SECTION REPORT
FAMILY LAW
http://www.sbotfam.org Volume 2013-3 (Summer)

IN THIS MONTH'S REPORT

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Section Wear and Publications

MESSAGE FROM THE CHAIR

With over 6,000 members, the Family Law Section has become the fourth largest section of the State Bar. I am honored to begin my term as Chair and I encourage all members to become involved with the Section. Work with a committee, speak at a pro bono seminar, bring a pro bono seminar to your hometown, or participate in the legislative process. You will find that the Family Law Section is made up of smart, hard-working and compassionate lawyers from across the State committed to the practice of family law.

Legislative Session

May 27, 2013 brought a close to the 83rd Regular Session and another successful legislative effort by Texas family lawyers. While it would be impossible to acknowledge and thank every individual that had a hand in our legislative success, it was a great team effort. The Section's Legislative Committee, chaired by Jack Marr and Diana Friedman, began work in August 2011 and drafted 16 family law bills. We owe a huge thank you to the legislators who sponsored these Section bills including Rep. Eddie Lucio III, Rep. Senfronia Thompson, Sen. Royce West, and Sen. Jose Rodriquez. When the legislative session began, the Bill Review Committee, led by Chris Wrampelmeier, reviewed and analyzed hundreds of filed bills. During each week of the regular session, members of the Texas Family Law Foundation, at their own expense, spent the week in Austin reviewing and amending bills, meeting with legislators and lobbying on behalf of Texas family law. The Section is also thankful to Rep. Tryon Lewis, Chair of the House Judiciary and Civil Jurisprudence Committee and Sen. Royce West, Chair of the Senate Jurisprudence Committee for working with the Foundation. Last, but certainly not least, none of our success would be possible without the hard work and dedication of our lobbyist and friend, Steve Bresnen.

This year, for the first time, the State Bar, in collaboration with the Family Law Section, Family Law Foundation, American Academy of Matrimonial Lawyers, Texas Chapter, and Texas Academy of Family Lawyers, will present a family law Legislative Update seminar. This course will provide family lawyers a unique opportunity to learn about the session and new legislation directly from the organizations and family lawyers that were on the ground during the session. There will be a live session in Houston, Dallas and Austin (see full details below). The Legislative Section Report will be released July 1.

Family Law Forms

The family law forms were published in the December 2012 Bar Journal. The Family Law Council has provided the Supreme Court with an itemization of specific concerns relating to the forms and filed an amicus brief opposing forms relating to retirement benefits. There has been no further activity since December but we remain hopeful that the Court will take these concerns under advisement and work with the Family Law Section to address pro bono legal services for litigants in family law matters.

Pro Bono Efforts

The Section continues to advocate that all indigent litigants deserves a lawyer, not a form. Over the last year we have continued our award winning pro bono efforts. What started with a simple idea – provide free CLE to lawyers willing to take a pro case – has grown to one of the largest pro bono efforts in the state. In 2013 the Section's Pro Bono Committee will host eleven seminars, (Palestine, Fredericksburg, Kingsville, South Padre, Victoria, El Paso, Amarillo, Longview, San Marcos, Eagle Pass/Del Rio, and Abilene) resulting in lawyer representation for hundreds of indigent litigants across the state.

The Family Law Section has also partnered with Texas Young Lawyers Association to develop CLE programs across the State to teach its 26,000 young lawyer members how to handle pro bono family law cases. The first seminar will be on July 26, 2013 in Dallas. Participant sponsors include the Dallas Bar Association, Dallas Young Lawyers Association, and the Dallas Volunteer Lawyers Program (DVAP). Future seminars are being planned throughout Texas.

The debate over family law forms has also brought renewed attention to the issue of legal services for the poor. When asked, "how would you do it better?" the Section answered with Family Law Cares. Family Law Cares is a campaign to mobilize and educate lawyers from all practice areas to take a pro bono family law case. With 6,000 members, the Family Law Section accounts for just over 6.5% of the lawyers in Texas. The state's legal aid providers report that at least seventy-five percent of the litigants that qualify for legal aid need assistance with a family law matter. With this said, it is clear that the only way to make a dent in the numbers

is for family lawyers to provide the support and resources necessary to enable lawyers in other practice areas to take a pro bono case in a family law matter.

Tedder v. Gardner Aldrich LLP

On May 17, 2013, the Texas Supreme Court issued an opinion in the case of *Tedder v. Gardner Aldrich LLP*. Over the last few weeks there has been growing concern regarding this case and its implication to family lawyers. The case raises two issues that may negatively impact family law practice: (1) under no circumstances can attorney's fees be considered necessary in divorces not involving children; and (2) when an intervention may be filed. The Family Law Council has voted to submit an amicus brief asking the Supreme Court to reconsider its ruling on these two issues.

Upcoming Events

Mark your calendar for the following family law events:

June 25, 2013:	Legislative Update, Norris Conference Center, Houston
June 26, 2013:	Legislative Update, Cityplace Events, Dallas
July 9, 2013:	Legislative Update, Texas Law Center, Austin
July 26, 2013:	TYLA, How to Handle a Family Law Case, Belo Mansion, Dallas
August 5-8, 2013:	Advanced Family Law, Marriott Rivercenter, San Antonio
October 3-4, 2013:	New Frontiers in Marital Property, Napa Valley Marriott Hotel & Spa
November 10, 2013:	Family Law Cares Fun Run, Fair Park, Dallas
December 5-6, 2013:	Advanced Family Law Drafting, Dallas

Finally, congratulations to Diana Friedman, Immediate Past Chair, for a remarkable year. On behalf of the Executive Committee and the entire Family Law Council I want to thank you for your dedication, hard work and leadership during a challenging and chaotic year. You are a hard act to follow.

----------**Sherri Evans, Chair**

TABLE OF CASES

In the Law Reviews and Legal Publications

LEAD ARTICLES

Engaging Fathers in Positive Parenting Programs, 32 CHILD L. PRAC. 63 (2013).

Child Custody, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 14 (Spring 2013).

Indicated Reports of Child Abuse or Maltreatment: When Suspects Become Victims, Joan **Owhe**, 51 FAM. CT. REV. 316 (2013).

Property, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 34 (Spring 2013).

Child Support, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 24 (Spring 2013).

Life Insurance, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 28 (Spring 2013).

Debts, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 26 (Spring 2013).

Spousal Support, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 40 (Spring 2013).

The Child's Attorney and the Alienated Child: Approaches to Resolving the Ethical Dilemma of Diminished Capacity, Jamie **Rosen**, 51 FAM. CT. REV. 330 (2013).

Marital Home, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 30 (Spring 2013).

Association of Family and Conciliation Courts Guidelines for Child Protection Mediation, Marilou **Giovannucci** & Karen **Largent**, 51 FAM. CT. REV. 193 (2013).

Waivers, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 43 (Spring 2013).

Taxation, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 42 (Spring 2013).

Retirement Benefits, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 38 (Spring 2013).

Enforcement, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 27 (Spring 2013).

Business Partnership, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 13 (Spring 2013).

Bankruptcy, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 12 (Spring 2013).

Attorney's Fees, Livia D. **Barndollar**, Willard H. **DaSilva**, Joy **Feinberg**, Melvyn B. **Frumkes**, Carl **Gilmore**, Bob **Guyot**, Ann M. **Haralambie**, Gregg **Herman**, Kathleen **Hogan**, Scott M. **Mann**, & Laura **Morgan**, 35 FAM. ADVOC. 12 (Spring 2013).

The Role of the State in Family Law, Peter **Boshier**, Judith **Kreeger**, George **Czutrin**, & Julia **Spelman**, 51 FAM. CT. REV. 184 (2013).

Grandma in the White House: Legal Support for Intergenerational Caregiving, Jessica D. **Weaver**, 43 SETON HALL L. REV. 1 (2013).

From Policy to Implementation – How Family Relationship Centres Became A Reality, Sue **Pidgeon**, 51 FAM CT. REV. 224 (2013).

The Future of Family, Max D. **Siegel**, 23 GEO. MASON U. CIV. RTS. L.J. 177 (2013).

Parsing Parenthood, Cynthia **Godsoe**, 17 LEWIS & CLARK L. REV. 113 (2013).

Family Relationship Centres: Partnerships with Legal Assistance Services, Lawrie **Moloney**, Rae **Kaspiew**, John **De Maio**, Julie **Deblaquiere**, 51 FAM. CT. REV. 250 (2013).

Nonmarket Values in Family Business, Benjamin **Means**, 54 WM. & MARY L. REV. 1185 (2013).

Tort Liability in the Age of the Helicopter Parent, Elizabeth G. **Porter**, 64 ALA. L. REV. 533 (2013).

Marriage, Biology, and Federal Benefits, Courtney G. **Joslin**, 98 IOWA L. REV. 1467 (2013).

ASK THE EDITOR

Dear Editor*:** I was recently retained to assist a client in defending against a post-divorce bill of review. In order to properly represent the client, I needed to review the original divorce file. I immediately sent a request to the prior law firm that had represented her and which she had paid in full at the conclusion of the divorce action. The prior firm refused to turn over the file. I then requested my client to contact the firm and make the request. In response to her request, the law firm wanted to know who was going to pay for them to copy the file. It is my understanding that the client's entire file belongs to the client and that the prior firm has no option except to turn over the file to the client *in toto*. Am I wrong? I really need that file to properly represent the client in the current proceedings. ***Fuming in Frisco

***Dear Fuming in Frisco*:** You are right. Unfortunately, this question comes up quite frequently. The Texas Supreme Court, however, has made it quite clear that your client is entitled to the entire file held by the prior law firm, including their work product. *Resolution Trust Corp. v. H___, P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989); Supreme Court of Texas Ethics Op. 570 (2006); *see also* Supreme Court of Texas Ethics op. 411 (1984) 1984 WL 50129; Tex. R. Discpl. P. 1.14(b), 1.15(d). Read together, Rules 1.14(b) and 1.15(d) provide that, generally, the documents in a lawyer's file, including his work product, that are property to which the client is entitled must be transferred to the client upon request unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation. *See* Ethics Op. 570. The only exception to this rule are certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. *Id.* citing Restatement (Third) of The Law Governing Lawyers (American Law Institute 2000) Section 46.

In Ethics Opinion 411, the Texas Supreme Court was asked whether an attorney may ethically assert retaining lien and withhold a client's papers, money or property, relating to a specific attorney-client legal matter, if the client has refused to pay the attorney's fees and expenses charged in connection with that matter? *Id.* The court held:

> . . . any lawyer contemplating retaining possession of a client's property, papers or money should be cognizant of the possibility that his action may be deemed unethical if enforcement of the lien forseeably prejudices the client's legal rights. Actual, foreseeable prejudice of a client's rights, as distinguished from mere inconvenience or annoyance, creates an ethical violation in contravention of the Disciplinary Rules. Although this ethical limitation removes much of the "clout" of a retaining lien—since the greater the client's need for his file, the greater the leverage the attorney retaining it will possess—an attorney who has once been retained to represent a client's rights may not later precipitate actual harm to those rights merely to collect a fee.
>
> Essentially, an attorney refusing to relinquish possession of a client's file on the basis of a common-law retaining lien does so at personal risk. The risks are perhaps best illustrated in Smith v. State, 490 S.W.2d 902 (Tex.Civ.App.—Corpus Christi 1972, writ ref'd n.r.e.), on motion to retax costs, 500 S.W.2d 682 (Tex.Civ.App.—Corpus Christi 1973), on appeal after remand, 523 S.W.2d 1 (Tex.Civ.App.—Corpus Christi 1975, writ ref'd n.r.e.) (attorney suspended for, among other things, refusing to relinquish files of a former client to her new attorney where jury found the attorney did not believe at the time that he was asserting a valid retaining lien). Note that the attorney must make demand for the unpaid amount or balance before a right to a lien arises. Smith, 490 S.W.2d at 910.

In your case, your new client has fully paid the prior attorney, and the prior attorney has made no demand for any unpaid amounts. Accordingly, the former attorney is subjecting himself to an ethical violation and possible damages should the client suffer prejudice because of this attorney's refusal to release the client's files. Additionally, because the file belongs to the client, any copies made by the former lawyer are on his nickel.

CONGRATULATIONS

Congratulations to Diana Friedman and Honorable Judy L. Warne, who were both selected to receive the "Standing Ovation Award" from the State Bar of Texas for their exceptional contributions to the Bar's continuing legal education efforts. Ms. Friedman and Judge Warne were two of only six volunteer lawyers receiving an award from the staff of Texas Bar CLE.

As a course co-director for the 2012 Advanced Family Law Course, Diana was invaluable throughout the entire program planning, including helping to meet various deadlines of the course development. As Chair of the Family Law Section, she also helped with other family law programs, including determining the location and sites, picking course directors, and working out details of Section-sponsored events and meetings.

A welcome addition to any planning committee, Judge Warne served as course director in 2011 for Texas Bar CLE's Marriage Dissolution Institute. On another occasion she graciously stepped in on a day's notice to speak on the Success Strategies for Young Lawyers course. At the Advanced Family Law Course she held two speaking slots – one the main program and another on the Associate Judge's program that same morning.

Congratulations also go out to our own Cindy Tisdale, treasurer of the State Bar Family Law Section, who has been elected as the Chairwoman of the State Bar of Texas board of directors.

Congratulations also go out to the following attorney's for receiving the award for the best CLE article for 2012, entitled "Appellate Practice from Every Angle": Chris Nickelson, Jimmy Vaught, Georganna L. Simpson, Larry M. Doss, Jeremy C. Martin, and Rebecca Tillery.

THERAPY TO GO

Dear Therapy to Go:
I am a practicing attorney and fairly new to my career. I am in private practice for myself and I am discovering so many challenges. Right now my biggest challenge is that I am EVERYTHING to my clients, lawyer, counselor, best friend and spouse. It is important to me to establish myself and my brand in order to attract clientele, and that was my attempt. Well, in this attempt I have marketed myself as "The Attorney You Can Reach." My cell phone is as published as the local newspaper. I find myself receiving calls around the clock and it is disrupting my life, and leading me to resenting my clients. While I do want to provide some level of "reach-ability," I do not want to be my client's "tech-support." Help me disconnect! **"Tech-Support" Terry.**

Dear "Tech-Support" Terry:
Thank you for your question. Before I get started, I need to ask you for some legal advice… Just kidding, of course. Do you feel smothered by your clients sometimes? Do you feel like some of your clients appreciate and respect the access you offer, while some do not? Terry, you are suffering from what I like to call, breachable walls. Maintaining professional boundaries is essential to your practice and the kind of interpersonal work that you do. It is a good thing that you are catching this now. It may seem reasonable to blame your clients for this, but they are only functioning within the rules you set. Children typically won't just run free in a wide open field, but they will in a wide open field with a fence that they can see. For your clients, it's about knowing the rules, accepting them, and ultimately benefiting from them. You have to teach your clients how to treat you. If you do not respect your time, than neither will they. It is about effectiveness and client safety. In between under-involved and over-involved is the zone of helpfulness, and this is where you want to be. For each person and practice, it's a little bit different. Professional boundaries can take several shapes, so here are a few guidelines. Professional boundaries are clearly established limits that allow for safe connections between service providers and their clients. Remember that "being with" the client does not mean becoming the

client. Be friendly with your client, not friends with your client. Maintain the ability to know where you end and the client begins. Lastly, and most importantly, maintain a clear understanding of the limits and responsibilities of your role as a service provider. The last thing you want to be dealing with is compassion fatigue, or experiencing vicarious trauma. These will sink your ship. Allowing client's access into your personal space and time will ONLY result in bad things happening… for you and your client. You are not to rescue your client or solve their problems, but you can model healthy communication and a healthy relationship. Good job catching this early. I'm going to want to discuss this with you further. I'll call you around suppertime.

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.

Child support modification: Massachusetts' Supreme Judicial Court reversed a trial court that dismissed a motion to increase the amount of child support a father paid, based upon his promotion and increased salary, for lack of a material and substantial change of circumstances because Massachusetts law states that modification is appropriate if there is an inconsistency between the amount of child support being paid and the amount that should be paid under Massachusetts' child support guidelines. ***Morales v. Morales,*** 984 N.E.2d 748 (Mass. 2013). The South Dakota Supreme Court held that receipt of an inheritance by a custodial father could not be considered when calculating the mother's child support obligation absent a finding that the child's needs were not being met through the parties' incomes. ***Crawford v. Schulte,*** 829 N.W.2d 155 (S.D. 2013). The Oregon Supreme Court enforced an agreement between divorced parents that neither of them would seek modification of the amount they agreed the father should pay the mother as child support. ***Matar v. Harake,*** 270 P.3d 257 (Ore. 2013). The West Virginia Supreme Court of Appeals reversed a trial court's decision to lower a father's child support after he quit a well-paying job with benefits to work part-time, at $10 per hour, for his fiancée's mother's company, holding that the trial court must base its decision on the father's earning capacity. ***Melinda H. v. William R.,*** -- S.E.2d --, 2013 WL 1707445 (W. Va. Apr. 19, 2013).

CPS: The Nevada Supreme Court affirmed a trial court's decision not to require a father to comply with a case plan and accept reunification services when the father had nothing to do with the mother's being drunk, which was the event that led to the child's removal from the mother's home. ***Washoe County Dep't of Soc. Servs. v. Kory L.G.,*** 295 P.3d 589 (Nev. 2013). The Nebraska Supreme Court also found a trial court's order that a mother submit to a pretreatment assessment and sign releases of her therapist and treatment records unreasonable when the state did not fault the mother for her inability to ensure her nonverbal, autistic, 16-year-old daughter's attendance at school. ***In re Interest of Rylee S.,*** 829 N.W.2d 445 (Neb. 2013). A Montana trial court did not abuse its discretion when it concluded that reunification efforts and another treatment plan would not be in the children's best interest after their mother was arrested on criminal charges. ***In re E.Z.C.,*** -- P3d. --, 2013 WL 1896275 (Mont. 2013). The California Supreme Court reversed a trial court's decision to declare a father's sons dependents of the court when the father had abused his daughter but there was no evidence that he had sexually abused or otherwise mistreated his sons. ***In re I.J.,*** 56 Cal.4th 766 (Cal. 2013).

Do adopting parents trump grandparents? The high courts in both Arkansas and West Virginia held that the adoption of a child after termination of parental rights cuts off any right to grandparent visitation, even if that visitation has been ongoing. ***Scudder v. Ramsey,*** -- S.W.3d --, 2013 Ark. 115 (Ark. 2013); ***In re Hunter H.,*** -- S.E.2d --, 2013 WL 1113367 (W. Va. 2013). But the Utah Supreme Court reversed a trial court that gave procedural precedence over the foster parents' adoption petition by granting that petition and dismissing a grandmother's adoption petition because a court must hold a hearing on the merits of competing adoption petitions. ***S.C. v. State,*** -- P.3d --, 2013 WL 1883234 (Utah 2013).

ERISA: The Fourth Circuit answered the question left open in ***Kennedy v. Plan Administrator for DuPont Savings & Investment Plan,*** 555 U.S. 285, 299 n.10 (2009), when it held that a decedent's estate may enforce the decedent's former spouse's waiver of any right to the decedent's retirement benefits, even though the decedent never changed her designation of the former spouse as primary beneficiary, by suing the beneficiary to obtain the benefits after the plan administrator has distributed the benefits to the beneficiary. ***Andochick v. Byrd,*** 709 F.3d 296 (4th Cir. 2013). The Minnesota Supreme Court held that under ERISA, surviving spouse benefits vest in a plan participant's current spouse when the plan participant retires, and therefore the DRO that a decedent's former wife tendered could not be qualified even though the parties' divorce decree awarded her part of the decedent's retirement benefits. ***Langston v. Wilson McShane Corp.,*** 828 N.W.2d 109 (Minn. 2013).

Inmate rights: The Montana Supreme Court held that a trial court abused its discretion when it denied an inmate's motion for continuance of his divorce hearing when the inmate could not appear telephonically because of surgery and hospitalization. ***Eslick v. Eslick,*** -- P3d --, 369 Mont. 187 (Mont. 2013). A New York trial court did not err when it required a mother to bring the parties' three-year-old to the prison where the father was an inmate for periodic, four-hour visitation periods because the trial court correctly applied the presumption in favor of visitation and the mother did not rebut that presumption by showing that visitation would be harmful to the child. ***Granger v. Misercola***, 96 A.D.3d 1694, 947 N.Y.S.2d 736 (N.Y. 2013).

Post-minority child support: An Alabama trial court properly ordered a father to pay the educational expenses of one daughter, who was already attending college and had received scholarships covering part of her tuition, but the trial court abused its discretion when it ordered the father to pay college expenses for his other daughter, aged 16, and his 14-year-old son because whether a parent must pay those expenses can be determined only when a child has reached or nearly reached graduation from high school. ***J.D.A. v. A.B.A.,*** -- So.3d --, 2013 WL 1016191 (Ala. App. 2013) (per curiam). The South Dakota Supreme Court affirmed a trial court that ordered a father to pay his share of his son's educational expenses through the first year of graduate school, following five years of study leading to a double major, when the parents agreed to pay educational expenses until the son completed a course of study or turned 25, whichever first occurred, and the son would turn 25 after one year of graduate school. ***Roseth v. Roseth,*** 829 N.W.2d 136 (S.D. 2013). The Montana Supreme Court read a decree requiring a father to pay child support of $6,977 per month until his daughter reached majority, graduated from high school or otherwise became emancipated to mean that the father must pay child support until the daughter graduated high school in July rather than on her 18th birthday, which took place the preceding November. ***Pfeifer v. Pfeifer***, -- P.3d --, 2013 WL 1966365 (Mont. 2013).

What's in a name? The West Virginia Supreme Court of Appeals reversed a trial court's grant of a mother's request to change the surname of the parties' daughter from [father's surname] to [mother's surname]-[father's surname], which the mother filed during a contentious visitation dispute, because the mother's opinion that the name change would make it easier for the child when she entered school did not constitute clear, cogent and convincing evidence that changing the child's name would significantly advance the child's best interests. ***In re Name Change of Jenna A.J.,*** -- S.E.2d --, 2013 WL 2302047 (W. Va. 2013).

COLUMNS

MENTAL HEALTH TESTIMONY = CONCLUSIONS + OPINIONS

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

Dr. Smith, a psychologist who had conducted a child custody evaluation, took the stand. On direct examination, Dr. Smith stated that because mother was depressed and psychological research showed that depressed mothers are less emotionally responsive to their children than mothers who are not depressed, the child's best interest would be served if the court granted father the right to establish the child's primary residence. Mother's lawyer had difficulty understanding how Dr. Smith's evaluation data supported the opinion but was unable to crack Dr. Smith's certainty, especially when Dr. Smith invoked research to support his conclusions. Mother's lawyer felt that her examination of Dr. Smith lacked focus in the face of Dr. Smith's certitude.

Lawyers in cases other than family law may feel similar frustrations with mental health experts who proffer confident opinions supported by seemingly relevant research. But how can lawyers go behind those opinions to understand the reasoning that these experts bring to their findings and testimony? A key is to determine the difference between experts' *conclusions* and experts' *opinions*. Doing so will aid trial preparation and focus deposition and trial questions.

How do conclusions and opinions differ? In short, conclusions arise from the data mental health experts gather, consider, and review. As a result, conclusions are within the social science sphere. In contrast, experts give opinions when they apply their conclusions to the legal standard the court is considering—e.g. the best interest of the child or criminal responsibility. Caselaw appears to meld the notions of expert conclusions and opinions. But lawyers who consider these concepts separately in their thinking, preparation, and expert examinations will improve their understanding of experts' testimony.

The tie between data and conclusions makes sense and is legally required—"[C]onclusions and methodology are not entirely distinct from one another." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 725 (Tex. 1998) ("*Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion"). Obviously, data from unreliable methods—poor interviewing, inappropriate testing, lack of considering relevant information from sources outside the evaluation—cannot lead to reliable conclusions. Experts link data to conclusions by interpretation and synthesis, products of their knowledge, experiences, and training. Experts' conclusions are reasoned inferences. Consequently, lawyers should keep in mind the adage that "there is much that may slip between the cup and the lip" when they address this subjective element to any expert conclusion. And be aware that experts' connections between their evaluation or therapy data and conclusions may not be as tight as experts try to present in their testimony.

In contrast to *conclusions*, experts give *opinions* when they apply their conclusions to legally-relevant case questions. For example, given the expert's conclusion that mother is depressed and, therefore, may not be optimally responsive to her child, will the best interest of the child be served by granting father the right to designate the child's primary residence? Or, in a criminal case, is the defendant legally responsible for the act

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with which he has been charged? Not all psychologists agree that mental health experts should offer expert opinions beyond social science conclusions. But if the expert offers an opinion, lawyers should ask how the expert understands the legal standard at issue. While the expert may not be expected to know the standard as a lawyer would, the expert may have idiosyncratic views of the standard that might compromise the opinion's reliability.

In sum, mental health expert testimony includes both social science conclusions and expert opinions. Conclusions and opinions address different issues. Treat them differently to understand and expose the bases of an expert's testimony. To address an expert's conclusions, follow three steps: first, focus on whether the expert's social science methods are reliable; second, assess the quality of the data generated by those methods—reliable data only comes from reliable methods; and finally, gauge whether the conclusions are sufficiently linked to the data. To address the expert's opinions, ask how the expert understands the applicable legal standard, and then how the expert applies his or her conclusions to that legal standard.

LIFE INSURANCE AND ESTATE TAXES

By Christy Adamcik Gammill, CDFA[1]

An alternative to selling assets to pay for estate taxes can be life insurance.

Many people think the best way to avoid estate taxes is to leave everything to their spouse. While it's true that leaving an estate to a surviving spouse can postpone estate taxes, it can sometimes mean a large tax bill later on.

The unlimited marital deduction enables one spouse to leave an unlimited amount of property to a surviving spouse without federal estate or gift taxation, provided that the surviving spouse is a U.S. citizen. However, doing so may only defer gift or estate taxes until the death of the surviving spouse.

The amount subject to federal estate tax is in flux after 2012 under current law, but estates of less than $1 million should be exempt from federal estate tax under both current and taxable upon the expiration of the two-year 2011 and 2012 provisions. For those with larger estates, it may pay to create an estate plan, with the assistance of your attorney and tax advisor. Estate planning can potentially help minimize the amount that goes to the IRS and maximize what goes to heirs.

One aspect of such a plan will address how to pay any estate taxes due when the surviving spouse dies. This may be complicated for many couples with a high net worth who have illiquid assets such as real estate or a business. Because estate taxes must generally be paid in cash within nine months after the death of the second spouse, this may force heirs to liquidate at a loss or sell an asset with the potential to appreciate significantly.

An alternative to selling assets to pay for estate taxes is life insurance. Survivorship life insurance covers two lives – typically a husband and wife, although it also can be used by business partners – and pays a death benefit at the second of the two deaths.

The death benefits paid by survivorship life insurance are generally income tax-free to the beneficiaries. The benefits are generally estate tax-free, subject to certain provisions, if the policy is owned by an irrevocable trust or by a person other than the deceased, such as the insureds' adult children.

For more information about how survivorship life insurance works, contact your financial professional.

In 2013, estate taxes are currently scheduled to go back to 2001 levels. In addition, many states impose estate taxes on relatively modest estates.

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Don't "Pay" That Bystanders Bill without Exceptions: Using Tex. R. App. P 33(2)
By Jeff Coen[3]

Recently we learned from our illustrious editor and chief in her "Ask The Editor Column" how to preserve evidence for appeal when it has been excluded in the trial court.[4] If your proffered evidence is denied you must preserve the substance of the evidence for the record. Texas Rule of Evidence 103 allows you to do this by offering the court what would otherwise be excluded. You can do it by live testimony (if the judge is willing) or as Georganna suggests by a written summary.

Some case law implies that live testimony outside the presence of the jury is preferable.[5] If presenting live testimony, it should be addressed to the court and in the judge's presence, not only because a "judge's place is on the bench" but secondarily to give the court the chance to reconsider the ruling and correct it if in error.[6] This method of preserving excluded evidence has been characterized in the past as an informal bill of exception.

