.

Here, Mother tested positive for cocaine after having her two oldest Children removed from her home, and only three weeks after giving birth to her third Child. The test did not indicate whether she had used cocaine while pregnant, but if not, it indicates she used cocaine while caring for a newborn. She admitted to

missing numerous scheduled drug tests. Mother's therapist reported that she had "difficulty assessing problem situations and determining some effective solutions," and that she had "poor judgment and impulse control." The therapist was also concerned that Mother might hurt herself or others, because of comments Mother made expressing anger and violent thoughts toward Department caseworkers.

In its analysis of whether termination was in the Children's best interest, COA weighed factors including the present and future physical and emotional needs of the children, present and future emotional and physical danger to the child, Mother's parental abilities, available programs, and Mother's acts or omissions demonstrating that the parent-child relationship was improper. The Children had been in the same foster home for the 27 months preceding the trial, and the social worker reported that the Children had shown behavioral progress while living with the foster family. Mother attended parenting classes and visited her children 20 or more times while they were in the Department's custody, but did miss three visits because her car was broken down. Mother had some income from Social Security checks and medical studies, but did not have a job. Mother did not comply with significant aspects of her family service plan, including remaining under psychiatric care and staying drug-free. Although there were programs available near Mother, such as daycare, WIC, and GED classes, Mother's therapist testified that Mother was not ready to reunite with her children. Based on this evidence, a reasonable factfinder could have reasonably found that the best interest of the children would be served by termination of Mother's parental rights.

FATHER'S PRIOR CRIMINAL CONVISTIONS FOR ASSAULT AND DRUG POSSESSION SUPPORTED TERMINATION OF FATHER'S PARENTAL RIGHTS, EVEN THOUGH THE CONVICTIONS OCCURRED PRIOR TO CHILD'S BIRTH. ALSO, FATHER'S FAILURE TO ATTEMPT OR MAINTAIN ANY SIGNIFICANT CONTACT WITH CHILD SUPPORTED CONCLUSION THAT FATHER NOT ABLE TO MEET CHILD'S PHYSICAL AND EMOTIONAL NEEDS

¶12-5-19. ***In re S.M.***, -- S.W.3d --, 2012 WL 4381372 (Tex. App.—El Paso 2012, no pet. h.) (09/26/12).

Facts: The Child was born while Father was incarcerated, and Father had never met the Child. When the Child was seven months old, Mother left the Child alone in a motel room. A neighbor heard the baby crying, discovered her alone on the bed, and took the Child to another motel resident who knew Mother. Mother returned at 2 a.m. intoxicated and had an altercation with the resident. The police were dispatched and the Department was called. Mother was arrested for child endangerment, and the Department placed the Child in foster care. The Department filed a petition for protection, conservatorship, and termination of the parental rights of both parents. Trial court entered temporary orders appointing the Department as temporary SMC, and Mother's rights were terminated prior to trial. At trial, the Department introduced judgments from Father's four prior convictions, three involving assault, and one involving possession of cocaine. Father pled guilty to all charges but claimed he was actually innocent, and that when he pled guilty he was actually lying. Father acknowledged he had no way to support the Child because of his incarceration, but that he had completed a drug course program and was up for parole. Father's Sister was interested in adopting the Child, and the Department was investigating that possibility. Trial court found there was clear and convincing evidence to support termination of Father's parental rights under TFC 161.001(1)(E) and (Q), and that termination was in the Child's best interest. Father appealed.

Holding: Affirmed

Opinion: In a proceeding to terminate parental rights, the petitioner must demonstrate by clear and convincing evidence that the parent committed one or more of the acts specifically set forth in TFC 161.001(1) as grounds for termination, and that termination is in the best interest of the child. The relevant inquiry for termination under TFC 161.001(1)(E) is whether evidence exists that the endangerment was the direct result of the parent's conduct, including acts, omissions, or failures to act. Here, Father had multiple prior criminal convictions, including assault and domestic violence against the Child's Mother, one of which occurred during pregnancy. Even though all these offenses occurred before the Child was born, they can still be considered

as part of a voluntary, deliberate, and conscious course of conduct that had the effect of endangering the Child. Termination of the parent-child relationship is not justified when the evidence shows merely that a parent's failure to provide a more desirable degree of care and support of the child is due solely to misfortune or the lack of intelligence or training, and not to indifference or malice. While the Child was only two years old at the time of trial and had never met her father, Father made only one attempt to meet or contact the Child. His failure to attempt or maintain any significant contact with the Child supported the conclusion that Father was not able to meet the Child's physical and emotional needs.

DEPARTMENT FAILED TO INTRODUCE DOCUMENTS INTO EVIDENCE THAT WOULD SHOW FATHER WAS ARRESTED AND JAILED FOR DRIVING UNDER THE INFLUENCE OF A CONTROLELD SUBSTANCE WHILE CHILD WAS IN THE CAR; FATHER'S TESTIMONY WAS INSUFFICIENT TO ESTABLISH THAT CHILD WAS REMOVED FROM HIS CARE FOR ABUSE OR NEGLECT, AND THEREFORE TERMINATION WAS NOT SUPPORTED BY THE EVIDENCE ON RECORD

¶12-5-20. ***In re J.E.H.,*** -- S.W.3d --, 2012 WL 4579296 (Tex. App.—San Antonio 2012, no pet. h.) (10/03/12).

Facts: The Department filed a petition for protection of the Child, for conservatorship, and for termination of parental rights. An Employee of the Department affirmed that Father had been driving under the influence of marijuana while transporting the Child and had been arrested and incarcerated. The Child's Mother died a few months later. Employee stated that the Department attempted to work with Father, but that there had been no progress. At trial, Father testified as the State's only witness. Father called only one witness, his Sister, who testified that he was a good dad. No other evidence was admitted. In its closing argument, the Department's attorney referred to testimony from a case worker, which in fact never occurred. Trial court terminated Father's parental rights. Father appealed, claiming the evidence was legally and factually insufficient to support termination.

Holding: Reversed and remanded in part; affirmed in part

Opinion: The Department has the burden to establish that the parent in question engaged in conduct enumerated in one of the subsections of Texas Family Code § 161.001(1) and that termination of the parent-child relationship was in the Child's best interest. Texas Family Code § 161.001(O)-(P) states that the court may order termination of the parent-child relationship if the court finds that the parent failed to comply with the provisions of a court order for the return of a child who has been in the conservatorship of the Department for at least nine months as a result of the child's removal from the parent for abuse or neglect; that the parent used a controlled substance and failed to completed court-ordered substance abuse treatment, or completed treatment and continued to abuse a controlled substance; and that the termination is in the best interest of the child.

The Department pointed to various documents contained in the clerk's record, including the Father's family service plan, to show that the evidence was sufficient. The State alleged that the Child was removed because Father drove under the influence of marijuana while the Child was a passenger, and cited to Employee's affidavit and the family service plan. However, none of the documents was introduced in evidence, and therefore the court could not have taken judicial notice of the family service plan. Father testified that his children were removed because he made a "wrong choice," and testified that he was not arrested for marijuana or jailed. Father's testimony was not sufficient to support a finding that the Child was removed from his care for abuse or neglect. Father admitted to testing positive for cocaine during pendency of the suit, but denied having actually used cocaine, and gave no testimony that would support a finding that his use of controlled substance endangered the Child.