When using an offer of proof or bill of exception you must provide enough information in the record so that the excluded evidence is clear to the appellate court. Recently the 14th Court of Appeals addressed this issue where the father was being asked questions about a court ordered psychological evaluation in a custody matter. The amicus objected on hearsay grounds and the report was excluded. Even though the mother appended the report to her brief it was insufficient to bring it to the appellate court's attention.[7]

Texas Rule of Evidence 103 is available to preserve on the record an erroneous exclusion of evidence. But what if your complaint is completely outside the record because the reporter wasn't present during the event? How often have you approached the bench or been called into chambers for an "off the record conference" and gotten a bad ruling or admonishment from the court? The last thing you want to do is prejudice the fact finder by requesting that the colloquy be replayed for the reporter in the courtroom. You at least want to wait to see if the court will ultimately rule in your favor. What if opposing counsel made material adverse admissions in a routine pre-trial hearing before the court. The reporter is rarely present at most cattle call docket hearings. Today, no trial attorney waives the reporting of the opening or summation in a jury case, but this was routine in the past. Closing arguments with references to insurance, race, legal residency status and other prejudicial statements were frequently made in jury arguments. In family law matters, what about an *ex parte* hearing on a TRO? There is simply no opportunity to make an offer of proof in these situations because there is no record available.

A criminal defense attorney's worst fear is an off-hand admission by a client. In another lifetime, I was defending a drug dealer who was living (and dealing) from his parent's home in an affluent neighborhood. The police on a tip, and without a warrant, entered the unlocked home when the family was away. They did so with the oral permission of a next door neighbor who said, "Sure they won't mind if you look around." Back then the State made a big production of bringing all the drugs, weight scale, and glassine (plastic) bags to every suppression hearing, placing them on the bench within view of the judge and the defendant. After granting my motion to suppress the evidence, the judge and reporter hurriedly left the courtroom. As the chamber's door closed my client asked in a rather loud voice, "Gee Jeff, does this mean I can take all my drugs home

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[4] *Ask the Editor: Worried in Wortham,* Simpson, Georganna, 2013-2 (Spring) SBOT Family Law Section Reports, p.11

[5] *In re Fuentes*, 2013 WL 772849 (Tex. App.—Beaumont Feb. 28, 2013, pet. denied) (mem. op.).

> "The record should indicate the questions that would have been asked, what the answers would have been, and what was expected to be proved by those answers. When the complaining party fails to make an offer of proof in the trial court, the party must introduce the excluded testimony into the record by a formal bill of exception."

[6] ***Error! Main Document Only.****Chance v. Chance*, 911 S.W.2d 40, 51-52 (Tex. App.—Beaumont 1995, writ denied)

[7] *In the Interest of L.D.W.*, 2013 WL 2247383 (Tex. App. –Houston [14th Dist.] May 21, 2013, no pet. h.) (mem. op.).

now?" The prosecutor had an unintelligible screaming fit, but I did make out the words ADMISSION and BYSTANDERS BILL. Thankfully, the judge and reporter were safely back in chambers. The DA looked around the courtroom and seeing only the bailiff, he angrily departed. When I returned to my office I began a search for this curious bystanders bill.

So what is the remedy in this situation? It may be a rare occurrence in your trial practice, but when it is needed you don't want to be scratching your head while your client ruminates about how unfair the system is treating him/her.

The solution is a bill of exception. This is a written objection to a ruling by the court or a statement of an incident or proceeding in the trial that is not otherwise documented in the record and to which one of the parties takes exception.[8] Bills of exception and their progeny, bystanders bills have a rather convoluted history. However, the application and wording of the rule has been consistent though first embodied in statute,[9] then a Rule of Civil Procedure,[10] and finally in two different Rules of Appellate Procedure.[11]

If the action you are complaining about is outside the court reporter's record (statement of facts) you begin the process by filing with the trial court a formal bill of exception. There is no magic wording or required form needed, but it must be specific enough for the court to understand the complaint.[12]

After filing, if the litigants agree to the contents of the bill, the court must sign it. Otherwise after notice and hearing, it is incumbent upon the court to take action by either endorsing the bill as correct or refusing it. If refused, the court must suggest changes that the judge believes would accurately reflect the complained of events. If the complaining party accepts the court's suggested changes, then the corrected bill is signed by the judge and becomes part of the formal clerk's record (transcript).

However, if the complaining party does not accept the court's suggested changes in the bill, the court must deny the original and draft a bill that reflects the court's opinion of the complained of proceedings.

Now, it gets interesting. Having rejected the suggested changes by the court, the complaining party must file the original bill together with the supporting affidavits of at least three people who actually witnessed the proceedings. Prior to being moved to Texas Rule of Appellate Procedure 33.2, this portion of the procedure was known as a bystanders bill. Most bystanders bills failed because the three affiants had to be neutral persons (bystanders) and it was difficult to find three neutrals to swear to the occurrence.[13] Even after the change in the wording of the rule to include any three people present at the complained of event, it is often difficult to find three people in a courtroom excluding the judge, reporter, opposing party and their counsel. However, jurors once released from their oath can be bystanders.[14]

The deadline for filing the bill of exception in the trial court is 30 days after the notice of appeal is filed.[15]

If the complainant does file at least three affidavits, the opposing party then has an opportunity to contravene the complainant's affidavits with his/her own. Thankfully, with the trial court's version, the complainant's version (with affidavits) and the opposing parties' affidavits now all in the clerk's record, the machinations in the trial court are concluded. If correctly filed it is then up to the appellate court to determine which version of the events to accept[16] even though it may place an impossible burden on the appellate court which has no way to determine the credibility of the affiants other than from the record.[17]

The procedure for perfecting your bill of exceptions, particularly if the trial judge disagrees, is cumbersome, but it may be your only avenue of supplementing the record. Because bills are outside the trial process they are narrowly construed and the procedure must be strictly followed.[18]

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[8] *Foreman v. Texas Emp. Ins. Ass'n*, 241 S.W.2d 977,979 (Tex. 1951)
[9] V.A.T.S Art. 2237.
[10] Tex. R. Civ. P. 372.
[11] Tex. R. App. P. 52, later changed to Rule 33(2).
[12] *Layne Glass Co. v. Parker*, 340 S.W. 2d 363 (Ft. Worth—Tex. Civ. App., 1960, no writ)
[13] *Smith v. United Gas Line Co.*, 149 S.W. 2d 149 (Tex. 1950) (bystanders bill defective where the affidavits were signed only by attorneys with an interest in the outcome.).
[14] *ABC Rendering of San Antonio, Inc. v. Covarrubias*, 1972 WL 268822 (Tex Civ. App.–San Antonio 1972, no pet.).
[15] Tex. R. App. P. 33.2(e)(1).
[16] Tex. R. App. P. 33.2(c)(3) "The truth of the bill of exception will be determined by the appellate court."; *see also Griffith v. Casteel*, 313 S.W.2d. 149, 154-155 (Tex. Civ. App.—Houston [1st Dist.] 1958, no writ).
[17] *See ABC Rendering*, 1972 WL 268822.
[18] *O v. P*, 560 S.W.2d 122, 124-125 (Tex. Civ. App.—(Tex. Civ. App.—Fort Worth 1977, no writ).

Lest you think this is a little used and antiquated procedural rule, it was an important issue in the first of the many appeals in the often cited *Grossnickle v. Grossnickle*.[19] Appellate courts are constantly citing the need for excluded evidence to be preserved in the record by a bill of exception. Appeals have failed in contests over social studies,[20] claims of separate property,[21] donative intent,[22] proof of adultery,[23] out-of-state child protective service records,[24] and just about any excluded evidence you can imagine.

If you have been caught flatfooted in trial and you don't have a written summary of excluded evidence, or if the court refuses to allow you additional time to present your offer of proof then Texas Rule of Evidence 103 is unavailable.[25] You can still regroup and file a post-trial bill of exceptions. By filing a bill of exception you are communicating to the court and opposing counsel your belief that an omission or error has been committed that could have affected the outcome of the trial. A formal bill of exception can influence the court and gain an advantage in your post-judgment strategy even if you have no intention of appealing an adverse judgment.

ETHICAL BILLING PRACTICES: A Paralegal Perspective
By Kay Redburn, TBLS-BCP[26]

Law firms sell their time. Whether it is a flat fee, hourly rates or contingent, billing practices all come down to one thing—how much time did it take to perform a task, and how is that time charged to the client?

Billing practices may begin as early as the very first call the potential client makes to the law firm. Disclosure of the firm=s billing rates in the initial contact the client has with the firm lets the client know you are not trying to "hide the ball" or misrepresent what the fee structure is, and that there is full disclosure about expectations for billing the client and being paid by the client.

Texas Rule of Disciplinary Procedure 1.04 sets out the attorney=s obligations regarding fees. Pursuant to Texas Rule of Disciplinary Procedure 5.03(a): "a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer" therefore Texas Rule of Disciplinary Procedure 1.04 should be applied to the conduct of paralegals, where applicable, when looking at billing practices.

Paralegals cannot set the fees that are charged to clients. But paralegals can disclose to the client the fee structure in place for the attorney or law firm for which the paralegal works. There is nothing unethical about being transparent to the client about billing. The paralegal should have a thorough knowledge of the firm=s billing practices, philosophies and expectations. What protocols does the firm have when discussing fees with clients? What does the firm expect of the paralegal regarding this issue? How does the firm bill for time? How much detail does the firm want in the billing that goes to the client? Some questions regarding ethical billing practices are Ablack and white@ and there are some that are more in the gray area. Some examples of the "black and white" ethical billing issues are:

- Padding the bill—probably the most common issue, this may arise when trying to meet a requirement for billing a certain number of hours per month; or if a paralegal receives an incentive for billing Aextra@ hours each month. If a task took one hour, it is unethical to bill for more than that amount of time.

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[19] *Grossnickle v. Grossnickle*, 935 S.W.2d 830 (Tex. App.—Texarkana 1996, writ denied).
[20] *In re D.J.E.*, 2013 WL 594021 (Tex. App.—Waco Feb. 14, 2013, no pet.).
[21] *Smith v. Smith*, 143 S.W.3d 206, 211 (Tex. App.—Waco 2004, no pet.).
[22] *In the Estate of Miller*, 243 S.W.3d 831 (Tex. App.—Dallas 2008, no pet.).
[23] *Ismik v. Ibrahimbas*, 2011 WL 2421017 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (mem. op.).
[24] *In re G.L.S.*, 2007 WL 3087685 (Tex. App.—Tyler Oct. 24, 2007, no pet.) (mem. op.).
[25] In a rather bizarre coincidence, just before submitting this column to the editor I read about the "unusual" proceedings taking place in the Galveston County Court at Law No. Three. If after reading this column you are looking for an example of a need for the use of a bill of exception, look no further than the reporter's record of a February 13, 2013, show cause order contempt hearing where the court repeatedly refused to allow counsel to make his proffer of evidence or rule on the request. See the record at: https://docs.google.com/file/d/0B9RaRTko0j09XzdPWnZxMi1rSWM/edit?pli=1 beginning at page 11, line 25 where the court says, "Let me interrupt you."

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- "Churning"—doing unnecessary work on a case for which you bill the client. Examples would be drafting a motion that you knew was not going to be needed, or preparing two pieces of correspondence when one would suffice.
- Billing for work you did not do yourself—if you delegate a task to a person in the firm that does not bill for their time, and then you bill the client for the task as if you performed it, that would be unethical.
- Billing for work you haven't done yet—entering billable time for a task that you intend to complete in the future, to meet monthly billing requirements or to make up billable hours.
- Billing multiple clients for work done during the same time period—an example would be billing the client for an hour of drafting a pleading, but during that hour, you took a 15 minute phone call from another client and billed one client for an hour, and the other client for .25 of an hour, when you only spent one hour total on both.
- Billing for "sweat equity"—because of years of experience and software improvements, what used to take 2 hours to prepare may now only take 45 minutes. Or, what takes an inexperienced paralegal 2 hours only takes the experienced paralegal an hour to accomplish.
- Spreading out your billable hours to cover the whole day (or more than the whole day)—it is virtually impossible to bill every minute of your workday. Everyone spends some non-billable time, screening prospective clients, taking restroom breaks, generally organizing your desk, taking non-client phone calls and the like.

Then there are the "gray" areas of law firm billing, the What, When, Where and How ("Who" is not very gray—the person performing the task bills for the task):

What: Sometimes the line between "substantive legal work" and clerical work can become blurry for a paralegal. Are you just copying exhibits for trial, or are you reviewing them as you make copies, determining the application of the exhibits to the issues before the Court, what your supervising attorney may need, in what order, etc.? Should this time be divided between billable and non-billable? How do you calculate such a division?

When: If you have to travel an hour to get to the Courthouse for a hearing, is it your firm's policy to bill for that time? Is this disclosed to the client ahead of time?

Where: If your firm has two separate cases for one client, but the work is substantially the same for both cases, where is the time for the task you performed recorded? If your firm is withdrawing from representing a client, is this recorded as billable or non-billable time to the client? Does the issue of "the client fired the attorney" or "the attorney fired the client" come into play?

How: How much detail of work performed should be put into the bill? Are the client's billing records subject to being produced to the opposing party? Who redacts the confidential information and how much information in the bill is redacted? How are billing errors handled?

There are no easy answers or guidelines that cover all of the above scenarios, but there are ways to help paralegals avoid unethical billing practices, which include:

$ Be aware of all of your supervising attorney's and/or firm's billing practices and procedures. Don't be afraid to ask questions or make suggestions that help the firm. Billing is the lifeline of our profession and the practice of law. Most of us are not lucky enough to be able to work in this business for free, and billing pays our salaries. Become familiar with the billing software used by the firm.

$ Be open and forthright with the client about the firm=s billing policies and procedures from the very inception of the attorney/client relationship. If a client is made aware of the policies and procedures (in writing—typically in the firm's fee agreement or engagement letter with the client) then the client cannot come back later and complain that they didn=t know. And even before the client retains the attorney or firm, provide the client with the firm's hourly rates, consultation fees and any other applicable fees that are requested.

$ Respond promptly to client=s questions regarding their billing statement. Ask (in the engagement letter) that the client contact the firm within 30 days of receiving a billing statement or invoice with any questions or concerns they may have. If the client waits until the end of a case that took 2 years to litigate to ask questions about the first billing, it will likely be much more difficult to answer after the passage of so much time.

- $ Correct billing errors as soon as they are found. Provide a full explanation of the error in writing to clients, even if the client did not notice the error.
- $ Hold periodic billing meetings—where only the billing matters are discussed for each client. If you combine this type of meeting with a case status meeting, it is easy to get off-track and talk about the case, rather than if the client is timely with their payments, if the attorney is willing to let a receivable wait, if the client needs to be contacted about payment and the like.
- $ If you provide a service to a client for which you are NOT going to bill the client, then list the service provided on the client=s bill and (usually in capital letters) indicate that it was a NO CHARGE on their bill. The benefits are two-fold: you are providing the client with information about what services you are providing and there is a psychological benefit to the client seeing "NO CHARGE" on their bill.
- $ Do not use abbreviations or terminology on the billing that clients will not understand. If the bill is easy to read and understand, it will be more likely to be paid.
- $ Review the billing before it goes to the client—this act guards against typing errors, as well as any obvious gaps in services performed, i.e., if you got busy and forgot to enter a time slip for services performed. Read the bill as if it were yours - what would you want to see/not see on the bill? Is it easy to tell what was billed, who provided the service and what is owed? Also, read the bill as if you were the trial judge and it was an exhibit. Does it provide the Court with the information needed to make an award of fees?

Attorney and law firm billing has come under more scrutiny by clients and by the Courts. Clients are educating themselves on billing practices and are more sophisticated in reviewing billing statements and asking pertinent questions. Errors in billing statements to the client harm the credibility of the client, the law firm and the staff at the Courthouse. Unethical billing practices are more likely to trigger grievances being filed by clients. Maintaining professionalism and a high standard of ethics in the billing process is paramount in providing quality services to clients, maintaining client satisfaction, and upholding the integrity and reputation of the firm.

ARTICLES

Is it Spoliation, Spoiliation, Spoilation, of What?

By Robert Matlock[1]

Remembering the proper spelling and pronunciation of the term is difficult. After all, "spoliation" sounds more sensible than "spoliation." When the bad guy is guilty of "spoiling" evidence, spoilation should be the name of the offense. But, it's not. Spoliation is the name and the concept has received considerable attention from the courts in recent years, particularly with respect to electronic data. When a party with control of pertinent evidence cannot or will not explain the failure to produce it, the opposing party generally assumes there must be some dark motive behind the tactic.

- ***Spoliation - Duty To Preserve Evidence***

Spoliation has been defined by the Texas courts as the improper destruction of relevant evidence. ***Walker v. Thomasson Lumber Co,*** 203 S.W.3d 470 (Tex. App.—Houston [14th Dist.] 2006 no pet.)*;* ***Cresthaven Nursing Residence v. Freeman,*** 134 S.W.3d 214 (Tex. App.—Amarillo 2003 no pet.)*;* ***Kang v. Hyundai Corp. USA,*** 992 S.W.2d 499 (Tex. App.—Dallas 1999 no pet.)*;* ***Brumfield v. Exxon Corp.,*** 63 S.W.3d 912 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). A duty to preserve evidence arises when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and the evidence will be material to that claim. ***WalMart Stores, Inc. v. Johnson***, 106 S.W.3d 718 (Tex. 2003)*;* ***Texas Electric Coop-***

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erative v. Dillard, 171 S.W.3d 201(Tex . App.—Tyler 2005 no writ)*;* ***MRT, Inc. v. Vounckx***, 299 S.W.3d 500 (Tex. App.—Dallas 2009 no pet.). If a party deliberately destroys evidence a presumption arises that the evidence was unfavorable and was disposed of for that reason. To establish the spoliation presumption the requesting party must demonstrate the opposing party breached the duty to preserve the evidence and the spoliation prejudiced the requesting party. ***Clark v. Randalls Foods***, 317 S.W.3d 351 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); ***Lively v. Blackwel1***, 51 S.W.3d 637 (Tex. App.—Tyler 2001 pet. denied). Further, the party who believes that spoliation has occurred must offer proof that 1) the absence of the evidence prejudiced the party's ability to present or defend the case, 2) a discovery request was made and pursued in the trial court, 3) there is no other evidence available to replace the missing item, and 4) the missing item is related to key issues in the case. ***Roberts v. Whitfill***, 191 S.W.3d 348 (Tex. App.—Waco 2006 no pet.).

- ***Spoliation Is Not A Tort – A Matter Of Evidence***

The Texas Supreme Court has expressly stated that spoliation of evidence is not an independent tort or cause of action. Instead, the complaint is to be handled by the trial judge fashioning an appropriate order in the context of the pending case. That remedy may range from an instruction to the jury up to "death penalty" sanctions. ***Trevino v. Ortega***, 969 S.W.2d 950 (Tex. 1998). A spoliation jury instruction outlines the permissible inferences the jury may make against a party who has lost, altered, or destroyed evidence. ***Brewer v. Dowling***, 862 S.W.2d 156 (Tex. App.—Fort Worth 1993, writ denied). Depending upon the circumstances, it may be reversible error for the trial judge to refuse a request for a spoliation jury instruction. ***Adobe Land Corporation, et. al. v. Griffin, LLC***, 236 S.W.3d 351 (Tex. App.—Fort Worth 2007, pet. denied).

- ***Explanation For Lack Of Evidence***

Although the destruction of evidence may give rise to a presumption that the missing items would have been unfavorable to the destroyer, the presumption may be rebutted with evidence that the destruction was not undertaken with fraudulent purpose. ***Ordonez v. M.W. McCurdy & Co., Inc***., 984 S.W.2d 264 (Tex. App.–Houston [1st Dist.] 1998, no pet.). The presumption of evil intent may be overcome if –

  - Documents were lost rather than intentionally destroyed. ***Cresthaven Nursing Residence v. Freeman***, 134 S.W.3d 214 (Tex. App.—Amarillo 2003, no writ);
  - A reasonable explanation is offered for the destruction. ***Buckeye Ret. Co. v. Bank of America,*** 239 S.W.3d 394 (Tex. App.—Dallas 2007 no pet.);·***Crescento Invs. v. Brice***, 61 S.W.3d 465 (Tex. App.—San Antonio 2001, pet. denied); or
  - The destruction was beyond a party's control because it was conducted by a third party.

- ***Sanctions***

If no plausible explanation is offered, the sanctions levied for spoliation can be severe. Everything from the assessment of attorney's fees and expenses to "death penalty" orders may be ordered. ***Cire v. Cummings***, 134 S.W.3d 835 (Tex. 2004); ***Roberto Vela, et. al. v. Wagner & Brown, Ltd***., 203 S.W.3d 37 (Tex. App.—San Antonio 2006, no writ).

- ***The Ultimate In Spoliation***

Mr. Taylor, an engineer the judge described as being "well versed in computer technology", filed claims against his employer, Mitre Corp. Taylor had a computer that he used for both business and personal purposes. When Taylor hired counsel to assist him, the attorney admonished Taylor to retain all pertinent evidence and warned that the failure to do so could result in severe penalties. Taylor hired a different lawyer and forged ahead with his claims.

When a request was made for the computer, Taylor offered multiple excuses for his refusal to produce it, including his insistence that it did not contain any relevant data. Ultimately it was determined that the original computer had been destroyed through Taylor's use of a sledge hammer followed by him dumping the remains in a landfill. Further, the examination of the laptop to which Taylor had downloaded documents from the original computer had been wiped three times with erasing software and at least 16,000 files had been deleted.

The judge wrote a stinging opinion and dismissed Taylor's claims. ***Taylor v. Mitre Corp.,*** No. 1:11-CV-1247, 2012 WL 5473573 (E.D. Va. Nov. 8, 2012) adopting recommendations of ***Taylor v. Mitre***, Corp., No. 1:11-CV-01247(LO/IDD), 2012 WL 5473715 (E.D. Va. Sept. 10, 2012).

Connecting the Dots: A Practice Guide for the Use of Expert Witness Testimony in Child Custody Cases Involving Domestic Violence

By Whitney Deason*

"Most contested custody cases present the unfortunate example of litigation in which 'expert testimony is not technically required, [but] a party often has little chance of success without it.'"[2]

I. Introduction: An All Too Typical Scenario[3]

The issues of domestic violence[4] are embedded in court procedures whether they involve the criminal process or the civil process. Domestic violence has historically been viewed as a private, family issue; however in recent years activists have worked to achieve increased public recognition of domestic violence as a significant problem in society.[5] These activists have convinced the legislature and judiciary in many states, including Texas, to expand the scope of evidence admitted, both lay and expert, to shed light on domestic violence issues during trial.[6] Despite these expanding evidentiary standards, developing evidence within the context of the complex relationship between domestic violence, personal relationships, and the law presents specific challenges. Expert witness testimony on domestic violence can address some of these challenges by educating the trier of fact on the effects domestic violence can have on the parties to the dispute, as well as dispelling some of the common misconceptions that persist with respect to the impact of domestic violence. This article will explore the use of expert witness testimony in civil cases involving domestic violence, specifically cases involving child custody issues.[7] In addition to examining the need for expert testimony to close the evidentiary gap that exists in domestic violence cases involving child custody disputes, this article will also focus specifically on the types of individuals qualified to provide such expert testimony, methods for efficiently and effectively utilizing expert testimony, and the benefits expert testimony can provide to a trier of fact making a decision within the context of a dispute involving a child custody determination.

Imagine the following facts: Carol, a twenty-one year old waitress meets Al, a moderately successful carpet salesman in his late twenties at a bar in Houston.[8] Al courts Carol and after a few months of lavish dates,

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[2] Carolyn R. Wah, *The Changing Nature of Psychological Expert Testimony in Child Custody Cases*, 86 JUDICATURE 142, 154 (2002).

[3] I would like to recognize Jeana Lungwitz, Director of The University of Texas School of Law Domestic Violence Clinic, who assisted me in developing this paper topic. Drawing upon her vast experience, Professor Lungwitz has identified a major issue in cases involving domestic violence as being the limited use of expert witness testimony as a way to educate the trier of fact about the implications of domestic violence and the often contradictory behavioral decisions of those involved in a relationship characterized by domestic violence.

[4] Tex. Fam. Code Ann. § 153.004 is entitled "History of Domestic Violence." This section addresses the consideration of domestic violence in determining conservatorship, possession and access of a child. Despite the use of the term "domestic violence" in the title of this section, both the remainder of the section and the remainder of the Texas Family Code employ the term "family violence." While these terms appear to be used interchangeably in the Texas Family Code, this paper will only use the term "domestic violence."

[5] MELISSA HAMILTON, EXPERT TESTIMONY ON DOMESTIC VIOLENCE 6 (Melvin I. Urofsky ed., 2009).

[6] *Id.*; *See* Tex. Fam. Code Ann. § 153.004 (requiring a consideration of domestic violence in determining conservatorship, possession, and access).

[7] A discussion regarding the value and implementation of expert witness testimony is relevant to any case involving domestic violence—criminal or civil. For the sake of brevity, however, this paper focuses specifically on civil cases involving child custody determinations, which are most likely to include divorce suits, Suits Affecting the Parent-Child Relationship (SAPCR), modification of a previous SAPCR order, and potentially, although less likely, Protective Orders.

[8] Men are not just abusers; they can also be victims of domestic violence. However, statistics indicate that women suffer intimate partner violence more frequently than men. In fact a study performed by the U.S. Department of Justice found that 22.1% of the women as opposed to 7.4% of the men surveyed for the study, reported suffering physical assault at the hands of a current or former spouse, cohabiting partner, boyfriend or girlfriend, or date in their lifetime. Accordingly, this paper will refer to men as abusers and women as victims of domestic violence. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST

beautiful gifts, and romantic gestures, the two marry. A month into their seemingly perfect marriage, Al strikes Carol for the first time, leaving a bruise on her arm. Al apologizes immediately and profusely and brings home a bouquet of roses the next evening after work. Carol accepts Al's apology and wears a long-sleeved shirt for the next few days. After all, Al had been working on a big project at work and was probably just stressed out. But a few weeks later, Al strikes Carol again, only this time he slams her head into a wall and yells vile things in her face. Carol is fearful, but at the same time, she loves Al and refuses to believe that the "real Al" would treat her this way. A few weeks later, Carol finds out she is pregnant. Halfway through her pregnancy, Carol and Al get into a verbal argument, because Carol arrived home from work later than usual. Al accuses her of being with another man, a physical struggle ensues, and Al, once again, strikes Carol. Carol leaves Al and moves in with her parents, but upon the birth of baby Ben, the two reconcile and Carol moves back in with Al. She thinks, perhaps, the presence of a baby in their lives will make things better. Unfortunately, she is wrong. The abuse continues.

Carol quits her job to care for their newborn son and becomes entirely economically dependent on Al. Al takes away Carol's credit card and begins to provide her with a weekly allowance—barely enough to cover groceries and basic necessities. Carol stops seeing her girlfriends, partly because she has no extra money to use on shopping trips or dinners, but also because Al constantly reminds Carol that her only purpose in life is to be a dedicated mother and a loyal wife. Over the course of the next eight years, Al grows increasingly physically abusive, even attacking Carol in front of Ben. Carol tries to leave once when Ben is three years old, but Al comes home from work early to find Carol packing a suitcase, which leads to another black eye and a trip to the hospital. Al threatens to kill Carol if she tries to leave again. Finally, when Ben is eight years old, Carol reaches her breaking point and decides to leave Al for good. She flees to a battered women's shelter and files for divorce. All of a sudden, custody of Ben becomes a hotly contested issue. Carol asks for sole custody of Ben, but then Al files his own custody petition. Carol fears a court will grant a joint managing conservatorship,[9] or even worse, a sole managing conservatorship[10] to Al. After all, Al presents well in public. He has a reliable job, a home, and a lot more financial security than Carol. No friends, co-workers, or neighbors had been aware of the abuse that occurred in Carol and Al's home. Carol never called the police on Al, so no police records exist. There are a few hospital records, but Carol always had ready excuses for her injuries—she tripped over one of Ben's toys, for example. Furthermore, if Carol is telling the truth about Al's abusive nature, it seems counterintuitive that she would go back to him after leaving the first time or stay and endure such abuse for so long while also exposing her son to such a dangerous man.

As this scenario plays out, an extraordinary number of hurdles arise for Carol in the face of a custody determination over Ben. Why did she make certain decisions, such as choosing to stay with Al after his physical violence towards her? Why, if the abuse has occurred for so many years, is Carol just now speaking out?

WOMEN SURVEY [hereinafter DOJ FINDINGS FROM NATIONAL VIOLENCE AGAINST WOMEN SURVEY] iv (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

[9] Instead of using the term "custody," Texas utilizes the term "conservatorship" to indicate the decision-making authority of the parents. A joint managing conservatorship is presumptively in the best interest of the child. Under a joint managing conservatorship, parents have roughly the same rights, duties, and decision-making authority; thus, a joint managing conservatorship requires significantly more cooperation and interaction by both parents in order to make decisions regarding the child. *See* Tex. Fam. Code Ann. §§ 153.073-153.076, 153.131.

[10] A sole managing conservatorship grants the following additional, exclusive rights to one parent in addition to the rights both parents would be granted under a joint managing conservatorship:

(1) the right to designate the primary residence of the child;
(2) the right to consent to medical, dental, and surgical treatment involving invasive procedures
(3) the right to consent to psychiatric and psychological treatment;
(4) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
(5) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
(6) the right to consent to marriage and to enlistment in the armed forces of the United States
(7) the right to make decisions concerning the child's education
(8) the right to the services and earnings of the child; and
(9) the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government. TEX. FAM. CODE ANN. § 153.132 (Vernon 2011).

Why, if Al is economically stable and Carol is not, should Al not be granted sole or joint custody? Is it not true that joint custody is presumed to be in the best interest of the child?[11]

Laypeople and triers of fact alike need assistance understanding and answering the questions recited above. That is where expert witnesses can enter the picture in order to offer specialized, scientific, or technical information to inform the trier of fact about the behavioral choices of domestic violence victims, like Carol, as well as the impact of domestic violence is likely to have on a child, like Ben. Domestic violence victims often face an uphill battle in the courtroom due to the misconceptions that exist regarding the severity of violence in a relationship, the abuser's nature, the victim's response, and the effect violence may have on the children. Furthermore, the law governing custody determinations in Texas has adopted the policy that the presence of both parents in a child's life is in the best interest of that child.[12] This policy foundation combined with the pervasive lack of knowledge among triers of fact with respect to domestic violence presents a formidable hurdle to domestic violence victims embroiled in child custody disputes. Expert opinions can level the playing field by dissolving misconceptions, explaining the behavioral decisions of the victim, and providing insight into the impact domestic violence has on the child. In doing so, expert witnesses can provide important information that allows the trier of fact to fully account for domestic violence as a factor in a custody dispute and make a better-informed decision in determining the conservatorship, possession, and access of the child.

This paper stresses the importance of utilizing expert witness testimony in child custody cases involving victims of domestic violence in our society. Although, this appears to be a nationwide issue, the focus narrows to the jurisdiction of Texas. Section II provides necessary background information on the pervasiveness domestic violence. Section III briefly delves into the dynamics of the law governing child custody determinations in Texas and the necessity for expert testimony in child custody cases. Section IV explores the intricacies of utilizing expert witnesses in child custody cases involving domestic violence—namely, the types of expert witnesses, the manner in which these experts provide testimony, and some of the hurdles that must be overcome for the successful employment of expert witness testimony. Section V discusses the current evidentiary admissibility rules with respect to expert testimony and their functioning in domestic violence cases generally. Section VI examines some of the common myths surrounding domestic violence and how expert witnesses can debunk these myths in order to shed light on the behavioral choices of the victim and the perpetrator as well as the detrimental effect domestic violence can have on children. Finally, Section VII concludes this exploration into the use of expert witnesses on domestic violence within the framework of child custody determinations.

II. Background on Domestic Violence in Our Society

Society may never achieve consensus on a precise definition of domestic violence, however the generally accepted definition is that domestic violence is "a pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion, that adults or adolescents use against their intimate partners."[13] Most victims of domestic violence find themselves trapped in a cycle of escalating abuse, which may not only include physical violence, but also verbal abuse, imprisonment, humiliation, and denial of access to financial resources and shelter.[14] Furthermore, domestic violence touches all echelons of society. Domestic violence occurs in all socio-economic, educational, cultural, and racial groups, although admittedly it does not occur at the same rates.[15] As a result of its pervasiveness throughout all strata of society, there remains a lack in determinative factors or characteristics to warn of an individual's likelihood to become a victim or a batterer in a domestic violence situation.[16] The absence of such useful determinative

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[11] Tex. Fam. Code Ann. § 153.131(b) ("It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child.").

[12] *Id*; Tex. Fam. Code Ann. §§ 153.001(a)(1) & (3) (stating that the public policy of the state of Texas is to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child" and to "encourage parents to share in the rights and duties of raising their child after the parents have separated").

[13] Ashleigh Owens, *Confronting the Challenges of Domestic Violence Sentencing Policy*, 35 FORDHAM INT'L L.J. 565, 571 (2012).

[14] John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 214 (2003).

[15] "Domestic violence is more prevalent among women who are unmarried but cohabitating, are pregnant, have lower-incomes, have less education, and/or are minorities." *Id*. at 212 (citing DOJ FINDINGS FROM NATIONAL VIOLENCE AGAINST WOMEN SURVEY, *supra* note 7, at 33).

[16] *Id*. at 215.

factors or characteristics makes it even more crucial that those who come into contact with victims, including judges and juries, assume that the individual is, in fact, a victim, unless or until that possibility is disproven.[17]

For centuries, society considered domestic violence to be a "private family affair."[18] As such, domestic violence enjoyed immunity from public scrutiny, and the belief perpetuated that blame for domestic violence should be laid at the feet of the victim.[19] In recent years, however, domestic violence has received increased public attention, and most people in society no longer consider it to be a private matter reserved for the family.[20] Instead domestic violence is being recognized as a growing societal problem. The American Medical Association describes domestic violence as "a major public health issue."[21]

Numerous studies have sought to define and quantify the extent of domestic violence as a problem in our nation as a whole, and in Texas. In 2000, the National Institute of Justice (NIJ) teamed up with the Centers for Disease Control (CDC), and pursuant to the direction of the United States Department of Justice (DOJ), issued a report claiming violence against women occurs primarily in the form of intimate partner violence[22] and "should be treated as a significant social problem" in the United States.[23] This particular study estimated that nearly one in every five American women has been physically assaulted by a date or an intimate partner at some point in her life.[24] In 2003, the CDC issued a report on the costs of intimate partner violence in the United States, finding that intimate partner rape, physical assault, and stalking results in costs of $5.8 billion each year.[25] This study estimated that nearly 5.3 million intimate partner violence victimizations occur among U.S. women each year, resulting in nearly 2 million injuries, over a quarter of which require medical attention.[26] In 2009, the DOJ issued a report on domestic violence, which estimated that the average annual domestic violence rate per 1,000 persons for intimate partners or family members was 5.9 for females and 2.1 for males.[27]

In 2009, the Texas Council on Family Violence (TCFV), [28] utilizing information provided by the Texas Health and Human Services Commission, reported that nearly 200,000 family violence incidents and over one hundred deaths by an intimate partner occurred during the calendar year in the state of Texas.[29] More recently, a 2011 study conducted by the Institute on Domestic Violence and Sexual Assault (IDVSA) at the School of Social Work at The University of Texas at Austin found that approximately 32% of Texans (nearly 5,353,434

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[17] *Id.*

[18] *Id.* at 210; Owens, *supra* note 12, at 573-74 ("In the United States and some Western European countries, the movement to end domestic violence dates back to the nineteenth century. Its development has paralleled the feminist movement in these countries. Consequently, in the early twentieth century, the attention to domestic violence waned as the focus of the feminist movement in the United States and England was more directed towards suffrage and temperance. Until the 1960s, the judicial and criminal justice responses to domestic violence in those countries diminished. The courts and criminal justice system systematically de-emphasized the criminal nature of domestic abuse by categorizing it as a private family matter. Arrests for domestic violence were uncommon, and prosecutions and convictions were even rarer. The typical police, prosecutor, and judicial response was to treat domestic violence as a 'private matter' that required compromise and reconciliation within the family. Remnants of this attitude persist event today.")

[19] Burman, *supra* note 13, at 210.

[20] *Id.* ("[D]omestic violence is no longer considered to be a private matter.").

[21] The American Medical Association describes domestic violence as "a major public health issue."[21]

[22] DOJ FINDINGS FROM NATIONAL VIOLENCE AGAINST WOMEN SURVEY, *supra* note 7, at 60-61.

[23] *Id.* at 59.

[24] *Id.* at 26.

[25] NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, CENTER FOR DISEASE CONTROL AND PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), *available at* http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf.

[26] *Id.* at 1.

[27] ANDREW R. KLEIN, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 1 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/225722.pdf.

[28] Since 1978, the Texas Council on Family Violence has developed into one of the largest domestic violence coalitions in the nation. TCFV has been a nationally recognized leader in making strides to end family violence through partnerships, advocacy, and the provision of services for men, women, and children. TEXAS COUNCIL ON FAMILY VIOLENCE (Oct. 10, 2012), http://www.tcfv.org/about-2.

[29] Facts and Statistics, TEXAS COUNCIL ON FAMILY VIOLENCE (Oct. 10, 2012), http://www.tcfv.org/resources/ facts- and-statistics [hereinafter TCFV Facts & Statistics] (reporting that the Texas Health and Human Services Commission found that 111 women were killed as a result of domestic violence and 196,713 family violence incidents occurred in the state of Texas in 2009).

individuals) have experienced intimate partner violence at some point in their lives.[30] Additionally, this study determined that over 57% of Texans, an estimated 10,314,003 individuals, know someone—a friend, relative, or coworker—who has experienced domestic violence, and that nearly 40% of all Texans consider intimate partner violence to be a *very serious problem*.[31] This IDVSA study also cited an earlier TCFV survey on the attitudes of Texans regarding domestic violence; out of the 1,200 Texans interviewed for the TCFV survey, 73% believed domestic violence to be a serious problem in Texas.[32] As a result of this survey, the TCFV concluded that a majority of Texans clearly understand domestic violence to be a problem, but instead of recognizing an abuser's culpability, many Texans still appear willing to blame domestic violence on either circumstances beyond the control of the abuser or on victims of the abuse themselves.[33]

III. The Link to Custody Cases

While domestic violence continues to impact a variety of cases presented to our legal system, it presents a particularly acute problem in civil cases involving custody determination, namely divorces, SAPCRs, modifications, and protective orders. This is particularly so given that batterers are twice as likely to contest custody as non-batterers.[34] Most states, including Texas, demand consideration of domestic violence in custody adjudications.[35] Furthermore, Texas has even adopted a presumption against granting custody to batterers in certain situations.[36] Yet, the fact that "society and courts have acquired a superficial understanding of the reality of domestic violence, [does not mean] that understanding is . . . sufficiently deeply integrated to survive the challenge of truly painful choices regarding families," such as fashioning a child custody arrangement.[37] Courts may be more willing to recognize domestic violence in "first order" cases, such as protective orders and criminal prosecutions, where the focus is primarily on the relationship between the two adults.[38] However, "when the issue becomes more fraught, and [a] father's relationship with [his] children [is] at stake, hard won insights about domestic violence too often fall away as judges once again avoid facing the reality of women battering, and the difficult choices needed to protect women and children and hold abusers accountable."[39] The trier of fact must not only determine whether the parents' relationship has been physically violent or abusive, but also how that violence might impact a decision about custody and visitation arrangements, thus pitting allegations of domestic violence against the "best interest of the child" practice to which Texas courts adhere.

Custody determinations in Texas hinge on the best interest of the child standard. Texas Family Code Section 153.002 states "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."[40] Unfortunately, there

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[30] For the purpose of assessing the prevalence of intimate partner violence in Texas, researchers conducted interviews with a representative sample of 1,074 adult Texans. Interviewees were asked about their experiences with psychological abuse, coercive control and entrapment, physical violence, stalking, and sexual violence. Researchers utilized eleven specific questions, decided upon by a group of leaders and practitioners in the field of family violence to estimate prevalence of intimate partner violence in Texas. This study was funded by the Office of the Governor of Texas and supported by the Texas Council on Family Violence. NOEL BUSCH-ARMENDARIZ, LAURIE COOK HEFFRON & TOM BOHMAN, INSTITUTE ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, SCHOOL OF SOCIAL WORK, THE UNIVERSITY OF TEXAS AT AUSTIN, STATEWIDE PREVALENCE OF INTIMATE PARTNER VIOLENCE IN TEXAS 9,47 (2011), *available at* http://www.utexas.edu/ssw/dl/files/cswr/institutes/idvsa/publications/DV-Prevalence.pdf.

[31] *Id*. at 12, 35.

[32] *Id.* at 15.

[33] *Id.* (citing SAURAGE RESEARCH, INC., PREVALENCE, PERCEPTION, AND AWARENESS OF DOMESTIC VIOLENCE IN TEXAS 2003, *available at* http://www.www.tcfv.org/pdf/PAC_Exec_Summary.pdf); *see also* TCFV Facts and Statistics, *supra* note 28.

[34] Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 685 (2003) (citing AM. PSYCHOLOGICAL ASSN PRESIDENTIAL TASK FORCE REPORT, VIOLENCE AND THE FAMILY 40 (1996)).

[35] *Id*. at 662; Tex. Fam. Code Ann. § 153.004.

[36] Tex. Fam. Code Ann. § 153.004(b) ("The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present . . . physical or sexual abuse by one parent directed against the other parent . . . . "); Tex. Fam. Code Ann. § 153.004(e) ("It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present . . . physical or sexual abuse by that parent directed against the other parent . . . .").

[37] Meier, *supra* note 31, at 663.

[38] *Id*.

[39] *Id*.

[40] Tex. Fam. Code Ann. § 153.002.

is little direction as to what "best interest the child" really means;[41] thus, the trier of fact, whether judge or jury, has wide latitude in determining an appropriate custody arrangement.[42] Furthermore, Family Code Section 153.001 also states the public policy of the state of Texas is to "assure that children will have frequent and continuing contact with parents" and to "encourage parents to share in the rights and duties of raising their children [even] after the parents have separated."[43] Despite the fact that these foundational elements of custody determination tend to favor the sharing of responsibilities by both parents, in 1995 the Texas Family Code also adopted the fundamental assumption that domestic violence is relevant in custody determinations as follows:

> §153.004. History of Domestic Violence
> (a) In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.
> (b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent [or a] spouse . . . .
> (c) The court shall consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed possessory conservator.
> (d) The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit, unless the court:
> 1) Finds that awarding the parent access to the child would not endanger the child's physical or emotional welfare and would be in the best interest of the child; and
> 2) Renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent . . .
> (e) It is a rebuttable presumption that it is not in the best interest of the child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child. . . .[44]

There is no question that the History of Domestic Violence provision is a crucial aspect of the law establishing conservatorship, possession, and access. The issue lies in the implementation of the statute. The best interest standard and the overarching policy presumption in favor of the parents sharing rights and duties ap-

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[41] The best interest standard in Texas has developed from factors established by the Texas Supreme Court in *Holley v. Adams*, a parental rights termination case. These factors, which the Texas Supreme Court termed "considerations" include: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W. 2d 367, 372 (Tex. 1976). Application of the Holley factors suffers from a number of flaws, one of which is the fact that *Holley v. Adams* was a parental rights termination case, and thus, some of the factors listed may prove inappropriate for a child custody case. Raymon Zapata, *Child Custody in Texas and the Best Interest Standard: In the Best Interest of Whom?*, 6 SCHOLAR 197, 205 (2003).

[42] *See generally* Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interest of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 817 (2000) (discussing the fact that even in states requiring judges to abide by rebuttable presumptions against awarding batterers joint custody, judges still receive little guidance as to their decision making and often employ their own discretion in child custody cases).

[43] Tex. Fam. Code Ann. § 153.001.

[44] Tex. Fam. Code Ann. § 153.004.

pear to be undercut by a history of domestic violence.[45] However, Texas courts often minimize or rationalize the abuse, as well as its impact on the children.[46] Furthermore, the legislature has implemented ways to maintain the parent-child relationship, despite the existence of evidence indicating domestic violence.[47] This article does not aim to dismiss the value to a child of growing up connected to both parents. However, in crafting a child custody arrangement, the court must understand that continued periods of access and possession may allow an abuser to wreak havoc on the lives of both the victim's mother and the child by utilizing the child as a pawn to further control the victim and increasing the likelihood that the child will suffer from either direct abuse or witness of further abuse to the mother.[48]

In child custody cases, expert witnesses can help ensure that judges and juries understand and account for the victim's story of abuse and the implications of that abuse in crafting a child custody determination.[49] A DOJ Report on battering and its effect in criminal trials indicates that expert testimony can aid the trier of fact in dispelling common societal myths and misunderstandings about domestic violence that may otherwise interfere with their ability to consider issues in the case.[50] For example, expert testimony may be able to shed light on why a victim remained in an abusive relationship for a substantial period of time if her claims of violence and abuse were accurate,[51] and how a child, who is not physically abused, but witnesses spousal abuse may suffer serious negative psychological and emotional effects.[52] An expert's role in combatting these common myths, and others, will be discussed in greater detail in Section VI. By educating the trier of fact on domestic violence through their testimony, experts can help the trier of fact "better interpret evidence of domestic violence in child custody and visitation cases" and provide "more accurate determinations of what custody and visitation arrangements are in the child's best interest."[53] For example, the trier of fact must understand that awarding an abusive parent, such as Al, a sole managing conservatorship not only grants him authority to make important decisions, but also power to control Carol by controlling one of the most critical components of a mother's existence: her child, Ben.[54] In some cases, a joint managing conservatorship may bestow an equally dangerous power to a batterer by granting him the authority to contact and communicate with the other parent, thus creating a higher risk of physical and emotional harm to mother and child.[55] Considering that a trier of fact must weigh the presence of domestic violence against Texas's best interest of the child standard

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[45] *Id.* ("The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present . . . physical or sexual abuse by one parent directed against the other parent.").

[46] *Pena v. Pena*, 986 S.W.3d 696, 698-99 (Tex. App—Corpus Christi 1998, pet. denied) (determining that three incidents of physical violence against the mother by the father failed to constitute a pattern of abuse); *Alexander v. Rogers*, 247 S.W.3d 757, 763 (Tex. App.—Dallas 2008, no pet.) (ignoring the fact that appellee's admittance of shoving appellant could support a finding of a history of physical abuse, given that one incident of physical abuse can constitute a history of physical abuse, and noting that the jury could also consider appellee's explanation for the conduct and the amount of time that had passed since the conduct in determining the weight to give to the evidence); *In re D.R.*, 177 S.W.3d 574, 582-84 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (noting that section 153.004 does not automatically preclude an abuser from being appointed the child's sole managing conservator upon a showing of history of family violence and holding that the trial court erred in submitting a question that instructed that jury that if it found by a preponderance of the evidence that there was a history or pattern of family violence by the father against the mother, it was not to consider the father as being eligible to serve as sole managing conservator of the child).

[47] Tex. Fam. Code. Ann. §§ 153.004(d)(2)(A)-(B) (granting the court power, despite evidence of family violence, to order periods of access to the abusive parent so long as they are supervised or so long as the exchange of the child occurs in a "protective setting," which might include a sheriff's office or a kids exchange).

[48] Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 187 (2009) ("Bestowing decision-making authority regarding the welfare of children to a batterer is not only imprudent because a perpetrator of domestic violence is likely to make poor decisions about the well-being of his children; he is also more likely to use it as a vehicle to control his former partner."); *see infra* Sections VI (C) & (D).

[49] *See* Lauren Zykorie, *Can a Domestic Violence Advocate Testify as an Expert Witness? Follow the ABC's of Expert Testimony Standards in Texas Courts*, 11 TEX. J. WOMEN AND L. 275, 276 (2002) ("[L]aypersons generally hold misconceptions related to domestic violence, [which] can negate the seriousness of the violence as well as the victim's response of fear. Because it is important that a jury understand the characteristics of domestic violence, prosecutors and defense attorneys may introduce domestic violence expert testimony in their cases.").

[50] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS xii (1996). Although this report specifically focuses on criminal trials, its findings with respect to the use of expert testimony to dispel myths surrounding domestic violence are applicable to civil trials as well.

[51] *Id.* at 177

[52] Levin, *supra* note 41, at 831.

[53] *Id.* at 819. Note that in Texas, when the jury is the trier of fact, it can decide only managing and possessory conservatorships, not that details. That is reserved for the court.

[54] Conner, *supra* note 47, at 187.

[55] *Id.*

and presumption in favor of a joint managing conservatorship, it is only appropriate that the trier of fact be well-informed about the impact and consequences a given custody decision may have in the context of a domestic violence relationship.

IV. Exploring the Use of Expert Witness Testimony

A. A Snapshot of the Different Types of Expert Witnesses

"As a general legal rule, an expert witness is one who, through knowledge, skill expertise, training, or education, is qualified to give testimony about scientific, technical, or other specialized knowledge."[56] This article focuses primarily on the use of nonscientific experts, such as social workers, counselors, therapists, and advocates, who can provide a wealth of knowledge in order to educate the trier of fact about domestic violence in child custody disputes.[57] "Unlike psychologists or doctors testifying about domestic violence, nonscientific experts arguably have fewer publications if any and lower status rank with that profession. They are also unlikely to know if their testimony would be accepted in a 'scientific' community, and such experts are commonly unfamiliar with the breadth of literature on the subject."[58] Instead, these experts possess knowledge of domestic violence gathered through professional experience dealing directly with victims of domestic violence.[59] In order for a witness to qualify to give expert testimony, the witness need not possess a license, college degree, or formal education; a witness's training, education, or experience, whether in Texas or another jurisdiction, will suffice.[60] For example, "[t]he shelter workers who work with battered women everyday—answering hot line calls, conducting intake interviews, providing shelter, transportation, and comfort—usually do not have degrees of any kind, yet these advocates are clearly the experts on battered women's lives as measured by the amount and quality of their contact with battered women."[61] Thus for the remainder of this article, the focus will lie in examining how quasi-scientific and, more specifically nonscientific experts can effectively and efficiently assist the trier of fact in understanding the misconceptions that plague the topic of domestic violence, so that the trier of fact may be better-informed in making a decision that impacts child custody.

B. The Role of a Psychologist

A psychologist may seem an obvious choice for an expert who can provide insight into the behavior of individuals in a relationship involving domestic violence, as well as the impact of that domestic violence on a child. "[T]he use of clinical and forensic psychologists as experts in contested child custody litigation has become commonplace."[62] A psychologist may be able to speak to scientific research or provide a clinical opinion as a means to debunking misconceptions about the behavior of the abuser and abuse victim, and yet the risk persists that a psychologist's clinical training and experience may prove "detrimental and reduce judgmental accuracy, or at the very least introduce systemic biases such as greater emphasis on pathology."[63] A nonscientific expert witness, on the other hand, with years of educational or occupational experience in the realm of domestic violence also possesses a knowledge not held by the average layperson or trier of fact.[64]

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[56] HAMILTON, *supra* note 4, at 6-7.
[57] A brief discussion follows in Section IV. B. regarding quasi-scientific or "soft science" experts, such as psychologists.
[58] Zykorie, *supra* note 48, at 286.
[59] *Id.*
[60] *Id.* at 287; *see infra* Section V addressing admissibility of expert testimony evidence.
[61] Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 229 (1992); Telephone Interview with Dr. Toby Myers, Ed.D., LCSW, LPC, Vice-Chair, National Center on Domestic and Sexual Violence (Dec. 11, 2012) (Dr. Myers is a Licensed Professional Counselor, a Licensed Clinical Social Worker, and a longtime worker to end violence against women. Having testified as an expert witness in over thirty cases and having worked in well over one hundred cases, she is recognized as one of the most well respected experts witnesses in domestic violence cases. It is Ms. Myer's belief that counselors and advocates performing day-to-day work with domestic violence victims are perhaps best situated to provide insight into the behavioral choices of domestic violence victims.).
[62] Wah, *supra* note 1, at 154.
[63] *Id.* at 158.
[64] The fact that these nonscientific expert witnesses develop a specialized knowledge not held by the average layperson is evidenced by the three expert witnesses interviewed for this paper:

The nonscientific expert can place his or her knowledge of domestic violence within a social context in order to help clarify contradictory behavior or misconceptions that may arise with respect to domestic violence.[65] The nonscientific expert can truly make a victim's story, emotions, and behavior come to life, whether through direct testimony about the case at hand or through hypothetical questions.[66] Admittedly, a psychologist or another quasi-scientific expert may be better qualified to illuminate the impact domestic violence in a relationship is likely to have on a child, as scientific medical and psychological research evidences the developmental and cognitive damage child witnesses of domestic violence may suffer;[67] however even those individuals with significant work experience with children may prove able to sufficiently educate the trier of fact on how exposure to domestic violence may harm a child.[68]

C. General vs. Specific Testimony

Expert testimony in child custody cases involving domestic violence can be either general or case-specific. This determination is up to counsel, who must weigh the circumstances in deciding whether it is more prudent for an expert to provide an opinion based on personal knowledge of the case.[69] Expert testimony can dispel stereotypes held by the trier of fact by explaining complexities of domestic violence that are beyond the ordinary experience or understanding of a layperson, without the expert witness possessing knowledge of the facts of the case at hand.[70] These experts can provide sufficient testimony simply by testifying about their own research or experiences with domestic violence victims' behaviors and how, based on these experiences, they believe a domestic violence victim would deal with certain hypothetical situations that mirror the case at hand.[71] In Carol's case, for example, an expert witness need not know the specific facts of Carol's relationship with Al in order to shed light on why Carol stayed with Al and endured eight years of abuse. The expert witness would not need to know that Al had threatened to kill Carol if she tried to leave

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Telephone Interview with Dr. Noel Busch-Armendariz, Ph.D., LMSW, MPA, Associate Professor and Director, Institute on Domestic Violence and Sexual Assault, The University of Texas School of Social Work (Dec. 6, 2012) (Dr. Noel Busch-Armendariz is an Associate Professor at The University of Texas School of Social Work and Director of the Institute on Domestic Violence and Sexual Assault. Dr. Busch-Armendariz holds a Ph.D. as well as a Master of Social Work and has published numerous works on domestic violence. She has served as an expert witness in nearly four dozen criminal, civil, and immigration cases involving domestic violence. Dr. Busch-Armendariz approaches her testimony from multiple perspectives—her experience as a researcher and academic, as well as her direct practice experience as a licensed social worker.);

Telephone Interview with Dr. Toby Myers, *supra* note 59 (Dr. Myers is a Licensed Clinical Social Worker and a Licensed Professional Counselor. She was instrumental in getting the first Battered Women's Shelter off the ground in Houston. She has testified in over thirty trials on the issue of domestic violence. Her testimony is informed by her personal experience working with domestic violence victims and perpetrators for over thirty years. Dr. Myers taught the first domestic violence course in our state at Texas Women's University in Houston.);

Telephone Interview with Gail Rice, Community Advocacy Director for SafePlace (Dec. 19, 2012) (Gail Rice has provided testimony on domestic violence in approximately fifteen trials. Since 1981, Ms. Rice has worked on the domestic violence hotline, as a counselor, and currently as the Director of Community Advocacy at SafePlace (formerly the Center for Battered Women) in Austin, Texas. Ms. Rice's expertise is grounded in the fact that she has interacted with so many domestic violence victims on a daily basis over the last thirty years.).

[65] Jane H. Aiken & Jane. C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L. Q. 43, 46 (2000) (discussing the benefit of providing a social framework opinion as a way to put clinical data in perspective, without the expert witness having any clinical relationship with the parties).

[66] Telephone Interview with Gail Rice, *supra* note 63 (When asked how her vast work experience with victims of domestic violence informs her testimony, Ms. Rice stated that she tries to tell a story that opens up the victim's behavior for the trier of fact or paints the behavior in a new light so that the trier of fact can understand the complex motivations underlying seemingly contradictory behavior by the victim.).

[67] *See infra* Section VI. E.