Editor's comment: *Are you kidding me? The Department failed to introduce their documents allegedly supporting the termination of the Father's parental rights into evidence. Apparently the Department believed that the court took judicial notice of the documents contained in the clerk's record and these documents then con-*

stituted "evidence." While a court may take judicial notice of the contents of the file, a court may not take judicial notice of the truth of allegations in its records. J.A.V.

FATHER'S ALLEGATIONS THAT WIFE HAD AN AFFAIR ONE MONTH BEFORE REVEALING HER PREGNANCY, COUPLED WITH CIRCUMSTANTIAL EVIDENCE THAT CHILD'S FEATURES DID NOT RESEMBLE FATHER'S, CONSTITUTED PRIMA FACIE CASE FOR TERMINATION OF FATHER'S PARENT-CHILD RELATIONSHIP WITH CHILD UNDER TEXAS FAMILY CODE § 161.005(c)

¶12-5-21. ***In re C.E.,*** -- S.W.3d --, 2012 WL 4717882 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (10/04/12).

Facts: Mother and Father had one Child. Shortly after the Child's birth, Father signed a birth certificate acknowledging the Child as his biological Child. When the Child was six years old, OAG petitioned to establish the parent-child relationship and set child support. Father signed an agreed child support review order, and trial court adjudicated Father as the father of the Child and set monthly child support payments. Ten years later, OAG filed a petition to modify the CSRO, seeking to increase Father's monthly support obligation. Father petitioned to terminate the parent-child relationship under Texas Family Code § 161.005(c), which permits a man to terminate the parent-child relationship if paternity previously was established without the benefit of genetic testing and a misrepresentation caused the man to believe that he fathered the child. Father verified in his petition that his paternity was never confirmed with genetic testing and alleged that he discovered Mother had a relationship with another man the month before Mother revealed she was pregnant. Father averred he mistakenly believed he was the Child's biological father based on misrepresentations that led him to that conclusion. At the pre-trial hearing, OAG said Father should make the prima facie case for termination on the record. Father testified that when Child was born, there were comparisons of his features to the Child, which he believed initially, but that as the Child grew, he noticed more differences. Father also testified that he discovered pictures of Mother lying in bed with another man. Father never discussed the matter at the Child's birth and conceded that Mother never expressly told him he was the Child's father. Several years later, the Child mentioned that Father might not be her biological father. Trial court denied genetic testing, finding that testing was not warranted because Father had failed to make a prima facie showing under Texas Family Code § 161.005(c). Father appealed.

Holding: Reversed and Remanded

Opinion: Texas Family Code § 161.005(c) permits a father to sue to terminate his parental rights without genetic testing if the man signed an acknowledged of paternity or was adjudicated to be the father, and alleges facts that he is not the child's genetic father, and he signed the acknowledgement of paternity or failed to contest parentage in the previous proceeding because of the mistaken belief at the time that he was the child's genetic father based on misrepresentations that led him to that conclusion. Trial court must hold a pre-trial hearing to determine whether the father has established a "meritorious prima facie case for termination of the parent-child relationship." If the man has established a prima facie case, the trial court shall order genetic testing.

Circumstantial evidence at the pretrial hearing supported Father's allegations. Father testified that he believed the comparisons of the similarities between his features and the Child's. Father further testified that Mother had an affair with another man one month before she revealed her pregnancy, and Mother then sought child support from Father. Father acknowledged paternity based on these representations without undergoing paternity testing. Father's allegations coupled with the circumstantial evidence constituted a prima facie case for genetic testing under Texas Family Code § 161.005(c).

Editor's comment: *To make a prima facie case for genetic testing, Father had to present evidence sufficient to support an inference that a misrepresentation caused him to believe that he was the child's biological father. In my opinion, the facts in this case constitute a prima facie case although I am a little vague about the*

misrepresentation. Would the mere failure to tell the Father that the child was not his biological child constitute a prima facie case of misrepresentation? J.A.V.

★★★TEXAS SUPREME COURT ★★★

FATHER'S CONVICTION OF AN OFFENSE INVOLVING A MINOR AND SUBSEQUENT DEPORTATION, WHICH OCCURRED BEFORE HIS CHILDREN WERE BORN, WERE INSUFFICIENT TO SHOW THAT FATHER'S CONDUCT ENDANGERED HIS CHILDREN

¶12-5-22. ***In re E.N.C.,*** -- S.W.3d --, 2012 WL 4840710 (Tex. 2012) (10/12/12).

Facts: Years before his Children were born, Father was convicted in Wisconsin of an offense involving an underage girl, and Father was placed on probation. Father moved to Texas without completing his probation. Father and Mother met and married, and had two Children during their marriage. Eight years later, they separated. After the separation, Father attempted to procure a green card, but because he had left Wisconsin in violation of his probation terms, he was arrested and deported to Mexico. The Children remained with Mother. The Department investigated mother several times in the following years but ultimately left the Children with her each time. Since being deported. Father called the Children several times per week and provided some financial support. A few years after Mother and Father separated, the Department investigated Mother for neglectful supervision and determined Mother was giving the children Tylenol PM to make them sleep. Mother gave birth to her fifth child, but the child's birth weight was so low the hospital notified the Department. Two month later, Mother was arrested for a DWI with one Child in the car, and the Children were removed from Mother's home and placed in foster care. The Department permitted Father one monthly conference call with his children, but once the foster parents moved the children four months before trial, Father could no longer speak with them. There is no evidence Father was subject to any child support order at any time, and the Department never requested support or offered a service plan. The Department's report stated Father would need to complete his probation and have the restrictions on his return to the United States lifted before he could be evaluated by the Department for his ability and willingness to provide for the children.

At the trial, the Department introduced only one exhibit, a document for Mother's DWI case, and asked the court to take notice of its files and reports. The Children did not testify but were interviewed by their attorney ad litem, who recommended against terminating Father's rights. The caseworker who testified said she had no knowledge of why Father was deported and was not aware that he had provided any support for the children since the case began. The caseworker's supervisor and a CASA volunteer both recommended Father's rights be terminated. Father testified over the phone that he never saw Mother drink, use drugs, or hurt the Children, and that she was a good mother. Father testified that the Children should live with Mother or his family. The only evidence regarding Father's conviction came during his testimony, when he said that his girlfriend in Wisconsin had been underage. The Department did not ask any questions about this on cross-examination. No other evidence was introduced concerning the date, circumstances, offending conduct, or the girl's age. Trial court terminated both parents' rights. Father filed a motion for new trial, which was denied. The court of appeals affirmed the judgment as to Father. Father filed a petition for review, which was granted.

Holding: Reversed and Remanded

Opinion: For a trial court to terminate a parent's right to his children, the State must prove by clear and convincing evidence that both (1) the parent committed an act prohibited under TFC 161.001(1), and (2) termination is in the children's best interest. Under TFC 161.001(1)(E), a parent's rights may be terminated if he engaged in conduct or knowingly placed his children with persons who engaged in conduct endangering the physical or emotional well-being of his children. "Endangerment" means more than a threat of metaphysical injury or potential ill effects of a less-than-ideal family environment, but that endangering conduct need not be direct at the child.