[68] Telephone Interview with Dr. Toby Myers, *supra* note 60 (noting that Dr. Myer's has provided testimony about the effects witnessing domestic violence may have on a child, based on her personal experience counseling children as a Licensed Social Worker).

[69] Anna Farber, Conrad, *The Use of Victim Advocates and Expert Witnesses in Battered Women Cases*, 30 COLO. LAW 43, 46 (Dec. 2001).

[70] Dr. Noel Busch-Armendariz, Dr. Toby Myers, and Gail Rice all stated that they have provided specific, as well as general testimony. When providing testimony based on the specific facts of the case at hand, these experts tend to review files and meet with the client. When providing general testimony, these experts typically enter the courtroom without any direct knowledge about the facts of the case at hand and impart their knowledge about domestic violence through the use of hypotheticals. Telephone Interview with Dr. Noel Busch-Armendariz, *supra* note 63; Telephone Interview with Dr. Toby Myers, *supra* note 60; Telephone Interview with Gail Rice, *supra* note 63.

[71] *Id.*

him, that he had taken away her credit card and placed her on a weekly allowance, or that he monitored her every move and refused to let her go out with friends. Instead, through the use of hypotheticals, an expert witness could paint a picture for the trier of fact in order to illustrate that abuse victims often fail to leave an abusive situation due to a number of reasons, some of which may, in fact, be applicable to Carol's situation—financial dependence on the abuser, fear of retaliation by the abuser, guilt for believing her behavior caused the abuse, and isolation from friends, family, and other means of support, to name a few.[72] Providing general testimony, as opposed to case-specific testimony, has its benefits and its pitfalls. If the expert provides general testimony about the behavior of a domestic violence victim, for example, without meeting that victim, opposing counsel is likely to question the applicability of the expert's testimony.[73] However, a benefit to providing general testimony, as opposed to specific, is that without personal knowledge of the victim, abuser, or facts of the case, the expert witness is likely to appear neutral, impartial, and more credible.[74]

D. Lay vs. Expert Witness Testimony

In select cases, an attorney may be faced with deciding whether to utilize a witness to provide lay opinion testimony or expert opinion testimony. Texas Rule of Evidence 701 requires that the testimony of a lay witness be based on the witness's perception.[75] Thus, the witness must have observed or experienced the events about which she is testifying.[76] On the other hand, expert testimony allows certain types of "relevant, helpful testimony by a witness who does not possess personal knowledge of the events about which he or she is testifying."[77] It seems the only viable time an attorney would choose to use a witness as a lay witness instead of an expert witness in the context of a case involving domestic violence, is when the witness being used has counseled or had direct and prolonged interaction with the client; thus the witness could base her testimony on her direct perception of the victim client's reaction to her abusive situation.

E. Hurdles to the Effective and Efficient Use of Expert Witnesses

Attorneys looking to increase their use of expert witnesses face several hurdles. One is that despite their usefulness, experts may be costly and impractical.[78] Many cases exist in which parties struggling over custody are economically unable to provide for an expert witness.[79] This particular problem can present a chicken and egg situation when domestic violence is involved, in that the victim, such as Carol from our hypo, may have been in a relationship where the abuser controlled the finances. Now, Carol is out on her own, struggling to pay bills, and barely able to retain a lawyer, or perhaps accepting free legal services from a qualified organization or clinic, such as Legal Aid or The University of Texas School of Law Domestic Violence Clinic. It is doubtful Carol can afford a professional expert witness to help explain the plethora of plausible explanations for why Carol endured Al's abuse for so long and to ensure the judge or jury that the fact Carol remained with Al for so many years should not discredit her story or diminish the severity of the abuse she suffered. Attorneys hoping to employ expert testimony on domestic violence but concerned about costs should investigate the options in the community, perhaps seeking out experienced counselors at battered women's shelters, who may be willing to provide testimony at a reduced cost or on a voluntary basis.

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[72] Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19-22 (Oct. 1999).

[73] Conrad, *supra* note 68, at 46; Interview with Gail Rice, *supra* note 63 (noting that after providing general testimony regarding the typical behavioral choices of a domestic violence victim, opposing counsel questioned the applicability of such testimony to the case at hand by pointing out that Ms. Rice did not actually know the victim or the victim's story).

[74] Conrad, *supra* note 68, at 46.

[75] TEX. R. EVID. 701(West 2011).

[76] *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997).

[77] *Osbourn v. State*, 92 S.W.3d 531, 535-36 (Tex. Crim. App. 2002).

[78] Aiken & Murphy, *supra* note 64, at 52; Conner, *supra* note 47, at 165 ("The use of experts to address demeanor, however, presents challenges for battered women. Survivors frequently have little financial means to afford counsel, let alone financing for experts at trial."); Telephone Interview with Dr. Toby Myers, *supra* note 60 (noting that cost is a factor that may influence the frequency of expert witness use in domestic violence cases); Telephone Interview with Dr. Noel Busch-Armendariz, *supra* note 63 (noting that cost is a factor that may influence the frequency of expert witness use in domestic violence cases).

[79] Hon. Lana Shadwick & Sandra Hachem, *Expert Witnesses in Child Abuse and Neglect Cases Involving Termination of Parental Rights*, 69 TEX. B.J. 756, 758 (2006).

Another hurdle attorneys seeking to employ expert witnesses in domestic violence cases may face is the appearance of bias. In her experience as an expert witness in over thirty trials, Toby Myers has faced opposing counsels who have attempted to paint a picture of bias based on her thirty years of experience working with domestic violence victims by asking whether she was "an advocate" or "an unbiased expert."[80] Gail Rice, in her experience as an expert witness in over fifteen trials, has faced questions from opposing counsel along the lines of: "You're an advocate. Doesn't that mean you will be an advocate for every individual who claims to be a victim of abuse?"[81] Given that this article hones in on experts who have developed knowledge from their immersion in the field of domestic violence as counselors, social workers, and advocates, it seems logical that the trier of fact may question their motivation for providing testimony. For example, a trier of fact may reasonably think that a counselor at SafePlace,[82] who assists victims of domestic violence day in and day out, may automatically be biased against an accused abuser and biased in favor of a victim based on her work experience; thus, the trier of fact may fear that any helpful information this expert witness provides to explain the behaviors of those involved in a relationship containing domestic violence may seem tainted or less reliable. There are two ways to combat the concern of an appearance of bias. First, an expert witness solely offering general testimony about the behaviors associated with domestic violence, without knowledge of the specific facts of the case, is less likely to present as biased.[83] Second, expert witnesses can be prepared to address claims of bias by the opposing counsel directly. A diplomatic response by the expert witness is the best way to counteract such an accusation. Such a response might clarify that upon starting a case, the expert witness begins as an unbiased person, listens to the facts and draws a conclusion as to whether the victim was abused and whether the abuse influenced her actions.[84] The expert witness should clarify that she is not an advocate for the specific plaintiff in the case and the reason he or she is providing testimony is not to provide a biased opinion, but to offer information that is not available to most laypeople.[85]

Relatedly, another hurdle exists primarily for expert witnesses who are counselors, shelter workers, or others who possess similar experience but lack professional degrees or published works. Although the rules of evidence specifically allow expertise based on experience, triers of fact may be wary of "experts" without requisite educational degrees.[86] This viewpoint is misinformed, as evidenced by an individual like Gail Rice, who has worked with domestic violence victims in multiple capacities—as a hotline operator, a counselor, and a community advocacy director—and has gained insight into the complex motivations underlying the behavior of a domestic violence victim; she has imparted this insight to the trier of fact through testimony approximately fifteen times.[87] Furthermore, Dr. Noel Busch-Armendariz, who does possess the requisite educational degrees, notes that her testimony frequently pulls from multiple perspectives—her direct practice, her research, and her experience as a licensed social worker.[88] Thus, while she possesses multiple degrees and performs research on the topic of domestic violence, Dr. Busch-Armendariz still credits her experience as a licensed social worker with informing her testimony in court.[89] The individuals who work in the trenches on a daily basis with victims of domestic violence have amassed knowledge about the behaviors and decisions, particularly of domestic violence victims, to which the general layperson is not privy. It is the attorneys' job to build up the witness and convince the trier of fact of the witness's expertise by asking the appropriate foundational questions regarding the expert's background, experience, and knowledge.

A final suggestion for those seeking to effectively and efficiently use expert witness testimony is to allow sufficient time for preparation by the expert witness. Both Dr. Noel Busch-Armendariz and Toby Myers, who

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[80] Telephone Interview with Dr. Toby Myers, *supra* note 60.
[81] Telephone interview with Gail Rice, *supra* note 63.
[82] SafePlace is a battered women's shelter in Austin, Texas that provides services, including emergency shelter, counseling, legal advocacy, life skills classes, and children's services to victims of sexual and domestic violence. http://www.safeplace.org/page.aspx?pid=286.
[83] Conrad, *supra* note 68, at 46 ("If the expert witness has personal knowledge of the defendant, the [opposing counsel] may attempt to attack the witness's credibility.").
[84] Telephone Interview with Dr. Toby Myers, *supra* note 60.
[85] *Id.*; Telephone Interview with Gail Rice, *supra* note 63.
[86] Aiken & Murphy, *supra* note 64, at 48; Telephone Interview with Dr. Toby Myers, *supra* note 60 (noting a trial in which her testimony went up against that of a psychologist and the jury appeared to pay more attention to the psychologist because of his degrees).
[87] Telephone Interview with Gail Rice, *supra* note 63.
[88] Telephone Interview with Dr. Noel Busch-Armendariz, *supra* note 63.
[89] *Id.*

combined have provided testimony in nearly one hundred cases involving domestic violence, noted that attorneys could more effectively utilize expert witnesses on domestic violence by providing adequate notice before trial.[90] This is particularly true in cases where an expert may be providing case-specific testimony and thus requires time to meet with the client and review case files.[91]

V. Admissibility of Expert Witness Evidence in Domestic Violence Cases

One additional hurdle attorneys must clear in order to utilize expert witness testimony is proving the admissibility of such testimony. The admissibility standards governing expert testimony are relatively new, having been established within the last twenty years. Texas Rule of Evidence 702 parallels Federal Rule of Evidence 702 governing expert testimony by stating, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."[92] Although both the Federal and Texas Rules of Evidence generally presume the admissibility of non-scientific expert testimony, "it remains challenging for attorneys in admitting domestic violence testimony [as] no court has articulated what standards apply to nonscientific expert testimony." [93]

The rules governing admissibility of expert testimony evidence have evolved along similar paths in Texas and on the federal level. In 1992, the United States Supreme Court in *Daubert v. Merrell-Dow Pharmaceuticals* granted judges a gatekeeping role in order to screen out irrelevant and unreliable *scientific* expert testimony.[94] Pursuant Federal Rule of Evidence 702, in order to qualify as reliable scientific evidence, an expert's testimony must be based on scientific knowledge "ground[ed] in the methods and procedures of science."[95] The *Daubert* Court also developed five factors to determine the reliability, and thus admissibility, of such evidence.[96] Given that these factors were developed with scientific testimony in mind, they have proven difficult to apply "to expert testimony based on behavioral sciences, soft-sciences, or professional experiences, such as domestic violence."[97] As a result, in 1999, the Supreme Court in *Kumho Tires v. Carmichael*, expanded the application of the *Daubert* gatekeeping obligation, as well as the implementation of the *Daubert* factors for reliability to apply to all expert testimony, including *non-scientific* expert testimony.[98] *Kumho* prompted an amendment to Federal Rule of Evidence 702 that went into effect in 2000 and incorporated both the *Daubert* and *Kumho* holdings.[99]

The Texas law governing admissibility of expert testimony evolved in similar fashion. The Texas parallel to *Daubert*, *Kelly v. State*, held that in order for expert testimony to be deemed valid, the underlying scientific theory must be valid, the technique applying the theory must be valid, and the technique must have been properly applied on the occasion in question.[100] The Texas court of Criminal Appeals established seven non-

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[90] Telephone Interview with Dr. Noel Busch-Armendariz, *supra* note 63; Telephone Interview with Dr. Toby Myers, *supra* note 60 (noting that a lot of times an expert may get a call on Friday, when trial is on Monday).

[91] *See* Telephone Interview with Dr. Noel Busch-Armendariz, *supra* note 63 (discussing her process for preparing to testify in a trial on the specific facts of the case).

[92] FED. R. EVID. 702 (West 2011); TEX. R. EVID. 702 (West 2011).

[93] Zykorie, *supra* note 48, at 275, 283.

[94] 509 U.S. 579, 584-87 (1993).

[95] *Id.* at 589-90.

[96] The *Daubert* factors for determining reliability of expert testimony evidence are: (1) whether the theory or scientific technique was subject to empirical testing, (2) whether the theory had been subject to peer review or publication, (3) the known or potential error rate of the theory, (4) the existence of standards or controls concerning the theory's operation, and (5) the degree to which the relevant scientific community had accepted the theory. *Id.* at 593-95.

[97] Zykorie, *supra* note 48, at 280.

[98] *Kumho Tire v. Carmichael*, 526 U.S. 137, 149 (1999); *See e.g.*, *U.S. v. Vallejo*, 237 F.3d 1008, 1019-20 (9th Cir. 2001) (admitting the testimony of a school psychologist to address the problems special education students have in attempting to communicate in high pressure situations).

[99] Federal Rule 702 requires: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliability applied the principles and methods to the facts of the case." FED. R. EVID. 702 (West 2011).

[100] 824 S.W.2d, 568, 573 (Tex. Crim. App. 1992).

exclusive factors of reliability.[101] In 1998, the Texas Court of Criminal Appeals held in *Nenno v. State* that the factors outlined in *Kelly* apply to non-scientific expert testimony as well.[102] Unlike the federal standard, the Texas court qualified its holding by noting that the factors applied in *Kelly may or may not* apply to non-scientific expert testimony depending on the circumstances, and that the rule in *Daubert*, the case on which *Kelly* was based, was a "flexible one."[103] Thus *Nenno* failed to provide Texas courts with specific guidance on what factors to utilize in making determinations of the relevancy and reliability of expert evidence.[104] The *Nenno* court did recognize that outside of the hard sciences, the *Daubert/Kelly* factors would enjoy a more flexible application.[105] Following *Nenno*, the Supreme Court of Texas in *Gammill v. Jack Williams Chevrolet* acknowledged that the analysis for expert testimony also applies in cases where the expert testimony is based on a witness' individual skill, experience, or training.[106] Unfortunately, *Gammill* also fails to set forth specific factors like those established in *Daubert* and *Kelly* for courts to utilize in making reliability and ultimately, admissibility decisions.[107] Given that the study of domestic violence does not qualify as a hard science and no court has explicitly articulated the admissibility standards that apply to nonscientific expert testimony, it can prove challenging for attorneys seeking to admit nonscientific expert testimony, particularly that of domestic violence experts.[108] Attorneys must take a more flexible approach to applying the *Daubert/Kelly* factors as allowed by *Nenno*, particularly with respect to "specialized soft-science knowledge such as that related to domestic violence."[109]

In order to properly lay the foundation for introducing testimony from an expert witness on domestic violence, an attorney must establish three primary things. First, the testimony must assist the trier of fact, meaning that the testimony must revolve around information that is beyond the ordinary knowledge of the average juror.[110] Second, the expert must be qualified on the basis of "knowledge, skill, training, experience, or education" according to Rule 702.[111] Medical doctors or psychological experts can provide proof of education, work experience, scientific research and specialized training in order to meet this requirement. Unlike psychologists or medical doctors testifying about domestic violence, counselors, social workers, and behavioral science experts are more likely to possess knowledge about domestic violence based primarily on direct professional experience working with domestic violence victims. In fields such as domestic violence, Texas courts have determined that years of experience in a field that is the primary litigated issue at trial, as opposed to the procurement of licenses and degrees, can qualify a witness as an expert based on his knowledge, skill, and experience.[112] Third, the expert's testimony must meet at least some of the factors listed in *Daubert* and

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[101] The *Kelly* factors for reliability include: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such community can be determined; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Id.*

[102] 970 S.W.2d 549, (Tex. Crim. App. 1998), *overruled on other grounds* by *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

[103] *Id.* at 560-61 (stating that these factors "do not necessarily apply outside of the hard science context; instead methods of proving reliability will vary, depending upon the field of expertise").

[104] In an effort to translate the *Kelly* analysis to soft-science expert testimony, the *Nenno* Court suggested asking the following questions: "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." *Id.* at 561. Unfortunately, these questions merely restate the relevancy and reliability standards already established by much precedent. Zykorie, *supra* note 46, at 282.

[105] *Nenno*, *supra* note 99, at 561.

[106] 972 S.W. 2d, 713, 725-26 (Tex. 1998).

[107] *See id.* at 726 ("[I]t is equally clear that the considerations listed in *Daubert* . . . for assessing the reliability of scientific evidence cannot always be used with other types of expert testimony."); Zykorie, *supra* note 48 at 283.

[108] Zykorie, *supra* note 48, at 283.

[109] *Id.*

[110] FED. R. EVID. 702 (West 2011); TEX. R. EVID. 702 (West 2011); *Fielder v. State*, 756 S.W.2d 309, 320-21 (Tex. Crim. App. 1998) (holding that a marriage and family violence counselor's testimony on battered woman's syndrome would be of assistance to the trier of fact because "by her testimony, [the expert] established the average lay person had no basis for understanding the conduct of a woman who endures an abusive relationship); *Scugoza v. State*, 949 S.W.2d 360, 363 (Tex. App.—San Antonio 1997, no pet.) (admitting the expert testimony of a program services director at a battered women's shelter regarding the emotional and behavioral patterns typical of spouse abuse as relevant to help the jury interpret the evidence).

[111] FED. R. EVID. 702; TEX. R. EVID. 702.

[112] *Wyatt v State*, 23 S.W. 3d 18, 29 (Tex. Crim. App. 2000) (holding that the trial court properly admitted the expert testimony of a human services aid with particular knowledge regarding sexual offenders based on the expert's nineteen years of training in the field

Kelly in order to fulfill the reliability requirement.[113] For medical and psychological experts, reliability can be established by introducing evidence of publications by the witnesses, for example. Social workers, counselors, and shelter workers with experience in the field of domestic violence may face increased difficulty meeting this requirement given that expert opinions based on experience are less likely to fit the established *Daubert/Kelly* factors used to determine reliability and admissibility.[114] Although the Texas Rules of Evidence and the developing admissibility standards on expert testimony evidence fail to provide explicit factors for Texas courts to follow in determining the admissibility of nonscientific expert testimony, Texas courts appear to be developing a precedent to provide some guidance in determining the admissibility of nonscientific expert testimony.

VI. Breaking Down the Major Misconceptions

Expert testimony is frequently necessary to eradicate common myths about domestic violence and to educate the trier of fact about the dynamics of domestic violence.[115] In this section, an array of misconceptions shrouding cases involving domestic violence are explored to illustrate how such misconceptions play a particularly detrimental role in child custody cases. Following the discussion of these misconceptions is an analysis of how expert testimony can dispel such misconceptions so that they do not negatively influence the custody determination made by the trier of fact.

A. If it were really that bad, she would just leave.[116]

One of the most prevalent misconceptions in existence is that if the abuse were so awful, the victim would simply leave for the safety of herself and her child.[117] Lacking sufficient understanding of the dynamics of a relationship involving domestic violence, the trier of fact is likely to view many of the victim's decisions as illogical and "question the ability of [a victim] to tolerate such severe acts of violence for so long."[118] Thus, the trier of fact may have difficulty believing the severity of violence described by the victim or trusting the victim's motives.[119] Furthermore, the trier of fact may label the mother-victim neglectful or ineffective for failing to protect her child.[120] This line of thinking is over-simplistic and fails to recognize the numerous rational reasons an abuse victim is likely to stay with or return to her abuser.

Like Carol in our hypo, the victim may be economically dependent on the abuser.[121] Her economic dependence may be so extreme that she lacks control over any estate planning, access to financial records, bank accounts, credit cards, and spending that occurs in the household.[122] Relatedly, the victim may lack job skills;

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of sexual offenders); *Hernandez v. State*, 53 S.W.3d 742, 751 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd.) (admitting the testimony of a children's advocacy center director in a child sexual assault case despite the director's lack of published material, based on over twenty years of work with child victims of sexual assault); *In re D.S.*, 19 S.W.3d 525, 529-30 (Tex. App—Fort Worth 2000, no pet.) (admitting the expert testimony of a general surgeon with over twenty-five years' experience in treating adult and child burn victims to explain how the nature of burn marks might indicate whether burns were accidental or not in a termination of parental rights case, despite the fact that the doctor's theory was not predicated on any medical study that had been conducted); *State v. Northborough Center, Inc.*, 987 S.W.2d 187, 194 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (holding that a principal in a firm of city planning consultants and landscape architects, who did not have a license as an architect, could provide expert testimony on the effects of a taking of a plot of property by the state).

[113] *See Fowler v. State*, 958 S.W.2d 853, 863-64 (Tex. App.—Waco 1997, aff'd) (refusing to admit a testimony by a family violence counselor whose experience consisted of a two thousand hour internship at the Family Abuse Center in Waco and one year in private practice, because apart from establishing her qualifications and experience, the testimony failed to meet a single of the *Kelly* factors).

[114] Zykorie, *supra* note 48, at 290.

[115] Aiken & Murphy, *supra* note 64, at 45.

[116] NAT'L DIST. ATTY ASSN, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS 17 (2007), available at http://www.ndaa.org/pdf/pub_ introducing_expert_ testiomony.pdf ("[M]any people expect domestic violence victims to leave their abusers [or] report the abuse.").

[117] All three expert witnesses interviewed stated that one of the most frequently asked topics on which they testify is why the victim does not leave her abuser or why she returns to her abuser.

[118] Conner, *supra* note 47, at 177.

[119] *Id.* (stating that "judges tend to doubt the testimony of survivors of domestic violence and are more likely to question the female victim's credibility")

[120] *See* Aiken & Murphy, *supra* note 64, at 51.

[121] Buel, *supra* note 71, at 19.

[122] *Id.*

perhaps, like Carol, she did not work for a long time in order to care for the children. If the victim has no place to go, she may choose to stay with the abuser based on her survival instincts; perhaps her abuser has convinced her that she is incapable of surviving outside the relationship.[123] Particularly when an abuse victim has a child, the threat of financial ruin if she leaves or the conviction that it is in the child's best interest to have both parents in the home, is likely to prevent her from fleeing.[124] The victim may, like Carol, believe her abuser's excuses—that he "had a tough week at work" and that he "will never hit her again"—partly because no one else can explain or hold the offender responsible, thus prompting a cycle where Carol forgives and forgets…until the next round of abuse.[125] She may be in denial about the danger, believing that if she were a "better partner" the abuse would stop, or as in Carol's case, that once the baby comes, things will get better.[126] Conversely, and discussed in more depth in the next subsection, she may take seriously her abuser's threats to kill her and the children if she attempts to leave.[127] Thus, some abuse victims may choose to stay with their abusers because they truly believe it is a safer course of conduct.[128] These victims correctly believe that by maintaining the ability to keep an eye on the batterer and sense when he is about to become violent, they will be better prepared to protect themselves, as well as their children.[129] Some abusers, like Al, may also isolate their victims, leaving them no family, friends, or colleagues to function as an escape route.[130]

The list of reasons abuse victims stay with their abusers is long; the discussion above has barely scratched the surface in this discussion. At first glance, a victim's decision to stay with her abuser may appear contradictory, but in reality many of the behaviors of domestic violence victims can be logically explained. Because neither a judge nor a jury is likely to have a comprehensive understanding of the behavioral dynamics of abuse victims, it will often be necessary for an expert witness to provide an explanation. Gail Rice described the process of understanding a victim's seemingly contradictory behavior: One reason a victim of domestic violence may not leave her abuser or may return to her abuser is that she is afraid of the unknown. Ms. Rice likened the situation to the phrase: "Keep your friends close and your enemies closer." She explained that many victims have an interest in knowing what their abuser is up to, as this knowledge helps them to feel more prepared and more in control.[131]

B. If she just leaves, the violence will stop.

That the violence will cease once the parties separate remains another common misconception that expert testimony could clarify for the trier of fact. A trier of fact uneducated about the intricacies of a domestic violence relationship may not understand that the most dangerous period of a relationship tends to be when a victim of abuse, such as Carol, attempts to leave her abuser.[132] Abusers tend to seek power and control; by leaving, Carol is betraying Al and undermining his power over her. It is hard to know how someone who has been willing to physically harm his partner for years and who has threatened to kill her, will react if and when she actually does leave. In fact, women in an abusive relationship are more likely to be murdered when reporting abuse or attempting to leave that abusive relationship.[133]

C. Domestic Violence has nothing to do with child abuse: Just because he hits you, does not mean he hits the kids.

In our hypo, there is no indication that Al has lashed out at Ben in an abusive manner, however, it would be dangerous for the trier of fact to assume that Ben is not at risk for future abuse by his father. A trier of fact making a "best interest of the child" determination and adhering to Texas' preferred public policy of keeping both parents in the life of the child, may be more likely to believe that an abuser, violent towards his spouse,

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[123] *Id.* at 24; Aiken & Murphy, *supra* note 64, at 46.
[124] Buel, *supra* note 71, at 19-20.
[125] Id. at 20-21.
[126] *Id.*
[127] *See infra* Section VI B.
[128] Buel, *supra* note 71, at 25.
[129] *Id.*; Telephone Interview with Gail Rice, *supra* note 63 (stating that victims may feel more in control if they know what their abuser is planning or if they feel they can mollify their abuser).
[130] Buel, *supra* note 71, at 22 ("Isolating the victim increases the likelihood that she will stay, for without safety plans and reality checks, it will be more difficult for her to assess her level of danger.").
[131] Telephone Interview with Gail Rice, *supra* note 63.
[132] Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991).
[133] ANGELA BROWNE, WHEN BATTERED WOMEN KILL, 111 (The Free Press New York 1987).

may nonetheless be a good father towards his children.[134] Instead "[d]omestic violence is the single most common context for child abuse and neglect."[135] A variety of estimates exist to describe the extent of overlap between spousal abuse and child abuse; some studies indicate that the overlap lies between 30% and 60%.[136] One study determined that child abuse occurs at a rate fifteen times higher than the national average in families where domestic violence occurs.[137] Thus any court making a determination about child custody should, at the very least, be aware of the rate of co-incidence between spousal abuse and child abuse.

D. The kids are young and resilient—they'll get over it when they're older

Unfortunately, some courts continue to operate under the notion that if children have not been physically harmed, evidence of domestic violence is not relevant to fashioning orders and agreements. The trier of fact could determine a more accurate assessment of what custody and visitation arrangements are in the child's best interest if it better understood the ramifications of a child witnessing domestic violence, even if that child is never physically harmed.[138] In reality, children who simply witness domestic violence in their family can suffer serious long-term, emotional and developmental damage. "Children exposed to marital violence are a clinical population whose bruises and scars are not necessarily observable."[139] Furthermore, children tend to learn from their parents' behavior and often adopt those behaviors as their own. Thus children who are abused are more likely to grow up to be abusive.[140] The harmful witnessing of domestic violence by a child can be auditory, visual, or inferred, and include situations in which the child witnesses the aftermath of domestic violence, such as cuts, bruises, and broken limbs.[141] For example, whenever Al strikes Carol or verbally abuses her for not preparing dinner on time in front of Ben, or whenever Ben sees Carol with a black eye, Ben's internal reaction is likely to manifest itself as it would if he were experiencing trauma; he may experience increased heart rate, blood pressure, and levels of cortisol.[142] The damaging effects of a child witnessing domestic violence can include the development of aggressive behavior, depression, and cognitive deficiencies.[143] In fact, research has found that exposure to domestic violence results in changes in brain structure and function, particularly during the first three to four years of a person's life where their brain develops to 90% of its adult size.[144] Thus, if a child is raised in an environment filled with chaos, stress, violence, pain, or continuing threat, this experience may produce an individual who lacks the ability to have a meaningful relationship with

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[134] Levin, *supra* note 41, at 830 ("Judges often believe that a spousal abuser can be violent toward his wife yet still gentle and loving toward his children.").

[135] Conner, *supra* note 47, at 185.