Here, the Department did not offer evidence concerning the Wisconsin or deportation proceedings aside from statements in its own reports. The only evidence concerning Father's alleged endangering conduct

comes from his own brief testimony, which is insufficient to determine whether Father's offense involved a seventeen-year-old girl or someone younger, or whether the offense in Wisconsin would have constituted an offense under Texas law. COA essentially inferred a worst-case scenario involving sex with a "child" that would have resulted in the endangerment of Father's own children. An offense occurring before a person's children are born can be a relevant factor in establish an endangering course of conduct, but the Department bears the burden of introducing evidence concerning the offense and establishing that the offense was part of a voluntary course of conduct that endangered the children's well-being. Further, deportation is a factor that may be considered, but its relevance to endangerment depends on the circumstances. There is no evidence that Father's criminal act and act of leaving Wisconsin without completing probation before his children were born created such uncertainty and instability for his children sufficient to establish endangerment. Father and Mother lived together as a family without apparent incident until they separated, and Father and his family remained a regular presence and source of support in the children's lives after he was deported. There is no evidence Father knowingly placed the children with Mother while she was doing drugs and his uncontroverted testimony was that he had never seen Mother use drugs.

To determine whether termination was in the best interest of the Children, COA evaluated a number of factors under TFC 161.001(2). COA incorrectly relied on a lack of any evidence that would indicate the Children wanted to live with Father in Mexico, and pointed to Father's failure to articulate a plan for the children as support for termination. Father testified the children should live with his mother or his family, and the Department never considered the possibility of the children living with Father in Mexico. A Department caseworker testified that Father had not provided financial support for the children or contacted them very often, but evidence showed that this was a result of the Department's actions. The Department did not request court-ordered support, but Father provided financial support on his own. The Department also limited Father's visitation to a once-a-month phone call, and Father was compliant until the Department moved the children without telling him. Further, the Department presented no evidence that another family wanted to adopt the children, or that the foster parents could provide for them in a way Father could not. The Department is required to meet its burden of proof in showing that termination was in the children's best interest, and the evidence provided failed to support that burden.

TERMINATION OF FATHER'S PARENTAL RIGHTS WAS APPROPRIATE WHEN EVIDENCE SHOWED HE HAD ABUSED MOTHER, HAD ANGER MANAGEMENT AND DRINKING PROBLEMS, AND INTENDED TO STAY WITH MOTHER EVEN THOUGH MOTHER HAD PLEADED GUILTY TO BREAKING CHILD'S LEGS

¶12-5-23. ***In re I.G.,*** -- S.W.3d --, 2012 WL 4867583 (Tex. App.—Amarillo 2012, no pet. h.) (10/15/12).

Facts: The Department was notified that a six-month-old Child had been treated for two broken legs. Mother initially provided multiple accounts of how the Child sustained these injuries, but ultimately admitted that she had forced the Child into a walker in a manner that bent his legs back toward his body. Mother agreed to place her two Children with a relative, who surrendered the Children to the Department; Mother and Father were estranged at the time. The Department placed the children in foster care. Mother and Father were estranged because of a domestic violence incident a few months prior. Mother testified that she and Father were both intoxicated, began arguing, and that Father struck Mother in the head with a bed post. Father was arrested, and an emergency protective order was issued prohibiting Father from having contact with Mother or the Children for sixty days. Mother pleaded guilty to reckless injury to a child. She was sentenced to ten year's incarceration, which was probated for eight years. Mother's probation officer testified that Mother committed several technical violations of the terms of her probation. The Department sought to terminate Mother and Father's parental rights to both Children. An agreed final order was entered, naming the Department permanent managing conservator, and naming Mother and Father possessory conservators. Mother and Father then had a third Child who was removed by the Department, and the Department also sought to terminate Mother and Father's parental rights to the third Child. Mother and Father were ordered to comply with a service plan, and eventually, the Children's Foster Mother intervened in the proceedings. A jury terminated both Mother

and Father's parental rights, finding that Mother had engaged in conduct under TFC 161.001(1)(D), (E), (L), and (O), and that Father had engaged in conduct under TFC 161.001(1)(D), (E), and (O). Father appealed.

Holding: Affirmed

Opinion: Abusive or violent conduct by a parent can produce an environment that endangers the physical or emotional well-being of a child within the scope of TFC 161.001(1)(D). If a parent abuses or neglects the other parent or a child, that conduct can be used to support a finding of endangerment even against a child who was not yet born at the time of the conduct. Here, Father had committed an act of domestic violence against Mother, and admitted to being ticketed or arrested on at least ten occasions for public intoxication. One of Father's therapists said Father had trouble controlling his anger, and although Father had attended parenting classes, a doctor testified that Father had made minimal progress. Additionally, Father intended to remain with Mother as a couple, even though Mother had pleaded guilty to injuring their Child. Further, Father failed to comply with the provisions of a court order under TFC 161.001(1)(O). Father argued that he "substantially complied" with the court order, but COA has consistently held that "substantial compliance" is not the same as completion.

SIBLINGS WERE NOT REQUIRED TO BE PLACED TOGETHER AFTER BEING REMOVED FROM PARENTS WHEN SEPARATE PLACEMENTS WITH GRANDPARENTS WERE IN EACH CHILD'S BEST INTEREST

¶12-5-24. ***L.V. v. TDFPS,*** -- S.W.3d --, 2012 WL 4910560 (Tex. App.—El Paso 2012, no pet. h.) (10/17/12).

Facts: The Child, a Son was born two months premature and was kept in the hospital for three months. After the Son's release, the Child, Mother, and Father lived occasionally with Grandparents. One day, Father was changing the Son's diaper when he heard one of the Child's legs "pop." X-rays showed the Son had a broken femur, as well as three partially-healed broken ribs and a fracture of his other leg. Neither parent knew how the other broken bones were caused. A doctor at the hospital said the injuries all appeared to be non-accidental. The Department initiated an investigation because the parents' explanation about the broken leg did not comport with the nature of the injury, and ultimately the Department filed a petition to terminate the parental rights of both Mother and Father. The Department's caseworker testified that when the Son was brought into the hospital, the Son and his parents were both dirty. Caseworker learned that Mother had no prenatal care, even though she had a history of premature births. Additionally, Mother and Father did not take the Son to the doctor for vaccinations due when he was four months old, and the Son had missed five weekly physical therapy sessions. The Department could not determine whether Mother had committed the physical abuse or neglect, but found there was reason to believe the Father had committed the abuse and neglect. The Department cleared grandmother of any wrong doing, and offered services to the parents. Mother did not comply by scheduling the Son's missed appointments with his doctors. The Son was removed from the home, and a service plan was created for each parent, requiring psychosocial evaluations, counseling, and parenting classes. Both parents completed the parenting classes and psychosocial evaluations, but did not attend all of the counseling sessions. Parents testified the counselor said no additional sessions were required, but the counselor said the parents failed to schedule the next appointment and never completed counseling. While the case was pending, Mother gave birth to a Daughter, who was born prematurely. Because of the pending case, Daughter was removed from Parents and placed with Grandfather. After a bench trial, the court terminated the parental rights of both Mother and Father, appointed the Department as the permanent managing conservator of the Son, and placed him with Grandmother. The court gave Grandfather visitation rights by agreement. Mother, Father, and Grandfather appealed, saying that Son and Daughter should have been placed together, and that trial court erred in appointing the Department as SMC of the Son.

Holding: Affirmed

Opinion: TFC 162.302(e) states that when the Department is providing adoption services, siblings should be kept together when it is in the children's best interest. Additionally, Tex. Admin. Code 700.1309 provides factors for the Department to consider when selecting the most appropriate living arrangement for a child, and places the best interest and safety of the child first above all other factors. The primary consideration in determining issues of conservatorship and possession is always the child's best interest. Here, placement of the Daughter was not at issue in the case, and TFC 162.302(e) only applies when both siblings are being placed for adoption. Further, even if the statute were applicable in this case, the legislative intent yields to the best interest of the child. Similarly, Tex. Admin. Code 700.1309 puts the child's best interest above being placed with a sibling. In determining that placing the Son with Grandmother was in the Son's best interest, trial court noted that the Son was a special needs child who required physical and speech therapy on an ongoing basis, as well as additional medical care. Mother testified that Grandmother's home was not safe, that Grandmother did not feed their pets, and that Grandmother had been physically aggressive with both her thirteen-year-old son and her husband. However, Grandmother had a bond with the son because the family had lived with her for a period of time, and she had maintained contact with the Son after he was removed from his parents' care. Grandmother's Husband had run a day care in the past and therefore had experience caring for small children, and their financial status and relationship were stable. Grandfather and his Wife had only been married for a few months. Based on the evidence, trial court did not err in determining that naming the Department managing conservator of the Son and placing the Son with Grandmother.

TERMINATION OF PARENTAL RIGHTS WAS APPROPRIATE WHEN MOTHER FAILED TO TAKE SPECIAL NEEDS CHILD TO DOCTOR'S APPOINTMENT FOR VACCINATIONS AND TO WEEKLY PHYSICAL THERAPY APPOINTMENTS, AND SON SUFFERED BROKEN BONES WHILE IN MOTHER'S CARE

¶12-5-25. ***C.H. v. TDFPS*****,** -- S.W.3d --, 2012 WL 4928911 (Tex. App.—El Paso 2012, no pet. h.) (10/17/12).

Facts: The Child, a Son was born two months premature and was kept in the hospital for three months. After the Son's release, the Child, Mother, and Father lived occasionally with Grandparents. One day, Father was changing the Son's diaper when he heard one of the Child's legs "pop." X-rays showed the Son had a broken femur, as well as three partially-healed broken ribs and a fracture of his other leg. Neither parent knew how the other broken bones were caused. A doctor at the hospital said the injuries all appeared to be non-accidental. The Department initiated an investigation because the parents' explanation about the broken leg did not comport with the nature of the injury, and ultimately the Department filed a petition to terminate the parental rights of both Mother and Father. The Department's caseworker testified that when the Son was brought into the hospital, the Son and his parents were both dirty. Caseworker learned that Mother had no prenatal care, even though she had a history of premature births. Additionally, mother and Father did not take the Son to the doctor for vaccinations due when he was four months old, and the Son had missed five weekly physical therapy sessions. The Department could not determine whether Mother had committed the physical abuse or neglect, but found there was reason to believe the Father had committed the abuse and neglect. The Department cleared grandmother of any wrong doing, and offered services to the parents. Mother did not comply by scheduling the Son's missed appointments with his doctors. The Son was removed from the home, and a service plan was created for each parent, requiring psychosocial evaluations, counseling, and parenting classes. Both parents completed the parenting classes and psychosocial evaluations, but did not attend all of the counseling sessions. Parents testified the counselor said no additional sessions were required, but the counselor said the parents failed to schedule the next appointment and never completed counseling. While the case was pending, Mother gave birth to a Daughter, who was born prematurely. Because of the pending case, Daughter was removed from Parents and placed with Grandfather. After a bench trial, the court terminated the parental rights of both Mother and Father, appointed the Department as the permanent managing conservator of the Son, and placed him with Grandmother. The court gave Grandfather visitation rights by agreement. Mother appealed.

Holding: Affirmed

Opinion: A court may terminate a parent's parental rights if clear and convincing evidence shows that termination is in the best interest of the child and that the parent has engaged in one of the enumerated acts under TFC 161.001(1). TFC 161.001(1)(D) permits termination if the court finds proof of endangerment, which means "to expose to loss or injury, or to jeopardize a child's emotional or physical health." The conduct need not be directed at the child, nor must the child suffer actual injury. A child is endangered when the environment creates a potential for danger that the parent is aware of but consciously disregards. Here, Mother failed to obtain any prenatal care, and Son was born two months premature. Mother and Father failed to take him for his vaccinations due at four months of age, and failed to take him to five of his weekly physical therapy appointments. The Son did not show any evidence of brittle bone disease or any condition that would have caused unusual fragility, and had not had any broken bones while in foster care. Even if trial court believed Mother's testimony that had no knowledge of Son's injuries, it was undisputed that she did not take him to his doctor's appointment for vaccinations or to physical therapy for an entire month. Mother and Father stated they did not have transportation to take Son to his therapy appointments, although Mother acknowledged that Son was on Medicaid and she knew Medicaid provided transportation. Mother claimed she could not use Medicaid transportation because her request for a food voucher for Daughter had been denied. However, Caseworker contradicted Mother's testimony and stated that Son was in fact eligible to use Medicaid transportation. Mother and Father's inability to recognize that a lack of medical care and hygiene presented a physical danger to the Son indicated there was a risk of future physical danger. Mother and Father frequently moved from one relative's home to another, and after the Son was removed from them, they did not visit him at all or communicate with the caseworker to inquire about him. Mother had been unable to keep a job for more than six weeks, and Father frequently changed jobs. Based on the evidence, trial court could have reasonably concluded that termination of Mother's parental rights was in Son's best interest.

REMOVAL OF A CHILD FROM A CRISIS CARE CENTER, EVEN THOUGH CHILD WAS VOLUNTARILY PLACED THERE, CONSTITUTES REMOVAL OF THE CHILD FROM THE PARENTS; TERMINATION OF PARENTAL RIGHTS WAS IN THE CHILD'S BEST INTEREST WHERE THE MOTHER HAD MOVED SEVERAL TIMES, CONTINUED TO USE DRUGS AND ALCOHOL IN VIOLATION OF HER SERVICE PLAN, AND FAILED TO MAINTAIN CONTACT WITH A DEPARTMENT SOCIAL WORKER AND THE CHILD

¶12-5-26. ***D.F. v. TDFPS,*** -- S.W.3d --, 2012 WL 5463025 (Tex. App.—El Paso 2012, no pet. h.) (11/07/12).