[136] Jeffrey L. Edelson, *The Overlap Between Child Maltreatment and Woman Battering*, VIOLENCE AGAINST WOMEN, vol. 5, 134-154 (1999) (summarizing studies that indicate that the overlap between spousal abuse and child maltreatment is about 30 to 60 percent in the families studied); *see* Joy D. Osofsky, *Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention*, CLINICAL CHILD AND FAMILY PSYCHOLOGY REVIEW, Vol. 6., No. 3 166 (2003) (citing Senate Hearing 101-939, 1990) ("Edelson's review of 35 published studies of co-occurrence concluded that the majority of reviewed research supports the notion of a high level of overlap ranging from 30 to 60% in most studies.").

[137] Osofsky, *supra* note 135, at 166.

[138] Levin, *supra* note 41, at 830.

[139] George W. Holden, Charles J. Holahan, Kasey M. Saltzman "*The Psychobiology of Children Exposed to Marital Violence*, JOURNAL OF CLINICAL CHILD AND ADOLESCENT PSYCHOLOGY, Vol. 34, No. 1, 129 – 139 (2005) (reporting the results of a study conducted by the Stanford University School of Medicine and The University of Texas at Austin Psychology Department in which the psychological and physiological functioning of a community sample of children exposed to marital violence were compared to a clinical group without marital).

[140] Osofsky, *supra* note 135, at 166 (stating that children "learn how aggression can be applied in intimate relationships [and] may view violence as an acceptable way to resolve conflicts").

[141] *Children and Domestic Violence: Summary of State Laws*, NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION 2 (March 2004), *available at* http://www.ncdsv.org/images/NAIC_ChildrenAnd DVSummaryOf StateLAws_3-2004.pdf.

[142] Holden, Holahan & Saltzman, *supra* note 138, at 136.

[143] Bruce D. Perry, *Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children, in* WORKING WITH TRAUMATIZED YOUTH IN CHILD WELFARE 29 (Nancy Boyd ed. 2006), *available at* http://www.childtrauma.org/images/stories/Articles/neurosequentialmodel_06.pdf (Dr. Bruce D. Perry is one of the preeminent medical doctors performing research on the impact of childhood maltreatment, including domestic violence, on brain development in children. He is the head of the Child Trauma Academy in Houston, Texas.).

[144] *Id.* at 41.

a supportive caregiver and grows up to be a violent and remorseless person.[145] Children exposed to stressful events such as domestic violence are much more likely to suffer from lack of empathy, poor impulse control, substance abuses, attempted suicide, depressive disorders, as well as problems developing and maintaining meaningful relationships for the rest of their lives.[146] In addition to these problems, psychologists and other researchers have found that children exposed to domestic violence run a high risk of having low self-esteem, PTSD, elevated heart rates, high levels of social incompetence, low school achievement, high rates of psychopathology, and low overall general health.[147] Furthermore, experts indicate that childhood trauma, such as witnessing domestic violence, is one of "the most significant predictors of adult ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease," all of which are often fatal.[148]

Courts that fail to take into account the severe, long-term impact domestic violence can have on a child risk putting not only the abused mother, but also the child at risk of additional immediate and long-term harm. Expert witnesses who have amassed a significant amount of knowledge on the impacts of domestic violence on children, either through work experience or academic research, can speak to the body of research that exists regarding the negative effects of a child witnessing domestic violence. This education of the trier of fact can help overcome the misconception that children are simply "resilient" and do not suffer long-term damage from the presence of violence in the home. Given that the court is bound to make a child custody determination according to the best interest of the child standard, it is only appropriate that the court be aware of the detrimental effects witnessing domestic violence may impose on the child. Perhaps, given such information, the court would be more likely to order supervised visitation periods at a visitation center, so that the parents in the abusive relationship do not have to interact in front of the child.

E. The Role of Expert Testimony in Educating the Trier of Fact and Debunking Misconceptions

"When representing a domestic violence victim, the lawyer's vital but confounding task is to contextualize the abuse for the [trier of fact] by eradicating inevitable misconceptions and incomprehensible contradictions regarding the victim's perceptions and reactions."[149] For example, an abused woman may decide to remain in an abusive relationship or she may minimize or deny the abuse, or even leave and go back to her abuser, like Carol did in our hypo. While most laypeople may not understand this behavior, Carol may have had reasons for acting the way she did. Perhaps she believed that Ben's need for a father figure in his life outweighed the damage of the abuse, or perhaps Carol feared, realistically, that she could not support herself and Ben without Al or that Al would kill her if she left.[150] Expert testimony can educate the jury about the paradoxical behavior of a domestic violence victim in order to help dispel common misconceptions.[151] These misconceptions threaten to influence the trier of fact to underplay the presence or severity of domestic violence in a relationship and misconstrue the victim's response,[152] which may result in a custody determination that, at the very least, is not fully appropriate to the situation at hand. Furthermore, expert testimony may prompt the trier of fact to be more creative in crafting a custody determination, given the presence of domestic violence in the home and its potential impact on the subject of the custody determination—the child.

In speaking with Dr. Noel Busch-Armendariz, Toby Myers, and Gail Rice, who combined have testified on domestic violence in nearly one hundred trials, it is clear that the single biggest misconception these experts are asked to clarify is why a woman would stay with her abuser, fail to report the abuse, minimize the

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[145] *Id.* Bruce D. Perry, *Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood*, http://teacher.scholastic.com/professional/bruceperry/bonding.htm (last visited December 15, 2012).
[146] *Id.*
[147] Osofsky, *supra* note 135, at 165 (Dr. Osofsky holds a Ph.D. in psychology and is currently a professor of pediatrics, psychiatry, and public health at the Louisiana State University Health Science Center in New Orleans, Louisiana); Holden, Holahan & Saltzman, *supra* note 138, at 129 – 139 (2005) (reporting the results of a study conducted by the Stanford University School of Medicine and The University of Texas at Austin Psychology Department in which the psychological and physiological functioning of a community sample of children exposed to marital violence were compared to a clinical group without marital violence exposure).
[148] Conner, *supra* note 47, at 186 (citing Vincent J. Felittie, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences Study*, 14 AM. J. PREV. MED. 245 (1998)).
[149] Aiken & Murphy, *supra* note 64, at 45.
[150] *See id.* at 46.
[151] *Id.* (recognizing that an abuse victim's "survival strategies appear maladaptive, illogical, and unstable. For example, despite brutal abuse the woman stays in the relationship; she fails to protect her child from her abuser; her resulting alcohol or drug abuse may cause her to neglect her child; she may minimize or deny the abuse or she may appear erratic and unreliable because she continually relocates to avoid the abuser.")
[152] Zykorie, *supra* note 48, at 276.

abuse, or return to her abuser. In order to first qualify an expert witness, an attorney will ask the witness about his or her education, work and research experience, length of time spent in the field of domestic violence, number of victims counseled or assisted, types of domestic violence encountered, how experience influenced his or her conclusions about domestic violence, and any other knowledge held about domestic violence.[153] Then, depending on whether the expert testimony is general or specific, the experts will typically attempt to tell a story to the trier of fact in order to explain the complex motivations that underlie the seemingly contradictory behavior of the victim.[154] For example, Toby Myers noted that in trying to explain why a victim with a child might not leave her abuser, despite the fact that he is a danger to both the victim and the child, Myers draws a comparison to an individual stuck in a job where he or she is being abused, demeaned, or devalued by a supervisor, but cannot leave because an entire family is depending on that paycheck.[155] These experts must figure out how to transfer their expertise to the trier of fact in a way that the trier of fact can understand and visualize the complicated dynamics at play in a relationship involving domestic violence.[156]

Exposing the trier of fact through expert testimony to the realities of domestic violence can affect the legal ramifications on the decision involving a child custody determination. Texas Family Code Section 153.002 states "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."[157] But what is "the best interest of the child" in a custody case involving domestic violence? Section 153.004 indicates that it is not in the best interest of the child to order a joint managing conservatorship if there is a "history of domestic violence."[158] Yet this provision appears in conflict with Section 153.131, which suggests that it is in the best interest of the child to appointment of the parents of a child as joint managing conservators.[159] Expert testimony on the myths surrounding domestic violence as well as the ramifications of domestic violence, a topic still not well understood in today's society, can help a trier of fact overcome the urge to blindly follow the policy preference for granting a joint managing conservatorship. This expert testimony can inform a trier of fact who might otherwise rely on the common myths surrounding domestic violence, or who might otherwise not understand that damage that exposure to domestic violence can cause a child. Armed with this additional knowledge, a trier of fact will be in a better position to weigh the best interest of the child standard and the policy preference for joint managing conservatorship against the prohibition against ordering a joint managing conservatorship if there is a history of domestic violence.

VIII. Conclusion

As society has evolved, domestic violence has gained recognition as a serious and pervasive problem in today's world. The State of Texas has led the charge with respect to implementing legislation that forces the courts to take an extra close look at allegations of domestic violence, particularly in custody cases.[160] Unfortunately, however, disconnects remain. Domestic violence is still a widely misunderstood phenomena; thus, triers of fact—be they judges or juries—may face difficulty understanding the severe effects domestic violence can have on a relationship, a victim, and a child. Given the misconceptions that abound when allegations of domestic violence enter the picture, it is crucial for attorneys to figure a way to bridge the evidentiary gap that inevitably arises in child custody disputes where domestic violence is present. Furthermore, those most immersed in the field of domestic violence note that experts on the topic of domestic violence are often underutilized, not only in cases involving child custody disputes, but in all cases involving domestic violence.[161] Thus lawyers are missing out on a vital resource; the reason likely stems from a lack of exposure to

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[153] *Id.* at 299-300.
[154] Telephone Interview with Gail Rice, *supra* note 63; Telephone Interview with Dr. Toby Myers, *supra* note 60.
[155] Telephone Interview with Dr. Toby Myers, *supra* note 60.
[156] *Id.*
[157] TEX. FAM. CODE ANN. § 153.002 (Vernon 2011).
[158] TEX. FAM. CODE ANN. § 153.004 (Vernon 2011).
[159] TEX. FAM. CODE ANN. § 153.131 (Vernon 2011).
[160] *See* TEX. FAM. CODE ANN. § 153.004 (Vernon 2011) (History of Domestic Violence).
[161] This claim actually formed the foundation for this paper, as Jeana Lungwitz, Director of the Domestic Violence Clinic at The University of Texas School of Law, suggested that expert testimony may be underutilized in cases involving domestic violence. Dr. Noel Busch-Armendariz, an Associate Professor at The University of Texas School of Social Work, Director of the Institute on Domestic Violence and Sexual Assault, and publisher of numerous studies and papers on domestic violence, also supported this claim.

the topic, an inability to spot the signs of a victim's seemingly contradictory behavior, and a lack of overall training in how to identify and address the presence of domestic violence in a larger legal battle.[162]

The Texas Family Code already makes the fundamental presumption that domestic violence is relevant to custody determinations.[163] Attorneys for victims of domestic violence should consider employing expert witnesses in order to truly put this presumption into practice. Assuredly, the court is likely to find its way to another presumption present in the Texas Family Code—the presumption that it is in the best interest of the child for both parents to be granted joint managing conservatorship.[164] If the court grants joint managing conservatorship in the case of Carol and Al, she and her son Ben may face a future full of further abuse and manipulation. Without a full understanding of how domestic violence affects a relationship and the behavior of individuals in that relationship, the court risks making a custody determination subject to the common misconceptions that surround domestic violence. An expert witness on domestic violence—whether that witness be a psychologist, a Ph.D. with a substantial body of research on domestic violence, a social worker, or a veteran counselor at a battered women's shelter—can help bridge the evidentiary gap that exists in child custody cases involving domestic violence, ideally leading to a more appropriate, or at the very least, a better-informed custody decision by the trier of fact.

Recouping Overpayment of Spousal Maintenance: The New Overpayment Statute and the Potential for Spousal Maintenance Fraud

By Tara Romero*

Thesis: In 2011, the Texas Legislature enacted a new law allowing for recouping overpayment of spousal maintenance, which, while signaling a new and less restrictive view of spousal maintenance in Texas, may prove to have unanticipated gaps and possibly allow for "spousal maintenance fraud."

I. Introduction

Spousal maintenance,[165] a.k.a. alimony, is an arguably controversial and unquestionably still developing concept in Texas family law. Currently Texas law provides for spousal maintenance in carefully described circumstances under Ch. 8 of the Texas Family Code.[166] Spousal maintenance is a court-ordered award, typically made during divorce proceedings, consisting of monthly payments from the future income of one spouse, e.g., the husband, for the support of the other spouse, e.g., the wife.[167]

A. The Traditional Texas View. The concept of spousal maintenance is not an outrageous idea or outlandish notion for most people as of 2013. Yet Texas looked at spousal maintenance in this way until less than two decades ago. Beginning in 1841, Texas courts repeatedly proclaimed that alimony was against Texas pub-

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[162] Telephone Interview with Dr. Noel Busch-Armendariz, *supra* note 63.

[163] *See* TEX. FAM. CODE ANN. § 153.004 (History of Domestic Violence).

[164] *See* TEX. FAM. CODE ANN. § 153.131(b).

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[165] Because the term "alimony" had negative connotations associated with it, the Texas Legislature employed the term "spousal maintenance" to refer to court-ordered alimony. James W. Paulsen, *Remember the Alamo[ny]! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 LAW & CONTEMP. PROBS. 7, 55 (1993) [hereinafter Paulsen, *Remember the Alamo[ny]!*]. For consistency, this article will refer to court-ordered alimony as spousal maintenance hereinafter.

[166] In section 8.051 of the Texas Family Code, spouses are only eligible for spousal maintenance if they "will lack sufficient property … on dissolution of the marriage to provide for [their] minimum reasonable needs." Additionally, relief is provided if the other spouse was convicted of or received deferred adjudication for an act of family violence or, while the suit is pending, the spouse seeking maintenance was married to the other spouse for at least 10 years and cannot earn the income to provide for minimum needs. Tex. Fam. Code Ann. § 8.059. Spousal maintenance can also be ordered for a spouse who cannot earn income enough to provide for their minimum reasonable needs because of an "incapacitating physical or mental disability" or is the custodian of a child of the marriage with a physical or mental disability and therefore cannot earn income to provide for minimum needs. Tex. Fam. Code Ann. § 8.051(2)(A), (2)(C).

[167] To avoid the strain of "his or her," the feminine pronoun will be used in this article to denote the obligee, which basically reflects the reality of virtually all cases; obviously the converse applies to the obligor.

lic policy.[168] Although court-ordered alimony was proclaimed to be against Texas public policy, in 1967 there was a softening of this view when the Texas Supreme Court ruled that contractual alimony[169] was not prohibited in Texas law in *Francis v. Francis*.[170]

This opposition to spousal maintenance was promulgated by a shifting number of legislators in the Texas House of Representatives for several years.[171] Finally, in 1995, perhaps after realizing that not allowing for spousal maintenance could have a debilitating impact on the state's economy as well as the spouse denied the right to request spousal maintenance, the Texas Legislature passed the statute allowing for court-ordered maintenance.[172] As the last state in the nation to pass an alimony statute, it might have seemed as if Texas had finally caught up with the spousal maintenance laws of the rest of the United States. In fact, while the passage of this statute marked a significant change in Texas family law, the Texas statute was almost certainly one of, if not the most, restrictive spousal maintenance statutes in the country.[173]

B. Modified View in 1995 (With Reservations). The purpose of spousal maintenance in Texas is "to provide temporary and rehabilitative support for a spouse whose ability to support himself or herself has eroded over time while engaged in homemaking activities and whose capital assets are insufficient to provide support."[174] The Texas Legislature apparently thought the restrictive statutes of 1995 adequately provided for this purpose, because until 2011, the spousal maintenance statutes remained basically the same. In 2011, the Texas Legislature amended the spousal maintenance statutes to make them dramatically less restrictive and more realistic.

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[168] In 1841, the Congress of the Republic of Texas passed Texas' second divorce statute. *1841 Laws of the Republic of Texas, An Act Concerning Divorce and Alimony § 4*, at 20, 2 H. GAMMEL, LAWS OF TEXAS 484 (1898). This statute provided for divorce and alimony during divorce proceedings, but was silent on the subject of alimony after divorce; thus, because permanent alimony was not expressed in the legislation, the courts took the stand that it was prohibited. James W. Paulsen, *The History of Alimony in Texas and the New "Spousal Maintenance" Statute*, 7 TEX. J. WOMEN & L. 151 (1998) [hereinafter Paulsen, *History of Alimony*]. After this statute was passed (until recent legislation), the courts of Texas declared that court-ordered permanent alimony was against the public policy of Texas. *See e.g.*, *Cunningham v. Cunningham, et al.*, 40 S.W.2d 46 (Tex. 1931); *Francis v. Francis*, 412 S.W.2d 29, 32 (Tex. 1967); *McElreath v. McElreath*, 345 S.W.2d 722, 747 (Tex. 1961); *Stubbe v. Stubbe*, 733 S.W.2d 132, 133 (Tex. 1987). One of the reasons the courts of Texas purported that alimony was against the public policy of the state was that the community property system in Texas already provided for the support of the wife in ways that states without community property systems did not, and thus, alimony was incompatible with the community property system. *See e.g.*, *Cameron v. Cameron*, 641 S.W.2d 210, 218 (Tex. 1982) ("One reason that Texas denies permanent alimony is that more than a century and a half ago, the state…took the lead to give wives equality with their husbands in the ownership of property they acquired during coverture…[thus,] spouses share the gain of their marriage equally under our community property [system.]"); *Pape v. Pape*, 35 S.W. 479, 480 (Tex. Civ. App. 1896) ("[I]t may be said that our statutes make no provision for permanent alimony…. Ample provision is made in the statutes of this state for the support of the wife by the provision of the division of the property.").

[169] Texas law distinguishes between "spousal maintenance" (or court-ordered alimony) and "contractual alimony." Since contractual alimony is interpreted under contract law, this article will only focus on the application of section 8.0591 and other section from Ch. 8 of the Texas Family Code to spousal maintenance. *See e.g.*, *Schwartz v. Schwartz*, 247 S.W.3d 804, 806 (Tex. App.—Dallas 2008, no pet.) (stating that contractual alimony agreements are "interpreted under general contract law").

[170] *Francis*, 412 S.W.2d 29.

[171] An alimony statute was consistently introduced in the Texas legislature beginning in 1971 and culminating in 1995 with the enactment of the spousal maintenance bill. Paulsen, *History of Alimony*, *supra* note 4, at 154. The latter bill almost always passed in the Senate, but was always lost in the process in the House without ever coming to a vote until 1995. *Id.* at 154-55.

[172] *See* Sampson & Tindall's Tex. Fam. Code Ann. ch. 8, Introductory Comment (stating that "[s]pousal maintenance was enacted, at least in part, allegedly as a measure to prevent an economically displaced spouse from going on welfare"); Paulsen, *History of Alimony*, *supra* note 4, at 155 (noting that while debating a welfare bill one representative stated that "forty-two percent of Texas homemakers are on welfare within two or three years after divorce, and said that she thought a good way to cut down on welfare would be by having alimony").

[173] The statute passed in 1995 had a marriage duration requirement of ten years in order to qualify for spousal maintenance; the only state in the nation to have such a requirement. Paulsen, *History of Alimony*, *supra* note 3, at 156. The statute also had a cap of no more than the less of $2,500.00 or 20% of the payor's "average monthly gross income"; Texas was one of only two states with this sort of income cap. *See* Tex. Fam. Code Ann. ch. 8, Introductory Comment; Paulsen, *History of Alimony*, *supra* note 4, at 156. Also, spousal maintenance ordinarily could not continue for longer than three years. Tex. Fam. Code Ann. § 8.054. The Texas statutes were so restrictive in an attempt to alleviate fears of wide-spread abuse of alimony. *See* Tex. Fam. Code Ann. ch. 8, Introductory Comment (noting that "the spousal maintenance statutes attempted to eliminate the legendary abuses surrounding Hollywood-style alimony…").

[174] 39A Tex. Jur. Family Law § 811.

C. Dramatic Makeover in 2011. Fifteen years of essentially ignoring the spousal maintenance statutes might raise questions as to why the legislature finally decided to amend these provisions. The most likely reason the Texas Legislature enacted amendments to the original statute is simply that these amendments and the expansion of the spousal maintenance law in Texas were a long time coming, essentially from its first enactment in 1995.[175] While the legislature in 1995 finally caved into pressures to pass a spousal maintenance bill, the statutes initially were designed to be very narrow and limiting in order to make it very difficult for courts to order spousal maintenance.[176] Therefore, while Texas finally "allowed" for the concept of spousal maintenance, it proved to be unrealistic and almost unworkable for most applicants in the courts.[177] Ever since this statute was passed, there were those who said that this restrictive statute was too limited and changes needed to be made.[178] It is most likely that the pressure from family law attorneys, the courts, and women's rights activists led the legislature to pass amendments that made the statutes more realistic and more workable.[179]

The Texas Legislature enacted amendments to eight existing sections and added one completely new section (the subject of this article). All of the action was in subchapter B, "Court-Ordered Maintenance." Section 8.0591 states that if the maintenance obligation has been terminated, an obligee must return any payment of spousal maintenance which exceeds that amount of maintenance ordered.[180] The legislation further provides the obligor with the right to sue the obligee to recover overpaid maintenance.[181] Thus, if the spousal maintenance requirement ends or is terminated, the obligor is entitled to recoupment of any overpayment of the spousal maintenance, and to recover "attorney's fees and all court costs" expended in order to recover the overpayment.[182]

The first issue is to identify the circumstances under which termination of the court-ordered obligation occurs. Section 8.056 provides that termination of spousal maintenance arises in three different instances.[183] First, a spousal maintenance obligation terminates on the death of either the obligor or the obligee. Logically, it seems that such an overpayment will most likely occur only upon the death of the obligee.[184] Second, the spousal maintenance obligation terminates on the remarriage of the obligee.[185] Third, a spousal maintenance obligation can terminate, after a court hearing if the court finds that the obligee "cohabits with another person with whom the obligee has a dating or romantic relationship in a permanent place of abode on a continuing basis," regardless of whether the obligee receives any money or support from this other person.[186]

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[175] Since the original enactment of spousal maintenance in Texas in 1995, there have been relatively few substantial amendments to the statute. *See* JUDICIARY & CIVIL JURISPRUDENCE COMMITTEE, BILL ANALYSIS: HB 901 (2011) (stating that the "spousal maintenance laws have had few amendments since enactment and interest parties note that these laws contain a number of vague provisions" which the legislature sought to address in the 2011 amendments); JURISPRUDENCE, BILL ANALYSIS: HB 901 (2011) (noting that the "[t]he law regarding spousal maintenance, including economic limitations and duration of maintenance, has remained mostly unchanged for many years and also contains a number of vague provisions" and that in implementing the 2011 amendments the legislature was moving to remedy these issues).

[176] Paulsen, *History of Alimony*, *supra* note 4; *see also* Lauren F. Redman, *Domesticity and the Texas Community Property System*, 16 BUFF. WOMEN'S L.J. 23, 30 (2008).

[177] *See e.g.*, J. Thomas Oldham, *Everything is Bigger in Texas, Except the Community Property Estate: Must Texas Remain a Divorce Haven for the Rich?*, 44 Fam. L.Q. 293, 315 (2010) (noting that "given the severe restrictions upon the award of spousal maintenance in Texas, in most instances a divorce court will not be able to adequately address the postdivorce [sic] needs of a dependent spouse via spousal support").

[178] *See* Redman, supra note 12, at 33-34 (noting that while the 1995 spousal maintenance statute was a "step in the right direction" for spousal maintenance law in Texas there were still problems with the statute and changes to be made).

[179] Witness lists from the House and Senate committees reviewing the bill show attorneys representing the Texas Family Law Foundation, as well as a family law attorney from El Paso. JUDICIARY & CIVIL JURISPRUDENCE COMMITTEE, WITNESS LIST: HB 901 (2011); JURISPRUDENCE, WITNESS LIST: HB 901 (2011).

[180] Tex. Fam. Code Ann. § 8.0591.

[181] *Id.*

[182] *Id.*

[183] Tex. Fam. Code Ann. § 8.056.

[184] Tex. Fam. Code Ann. § 8.056(a). It is possible, however, that an obligor may have established an automatic payment plan with his bank, which goes unnoticed by the estate administrator for a period, and thus the estate makes overpayments of spousal maintenance after the obligor's death.

[185] *Id.*

[186] Tex. Fam. Code Ann. § 8.056(b). This author notes that section 8.056 does allow for termination upon cohabitation regardless of whether the obligee receives an support or money from her significant other in order to distinguish the Texas law from some other states laws which require more than mere cohabitation. *See Divorced Woman's Subsequent Sexual Relation or Misconduct as Warranting, Alone or with Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453 (1980) (noting states, such as

With this understanding of termination, the possibilities for overpayment are relatively clear. Yet, the third possibility for termination and thus overpayment, in practice, becomes considerably more problematic to deal with. Under the third possibility, the spousal maintenance will not end until a court order terminates the maintenance. It seems, then, that the time the obligee and her significant other were living in a permanent home up until the court order is rendered does not technically constitute overpayment under Texas law.

The reasons the law does not provide overpayment in this instance are unclear. There is a possibility the obligee will have a conjugal relationship (i.e., a marriage-like relationship with her significant other) but may not actually be living with the significant other. Texas law does not seem to provide protection for the obligor in these circumstances. The spousal maintenance statutes in Texas, particularly section 8.0591 read in conjunction with section 8.056, contain gaps regarding these circumstances. These gaps could allow for the obligee to abuse the system, and essentially have her cake and eat it too by retaining her spousal maintenance intact while having an effective conjugal relationship on the side.

While the 2011 amendments to the spousal maintenance chapter providing for overpayment of spousal maintenance may signal a new and less restrictive view on spousal maintenance, they prove to have gaps and possibly allow for "spousal maintenance fraud." This article explores this idea in depth by introducing the overpayment statute, explaining its uses, and introducing the possible gaps in Part II. In Part III, the article expands on the possible gaps to demonstrate how they could lead to "spousal maintenance fraud." Part IV examines the legislative intent behind the spousal maintenance statutes, which demonstrates the need for a solution to the potential of "spousal maintenance fraud" and proposes a possible solution. Finally, Part V discusses some other potential issues with the overpayment statute.

II. What is Overpayment of Spousal Maintenance?

This part explores the language and purpose of the overpayment statute, explains how overpayment is likely to happen, and introduces a possible gap in the statute that legislation should address.

A. The Overpayment Statute. Some of the most noted amendments to the spousal maintenance statute made in 2011, such as the expanded duration of maintenance and expanded maximum amount of maintenance,[187] relaxed the spousal maintenance statute and made the statutes, as most people see it, less restrictive and more realistic. There are several provisions that continue to protect the obligor as Texas has historically done,[188] including section 8.0591.

§ 8.0591. Overpayment

(a) If an obligor is not in arrears[189] on the obligor's maintenance obligation and the obligor's maintenance obligation has terminated, the obligee must return to the obligor any maintenance payment made by the obligor that exceeds the amount of maintenance ordered or approved by the court, regardless of whether the payment was made before, on, or after the date the maintenance obligation terminated.

(b) An obligor may file a suit to recover overpaid maintenance under Subsection (a). If the court finds that the obligee failed to return overpaid maintenance under Subsection (a), the court shall order the obligee to pay the obligor's attorney's fees and all court costs in addition to the amount of the overpaid maintenance. For good cause shown, the court may waive the requirement that the obligee pay attorney's fees and court costs if the court states in its order the reasons supporting that finding.

Enacted by Acts 2011, 82nd Leg., ch. 486 (H.B. 901), § 8, eff. Sept. 1, 2011.

Illinois, which require the lover to give the obligee financial assistance in order for a court to be able to terminate the spousal maintenance).

[187] Tex. Fam. Code Ann. § 8.054 (expanding the duration of maintenance from a limit of 3 years to a max of 10 years); Tex. Fam. Code Ann. § 8.055 (expanding the amount of maintenance from a limit of the lesser of $2,500 or 20% of the spouse's average monthly income to the lesser of $5,000 or 20% of the spouse's average monthly income).

[188] For a full discussion of the provisions which continue to protect the obligor *see infra* sec. IV(a).