Facts: Mother previously resided in California with her two Children, her partner (Father), and Father's two children. Only one of Mother's Children is the subject of the appeal. The family moved frequently for several years. After California CPS became involved, Father's mother (PGM) brought the four Children to El Paso to live with her. PGM suffered a heart attack, and placed the four Children in the Child Crisis Center of El Paso. A Department investigator spoke to Mother, who was homeless and unemployed at the time but stated she wanted to reunify with her children in California and that she would be able to stay with her children in a long-term program at the Rescue Mission in San Diego. However, the Investigator learned there was a two-month waiting period for the program, and the program required Mother and the Children to be out of the facility during daytime hours. The Child Crisis Center in El Paso notified the Department that the Child had medical needs and no insurance, and thus needed to be discharged. They also advised that neither Mother nor Father were returning calls nor checking in on the children. The Department filed a petition to terminate the parental rights of Mother and Father. Trial court signed an order naming the Department as the Child's temporary managing conservator, and included a finding of "an immediate danger to the physical health or safety of [the Child] or [that the Child has] been the victim[] of neglect or sexual abuse and that continuation in the home would be contrary to [the Child's] welfare." Trial court conducted a hearing and issued an order requiring Mother to "comply with each requirement set out in the Department's original, or any amended, service plan during the pendency of this suit." The Department's Caseworker contacted Mother via telephone and discussed the Service Plan with Mother over the phone. At that time, Mother had no plans to come to El Paso, so the Service Plan was mailed to her. The Service Plan required that Mother: (1) refrain from using any illegal substances or alcohol; (2) refrain from associating with individuals that used illegal substances or alcohol;

(3) maintain phone contact with the Child at least twice a week; (4) obtain and maintain appropriate housing and providing proof of same to the Department Caseworker; (5) maintain regular and consistent contact with Caseworker by telephone no less than once per week; and (6) follow any and all family service plans. Mother and Father moved to El Paso a few months later, and Mother moved into the Opportunity Center. Mother met with Caseworker, who reviewed the Service Plan with Mother. Caseworker told Mother she needed to remain in contact, which she initially did. Mother completed parenting classes and completed a psychological evaluation. Mother also visited the Child regularly. However, Mother and Father separated, and during an unsupervised visit with the Child, Mother assaulted Father in front of the Child. Mother was diagnosed with depression and placed on medication. Mother submitted to a random drug test but admitted she had used marijuana a few times. Mother failed to maintain required phone contact with the Child and the Department, and had never obtained appropriate housing. Caseworker saw Mother socializing with a group of people behind the El Paso County Courthouse who appeared to be homeless; the group frequented a nearby bar. Mother later told Caseworker she had been living behind the courthouse because she had been banned from the Opportunity Center, which Caseworker discovered to be untrue. Mother thereafter did not contact the Department or make any effort to visit the Child for several weeks, then had two visits with the Child before her trial. Mother did not appear at trial. Caseworker testified that termination of Mother's parental rights was in the Child's best interests, because Mother's housing situation had been unstable and inconsistent, and Child was living with a foster family who was interested in adopting her. Trial court terminated Mother's parental rights under TFC Section 161.001(1)(O). Mother appealed.

Holding: Affirmed

Opinion: To terminate a parent's parental rights under TFC 161.001(O), the court must find that the child who is the subject of the suit was removed as a result of abuse or neglect of that same child. Here, Mother argued that the Child was not "removed" from her care but voluntarily placed with PGM, who then voluntarily placed the Child at the Child Crisis Center, and only then was the Child removed. Mother also argued that there was no evidence of abusive or neglectful conduct that led to removal. However, in Texas, children are removed from their parents under Chapter 262 for the abuse or neglect of a child where the Child may have been "physically in the care of a relative, a medical or social services institution, or the Department." The child was residing at the Child Crisis Center at the time of her removal, and for the purposes of Chapter 262, this shows that the Child was removed from her parent. Further, the evidence showed that the Child had been neglected by Mother, given Mother's unstable living conditions in California and El Paso, and Mother left the Child with PGM who had significant health problems.

Additionally, Mother claimed she was not specifically aware of the existence of the Service Plan and was not aware that failing to complete all of the tasks assigned to her would result in the termination of her parental rights. However, the plan was prepared with Mother via telephone by Caseworker, and Mother reviewed the Service Plan with Caseworker when Mother arrived in El Paso. Mother argued that she completed a significant portion of the services required under the plan. However, partial compliance is insufficient to establish complete compliance under a court-ordered plan. Mother did undergo random drug testing and complete a psychological evaluation. But, she failed to obtain housing or employment, admitted to using marijuana on a few occasions, and failed to maintain contact with the Child and Caseworker.

Finally, Mother argued the evidence was factually insufficient to support termination of her parental rights based on the child's best interest. In determining whether the termination was in the Child's best interests, COA weighed a number of factors, including the emotional and physical needs of the child, Mother's parental abilities, and the stability of the proposed placement. While Mother had two visits with the Child that had gone "extremely well", according to the caseworker, the Child had adjusted very well to living with her foster family, and Mother did not see Child for several months at a time and did not ask about her. While Mother did complete parenting classes, she failed to secure basic necessities for the Child, failed to keep in regular contact, and engaged in domestic violence in the Child's presence. At one point, Mother told Caseworker she would use a tax refund to obtain an apartment. However, Mother did not follow through with this plan and spent the money on a birthday party for Husband's daughter. Caseworker provided Mother with a list of apartments that would work with Mother, but Mother did not explore these options. The Child's foster parents are interested in adopting her, while Mother presented no evidence of future stability. Finally, Mother

argued her depression was an excuse for her failure to comply with the Service Plan, but provided no excuse for failing to obtain employment or housing, failing to maintain contact with Caseworker, and continuing to associate with persons who used illegal substances or alcohol.

A PRIOR CONVICTION OF SEXUAL ABUSE QUALIFIES AS A SERIOUS INJURY WARRANTING TERMINATION OF PARENTAL RIGHTS UNDER TFC 161.001(1)(L)(IV); FATHER'S HISTORY OF DRUG USE, DOMESTIC VIOLENCE, SEXUAL ABUSE OF HIS DAUGHTERS, AND INABILITY TO PROVIDE STABLE AND SANITARY HOUSING SHOWED THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILDREN.

¶12-5-27. ***R.F. v. TDFPS,*** -- S.W.3d --, 2012 WL 5450715 (Tex. App.—El Paso 2012, no pet. h.) (11/08/12).

Facts: The Department removed six Children from the care of their Mother and Father, and the Department was granted temporary conservatorship. According to the Department's Caseworker, the Children were removed due to the parents' continued drug use, and continued residence in a small, unsanitary home. Caseworker worked with Father and Mother for 18 months before reaching a settlement agreement. The Agreement provided that the Department would become the permanent managing conservator of the children, and the parents would be possessory conservators. Mother had a stable home at the time and was looking for employment. Father was required by the service plan to have weekly supervised visits with his sons, provide financial support to Mother, obtain employment, keep in communication with Caseworker, and attend to the Children's educational needs. A few months later, Father was arrested for engaging in sexual contact with one of his daughters. The Department filed a petition to terminate both Mother's and Father's parental rights. Father pleaded guilty and placed him on deferred adjudication community supervision for ten years. Once released, Father contacted the Caseworker and was permitted only to visit his oldest Son. Caseworker testified that these visits were only allowed because the Son requested to see Father. At the hearings, Father and Mother testified, as well as Caseworker and the Children's Therapist. During Father's initial testimony, his attorney attempted to ask him why he pleaded guilty to the sexual offenses. The State objected on grounds of collateral estoppel, and trial court sustained the objection. Trial court signed an order terminating Father's parental rights under TFC 161.001(1)(L)(iv) and found termination to be in the best interest of the children. Father appealed.

Holding: Affirmed

Opinion: A guilty plea collaterally estops the convicted party from re-litigating his guilt because "a valid guilty plea serves as a full and fair litigation of the facts necessary to establish the elements of the crime." Regardless of the reasons for Father's guilty plea, the issue of his guilt could not be re-litigated. Additionally, Father argued that there was insufficient evidence to prove his conduct "caused the death or serious injury of a child," as required under TFC 161.001(1)(L)(iv). Here, the record contained expert testimony from the Child's therapist, who testified that the Child suffered from severe anxiety issues, required medication, and had been treated in a mental hospital. The Child did not want to see her father and expressed anger toward him, as well as fear about returning to her prior living environment. The injuries suffered by the Child supported a finding that she suffered "serious injury."