[189] Spousal maintenance arrearage is defined in the Texas Family Code as "a spousal maintenance payment not timely made." Tex. Fam. Code Ann. § 8.058.

This completely new section was put in place to fill a gap in the previous iteration of the spousal maintenance statutes. The 1995 statutes did not contain an overpayment provision; the obligor had no remedy for overpayment before September 1, 2011. This provision protects the obligor from the obligee in that it codifies the fact that the obligee legally must return any overpayment of spousal maintenance to the obligor and, if not, the obligor has a cause of action against them. This cause of action essentially protects the obligor from a dishonest obligee.

B. How Overpayment Happens. The text of the overpayment statute itself gives very little guidance on its applicability.[190] There is no explanation or formal definition provided for "overpayment." Nonetheless, what overpayment is and how it occurs is relatively simple to deduce from the surrounding statutes, most especially section 8.056 on termination of spousal maintenance.

> § 8.056. Termination
> (a) The obligation to pay future maintenance terminates on the death of either party or on the remarriage of the obligee.
> (b) After a hearing, the court shall order the termination of the maintenance obligation if the court finds that the obligee cohabits with another person with whom the obligee has a dating or romantic relationship in a permanent place of abode on a continuing basis…
> Ended by Acts 1997, 75th Leg., ch. 7 (S.B. 334), § 1, effective April 17, 1997; am. Acts 2001, 77th Leg., ch. 807 (H.B. 691), § 1, effective September 1, 2001 (renumbered from Sec. 8.007); am. Acts 2011, 82nd Leg., ch. 486 (H.B. 901), § 5, effective September 1, 2011.

In sum, there are three instances in which spousal maintenance can be terminated, and how the facts lead to overpayment of spousal maintenance. The first is death of either the obligor or obligee. Any payments made after the death of either is assuredly an overpayment. The second is remarriage of the obligee. And, the third is the obligee cohabiting with another person with whom she has a "dating or romantic relationship in a permanent place of abode on a continuing basis."[191]

III. Potential for "Spousal Maintenance Fraud"

As used in this article, "spousal maintenance fraud" is the process by which an obligee uses gaps in the language of the overpayment statute to continue to "legally" receive spousal maintenance contrary to legislative intent. This part will explore the potential types of "spousal maintenance fraud" and how they could occur, why the gaps (and the possibility of "spousal maintenance fraud") go against a traditional view of legislative intent as related to spousal maintenance, and a possible solution to these gaps.

There are three possible types of "spousal maintenance fraud" to be introduced. In order to best understand how "spousal maintenance fraud" can occur, it is best to look at the hypothetical of Ted and Alice. Ted and Alice were married in June 1998 and obtained a divorce on January 2, 2011. During their marriage, Alice decided to drop out of college to become a homemaker and care for their two children. Ted supported their family throughout their marriage. Upon their divorce, Alice was unable to earn sufficient income to provide for her minimum reasonable needs or care for their children, and Ted was ordered to pay spousal maintenance of $2,500 a month for 3 years, payable January 31, 2011, and every month thereafter.[192]

A. First Scenario: Spousal Maintenance Fraud through Remarriage of Obligee

First, in order to understand how the first type of "spousal maintenance fraud" can occur, it is imperative to understand how the overpayment happens looking at the hypothetical of Ted and Alice. In this hypothet-

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[190] There is currently very little case law on overpayment in Texas, since it was enacted in September 2011. One case, which recently came out of the Houston 14th District Court of Appeals, *Garcia v. Alvarez* deals with the concept of overpayment of alimony, yet in a contractual alimony setting. Because the issue in that case dealt with contractual alimony, the parties relied on contract law and not on section 8.0591 of the Texas Family Code. *See generally* *Garcia v. Alvarez*, 367 S.W.3d 784 (Tex. App—Houston 14th Dist., 2012).

[191] Tex. Fam. Code Ann. § 8.056(b).

[192] While in the hypothetical presented the male is the obligor and the female is the obligee, this Author recognizes that this is not always the case. *See e.g.*, *Smith v. Smith*, 115 S.W.3d 303 (Tex. App.—Corpus Christi 2003); *Hackenjos v. Hackenjos*, 204 S.W.3d 906 (Tex. App.—Dallas 2006) (depicting cases in which a former wife is required to pay spousal maintenance to her former husband).

ical, in order to comply with the spousal maintenance court order, Ted has been sending Alice monthly spousal maintenance checks and she cashes or deposits them. Ted and Alice do not talk much and do not communicate about the personal lives and romantic relationships of one another. On October 31, 2011, Alice marries her boyfriend, Bob, and neglects to inform Ted of her nuptials (perhaps innocently, most probably not). Ted, unaware that his spousal maintenance obligation has been terminated by Alice's marriage,[193] continues to send spousal maintenance checks and Alice continues to deposit them. A year later, Ted hears of Alice's happy new marriage to Bob from a family friend. He realizes that he has been paying spousal maintenance for longer than he was required to.[194] He is furious when he realizes that he has overpaid spousal maintenance in the amount of $30,000.00.

In this scenario, Alice is mandated by law to reimburse Ted for the overpayment of spousal maintenance for the year in which she was married yet still receiving spousal maintenance checks from Ted. If she does not reimburse the $30,000.00 of overpayment, Ted has a cause of action against her under section 8.0591(b). Ted may receive a money judgment against Alice who will be liable for the repayment of overpayment and most likely for Ted's attorney's fees and court costs. Good luck to Ted with the collection process.

This first type of "spousal maintenance fraud"[195] occurs if the obligee willfully or knowingly hides the obligee's remarriage from the obligor in order to wrongfully continue receiving spousal maintenance, which under section 8.056 of the Texas Family Code terminates upon the obligee's remarriage.[196] Here if Alice willfully or knowingly hides her marriage to Bob from Ted for the purpose of unlawfully continuing to receive spousal maintenance payments from Ted, she commits "spousal maintenance fraud."

This first type of "spousal maintenance fraud" is the only version that has a statutory remedy provided under the Texas Family Code. Under section 8.056, the spousal maintenance obligation terminates upon the remarriage of the obligee, any payment of spousal maintenance (if the obligor is not in arrears) after the date of termination constitutes overpayment under section 8.0591. The obligee must return the overpaid maintenance to the obligor. If the obligee does not do so, the obligor may file a suit in order to recover the overpaid maintenance from the obligee. The other two types of "spousal maintenance fraud," discussed below, do not have the same explicit protections or remedies under current Texas law.

B. Second Scenario: Spousal Maintenance Fraud Through Cohabitation with Romantic Partner

Assume since the divorce Ted has been diligently paying his monthly spousal maintenance obligation of $2,500/month to Alice. They did not end their marriage on good terms and do not speak much, thus they do not keep up with each other's personal life or relationships with significant others. On October 31, 2011, Alice moves in with her boyfriend, Bob. Alice knows that if she tells Ted she is living with Bob, Ted could take her to court and have his spousal maintenance obligation terminated, so she keeps her silence. Ted does not

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[193] As stated, spousal maintenance obligation terminates upon the remarriage of the obligee. Tex. Fam. Code Ann. § 8.056(a). An interesting issue that this section could present is that of same-sex marriage. In Texas, a constitutional amendment provides for non-recognition of same-sex marriage. TEX. CON. Art. 1 § 32. At least for the foreseeable future, a real issue is presented regarding enforcement of spousal maintenance if the obligee marries someone of the same-sex in a state that recognizes such unions. This might create a scenario in which the spousal maintenance would terminate after a court hearing in which the court finds that the obligee is cohabiting in a permanent residence with a romantic partner, under section 8.056(b). This conclusion seems be consistent with the legislative intent of the statute to not require the obligor to pay spousal maintenance when the obligee is married to someone else; or, it might be viewed as consistent with Texas public policy of not recognizing same-sex marriage. This is not an issue that this article will focus on, but one that deserves note.

[194] This and the following hypotheticals assume that Ted is not in arrears on any of his payments and thus all of the three months overpayment is due him.

[195] "Spousal maintenance fraud" is a term used to describe the process in which an obligee can abuse loopholes and gaps in section 8.0591 of the Texas Family Code in order to continue to receive spousal maintenance payments when she legally or ethically should not.

[196] Arguably it is difficult to imagine a scenario in which the obligee "unknowingly" or "accidentally" continues to accept court-ordered spousal maintenance after remarriage. On the other hand, continued payment of contractual alimony may be entirely consistent with such an agreement reached in negotiations leading to divorce. More often than not, such an agreement is made with an eye to bringing equity to the division of property on divorce. Although the Internal Revenue Service takes a dim view of using alimony to provide such equity, the technique is thoroughly engrained in the practice of divorce law. The fact that Uncle Sam winds up paying some of the cost of such agreements (by reduced total taxes paid by the parties), is just one of those unfortunate facts of life for the Service. 26 U.S.C. § 71 (1986).

find out about Alice's living arrangements until late October, 2012. He files suit on November 1, 2012 to terminate the spousal maintenance pursuant to section 8.056(b).[197] After as much delay as Alice was able to generate, the court finds that she has been cohabiting with her boyfriend in a permanent place of abode on a continuing basis and terminates the spousal maintenance obligation on April 30, 2013.

Pursuant to section 8.056(c), Ted has continued to make spousal maintenance payments while the litigation was pending up until the court officially ordered the termination.[198] It seems clear and logical that the payments made during the litigation should constitute overpayment once the court made its finding. Since the obligee's actions were enough to terminate the spousal maintenance requirement, it seems to follow that the obligor should not have been required to pay spousal maintenance for the entire time the obligee acting in such a manner. Yet, this is simply *not* the case under Texas law currently. The new overpayment statute does not include language that either requires, suspends, or creates an escrow account for this payment of spousal maintenance while litigation is pending. It does not seem clear that if Ted makes the regular payments as ordered while the litigation is pending, the "overpayment" remedy is applicable when the court makes its finding.

In a state known for protecting the obligor and only allowing for spousal maintenance to be ordered in narrow circumstances, this gap in the statute, which may leave the obligor unprotected for a considerable time, allows for the obligee to abuse to the system when she knowingly or willingly hides the fact that she is cohabiting with a romantic partner in a permanent place of abode on a continuing basis in order to continue to receive spousal maintenance payments for as long as possible.

The language of section 8.056 and 8.0591 does not categorize an obligor's spousal maintenance payments as overpayment until the court officially terminates the spousal maintenance obligation. Thus, it appears an obligee can purposefully hide the fact that the obligee is cohabiting with a romantic partner from the obligor in order to fraudulently prolong the spousal maintenance payments for as long as possible. It is possible that an obligee might secrete her living arrangement from the obligor until the duration of the maintenance order has been completed. It may prove difficult for the obligor to keep track of the obligee's living situation and romantic relationships. Without a remedy found in the law, the obligor is essentially left unprotected from a dishonest obligee and must continue to make maintenance payments.

This second instance of a type of "spousal maintenance fraud" should be provided a remedy under the Texas Family Code. If the obligee's actions of cohabiting with a romantic partner are enough to constitute a reason the court *must* terminate the spousal maintenance, logic demands that the obligee cannot keep the spousal maintenance payments made during that time.

In implementing section 8.056(b), the legislature sought to terminate spousal maintenance in situations in which the obligee did not necessarily remarry, but provided the outward appearance of marriage. The legislature's use of the word "cohabiting" demonstrates this intent. According to Black's Law Dictionary, cohabiting is defined as: "[t]he fact or state of living together, *esp. as partners in life*, usu. with the suggestion of sexual relations."[199] (emphasis added) The phrase "partner's in life" is indicative of the legislature's intention to provide for situations in which the obligee is not remarried, but nonetheless is living with a romantic or dating partner as if married.

This intention may be construed by some as problematic. An obligee may argue that the legislature has surpassed their power in implementing a punishment or fine for legal conduct. Here the legislature seems to be reducing the rights of the obligee to have a romantic relationship with whomever she chooses whenever she chooses. Though, the legislature may so choose to restrict the rights of the obligee if they believe it is in the best interest of the state. Furthermore, the legislature included some protection for the obligee in this instance by providing that termination only occur after a court hearing. It is understandable that the legislature required a court hearing in the instance of cohabitation before termination of spousal maintenance could be officially ordered. Unlike marriage or death, cohabitation has no legal form or official filing associated with

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[197] Tex. Fam. Code Ann. § 8.056(b) ("After a court hearing, the court *shall* order termination of the maintenance obligation if the court finds that the obligee cohabits with another person with whom the obligee has a dating or romantic relationship with in a permanent place of abode on a continuing basis.")(emphasis added).

[198] *See* Tex. Fam. Code Ann. § 8.056(c) (stating that "[t]ermination of the maintenance obligation does not terminate the obligation to pay any maintenance that accrued before the date of termination…").

[199] BLACK'S LAW DICTIONARY 712 (9TH ed. 2009).

it.[200] What is not understandable is why the legislature did not provide the court with the ability to determine the date on which the obligee began the cohabitation and retroactively designate the termination to occur on that date.

Section 8.056(a) provides that maintenance obligations terminate automatically upon the remarriage of the obligee, and section 8.056 was implemented to terminate maintenance obligation in situations where the obligee may not technically be remarried but gives the appearance of marriage. There is no justification, after a court hearing, for the court not to determine retroactively the maintenance terminated when the cohabitation began. This is a gap in the statutes that provides an opportunity for the obligee to circumvent the legislative intent and commit "spousal maintenance fraud."

C. Possible Third Scenario: Spousal Maintenance Fraud Through Continued Conjugal-Like Relationship

Clearly the legislature intended to terminate spousal maintenance in situations in which the obligee was giving the outward appearance of marriage. It is also possible that an obligee could give some outward appearance of a marriage without "cohabiting" with their romantic partner on a continuing basis. Such a scenario is presented by a third possible instance in which "spousal maintenance fraud" may occur. Again, assume Ted has been persistently paying to Alice his monthly spousal maintenance obligation of $2,500/month. They do not speak frequently, because they did not end their marriage on good terms. They do not keep up with each other's personal life or whether the other has a significant other. Alice has had a continuing, sexual relationship with her boyfriend, Bob, since May 31, 2011. They spend many nights together, but do not live together. On October 31, 2011, Bob asks Alice to move in with him and live as his common law wife. Alice knows that if she moves in with Bob and Ted finds out, Ted could take her to court and have his spousal maintenance obligation terminated. She decides not to move in with Bob for that sole purpose, yet continues their intimate relationship, but maintains separate households. Under current Texas law, Ted has no remedy by which he can seek to have the spousal maintenance terminated if Alice is not cohabiting with Bob. Here, Alice is able to evade the court process, thereby having her cake and eating it too by continuing to receive her spousal maintenance payments. This is where the third possible type of "spousal maintenance fraud" arises.

This type of "spousal maintenance fraud" may occur when the obligee purposefully maintains a separate place of residence from her romantic partner with whom she has a continuing, romantic (formerly conjugal[201]) relationship, for the purpose of continuing to receive spousal maintenance payments. A conclusion of "spousal maintenance fraud" is the most speculative—and likely to be the most controversial—of the three versions presented in this article, though the argument for it can logically be made.

In amending section 8.056(b), the legislature was attempting to terminate spousal maintenance obligations when the obligee gives the outward appearance of being married. Yet, there are certainly situations in which a couple could give off the outward appearance of marriage without living together in a permanent place of residence. There are also, certainly, instances in which an obligee could purposefully (spitefully even, some might argue) keep a separate residence apart from a romantic partner, with whom she has a continuing, intimate relationship, for the *sole purpose* of evading section 8.056(b). This gap in section 8.056—which in turn provides a gap in section 8.0591 by not terminating the maintenance obligation and thus not allowing payments during the time of this relationship to not to constitute overpayment—allows an obligee to abuse a loophole in the law and leaves the obligor unprotected from a crafty obligee.

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[200] Interestingly, Texas also recognizes informal marriage, a.k.a. common law marriage. Tex. Fam. Code Ann. §§ 2.401-2.404. Such a marriage may also lack a legal form or filing. A couple may execute and file a declaration of informal marriage with the county clerk, but may also prove an informal marriage through a three-prong test showing: an agreement to be married, that they lived together after the agreement, and an outward appearance of marriage. Tex. Fam. Code Ann. §§ 2.401-2.402. It too requires a court finding to confirm the existence of a marriage. Tex. Fam. Code. Ann. § 2.401. But, once that occurs section 8.056 and all of the remedy set forth in section 8.0591 spring forth.

[201] "Conjugal" is a term that the legislature employed in section 8.056(b) before the implementation of the 2011 amendments, which deleted the term. Tex. Fam. Code Ann. § 8.056. Black's Law Dictionary defines conjugal as "[o]f or relating to the married state…." BLACK'S LAW DICTIONARY (9th ed. 2009). Conjugal is used in this article's explanation of the third type of "spousal maintenance fraud" in order to establish the legislative intent of terminating "spousal maintenance fraud" where an obligee is giving off the outward appearance of marriage.

There are serious reservations to identify this potential activity on the part of the obligee as "fraud." First, the legislature, when amending and reworking the statute, purposely reworded section 8.056(b), which made the requirements for termination through cohabitation more lax, but did not provide for termination of spousal maintenance where some form of cohabitation does not exist. In 2011, the legislature amended the former language in section 8.056(b) for termination upon a finding "the obligee cohabits with another person in a permanent place of abode on a continuing, *conjugal* basis" to termination upon finding "the obligee cohabits with another person *with whom the obligee has a dating or romantic relationship* in a permanent place of abode on a continuing basis."[202] (emphasis added). The asserted clarification of language to "dating or romantic relationship," instead of the term "conjugal"—which has a connotation of marriage—strongly suggests that the legislature was making the finding of termination in these instances to be less strict (or more relaxed), yet the obligee is still required to cohabit with her romantic partner. The fact that the legislature kept this requirement in place is testament to the fact that cohabitation is a necessary element for termination of spousal maintenance.

By analogy, cohabitation is a necessary element in a court finding for informal or common law marriage.[203] The fact situations that give rise to common law marriage are similar to those which cause the type of termination set forth in section 8.056(b). It is significant that in showing a common law marriage there must be proof of cohabitation. The fact that in the scenario which gives rise to the third type of spousal maintenance the obligee does not live with her romantic or dating partner is a significant weakness in a court actually finding that that scenario presents a type of fraud.

An obligee, who is single, choosing to date someone or have a romantic involvement with someone and not live with him is too much of a lifestyle choice, even if that choice is to purposefully evade section 8.056(b). If so, it is not a situation that should rise to the leverl of fraud. Being single and sexually active is not sufficient for special financial punishment in 2013. Here, the obligee, if not living with her significant other solely for the purpose of evading termination of spousal maintenance, at worst is merely being crafty. Therefore, a reasonable conclusion is that this type of possible "spousal maintenance fraud" need not be addressed by the legislature, and does not need a special provision to provide a remedy.

III. The Need for a Solution and Possible Solutions Proposed

Remarriage, the first type of "spousal maintenance fraud," is already provided a statutory remedy, and non-cohabitation, the third type of possible "spousal maintenance fraud," does not require a remedy. On the other hand, cohabitation, the second type of "spousal maintenance fraud," should be addressed by the legislature and a remedy should be provided. This part of the article examines how the cohabitation gap is contrary to the apparent legislative intent, and therefore needs a remedy and the possible remedies available.

A. Contrary to Legislative Intent: Why a Solution Is Necessary

The gaps in the "cohabitation termination" statute seem to go against the legislative intent. As initially stated, Texas had a long history of claiming spousal maintenance to be against Texas public policy.[204] After the legislature eventually passed a statute allowing for spousal maintenance in 1995, this statute was *very* restrictive and unrealistic in its provisions. The restrictive statutes demonstrated the legislature's continued skepticism of spousal maintenance as truly a sound policy, and there was a desire to protect the obligor from what was deemed an outrageous abuse of alimony in other states. Although the legislature made large strides to fashion spousal maintenance into a less restrictive and more realistic form in the 2011 amendments, there are still several provisions in the amended statutes that disclose the legislature's continued intent on protecting the obligor.

First, section 8.053 provides:

> [i]t is a rebuttable presumption that maintenance under Section 8.051(2)(B) is *not warranted unless the spouse seeking maintenance has exercised diligence* in:
> (1) earning the sufficient income to provide for the spouse's minimum reasonable needs; or

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[202] Tex. Fam. Code Ann. § 8.056.
[203] Tex. Fam. Code Ann. § 2.401.
[204] *See* discussion *infra* Part I.

> (2) developing the necessary skills to provide for the spouse's minimum reasonable needs during a period of separation and during the time the suit of dissolution of marriage is pending.[205] (emphasis added).

This section indicates courts should assume that ordering spousal maintenance is not appropriate unless the party seeking the spousal maintenance can show to the court she attempted to earn sufficient income or to develop the necessary skills to provide for her minimum reasonable needs. This assumption leans heavily in favor of the possible obligor, because the spouse seeking spousal maintenance has the burden to provide sufficient evidence to rebut the presumption.[206]

Second, section 8.054 requires that the court must "limit the duration of a maintenance order to the shortest reasonable period that allows the spouse seeking maintenance to earn sufficient income to provide for the spouse's minimum reasonable needs…."[207] In addition, the 2011 amendments to the statute continue to set a maximum number of years that spousal maintenance can be ordered, based, in part, on the number of years the couple was married.[208] This section demonstrates the legislature's attempt to deter the abuse of spousal maintenance by not allowing the courts to order spousal maintenance for more than is absolutely necessary. This is, again, a protective measure for the obligor.

Third, while increasing the income cap in the 2011 amendments,[209] the legislature made the decision to keep an income limitation of some sort. Texas is only one of two states in the country that have an income cap on spousal maintenance (the other being Louisiana where a maximum of one-third of the spouse's average monthly income is imposed).[210] The income cap, or the maximum allowed court-ordered spousal maintenance, demonstrates the legislature's continued attempt to protect the possible obligor from being ordered to pay outrageous sums in monthly spousal maintenance, a.k.a. "Hollywood-style alimony". The fact that the legislature kept this income cap in place when they were implementing amendments to make the statute less restrictive exhibits the legislature's continued interest in protecting the obligor.

These provisions in the spousal maintenance statutes and Texas' history of skepticism towards spousal maintenance taken together with the new overpayment provision demonstrate the legislature's intent to provide temporary, rehabilitative support for a spouse in need, but still to protect the obligor required to make these payments.

The gaps in section 8.0591 do not reflect the true intent of the legislature. If the legislature intends to protect the obligor from abuses of the obligee, which it has been demonstrated is indeed their intent, this gap cannot be left as is. The obligor is essentially left unprotected, since without the explicit right to sue under the statute, he has no remedy for overpayment, and the obligee is provided a loophole in which she can defraud the obligor (and the system). Therefore, the statutory language should be amended to close these gaps and eliminate the possibility.

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[205] Tex. Fam. Code Ann. § 8.053.

[206] While the trial courts have discretion to determine what amount of evidence is sufficient, the courts seem to agree that the spouse seeking spousal maintenance has to demonstrate evidence of a good faith attempt to earn the income or develop the necessary skills to provide for their minimum needs. *See e.g.*, *Coleman v. Coleman*, Not reported in S.W.3d, 2009 WL 4755173 (Tex. App.—Fort Worth 2009, no pet.) (showing the amount of evidence that is not sufficient to rebut the presumption); *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772 (Tex. App.—San Antonio 2004, pet. denied) (holding that the wife did not provide sufficient evidence to rebut the presumption); *In re Marriage of Eilers*, 205 S.W.3d 637 (Tex. App.—Waco 2006) (holding that the wife did provide sufficient evidence to rebut the presumption).

[207] Tex. Fam. Code Ann. § 8.054(a)(2).

[208] Tex. Fam. Code Ann. § 8.054(a)(1) (providing that the spousal maintenance order have a maximum duration of five years if the couple was married between ten and twenty years, seven years if the couple was married for more than twenty but less than thirty years, or ten years if the couple was married for more than thirty years).

[209] The 2011 amendments to the spousal maintenance statutes increased the income cap on the amount of maintenance allowed to be ordered from the lesser of $2,500.00 or 20% of the spouse's average monthly gross income to $5,000 or 20% of the spouse's average monthly gross income. Tex. Fam. Code Ann. § 8.055.

[210] *See* Paulsen, *History of Alimony*, *supra* note 4 (stating that "[t]here is only one [other] state, Louisiana, that puts an absolute income cap on alimony…[and] Louisiana [law] says no more than one-third of income [can be ordered for spousal maintenance]").

B. Possible Solution: Rewording of the Statutes

While the gaps in section 8.056 and section 8.0591 provide for the potential of "spousal maintenance fraud," a rewording and amendment to the statutes could resolve this problem. As is shown below, the statutory language in section 8.0591 does not necessarily need amending provided amendments to and rewording of section 8.056 are accomplished. Once rewording of section 8.056 is completed, section 8.0591 will provide remedies for the first two types of "spousal maintenance fraud" presented. When the obligee willfully or knowingly hides her remarriage, the obligor has a ready remedy.[211] For this reason, this article only proposes a potential solution for "cohabitation spousal maintenance fraud."[212]

The possible solution to this gap in statutory language when the obligee willingly or knowingly secretes the fact that she is cohabiting with a romantic partner in a permanent home on a continuing basis requires only simple rewording of section 8.056, such as:

> § 8.056, Termination
> (b) After a hearing, the court shall order the termination of the maintenance obligation if the court finds that the obligee cohabits with another person with whom the obligee has a dating or romantic relationship in a permanent place of abode on a continuing basis. Upon finding the above, the court shall retroactively date the termination of the maintenance obligation to the date the obligee began cohabiting with another person with whom the obligee has a dating or romantic relationship. (emphasis added to denote the addition).

This amendment would provide the authority for the court[213] to retroactively date the termination of the maintenance obligation to the proper date.

The court could also provide a temporary order, which orders the obligor to make spousal maintenance payments into an escrow account beginning the day the suit for termination is filed. This will allow the obligor to be protected from a pyrrhic victory and more easily recover overpayment after termination is determined.

Section 8.0591 states that if the maintenance obligation has been terminated and the obligor is not in arrears, the obligee is required to return to the obligor any overpaid spousal maintenance "*regardless of whether the payment was made before, on, or after the date the maintenance obligation was terminated*."[214] (emphasis added). Therefore with the proposed amended language in place, the obligor would be entitled to repayment of all the maintenance payments made from the date the obligee began cohabiting with her significant other (or the date of termination the court retroactively ordered).

It might be argued that it will be too difficult for the obligor to establish the exact date the obligee began the cohabitation and that, therefore, this high burden of proof on the obligor presented by the suggested amendment language is unworkable. If so, the legislature might direct the court to retroactively date the termination of the spousal maintenance obligation to the date the suit for termination of spousal maintenance was filed by the obligor. This could be done by adding the following language in place of the italicized provision above: "*Upon finding the above, the court shall retroactively date the termination of the maintenance obligation to the date the suit for termination of spousal maintenance was filed with the court.*" This still leaves a gap of time when the obligee is cohabiting with her romantic partner unbeknownst to the obligor and legally receiving spousal maintenance payments.

There is the danger that this could create an even larger incentive for the obligee to try to defraud the obligor by secreting her living arrangements from the obligor in order to continue to receive spousal maintenance payments. This type of incentive system should be avoided in order to prevent situations of "spousal maintenance fraud" from occurring. Therefore, the first proposed solution, with the termination retroactively dated to the date the cohabitation began, is preferable.

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[211] *See supra* p. 17-18.
[212] *See supra* p. 20-22.
[213] This author continues to think a court hearing is necessary in the solution presented, because, as stated above, cohabitation or beginning a continuing, dating relationship requires no legal filing, whereas death and marriage both have legal certificates filed with the county courthouse. It is important for a court to make a determination on the facts of the case before the maintenance can officially be terminated.
[214] Tex. Fam. Code Ann. § 8.0591(a).

IV. Other Potential Issues:

There are other issues that the overpayment statute presents other than the gaps that provide for the potential of "spousal maintenance fraud," which might be addressed. First, it should be noted that section 8.0591(b), which allows for the obligor to bring suit against the obligee in order to recover overpaid spousal maintenance, provides for a money judgment. Obviously, money judgments against private individuals are very difficult to enforce or collect. Texas only allows for non-exempt property to be seized for payment of money judgments.[215] Because court-ordered spousal maintenance is awarded to a spouse who has successfully demonstrated to the court that she cannot provide for her reasonable *minimum* needs, intuitively it follows that most obligees will not have non-exempt property.[216] In attempting to enforce a money judgment, the obligor is faced with trying to squeeze the proverbial blood from a turnip. In seeking relief, the obligor must go to court in hopes of recouping the overpayment, racking up court costs and attorney's fees along the way and in the end only to receive an assumptively worthless money judgment, which incidentally he would have to go to court again to try to enforce.[217] In short, allowing only for a money judgment essentially leaves section 8.0591(b) virtually useless.

Arguably, this system imposes a due diligence requirement on the obligor to make sure he does not overpay his spousal maintenance in the first place. This due diligence requirement could be a good thing in the eyes of the legislature because, if an obligor does not overpay his spousal maintenance requirement, unnecessary litigation could be avoided.

Another public policy concern is the proposed amendments could possibly discourage an obligee from remarriage until the duration of her spousal maintenance payments is over. Again, this seems rather unlikely. Though Texas has a longstanding public policy of encouraging marriage,[218] this public policy must be weighed against the public policy of limiting spousal maintenance and protecting the obligor. Because the possibility of showing the policy discourages marriage is so slim, likely the legislature's interest to protect the obligor will prevail.

V. Conclusion

The Texas Legislature introduced a new law allowing for the recoupment of overpayment of spousal maintenance in 2011, which while potentially signaling a new and less restrictive view of spousal maintenance, possibly proves to have gaps that allow for "spousal maintenance fraud." Texas Family Code Section 8.0591, the overpayment statute, provides some protection to the obligor, but has gaps in the statutory language, which leave the obligor susceptible to abuse. While this statute is meant to protect the obligor in situations where the obligor has continued to make spousal maintenance payments after the maintenance obligation has been terminated, it when read in conjunction with section 8.056, has gaps or loopholes in the statutory language that allows the obligee to potentially commit "spousal maintenance fraud" and leave the obligor unprotected. While the potential of "spousal maintenance fraud" is indeed troubling and against the legislative intent behind spousal maintenance provisions, it is possible to remedy some of this problem with further amendments.

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[215] Tex. Prop. Code §§ 42.001–42.002

[216] Examples of non-exempt property are as follows: a second house (beach house, lake house, etc.), a third firearm, home furnishings worth more than $30,000, a second car, etc. *See* Tex. Prop. Code §42.002.

[217] Interestingly, an obligee is able to garnish wages from an obligor in order to pay for his spousal maintenance obligation in instances where the court orders. Tex. Fam. Code Ann. § 8.101. Yet, the obligor has no such option or remedy under the law when attempting to recoup overpayment of spousal maintenance.

[218] *See* Tex. Fam. Code Ann. § 1.101 (noting that "it is the policy of this state to preserve and uphold each marriage against claim of invalidity"); *Roberts v. Roberts*, 192 S.W.2d 774 (Tex. 1946) (stating that Texas has "the public policy of encouraging a continuation of the marriage relations").

Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Chris Nickelson (*C.N.*), Rebecca Tillery (*R.T.*), Jeff V. Coen *(J.V.C.)*

DIVORCE
STANDING AND PROCEDURE

IN ORDER TO ESTABLISH DOMICILE, NEITHER PARTY NEEDS TO BE A CITIZEN OF THE UNITED STATES OR CARRY A CERTAIN TYPE OF VISA, THE MERE STATEMENT THAT A PARTY INTENDS ON REMAINING IN TEXAS IS SUFFICIENT.

¶13-3-01. *Nieto v. Nieto*, 2013 WL 1850780 (Tex. App.—San Antonio 2013, no pet. h.) (mem. op.) (5/01/13).

Facts: The parties, Mexican citizens, were married on December 7, 1991, in Mexico. Wife filed for divorce in Bexar County on September 25, 2009. Prior to their marriage, the parties secured a marriage application in Mexico that included an "Agreement of Separate Properties." According to expert testimony presented post-trial, at the time a couple obtains a marriage license in Mexico they can decide whether they want the marriage under a community property regime or a separate property regime. The information indicating the parties agreed to a separate property regime was printed on the marriage application, which was signed by both parties before a notary public.

The parties testified they both spent time during their marriage traveling between Mexico and the United States. The parties owned a house in San Antonio, but were here in the United States pursuant to an investment visa.

At the conclusion of the trial, Husband was unhappy with the property division and filed this appeal wherein among other matters, he challenged the trial court's jurisdiction claiming that the parties did not meet the domiciliary and residency requirements of Texas Family Code section 6.301.

Holding: Affirmed

Opinion: Family Code section 6.301 provides: "A suit for divorce may not be maintained in this state unless at the time the suit is filed either the petitioner or the respondent has been: (1) a domiciliary of this state for the preceding six-month period; and (2) a resident of the county in which the suit is filed for the preceding 90-day period." Tex. Fam. Code Ann. § 6.301. "Section 6.301 . . . is akin to a jurisdictional provision in that it controls a party's right to maintain a suit for divorce and is a mandatory requirement that the parties cannot waive." *Palau v. Sanchez*, No. 03-08-00136-CV, 2010 WL 4595705, at *5 (Tex. App.—Austin Nov. 10, 2010, pet. denied) (mem. op.). "[S]ection 6.301 requires only that a petitioner be a domiciliary of Texas and a resident of the county in which the suit is filed, not that she be a citizen of the United States or carry a certain type of visa." *Id.* at *6. Domiciliary is defined as "[a] person who resides in a particular place with the intention of making it a principal place of abode." *Black's Law Dictionary* 524 (8th ed. 2004). Residence is defined as "[t]he place where one actually lives, as distinguished from a domicile." *Id.* at 1335.

At the hearing on Husband's motion to dismiss for lack of jurisdiction on December 8, 2009, the court heard the following evidence. The parties were both Mexican nationals in the United States on investment visas. The visas were effective for three years, subject to a renewal. Husband applied for the investment visa, and Wife and son were here pursuant to Husband's investment visa. The parties were married in Mexico and they owned a residence in Mexico. The parties also owned a home in Bexar County that was purchased five years prior to filing for divorce. The parties had a fifteen-year-old son who had attended private schools in San Antonio for six years. For the year preceding the divorce filing, their son was attending a public school in San Antonio.

Wife testified that she and Husband stayed at the home in Mexico during summer vacation, for Christmas, or to visit family. Wife testified her residence was in San Antonio and the home in Mexico was a "vacation home." Wife stated it was her intent to establish a domicile in Texas and her son intended to finish high

school in Texas. Wife agreed she was in the United States on an investment visa and that she had not filed for permanent resident alien status for either herself or for her son. However, Wife also testified it was not her intention to return to Mexico and she would only be returning to Mexico to visit family or for vacation. On the other hand, Husband testified their home was in Mexico and the San Antonio residence was their vacation home. The court concluded that the trial court did not abuse its discretion in finding the requirements of Family Code section 6.031 were satisfied.

Editor's Comment: *Here's a one sentence explanation. "Residence is where you lay your head at night. Domicile is where you lay your head in your head." Be careful of these cases where one spouse's visa is dependent on the other's. A divorce can terminate the dependent spouse's right to legal residence immediately unless independent grounds have been applied for prior to the signing of the divorce decree. This can be troublesome with kiddo cases that have residency restrictions in the decrees. (J.V.C.)*

DIVORCE
DIVISION OF PROPERTY

WIFE FAILED TO ADEQUATELY TRACE $32,000 OF HER SEPARTE PROPERTY REIMBURSEMENT CLAIM, WHICH HAD MORE THAN A *DE MINIMIS* EFFECT ON THE PROPERTY DIVISION

¶13-3-02. ***Roberts v. Roberts,*** -- S.W.3d --, 2013 WL 1831199 (Tex. App.—San Antonio 2013, no pet. h.) (op. on rhrng.)(5/01/13).

Facts: Husband and Wife married on March 8, 1997, and had two children together. Husband worked as a civilian for the U.S. Army and was also in the Navy Reserves. It is undisputed that for several years prior to separation, Husband's income was the family's sole source of income. Husband filed for divorce in 2009. After trial, the trial court ordered a disproportionate division of the marital estate and confirmed Wife's separate property reimbursement claim in the amount of $41,000, represented by equity in the marital residence that was awarded to Wife. At the time of divorce, the marital residence was valued at $140,000 and unencumbered by a mortgage.

Holding: Reversed and remanded for just and right property division

Opinion: A claim for reimbursement is an equitable claim arising upon dissolution of a marriage when funds from one marital estate have been expended to benefit another marital estate. A spouse seeking reimbursement must establish that the contribution was made by one marital estate to another, that the contribution was reimbursable, and the value of the contribution. Because a reimbursement claim may arise when separate property is used to pay a community debt, the trial court begins its analysis by determining whether there is some evidence to support the trial court's implied finding that $41,000 constituted Wife's separate property.

At the dissolution of the marriage, all of the parties' property was presumed to be community property. To rebut this presumption, Wife was required to prove the separate character of the various funds she claimed to be her separate funds by clear and convincing evidence. It appears the trial court arrived at $41,000 by considering the following funds: $9,000 Wife received as a bequest from her aunt during the marriage, $20,000 in two certificates of deposit (CDs), $10,000 in a savings account, and $2,000 in a brokerage account that Wife owned prior to the marriage. With regard to the $9,000, Wife introduced a photocopy of the check and a letter from her father describing the bequest. As to the remaining accounts, Wife testified that they constituted her separate property. She produced statements of account for two share certificate/IRA accounts she claimed as her separate CDs. She introduced no other documentary evidence tracing the separate origin of the funds in these accounts.

Wife's testimony and documentary evidence in the form of a photocopy of the check and a letter from her father sufficiently traced the separate nature of the $9,000. These documents established the separate origin of the funds by showing the time and means by which Wife originally obtained possession of them. The statements of account for the two CDs reflected account balances during the marriage. Thus, the documents failed to establish the separate origin of the funds because they did not show the time and means by which Wife originally obtained possession of them. Although Wife testified she came into the marriage with the CDs, her testimony was contradicted by Husband's testimony that the CDs were created by monies obtained during the marriage. Because Wife's testimony was contradicted and "unsupported by documentary evidence tracing the asserted separate nature of the property," it was insufficient to trace the separate origin of the CDs. As to the remaining accounts, Wife introduced no documentary evidence establishing their separate nature. Therefore, Wife did not clearly and convincingly establish the separate nature of the funds in the CDs, and savings and brokerage accounts, and thus failed to overcome the presumption of community property. Therefore, $32,000 of the $41,000 was improperly characterized.

Husband argues that this error was harmful because the mischaracterization of $41,000 as separate property resulted in an 80/20 division of property, instead of the 60/40 division represented in the court's order, which requires reversal. The marital residence, valued at $140,000 and unencumbered by a mortgage, formed the bulk of the marital estate. According to the assets inventoried in the decree and the values set forth in the record, the marital estate contained assets worth approximately $225,000 and community debts totaling approximately $58,000—bringing the total value of the marital estate to roughly $167,000. Thus, $32,000 represents nearly 20% of the overall estate. Therefore, the appellate court concluded that the mischaracterization of $32,000 had more than a *de minimis* effect on the trial court's just and right division of marital property.

Editor's Comment: *This case serves as a reminder to all family law trial attorneys to make sure you have documentary proof of separate property claims. Don't just rely on testimony of your client alone. (M.M.O.)*

Editor's Comment: *This is an en banc reconsideration. Conflicting oral testimony can never meet the "clear and convincing" test. Apparently the W had a hard time consistently recounting the origination of her separate property reimbursement claim. Her case was simply inadequate. Also, H argued that her request for statutory spousal support was unsupported by any evidence of financial need and probably would have been denied for that reason. But the COA remanded the case for a redivision of the community and sidestepped the decision as the trial court would have to reconsider the amount of spousal support anyway. (J.V.C.)*

Editor's Comment: *Remember, on appeal, it's not enough to just prove that property was incorrectly found to be separate property you also have to prove that the mischaracterization error had a substantial effect on the overall property division. (R.T.)*

★★★TEXAS SUPREME COURT★★★

SPOUSE NOT LIABLE FOR OTHER SPOUSE'S ATTORNEY'S FEES INCURRED DURING DIVORCE PROCEEDINGS

¶13-3-03. ***Tedder v. Gardner Aldrich, LLP,*** -- S.W.3d --, 2013 WL 2150081 (Tex. 2013) (5/17/13).

Facts: Husband sued Wife for divorce and custody of their two children. Wife hired Law Firm to represent her in the proceedings. Her contract with Law Firm provided that the Law Firm would seek to get Husband to pay their fees. After nearly two years of contentious litigation, a jury found that the couple should be joint managing conservators of the children. After the jury verdict, Law Firm withdrew as Wife's counsel and then intervened in the case, suing both Husband and Wife for its fees. The Law Firm had already been paid $50,000 from the community estate and claimed an additional $151,747.28. Law Firm couched its claim in a sworn account. The trial ultimately granted a judgment in favor of Law Firm, but only against Wife, but also ordered Husband to pay Wife $190,000 for her attorney's fees. It was then that Husband and Wife settled and agreed the divorce decree would award Law Firm's fees against Wife and would not award Wife's attorney's

fees against Husband. After trial court signed decree to that fact, Wife filed for bankruptcy. Law Firm appealed. The COA also held that Husband was liable for Wife's legal fees for two reasons: the obligation was a "community debt" for which both spouses were jointly and severally liable, and the legal fees were "necessaries" for which Husband was liable to the firm under Section 2.501 of the Texas Family Code. Accordingly, the COA rendered judgment for Law Firm against Husband and Wife, jointly and severally. The Supreme Court of Texas granted Husband's petition for review.

Holding: Reversed

Opinion: One spouse's liability for debts incurred by or for the other is determined by Section 3.201(a) of the Texas Family Code, which states that a person is personally liable for the acts of the person's spouse only if: (1) the spouse acts as an agent for the person; or (2) the spouse incurs a debt for necessaries as provided by Section 2.501 of the Texas Family Code. The SC clarified that necessaries are "things like food, clothing, and habitation – sustenance." The SC rejected the view that legal fees in a divorce proceeding fall into the category of necessaries. Thus, the SC held that since Wife's legal fees were not necessaries, Husband was not liable to Law Firm for its bill for the representation of Wife in their divorce proceeding.

The SC also held that intervention was improper. A person may intervene in an action if (1) he could have brought the action himself, or it could have been brought against him; (2) the intervention will not complicate the case by an excessive multiplication of the issues; and (3) intervention is almost essential to effectively protect the intervenor's interest. The Law Firm did not meet the first requirement. It probably did not meet the second, since the interjection of its claim added issues to the divorce proceeding and delayed its final resolution. And it did not meet the third, inasmuch as it could have sued Husband and Wife in a separate action.

Editor's Comment: *Stare Decisis takes a vacation and Former Chief Justice Robert W. Calvert rolls over in his grave. In 1946, the Texas Supreme Court held that wife's attorney's fees can be recovered as necessaries in a divorce case and an award of fees is binding on wife's attorney, with regard to a necessaries claim against husband, as if the attorney was a party to suit. See* ***Roberts v. Roberts*****, 192 S.W.2d 774 (Tex. 1946)**. *Four years later, the Texas Supreme Court approved a trial court decision to order payment of wife's attorney's fees directly from husband's share of community funds held by a receiver. See* ***Carle v. Carle*****, 149 Tex. 469, 234 S.W.2d 1002, 1004-05 (1950)***(rejecting husband's argument that property division was unfair on the grounds that the trial court had the authority to make an unequal division). At that time, the Court was populated by Hickman, Sharp, Smedley, Brewster, Garwood, Griffin, Calvert, Smith, and Wilson. Four years later, in 1954, with Hickman, Brewster, Garwood, Griffin, Calvert, Smith, and Wilson, still on the bench, the Texas Supreme Court refused a petition for writ of error with the notations "no reversible error" in a case where the court of appeals relied on Roberts, supra, and held wife could recover attorney's fees as necessaries in a divorce case. See* ***Jindra v. Jindra*****, 267 S.W.2d 287, 288 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.rr.e.)**. *Eleven years later, in 1965, with Calvert, Griffin, and Smith still on the bench, the Texas Supreme Court refused a petition for writ of error with the notations "no reversible error" in a case where the court of appeals held wife may recover her attorney's fees in a divorce case under the necessaries doctrine. See* ***Schwartz v. Jacob*****, 394 S.W.2d 15, 21 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.)**. *Later, in 1981 and 1987, the Texas Supreme Court refused two more petitions for writ of error with the notation "no reversible error." See* ***Petrovich v. Vautrain*****, 730 S.W.2d 857, 861 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.)** *(holding that divorce attorney may sue opposing client in a separate lawsuit);* ***Navarro v. Brannon*****, 616 S.W.2d 262, 263 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.)***(reversing and remanding dismissal of attorney's intervention to recover fees incurred on behalf of wife before husband and wife reconciled; holding wife's attorney's fees are necessaries if she acts in good faith and on probable cause). Fast-forward to 2013. The Texas Supreme Court says its Carle opinion overruled the necessaries doctrine and the Court holds that attorney's fees in a divorce case will never qualify as a necessary. This decision is shocking since it ignores the foregoing authority and overlooks the fact that coveture did not end until 1963. It seems highly implausible that the Carle Court would have overruled the necessaries doctrine before*

coveture ended since that was the only legal theory that permitted wife to hire an attorney, let alone get him or her paid. Moreover, this decision is shocking because it ignores the Legislature's enactments on the subject. In the 1960s, the statute governing temporary orders did not allow for an award of interim attorney's fees. See ***Wallace v. Briggs*****, 348 S.W.2d 523 (Tex. 1961)***(citing Roberts, supra, with approval and holding that attorney's fees could be awarded on final trial of a divorce case, but not on an interim basis). The Legislature later added statutes authorizing awards of interim attorney's fees in divorce and SAPCR cases and authorizing awards of attorney's fees upon final trial in a SAPCR. See TFC 6.502, 105.001, and 106.002. Why did the Legislature do this? Could it be the Legislature thought that attorney's fees often qualify as necessaries in divorce and SAPCR cases (i.e., attorney's fees caused by one party's attempting to deprive the other party of his or her property or children are as necessary as food, clothing, and shelter)? Could it be an error? Or, could it be Satan? Stare Decisis can be helpful, but one has to actually read the older cases in order to know what has been decided already. (C.N.)*

Editor's Comment: *All of the commentary I've read about this case seems to be hyping it as the "end" of attorney's fees collection. However, what this case stands for is that you can only sue your client – the one that signed the contract. You can't sue the opposing party who did not sign your contract. That seems like an obvious concept to me… so I'm not sure how this is so new. I do find the clarification interesting that attorney's fees are not "necessaries". That could have an impact on temporary attorney's fee award. (M.M.O.)*

Editor's Comment: *Please raise your hand if you have ever received a judgment for attorney fees specifically based on "necessaries" in a property division. This is simply a situation where the H & W agreed to cheat the attorney out of fees (nothing new there). They neatly rearranged the property division so W could file bankruptcy, which she promptly did. I'm not sure how the court could accept the H & W's "agreement" over the objection of the Intervenor at the time of the entry of the decree. Presumably, the bulk of the fees were for the jury trial on the kiddo issues. No one can dispute that attorney fees in SAPCR suits are authorized by statute TFC §106.002. Did everyone just ignore it? Including the bankruptcy court? Even if fees for property division are not "necessaries" there is potential liability by each party for the intevenor's fees in a SAPCR and it is improper to sever it, despite the dicta in this opinion. The good news is that the SC has admonished trial and appellate courts to stop using the term "community debts" as they simply don't exist. Now if they could just explain to the courts that we only have "informal marriages" not "common-law marriages" in Texas. (J.V.C.)*

Editor's Comment: *This case is a must read for any lawyer before deciding to intervene for unpaid attorney's fees. Although the Court's comments about the intervention are dropped in a footnote, they are still concerning. (R.T.)*

PAROL EVIDENCE ALLOWED TO INTERPRET DEED, WHEN SPOUSE NOT ONE OF THE GRANTORS

¶13-3-04. ***In re Marriage of Moncey,*** -- S.W.3d --, 2013 WL 2127276 (Tex. App.—Texarkana 2013, no pet. h.) (5/17/13).

Facts: During the marriage, Wife's father (Father) formed a trust to benefit Wife and her two sisters. At Father's death, Wife (who was listed as the trustee) was to distribute equal interests in each piece of real estate amongst herself and her sisters. The trust limited Wife's ability to dispose of the property for less than adequate consideration. After Father's death, Wife and Sisters executed an Exchange Deed to provide for a distribution of the real estate but in a method different from what was set forth in the Trust. Sister 1 and Sister 2, owning an interest in the property at issue as their sole and separate property, granted the property at issue to Wife and Husband. As consideration, Wife and Sister 1 made a likewise exchange to Sister 2 and her husband, and Wife and Sister 2 made another likewise exchange to Sister 1 and her husband. The Exchange Deed, in a later paragraph, stipulated that each sister was the individual owner of the property that was granted to them. Wife did not individually or as trustee convey the property she and her husband received, she signed the deed as trustee, she testified at the divorce hearing that neither she nor her sisters intended to deed

any property to their husbands, and Wife's sisters and their husbands also testified that the husbands were never supposed to own an interest in any of the real property that was subject to the Exchange Deed. The trial court characterized the real property as Wife's separate property and awarded it to her accordingly.

Holding: Reversed in part, affirmed in part

Opinion: Husband argued that since he paid no consideration for the real estate at issue, the disputed property was received by gift jointly to both spouses during marriage and thus is the separate property of each spouse. Husband further argues that the grant in the Exchange Deed was unambiguous and thus parol evidence (i.e. testimony of Wife, Sisters, and Sisters' husbands) should not be allowed to vary the terms of the unambiguous deed. However, the COA held that the parol evidence caselaw cited by Husband only applied in situations where there is a deed from one spouse as the grantor to the other spouse as the grantee. In this case, Wife's sisters (not Wife) were the grantors under the Exchange Deed, and therefore the presumption that would operate to exclude parol evidence did not apply. The COA also found that when a spouse uses separate property to acquire land during marriage and takes title to the land in the names of both the husband and wife, it is presumed that the interest placed in the non-purchasing spouse is a gift; this presumption can be rebutted by parol evidence clearly establishing there was no intent to make a gift. Therefore, the COA held that the trial court did not err in admitting the testimony of Wife's Sisters or their husbands.

The COA held that the parol evidence established that Husband did not receive a gift from the Trust. Wife did not join in the conveyance of the disputed property in any capacity when only her sisters were listed as the grantors of the property that was granted to Wife and Husband; thus the COA held that the addition of Husband's name to the granting clause could not be classified as a gift from the trust. The COA also held that the parol evidence established that Husband did not receive a gift from Wife. The Exchange Deed recited that Wife gave consideration for the acquisition of the disputed property in the form of Wife's relinquishment of her separate property rights in other parcels she was to inherit under the trust. The COA held that since Wife testified that there was no intent to gift the property to Husband, and no further evidence was presented to challenge Wife's intent, Husband was unable to meet his burden to show that Wife had given him a one-half interest in the property via the Exchange Deed.

The COA found that since Husband failed to prove that the conveyance was a gift, the parties were returned to the starting position that the property at issue was presumed to be community property. However, a presumption of separate property arises where the instrument of conveyance contains a separate property recital. A recital in an instrument of conveyance is considered to be a separate property recital if it states that the consideration is paid from the separate funds of a spouse or that the property is conveyed to a spouse as his or her separate property. Since the Exchange Deed specifically recited that (1) consideration was paid in the form of relinquishment of Wife's "sole and separate property" interests in other parcels of land, and (2) Wife was to own the disputed property, the COA found that the presence of such recitals negated the community property presumption and were prima facie evidence that the property was Wife's separate property. In addition, Wife, her sisters (as interested witnesses), and her sisters' husbands (as uninterested witnesses) all testified that no gift was intended when the husbands' names were added to the granting clauses in the Exchange Deed. The COA found that the trial court did not abuse its discretion because there was some evidence to support its factual findings that the property was Wife's separate property. Thus, the COA affirmed the trial court on this point.

Editor's Comment: *Can someone explain why you would include H's in a settlement of a testamentary trust unless you intended a gift to him? No one argued the presumption of gift from W to H. This happens all the time where one spouse refinances a separate residence. Because the other spouse is now signing the note, title companies feel compelled to convey an undivided interest to the other spouse creating a presumption of gift. Both sides had legal experts testify as to the law regarding the deeds thus ignoring the prohibition against legal opinions under the assumption that the court is presumed to know the law. (J.V.C.)*

SAPCR
PARENTAGE

IN WRONGFUL-DEATH ACTION, EVIDENCE OF A PHYSICAL RESEMBLANCE AND A PRIOR ADMISSION OF PATERNITY IS ENOUGH TO ESTABLISH BIOLOGICAL PARENTAGE

¶13-3-05. ***Brock v. Gurka,*** -- S.W.3d --, 2013 WL 2253587 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (5/23/13).

Facts: Child allegedly drowned while at the residence of Appellants. Father filed a wrongful death action against appellants. Appellants argued that Father was not the biological father of the child, and therefore had no standing to file the claim. At the evidentiary hearing on paternity, Father testified that, in his mind, there was no question that he was Child's father. Father stated that he was living with Mother in 2006 when she became pregnant with their first child. After Father moved out, a paternity action was filed in which Mother sought child support for their first child and Father sought access to their first child. During the pendency of the action, Mother became pregnant with Child at issue. Although the couple was not living together at the time, Father testified that they still had a sexual relationship. Mother told Father that he was Child's father, and he moved back in with her while she was pregnant. Father was present in the delivery room when Child was born in March 2008. Child was born three weeks early and had to stay at the hospital for a week. During this time, Father visited Child at the hospital every morning before work and every evening after work. When Mother took the baby home, Father stayed with them to help because he wanted to spend as much time as he could with Child.

Mother's paternity action was amended to include Child, and the case was settled with Father acknowledging that he was the father of both children. When Father's counsel offered the trial court's order in the paternity case into evidence in the present case, appellant's counsel objected that the conclusions in the order were not relevant to the trial court's determination in the present case. The trial court admitted the agreed order into evidence, stating that while it was not dispositive on the issue of paternity, it was relevant to the determination because showed that Father had acknowledged paternity previously.

Father paid child support for years, occasionally falling behind and having to pay arrearages. Father also testified that he exercised his visitation rights as often as he could and sometimes took possession of the children even when it was not hid time under the order to do so.

According to Father, when Child was about seven or eight months old, Mother "blurted out" (for the first time) during an argument that Father was not the biological father. Father did not believe her and he never told anyone that Child was not his son; however, Father did purchase a paternity testing kit from a pharmacy and testified that the results came back as inconclusive. Father admitted that he may have mentioned the test to Mother but said that he did not do anything to follow up on the testing and never took the results to Mother's house. Mother also never told father again that he was not the biological father; she continued to act as though Father was Child's biological father, and Father continued to have visitation with Child and pay child support. Father speculated that Mother only claimed he was not the biological father "to be hateful" and noted that Mother has a habit of lying.

Father further denied that Mother ever told him that a man named D.G. was actually Child's biological father. Father recalled meeting D.G. once at Mother's house, but denied that they discussed the paternity of Child. Father offered photos into evidence to support his testimony that Child looked like his older brother and that Child had certain characteristics that were common in his family. Father also testified that Child and his older brother shared certain characteristics in the way they behaved.

On cross-examination, appellant's counsel challenged Father with several statements made in his deposition. Father admitted that in his deposition he testified that he was not Child's biological father and that the paternity test came back showing (with an unspecified level of certainty) that Father was not the biological father of Child. However, on redirect, Father explained away all of the inconsistencies of his deposition.