Further, Father argued the evidence was insufficient to support the trial court's best interest finding under Section 161.001(2). In determining whether the termination was in the best interest of the children, COA evaluated several factors, including the desires of the children, the physical and emotional needs of the children, and acts or omissions which may indicate the existing parent-child relationship is not appropriate. Only one of the six Children expressed any desire to see Father again. The Children were forced to move frequently, were exposed to drug use and domestic violence, and expressed fear about returning to their parents because they remembered not having enough food to eat. Several of the children had emotional problems and required medication. Both girls told their therapist they had been sexually abused by Father. Although Father paid child supported, complied with his service plan, and regularly visited his Children before he was incarcerated, his prior history of drug abuse and domestic violence, as well as his conviction for sexual abuse of

his daughter, show a lack of parental ability. The evidence showed that trial court could have reasonably formed a firm belief that termination of Father's parental rights was in the best interest of the Children.

FATHER WAS ENTITLED TO NEW TRIAL WHEN HE DID NOT APPEAR AT TERMINATION PROCEEDING AND THE DEPARTMENT FAILED TO SHOW STRICT COMPLIANCE WITH SERVICE REQUIREMENTS; DEPARTMENT ATTEMPTED TO SERVE FATHER BY PUBLICATION USING AN INCORRECT NAME, EVEN THOUGH DEPARTMENT LATER LEARNED FATHER'S REAL NAME AND LOCATION

¶12-5-28. ***In re J.M.,*** -- S.W.3d --, 2012 WL 5463712 (Tex. App.—San Antonio 2012, no pet. h.) (11/09/12).

Facts: The Department filed a petition seeking emergency removal of two Children from Mother (however, only one Child is the subject of the appeal). The petition asserted the Child's alleged Father was "Julian Martinez" whose location was unknown, sought a determination of parentage, and an order terminating "Julian Martinez's" parental rights. Trial court authorized service of citation by posting a copy of the citation on the courthouse door. The record does not contain a motion for substitute service on Father (Jose Martinez) or on "Julian Martinez," nor a return of service on either man. Trial court appointed an Attorney ad litem ("AAL") to represent Father. After the children were removed, a hearing was held, but AAL did not appear, and neither the Clerk nor Bailiff had seen or heard from AAL. At the time of the hearing, the Department had learned the correct name of the Child's Father was Jose Martinez, and had searched the Bureau of Vital Statistics and discovered that no man had registered an intent to claim paternity of the Child. At the next status conference, the Department's Caseworker testified she learned that Father had been deported to Mexico, and she had contacted the consulate to try to locate Father. AAL again did not appear at this conference. Caseworker filed a permanency plan and progress report a few months later, stating she was in contact with Father through the consulate and had sent copies of the service plan and other documentation to the consulate. Caseworker reported that Father was "somewhat engaged" in his service plan but it was difficult to judge his progress because her only contact with him was through the consulate. Caseworker reported that Father was in therapy, provided proof of employment and housing, and had tested negative on one drug test. However, he had not completed parenting classes and had not been able to participate in visits with his child due to his location. The Department announced it was recommending termination of parental rights of Mother and the alleged Fathers of all the Children based on lack of progress in the case. Caseworker testified at the hearing but was not asked any questions about Father. AAL was again absent from the hearing and no one had heard from him or knew where he was. At a hearing a few months later, Caseworker reported that Father continued to attend therapy and had completed parenting classes and a domestic violence class. He had completed a psychological evaluation, which recommended further psychological services in which Father had not engaged. Because of the "not favorable" psychological evaluation, Caseworker recommended termination of Father's parental rights. AAL once again did not attend the hearing. At trial, AAL was absent, and Father did not appear. Caseworker testified at trial that Father had taken no formal steps to legitimate his interest in the Child or establish paternity. Caseworker also answered "yes" when asked whether "each of these fathers or alleged fathers constructively abandoned their children." Caseworker testified that termination was in the best interest of the children. Trial court signed the termination order, which erroneously stated that Father appeared in person through his AAL. The order adjudicated Father to be the Father of the Child and ordered the parent-child relationship to be terminated. The order did not state that termination was in the best interest of the child. Father appealed arguing that the order terminating his rights should be reversed because he was not properly served, the evidence was factually insufficient to support the termination order, and because he received ineffective assistance of counsel.

Holding: Reversed and Remanded

Opinion: In a direct attack on a judgment rendered without the defendant's appearance, the record must show strict compliance with the rules regarding service of citation. Strict compliance means "literal compliance with the rules governing issuance, service, and citation." Service by publication directed to a party using an

incorrect name is not in strict compliance with the rules and does not affect valid service. Here, the Department obtained an order authorizing substituted service for "Julian Martinez," which was not Father's correct name. The Department learned Father's name and his location more than four months before trial, but did not attempt to serve him, even though Father had not waived service or appeared. The record also does not show that the Department filed a statement of the evidence of service, as required by TFC 102.010(d). The record did not show strict compliance with the rules of service, and the service was invalid. The Department argued that TFC 161.002(b) authorized termination of Father's parental rights without notice or service of process. However, this subsection authorizes termination in four circumstances, none of which applies in this case. The four circumstances are: (1) when the alleged father has been validly served with citation; (2) when the child is over one year of age when the petition was filed, the alleged father has not registered with the paternity registry, and the alleged father's identity or location are unknown; (3) when the child was under one year of age when the petition was filed, and when the alleged father registered with the paternity registry but cannot be located for service.

Further, termination for constructive abandonment required not only service or waiver of citation, but also proof by clear and convincing evidence that termination is in the best interest of the Child and that Father constructively abandoned the Child. Trial court did not make a finding that termination was in the best interest of the Child, and did not present any factual evidence establishing constructive abandonment. Caseworker's statement that the alleged fathers constructively abandoned their children was too conclusory to amount to evidence.

TERMINATION WAS SUPPORTED BY TFC 161.001(1)(E) BECAUSE ALTHOUGH STEPFATHER ADMITTED TO SEXUALLY ABUSING THE CHILD, MOTHER EXPRESSED DISBELIEF AND BLAMED THE CHILD FOR STEPFATHER'S CRIMINAL PROSECUTION; MOTHER INTENDED TO REMAIN WITH STEPFATHER DESPITE HIS REPEATED ABUSE OF THE CHILD

¶12-5-29. ***K.M. v. TDFPS,*** -- S.W.3d --, 2012 WL 5835332 (Tex. App.—El Paso 2012, no pet. h.) (11/19/12).

Facts: The Department began an investigation after the Child reported that she had been sexually abused by Stepfather. The Department's Investigator interviewed Mother, who was "hostile" and did not believe the abuse actually occurred. However, Stepfather admitted to the abuse, and although he began attending therapy, he continued to abuse the Child. Stepfather was tried as a result of the abuse allegations and found guilty of sexually abusing the Child. At the sentencing hearing, Mother testified that she did not believe the allegations, and request that the court show leniency so that Stepfather could support her and her other children. A few months later, the Child had a black eye and reported that Mother had hit her in the face because Mother blamed the Child for Stepfather's criminal prosecution. The Investigator reported that she never heard Mother express compassion for the Child, and that Mother had expressed to the Child that she was "a big girl" and "basically needed to suck it up." Mother placed the Child in a runaway shelter from which the Child ran away a few weeks later, saying she was "scared for her life" because of Mother. The Child was eventually diagnosed with PTSD resulting from the repeated abuse. Mother signed a court-ordered service plan, but failed to comply with several of its terms, including a drug and alcohol assessment, family therapy, or providing documentation regarding her housing and employment situation after she moved from Texas to Utah. Mother made no effort to contact or see the Child, aside from sending some Facebook messages in which she blamed the Child for breaking up their family. Eventually, Mother stopped communicating with the Department's Caseworker at all, failing to return phone messages or emails. The Department moved to terminate Mother's parental rights, arguing that termination was proper under TFC 161.001(1)(D), (E), (N), and (O). Trial court terminated Mother's parental rights, and Mother appealed.

Holding: Affirmed.

Opinion: 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 TFC 161.001(1) *and* termination is in the best interest of the child. Under TFC 161.001(1)(E), the judge was required to find by clear and convincing evidence that Mother "en-

gaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child." Here, there was evidence that Mother assaulted the Child and gave the Child a black eye. Further, Mother's testimony at Stepfather's sentencing hearing indicated that Mother intended to stay with Stepfather, even though Stepfather admitted to repeatedly victimizing the Child. Abusive and violent criminal conduct by a parent can produce an environment that endangers the well-being of a child. Mother made no effort to see or communicate with the Child, even after learning of the Child's PTSD diagnosis, and did not respond to the Department's requests for documentation showing that Mother was complying with her service plan. The evidence supported trial court's judgment that termination was in the best interest of the Child.

WITHOUT EVIDENCE OF THE QUALIFICATIONS OF A PERSON WHO CONDUCTED TESTS, THE METHODOLOGY, AND WHETHER THE TESTS ARE STANDARD FOR A PARTICULAR SUBSTANCE, DRUG TEST RESULTS ARE INADMISSIBLE HEARSAY

¶12-5-30. ***In re S.S.,*** -- S.W.3d --, 2012 WL 5991391 (Tex. App.—Tyler 2012, no pet. h.) (11/30/12).

Facts: Mother had three Children. The Children were removed from the home when a Caseworker found a handprint on a Child's leg and learned that Father tested positive for drugs. The Department moved to terminate Mother's parental rights and was appointed temporary managing conservator of the Children. A collector with Drug Test Services of East Texas collected strands of hair from the family members and had them tested for drugs. The results from five different test dates showed that, at various times, Mother and Father tested positive for marijuana, and Father and all three Children tested positive for cocaine. Mother signed a service plan, requiring that she not expose the Children to Father as long as he was using drugs. However, Caseworker testified that during various home visits, she saw Father at the home, and Mother stated that she was still seeing him and living with him. At the trial, the Collector testified that once she shipped the samples to a laboratory in Ohio, she had no personal knowledge about happened to the samples. The Department offered into evidence affidavits from the Texas Alcohol and Drug Testing Service, signed by their custodian of records, including the results of the hair follicle drug tests. The Caseworker testified regarding the test results, stating that she had received them from the Texas Alcohol and Drug Testing Service, but that she had no familiarity with the methodology for testing, that she could not state the testing was reliable, and that she had no personal knowledge that testing was done with industry standards. The affidavits were admitted as business records. The jury found that Mother's parental rights should be terminated under TFC 161.001(1)(D) and (E). Mother filed a motion for new trial, which was denied. Mother appealed.

Holding: Affirmed

Opinion: Business records are admissible in any court in Texas as a hearsay exception if admitted with the affidavit of a witness who has personal knowledge of the manner in which the records were prepared. The witness does not need personal knowledge of the contents of the record. However, business records are not admissible if "the source information or the method or circumstances of preparation indicate lack of trustworthiness." Here, Caseworker testified at trial regarding the test results. She stated that she received the test results, but admitted she had no personal knowledge of how the tests were conducted. There was no evidence regarding the qualifications of the person who tested the samples, the types of tests administered, or whether such tests were standard for the particular substance. Further, there was no evidence to show that the devices used to conduct the tests were properly supervised, maintained, or operated by a person competent to do so. Consequently, the results of the test should not have been admitted. However, separate testimony established that Mother and one of the Fathers admitted to using drugs, so the error in admitting the test results was harmless.

A court may terminate a parent's parental rights if clear and convincing evidence shows that termination is in the best interest of the child and that the parent has engaged in one of the enumerated acts under TFC 161.001(1). TFC 161.001(1)(O) permits termination if the court finds that 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 the Department of Family and Protective Services 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." At the time of trial, the Department had been temporary managing conservator of the children for nearly three years, and the Children had been removed from the home because they had been repeatedly exposed to drugs. Mother was required to comply with her service plan, which stated that Mother could not be reunited with her Children while living with the Father who continued to test positive for drugs. However, Mother continued to live with Father, admitted that he had abused her, and that she had even occasionally left her newborn baby with him. Mother did not maintain weekly contact with Caseworker, did not notify Caseworker when she moved to a new address, and did not attend therapy regularly, as required by her service plan. Her psychiatric evaluation showed that she was highly emotional, and as a result could not make good decisions for herself or her Children.

Editor's comment: *This case is troubling. Of course, the qualifications of the person who tested the samples, the types of tests administered, whether the tests were standard for a particular substance, and whether the devices used to conduct the tests were properly supervised, maintained or operated by a person competent to do so are critically important. However, this case will probably create problems for test results from drug testing services that send the samples to out of state labs for testing. It appears that unless the drug testing services and labs can produce witnesses to meet these requirements, many drug tests will not be admissible even with a business records affidavit. J.A.V.*

Editor's comment: *The court notes that although expert opinions can be admissible by business records affidavits in civil cases if the requirements of Tex. R. Evid. 702 are met, a more stringent standard must be applied in termination cases where the burden of proof is by clear and convincing evidence. J.V.*

MISCELLANEOUS

TRIAL COURT IS REQUIRED TO HOLD AN ORAL HEARING ON A MOTION TO REINSTATE, WHEN THE MOTION WAS TIMELY FILED AND VERIFIED

¶12-5-31. ***In re Marriage of Gilliam,*** No. 12-12-00037-CV, 2012 WL 3991875 (Tex. App.—Tyler 2012, no pet. h.) (mem. op.) (09/12/12).

Facts: Husband was an inmate when he filed a pro se petition for divorce. He unsuccessfully sought to have Wife served with process, and two years later the suit was dismissed for want of prosecution. Less than one month later, Husband filed a motion to reinstate his suit supported by a sworn declaration. Husband sent a letter to the trial court requesting that the motion be set for hearing. Without holding a hearing, the trial court denied Husband's motion to reinstate. Husband appealed.

Holding: Reversed and Remanded

Opinion: The decision to dismiss a case for want a prosecution is at the discretion of the trial court. A motion to reinstate must be filed within thirty days after the order of dismissal is signed and must be verified by the movant or his attorney. Tex. R. Civ. P. 165a(3). The judge must set a hearing on the motion as soon as practicable. Tex. R. Civ. P. 306a. Once a motion to reinstate meets the threshold requirements of being timely filed and verified, a hearing must be held on it regardless of whether the motion states meritorious grounds or whether the facts verified in the motion are sufficient to sustain the movant's burden of proof to warrant reinstatement.

Here, Husband timely filed his motion to reinstate. His motion contained a "verification paragraph," declaring "under penalty of perjury" that the facts set forth in the motion were true and correct. Husband sent a letter to the trial court coordinator requesting that the motion be set for hearing. Because Husband filed a

timely motion to reinstate that was supported by a sworn declaration, trial court erred in failing to hold an oral hearing on the motion.

HUSBAND WAS ENTITLED TO MANDAMUS RELIEF WHEN COURT DID NOT ISSUE SHOW CAUSE ORDER AFTER HUSBAND FAILED TO APPEAR AT TRIAL; COURT MUST ISSUE A SHOW CAUSE ORDER TO SATISFY DUE PROCESS

¶12-5-32. ***In re Elmakiss,*** No. 12-10-00219-CV, 2012 WL 4497997 (Tex. App.—Tyler 2012, orig. proceeding) (mem. op.) (09/28/12).

Facts: In the underlying divorce proceeding, trial court ordered both parties to deliver their passports to the court. Trial court eventually ordered that the passports be returned, but Husband refused to pick up his passport in person, as required by the court. During the divorce proceedings, Husband was held in contempt twice. The first instance was due to Husband's refusal to answer a question posed by Wife's counsel. Husband was confined in the county jail for sixty days. The second instance occurred when the trial resumed and Husband did not appear. The bailiff was instructed to call Husband's name on the courthouse steps but did not find him. The bailiff claimed that Husband knew what day to come back because he was told as he was brought to jail for his first contempt offense. Husband was arrested and jailed, and was released after posting an appearance bond. Husband filed a petition for writ of mandamus, claiming that the trial court's retention of his passport was an unconstitutional restriction on his freedom of movement and that the order holding him in contempt for refusing to answer questions and his commitment relating to the second instance were void because he received inadequate notice of the charges against him.

Holding: Petition for Writ of Habeas Corpus Dismissed in Part, Granted in Part

Opinion: The jurisdiction of appellate courts to issue writs of habeas corpus is limited to those cases in which a person's liberty is restrained because the person had violated an order, judgment, or decree entered in a civil case. COA was without jurisdiction to address the merits of Husband's complaint regarding his passport because the record did not show that he was ordered to surrender his passport because he had violated an order.

Regarding Husband's first contempt offense, Husband's confinement had ended at the time the petition was filed, and therefore COA had no jurisdiction to address the issue. Regarding the second instance, Husband was considered restrained or in custody because he was required to post an appearance bond, which was still in effect. A violation of a court order outside the presence of the court, including the failure to appear for a hearing, is constructive contempt. The court must issue a valid show cause order or equivalent legal process apprising the contemnor of the accusation to satisfy due process. Here, no show cause order was ever issued, no hearing was conducted, and no written contempt judgment was signed that warranted mandamus relief.

TO BE IMPRISONED FOR CIVIL CONTEMPT, BOTH A WRITTEN JUDGMENT OF CONTEMPT AND WRITTEN ORDER OF COMMITMENT ARE REQUIRED; COMMITMENT ORDER MUST SPECIFICALLY DIRECT SHERIFF TO TAKE A PERSON INTO CUSTODY

¶12-5-33. ***In re Jorge,*** No. 02-12-00407-CV, 2012 WL 5275343 (Tex. App.—Fort Worth 2012, orig. proceeding) (mem. op.) (10/26/12).

Facts: Relator was found in contempt for violating agreed temporary orders, specifically, "by failing to make certain payments required by the agreed temporary orders and by intentionally, knowingly, or recklessly causing Real Party in Interest bodily injury." He was ordered to be committed to the county jail for 45 days for each violation. Relator filed a writ of habeas corpus alleging he had been illegally restrained because no commitment order had been signed.

Holding: Petition for Writ of Habeas Corpus Granted

Opinion: Both a written judgment of contempt and a written order of commitment are required by due process to imprison a person for civil constructive contempt. A commitment order need not be in any particular form, but must contain a directive to the sheriff to take the person into custody. Here, the trial court's contempt order did not direct the sheriff or other ministerial officer to take custody of relator, and no other document was signed by the trial court or issued by the court clerk containing the required directive.

WHEN PURSUING A LIMITED APPEAL GENERAL STATEMENTS IDENTIFYING PORTIONS OF A JUDGMENT BEING APPEALED AND DECLARING INTENT TO APPEAL ONLY THOSE PORTIONS DO NOT SATISFY THE REQUIREMENT IN TRAP 36.(C)(1) THAT A REQUEST FOR REPORTER'S RECORD MUST INCLUDE A STATEMENT OF POINTS AND ISSUES TO BE APPEALED

¶12-5-34. ***In re McKay,*** -- S.W.3d --, 2012 WL 5439269 (Tex. App.—Amarillo 2012, no pet. h.) (11/07/12).

Facts: Husband and Wife had one Child before they married. The Child's Great-Aunt and Great-Uncle ("the Relatives") helped care for the Child throughout the Child's life. After three years of marriage, Husband and Wife filed for divorce, and were named temporary JMCs of the Child. Wife was given exclusive right to designate the child's primary residence, limited to Potter and Randall Counties. While the divorce was pending, Wife moved to California to attend beauty school without Husband's consent; the Child remained with Husband. One month later, Husband was involved in a car accident that left him incapable of caring for the Child. While Husband recovered, the Relatives became the Child's sole caretakers. Wife was unaware of Husband's inability to care for the Child and of the fact that the Child was being cared for exclusively by the Relatives. Husband had been drinking when he was involved in his car accident and was consequently arrested and convicted of driving while intoxicated. Husband was incarcerated until his trial, during which time Wife was aware that the Child was being exclusively cared for by the Relatives. The Relatives subsequently petitioned to be named JMCs of the Child and to intervene, and trial court issued a TRO preventing removal of the Child from the Relatives' care. Mother filed a motion to dismiss the Relatives' suit for lack of standing, and the case went to a jury trial. The jury returned a verdict that the Relatives and Husband should be JMCs, with the Relatives having exclusive right to designate primary residence of the Child without geographic restrictions. Wife timely appealed and requested preparation of the reporter's record, requesting preparation of certain specified portions of the record as well as "[a]ny and all parts of the transcript covering Standing along with Voir Dire."

Holding: Affirmed

Opinion: In an appeal with only a partial reporter's record, a court of appeals must presume the omitted portions of the record are relevant and support the trial court's judgment. Texas Rule of Appellate Procedure 34.6(c)(1) provides one exception: "If the appellant requests a partial reporter's record, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues." The statement of points must "designate with reasonable particularity the complaints to be pursued on appeal." However, a general statement identifying the portion of the judgment that is being appealed and declaring an intention to appeal that portion is insufficient to satisfy TRAP 34.6(c)(1). Here, Wife's statement only identified the portion of the judgment she was appealing and declared her intention to appeal that portion. Wife's statement left the Relatives to guess which additional portions of evidence should have been included in the reporter's record. The Texas Supreme Court has held that a complete failure to include a statement of points when a partial reporter's record is filed requires an appellate court to affirm the judgment of the trial court.

Editor's comment: *The court quotes Munden v. Reed, No. 05–01–01896–CV, 2003 WL 57751 (Tex. App.—Dallas Jan.8, 2003, no pet.) (mem.op.), which faulted a statement of the points or issues to be presented on appeal "because it requests part of the record but does not state the issue on appeal." J.V.*