Mother testified by deposition that D.G. was the biological father of child. Mother also testified that she saw the results of the paternity test that Father conducted and that the results excluded Father as the biological

father of Child. Mother testified that she knew D.G. was the father because Child looked exactly like him, and Child could only have been fathered by Father or D.G. Mother further testified that D.G. had had minimal contact with Child and that she never intended to seek child support from D.G. because there was a verbal agreement between her, D.G., and Father that Father would be considered Child's biological father and that the issue "would never ever, ever be brought up, ever." Finally, Mother testified that her father once saw a photograph of D.G. as a child and thought that it was Child in the picture. Both Father and Mother testified that Mother had a temporary protective order entered against Father in 2008.

After both sides rested and presented closing arguments, the trial court permitted G.G. to testify over the objection of appellant's attorney. G.G. testified that neither Mother nor Father ever told her that Father was not Child's biological father. Father's position had always been that he was the biological father. G.G. stated that she thought Child looked more like Mother, and that although Father was blond, darker features (such as Child's) ran in her family. G.G. testified that she had no reason to think that Father was not Child's biological father. The trial court held that Father was Child's biological father. Appellants appealed.

Holding: Affirmed

Opinion: Proof of paternity of a child born out of wedlock – in the context of a wrongful-death action, as well as in various other contexts – must be by clear and convincing evidence. In the context of a paternity determination in a wrongful-death action, the fact finder must decide what evidence is clear and convincing on a case-by-case basis. Blood tests, when available, may help show the alleged father's paternity. Evidence of physical resemblance of the child to the alleged father or to someone else, either by photographs or testimony of a knowledgeable witness may also be helpful. Prior statements by the purported father that he was the father of the child, or other admissions bearing on his relationship to the child, may also be considered, as may evidence regarding the time periods of conceptions and gestation. The COA found that the trial court, as fact finder, was free to believe Father's hearing testimony and discount the contradictory deposition testimony of Father and Mother (especially since Mother's statements were arguably in her own financial interest). The COA also found that the trial court was free to believe Father's testimony that the store-bought paternity test was inconclusive over Mother's testimony that she saw the results that excluded Father as Child's biological father. Furthermore, the trial court was within its discretion as fact finder to place more weight on the testimony from Father and G.G. that Child had characteristics in common with members of their family than it did on Mother's testimony that Child looked like D.G. The trial court had before it evidence that Mother consistently represented Father was Child's biological father except for one time when she was angry with him and another when she arguably stood to gain financially from saying otherwise. Father, meanwhile, accepted his paternity of Child even when it was detrimental to his financial interests.

The COA found that the family court order in the case was not offered as a determination of parentage but was offered only for the limited purpose of showing that Father had acknowledged his parentage of Child in the family court proceeding – the order in question being an agreed order naming Father as Child's biological father and requiring him to pay child support. The trial court articulated an understanding of the limited role of the family court order as it mentioned its admission in the Findings of Fact but did not deem it to be dispositive on the issue of paternity. Accordingly, the COA held that Appellants had not demonstrated that the trial court abused its discretion in admitting the order.

Editor's Comment: *Right result, but someone needs to bring the Texas Appellate Courts into the 21st Century. The genesis of the theory that parents under the TFC don't have the same rights as parents under the Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a) is a SC case from 1989 that differentiates between "legitimate or adopted" and "illegitimate." The US Supreme Court prohibited such differentiation in 1973. Texas was the first state to adopt the Uniform Parentage Act in 1999. How this theory has survived for 25 years is a mystery. If you ever get one of these ask to court to read the commentary from the Uniform Commissioners. See http://www.uniformlaws.org/ shared/docs/parentage/upa_final_2002.pdf. (J.V.C.)*

SAPCR
CHILD SUPPORT

TRIAL COURT ERRED IN CALCULATING CHILD SUPPORT USING FATHER'S EARNING POTENTIAL BASED ONLY ON MOTHER'S TESTIMONY THAT FATHER COULD EARN A HIGHER AMOUNT BY "APPLYING HIMSELF"; FATHER'S ACTUAL EARNINGS WERE SUBSTANTIALLY LESS THAN THE AMOUNT ALLEGED BY MOTHER

¶13-3-06. ***Trumbull v. Trumbull,*** -- S.W.3d --, 2013 WL 936359 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (03/12/13).

Facts: Mother and Father had two Children. Father had worked as a sales manager and told Mother he could earn between $60,000 and $80,000 per year based on commission, but never actually earned more than approximately $44,000 per year. Mother never knew the exact amount of Father's salary. Father later opened a liquor store and paid himself $3,000 initially, but as business declined he sometimes paid himself nothing to keep the business afloat. After Mother filed for divorce, the liquor store was foreclosed on, and Father returned to his job as a sales manager, though at a lower salary. At trial, Father introduced paystubs showing his current earnings as $2,000 per month plus commission. Mother testified that Father had previously installed car and boat accessories on weekends for extra money, but Father indicated that there was no longer a market for those services. Mother admitted she had signed joint tax returns without reviewing the income reported within. Trial court found Father was capable of earning $60,000 and therefore ordered him to pay $1,000 per month in child support. Father appealed, alleging that trial court erred in calculating child support based on his potential earnings rather than his actual income.

Holding: Reversed and Remanded

Opinion: Under TFC 154.066, a trial court may issue a child support order based on the earning potential of a party, rather than the party's actual income, "[i]f the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment." The evidence showed Father was earning $2,000 per month at the time of trial and had never earned more than $44,000 per year during the marriage. Mother testified that Father could earn up to $60,000 "if he applied himself," but introduced no evidence to show how he would earn that money. Although Father previously earned supplemental income by installing car and boat accessories on weekends, Mother did not testify that this alternate source of income was still available, and Father testified that there was no longer a market for these services. Therefore, the evidence did not support a finding of intentional underemployment by Father, and child support should not have been calculated based on Father's alleged earning capacity of $60,000. *See* *Iliff v. Iliff,* 339 S.W.3d 74, 82 (Tex. 2011).

Editor's Comment: *Evidence seems to be a theme with the cases this quarter. Here again, the 14th Court affirms the concept that a party must actually present evidence of their claims. If the claim is "underemployment" then it isn't enough for one party to say the other one should "just work harder". Having some evidence that the other party could actually get a job making more money is essential. Evidence… hmmmm. (M.M.O.)*

Editor's Comment: *If all you have regarding the "intentional underemployment" issue is that the obligor should apply himself, why bother? (J.V.C.)*

Editor's Comment: *Another case that appears to be trimming back the ability to get a finding of intentional underemployment. Although here, the wife failed to properly plead intentional underemployment, the court notes that even if she had, her evidence was not sufficient for such a finding. (R.T.)*

IF DIVORCE DECREE FROM ANOTHER STATE DOES NOT ESTABLISH OR DENY AN ORDER FOR SUPPORT, THEN THAT COURT DOES NOT HAVE CONTINUING, EXCLUSIVE JURISDICTION OVER MATTERS OF SUPPORT

¶13-3-07. ***OAG v. Long,*** -- S.W.3d --, 2013 WL 2180922 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (5/21/13).

Facts: In 2006, a North Carolina court entered a judgment of divorce dissolving the marriage of Father and Mother. The scope of the judgment was not as comprehensive as a traditional divorce decree in Texas; it did not purport to divide any of the marital estate, and it was silent on matters of conservatorship and support despite there being two children born of the marriage. Instead of adjudicating such rights and incidents to divorce, the North Carolina court issued findings that stated that "there [were] no claims for child support, alimony, or equitable distribution of marital property between the parties."

After the divorce, Father relocated to Texas and remarried. Mother and Children continued to reside in North Carolina. The Texas AG filed a petition against Father in 2011 at the request of North Carolina's federally mandated Title IV-D agency to establish a support obligation for the benefit of his children. Father answered with a plea to the jurisdiction and contended that the North Carolina court was the only tribunal that could adjudicate his child support obligation. The trial court agreed with Father and dismissed the petition without prejudice. The Texas AG appealed.

Holding: Reversed

Opinion: A trial court's jurisdiction in cases such as these is governed by the Uniform Interstate Family Support Act (UIFSA), which all fifty states have adopted. UIFSA is designed to maintain a "one-order-at-a-time world," ensuring that only a single controlling support order exists and is enforced consistently among the states. UIFSA achieves its one-order-at-a-time system through recognition of "continuing, exclusive jurisdiction." Once a court having jurisdiction enters a support decree, that court becomes the only tribunal authorized to modify the decree for as long as it retains jurisdiction. A court retains jurisdiction under UIFSA if at least one person affected by the decree still resides in the issuing state. Once issued, a decree becomes entitled to full faith and credit in all fifty states. If no support order has been issued, UIFSA provides that a court may establish an order for child support on behalf of an individual or support enforcement agency located in another state.

The Texas COA, using North Carolina law, analyzed whether the North Carolina tribunal ever obtained continuing and exclusive jurisdiction over matters surrounding support for the children of Father and Mother. Under North Carolina law, "if claims for custody or support are not pursued in the original divorce proceeding, they may be maintained as independent civil actions…. Those separate actions may proceed before or after the divorce is final and regardless of whether a petition for divorce [had] ever been filed." The COA ultimately held that if parties to a divorce in North Carolina are not required to petition for child support, and if the findings indicate that no demand for child support had been made, then no order for child support was established and the North Carolina tribunal did not have continuing and exclusive jurisdiction over issues of support. Therefore, the Texas AG's petition was properly classified as a petition to establish an order of support, and the Texas trial court had the authority to adjudicate Father's child support obligation.

SAPCR
CHILD SUPPORT ENFORCEMENT

★★★TEXAS SUPREME COURT ★★★

EVEN THOUGH FATHER HAD PAID OFF HIS CHILD SUPPORT ARREARAGES SHORTLY AFTER A MOTION TO ENFORCE WAS FILED, FATHER WAS NOT CURRENT IN HIS PAYMENTS WHEN A HEARING ON THE MOTION WAS HELD SEVERAL MONTHS LATER; TFC 157.162(D) ALLOWED TRIAL COURT TO HOLD HIM IN CONTEMPT FOR LATE PAYMENTS BECAUSE FATHER WAS NOT CURRENT "IN THE PAYMENT OF CHILD SUPPORT AS ORDERED BY THE COURT"

¶13-3-08. ***In re O.A.G.,*** -- S.W.3d --, 2013 WL 854785 (Tex. 2013, orig. proceeding) (03/08/13).

Facts: Trial court ordered Father to pay $5,400 each month in child support payments. Father made partial payments for three months, then stopped paying entirely for three months. The Tarrant County Domestic Relations Office filed a motion to enforce, alleging six counts of contempt, one for each missed payment, and alleging a total amount in arrearage of $23,044.78. A hearing date was set for eight months later, although Father paid off the entire arrearage the same month the motion to enforce was filed. After paying off the arrearage, Father continued to make only partial payments. Trial court held Father in contempt for failure to make timely child support payments due under the prior child support order. Father argued that under the purging provision of Texas Family Code § 157.162(d), he should not have been found in contempt for missed payments because he had satisfied the amount owed, as alleged in the motion for enforcement, prior to the hearing. The court of appeals granted mandamus and habeas corpus relief. Both Father and OAG appealed.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Texas Family Code § 157 provides a statutory framework for a trial court's power to hold a party in contempt for failure to pay child support. The purging provision found in Texas Family Code § 157.162(d) provides that "[t]he court may not find a respondent in contempt of court for failure to pay child support if the respondent appears at the hearing with a copy of the payment record or other evidence satisfactory to the court showing that the respondent is current in the payment of child support as ordered by the court." The plain language of the statute indicates that a party may invoke the provision by demonstrating that, as of the date of the court hearing, the party has no outstanding child support obligations. However, the statute does not indicate that the party must only be current in the amount pled in the motion to enforce. Rather, the party must be current in all payments "as ordered by the court" as of the date of the court hearing. Because Father was not current in his child support obligations when the hearing was held, trial court did not abuse its discretion in finding him in contempt. Further, the purging provision does not implicate due process concerns for lack of notice. The purging provision is similar to an affirmative defense. A party is entitled to notice of specific alleged conduct charged against him, but is not entitled to notice of all the affirmative defenses available to him.

Editor's Comment: *This case provides an interesting distinction. In between the filing of an enforcement action and the date of hearing, the obligor is given a "grace period" to catch up all of his payments to avoid contempt. The Court finds that by "all" the statute means not just the payments and arrearage plead in the enforcement, but all payments due as of date of hearing. If the obligor does so, then the "purging" provisions precludes contempt finding at the hearing. If the obligor does not – for example, if he pays the arrearage plead but remains behind on the payments due since the enforcement pleading was filed – then the "purge" is incomplete and contempt remains on the table for the payments plead. The Court clarifies that it does not mean that contempt may be had for payments not paid but not plead in the enforcement either. (M.M.O.)*

Editor's Comment: *A concern for me is the Court's dismissal of the mother's argument that Section 157.162(d) should only apply if the obligor has strictly complied with the support order by timely making all payments when they become due. Under the Court's apparent holding, an obligor can still wait until right before an enforcement hearing to pay off his or her outstanding child support obligations and avoid contempt under Section 156.162(d). (R.T.)*

★★★TEXAS SUPREME COURT★★★

OAG'S CLERICAL ERROR RESULTING IN A CHILD SUPPORT OBLIGATION ENDING 12 YEARS EARLY DID NOT SERVE AS A BASIS FOR MODIFYING CHILD-SUPPORT ORDERS

¶13-3-09. ***Granado v. Meza,*** -- S.W.3d --, 2013 WL 1689233 (Tex. 2013) (4/19/13).

Facts: Mother and Father had one Child. In 1982, Mother filed a suit to establish paternity and obtained a default judgment ordering Father to pay $60 per month in child support until the Child's eighteenth birthday. The order also said that direct payments would be treated as gifts and Father would not receive credit for such payments in satisfaction of the order. Father testified that he made all payments to the OAG in Corpus Christi, and in 2002, OAG closed the case, erroneously concluding that the child-support obligation had ended in 1986. In 2009, Mother sought to enforce the order through child-support liens and a writ of withholding. However, Father moved to stay enforcement of the liens and the writ, so Mother sought a determination of arrearages. OAG testified that the case was closed early because its internal file showed that Father owed less than $500 at the time, and that perhaps the clerical error indicating the obligation ended in 1986 was because Mother stopped receiving public benefits that year. The trial court found that Father owed $500 in arrearages. Mother appealed, arguing that no evidence supported the trial court's $500-arrearage determination. COA affirmed, holding that the evidence that the OAG's internal files showed Father owing less than $500 in arrearages supported the trial court's finding.

Holding: Reversed and Remanded

Opinion: A determination of arrearages must be set aside if no evidence supports it. Here, there was no evidence to support trial court's specific finding of $500 in arrearages, because that finding was based on OAG's clerical error reflecting that the child-support obligation ended years earlier than ordered. COA erred by relying on the statement in the Payment Record indicating that the Record could be inconclusive. Father's own testimony established that he only made payments through the OAG in Corpus Christi and negated any possibility that he made other payments that would reduce the amount of arrearages.

Editor's comment: *This one troubles me by its inference. If the obligor never testifies and the obligee or OAG enters only the SDU record which states the "arrearage may be incorrect due to payments to another agency", would the result have been different? If all you have is the payment record and it states on its face that it "may" be incorrect, does the burden still shift to the obligor to show that it is in error? In the majority of enforcement cases by the OAG, they enter the records of the SDU and then rest. The obligor may never testify. See Texas Family Code § 157.162(c-1). (J.V.C.)*

ORDERS FOR COMMITMENT TO COUNTY JAIL MUST INCLUDE A DIRECTIVE TO THE SHERIFF TO TAKE THE SUBJECT INTO CUSTODY

¶13-3-10. *In Re Ruiz*, 2013 WL 2338614 (Tex. App.—Waco 2013, no pet. h.) (mem. op) (05/30/13).

Facts: Relator was ordered to temporarily pay child support and spousal support. After failing to do so, an order was issued. The order incorrectly stated that Relator did not appear and was entitled "Order Holding Respondent in Contempt for Failure to Pay Child Support and Spousal Support, Granting Judgement, and for Commitment to County Jail." The order contained no language directing the sheriff to take Realtor into custody and merely stated, "IT IS ORDERED that all writs and other process necessary for the enforcement of this order be issued." Subsequent to the order, Relator was taken into custody. Relator sought a writ of habeas corpus.

Holding: Writ of habeas corpus granted.

Opinion: A person may not be confined without a valid order of commitment. A commitment order is the warrant, process, or order by which a court directs a ministerial officer to take custody of a person. An order that lacks any directive to the sheriff to take a person into custody cannot constitute a commitment order. The COA held that here, even though the contempt order had ¨for commitment to county jail" in its title and sentenced Relator to commitment in the county jail, because it lacked any directive to the sheriff to take Realtor into custody, and no other document was signed by the trial court or issued by the court clerk containing the required directive, Relator had been illegally restrained. The COA ordered that Relator be immediately discharged from custody.

Editor's Comment: *When seeking to hold someone in contempt and to have them jailed, it is advisable to have a written judgment of contempt and a separate written order of commitment.* ***Ex parte Shaklee*, 939 S.W.2d 144, 145 (Tex. 1997)** *(C.N.).*

Editor's Comment: *Obligor skips because of bad drafting by attorney and even though judges sign more orders each day than you can imagine, commitments are something the court should review thoroughly. (J.V.C.)*

SAPCR
MODIFICATION

CONDITION PRECEDENT PROVISION IN FINAL DECREE IS VOID BECAUSE IT VIOLATES THE FAMILY CODE PROVISION PROHIBITING AGREEMENTS REGARDING CHILD SUPPORT TO BE ENFORCED AS A CONTRACT.

¶13-3-11. *In re I.R.H.*, 2013 WL 1850778 (Tex. App.—San Antonio 2013, no pet. h.) (mem. op.) (5/01/13).

Facts: The parties divorced and appointed joint managing conservators. The decree provided in part: "IT IS ORDERED that upon filing a suit for modification of the terms and conditions of conservatorship, possession of the children or support, except in an emergency, the filing party shall pay to the other conservator the sum of $25,000 on the date a suit for modification is filed. Failure by the filing party to pay the sum of $25,000.00 to the other conservator shall result in the immediate dismissal of the modification suit brought by the filing party. The parties expressly agree that this requirement is contractual in nature and enforceable as a contract, in addition to any other remedy at law." Subsequently, Mother filed a petition to modify without paying the requisite $25,000. Father filed a plea in abatement until Mother paid the $25,000. The trial court first abated, then, subsequently dismissed the suit. Mother appealed arguing the provision is void and unenforceable as a matter of public policy and under principles of contract law.

Holding: Reversed and remanded

Opinion: Texas courts have long recognized that an agreement that violates a valid statute is illegal and void. Though the condition precedent provision does not explicitly outline support or visitation, it does restrict with the court's ability to consider changes to child support. In fact, Mother, in her petition to modify the parent-child relationship, specifically asked for child support from Father. Therefore, the condition precedent provision is void because it violates the Family Code provision prohibiting agreements regarding child support to be enforced as a contract.

Editor's Comment: *The court reached this on interpretation of statutory grounds, but I'd contend that it violated the Texas Constitution "Open Courts" provision also. (J.V.C.)*

SAPCR
TERMINATION OF PARENTAL RIGHTS

TERMINATION OF FATHER'S PARENTAL RIGHTS WAS PROPER WHEN FATHER LIVED IN CALIFORNIA AND DID NOT ATTEMPT TO CONTACT OR VISIT HIS CHILD FOR ONE AND A HALF YEARS, COULD NOT MAINTAIN STEADY EMPLOYMENT OR HOUSING, AND DID NOT COMPLETE THE DEPARTMENT'S SERVICE PLAN

¶13-3-12. ***H.N. v. DFPS,*** -- S.W.3d --, 2013 WL 968209 (Tex. App.—El Paso 2013, no pet.) (03/13/13).

Facts: The Department removed Child from Mother shortly after Child was born. Several months later, Father was adjudicated to be the biological Father of the Child. Trial court appointed the Department as the Child's sole managing conservator and gave Father and Mother rights to weekly supervised visitation. Trial court also ordered the Department to initiate an Interstate Compact on the Placement of Children home study on Father's home in California. Child's Foster parents intervened, seeking conservatorship of Child and seeking to terminate Mother and Father's parental rights. The California Department of Children and Family Services notified the Department that it had denied placement of Child in Father's home. The Department then sought to terminate Father's parental rights. Trial court took judicial notice of the previous filings in the case, and found clear and convincing evidence to support termination of Father's parental rights under Texas Family Code 161.001(1)(C), (F), and (N), and that termination was in the best interest of the Child. Trial court named Foster Parents JMCs. Father appealed, challenging the sufficiency of the evidence.

Holding: Affirmed

Opinion: A trial court may terminate a party's parental rights if the court finds by clear and convincing evidence that (1) the parent committed one or more of the acts specifically set forth in Texas Family Code 161.001(1) as grounds for termination, and (2) that termination is in the best interest of the child. Under Texas Family Code 161.001(1)(N), a trial court may order termination of parental rights if "(1) the child has been in the permanent or temporary managing conservatorship of the State or an authorized agency for at least six months; (2) the State or authorized agency has made reasonable efforts to return the child to the parent; (3) the parent has not regularly visited or maintained significant contact with the child; and (4) the parent has demonstrated an inability to provide the child with a safe environment."

Here, Child had been in the Department's custody for 14 months. The Department created a service plan for Father and tried to help him arrange services in California that would help him regain custody of Child. Father did not complete the service plan, and home studies denied Father's home as a suitable placement for Child. Father claimed the Department would not tell him where Child was or how to locate him, although the

Department's Caseworker testified that Father had contact information and knew who to contact if he wanted to visit Child. Father never attempted to visit Child, although he was allowed weekly visitation, because he claimed to be too busy complying with the Department's requirements. Father could not maintain steady employment or housing, and although he said was moving in with his aunt, a home study on his aunt's home was also denied, and Father claimed to be moving in with her for months. This same evidence supported the finding that termination was in the best interest of Child, and that naming the Foster Parents JMCs was in the best interest of Child.

MOTHER'S PRIOR ABUSE OF A CHILD, SUICIDE ATTEMPT WHILE IN JAIL, SUBSEQUENT ARRESTS FOR CRIMINAL ACTIVITY, AND INABILITY TO MAINTAIN STABLE HOUSING OR EMPLOYMENT SUPPORTED TERMINATING MOTHER'S PARENTAL RIGHTS

¶13-3-13. ***In re T.G.R.-M,*** -- S.W.3d --, 2013 WL 1163986 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (03/21/13).

Facts: The Department removed the Child from Mother when the Child was two years old, based on risk of physical abuse, because Mother had previously physically abused the Child's older Sibling. Mother previously pleaded guilty to the charge of injury to a child for striking, dragging, and pulling Sibling's hair, and Mother was placed on four years' community supervision. During this period, Mother was arrested twice for criminal trespass and burglary of a habitation. When Mother was in jail resulting from the injury to a child charge, she tried to commit suicide. Mother testified that she had been living in a transitional home and had been unemployed for nearly twenty months. The Child's Foster Mother also testified that the Child was "a happy baby," and that she wanted to adopt the Child. Trial court found that termination was proper under Texas Family Code 161.001(1)(E), (L)(ix), and (O), and that termination was in the Child's best interest. Trial court named the Department sole managing conservator. Mother appealed, challenging the factual and legal sufficiency of the evidence used to support termination of her parental rights.

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). Under TFC 161.001(1)(E), parental rights may be terminated if a parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." Mental illness alone is not enough, except when it causes the parent to engage in conduct that endangers the health or well-being of a child. Evidence regarding how a parent treated another child also may be relevant. Here, Mother's criminal record established that she had been convicted of felony injury to a child for abusing the Child's older Sibling. She was subsequently arrested twice for criminal trespass and burglary of a habitation, and although the charges were ultimately dropped, her arrests caused her to be absent from the Child's life. Mother continued to place herself in situations that risked her imprisonment. Mother testified that she had attempted suicide while in jail and had subsequently not completed recommended psychiatric treatment. Mother had been unemployed and unable to keep stable housing for several months. All this evidence supported both termination of Mother's parental rights and a finding that termination was in the Child's best interest.

TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS PROPER AFTER MOTHER ENTERED AN ABUSIVE RELATIONSHIP, BEGAN ABUSING DRUGS, AND WAS ARRESTED FOR D.U.I. WITHIN MONTHS OF BEING RELEASED FROM PRISON

¶13-3-14. ***In re T.A.D.,*** -- S.W.3d --, 2013 WL 1830963 (Tex. App.—Dallas 2013, no pet.) (03/26/13).

Facts: Mother had Child while she was in prison for possession of methamphetamine with intent to distribute. Mother voluntarily placed Child with Foster Parents until nine months after she was released from prison.

After Mother's release, she found a job, participated in Brighter Tomorrows, a program for single mothers that provided housing and job search assistance, and took custody of Child. Foster Parents continued to watch Child for Mother. Within a few months, Mother had been arrested for public intoxication, twice failed to pick up Child as promised, and was dismissed from Brighter Tomorrows for consuming alcohol. Father moved in with Mother and Child, and shortly thereafter was in a car accident while Child was in the car after Father had been drinking. Father was also charged with assault against Mother. The Department received a referral for neglectful supervision of Child. Mother refused one drug test and tested positive for heroin in a second drug test. Mother admitted to using heroin while Child was asleep or visiting Foster Parents. Mother admitted there had been domestic violence between her and Father and that twice she had called Foster Parents to come pick up Child because of the violence from Father. Trial court found that termination of Mother's parental rights was proper under TFC 161.001(1)(D) and (E), and that termination was in the best interest of Child. Mother appealed, challenging the factual and legal sufficiency of the evidence supporting trial court's findings.

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). Under subsection (D), the environment itself and not the parent's conduct must cause the child's physical or emotional well-being to be endangered, and there must be proof that the parent was aware of the potential for danger to the child and disregarded that risk. In a suit to involuntarily terminate the rights of an imprisoned parent under subsection (E), mere imprisonment will not, standing alone, constitute engaging in conduct that endangers the emotional or physical well-being of the children. Here, Mother was arrested for public intoxication within four months of regaining custody of Child. Mother began living with Father, who was an alcoholic, and who was arrested for DUI while Child was with him. Mother used heroin while Child was asleep and admitted that there were instances of family violence between her and Father. Mother's conduct allowed Child to remain in surroundings that endangered Child, and therefore the evidence supported termination of Mother's parental rights under TFC 161.001(1)(D).

In its analysis of whether termination was in the Child's best interest, COA weighed *Holley* factors including the desires of the Child, Mother's parenting abilities, her acts or omissions demonstrating that the parent-child relationship was improper, and any excuses she has offered for her acts and omissions. Mother had begun drinking, using drugs, and was involved in an abusive relationship. Mother admitted that the violence between her and Father endangered Child's emotional and physical well-being. Child expressed to the Caseworker that he was happy with Foster Parents, and Caseworker testified that Child was happy and doing well in school. Trial court could have reasonably concluded that termination of Mother's parental rights was in Child's best interest.

MOTHER'S HISTORY OF SUBSTANCE ABUSE, CONTINUED RELATIONSHIP WITH ALCOHOLIC AND ABUSIVE FATHER, AND PRIOR TERMINATION OF PARENTAL RIGHTS TO SIX CHILDREN, SUPPORTED TERMINATION OF HER PARENTAL RIGHTS TO HER TWO REMAINING CHILDREN, AFTER HER NEWBORN DIED WHILE SLEEPING IN MOTHER'S BED

¶13-3-15. ***R.H. v. DFPS,*** -- S.W.3d --, 2013 WL 1281773 (Tex. App.—El Paso 2013, no pet. h.) (03/28/13).

Facts: Mother and Father had nine Children. Their parental rights to their first five Children were terminated in 2007 and rights to their sixth Child were terminated in New Mexico in 2008. The Department opened an investigation regarding neglect of the seventh Child, but closed the investigation after Mother completed therapy, family violence classes and parenting classes. The seventh and eighth Children were removed in 2012 after the ninth Child, a newborn at the time, died while sleeping in Mother's bed. A Department Caseworker met with Mother and Father to discuss required services. A month later, neither Parent had made any progress on the required services. The Department requested a finding of aggravated circumstances against Parents.

Trial court granted the request as against Father, but gave Mother one more opportunity to comply. Mother enrolled in a substance abuse rehab program, but left after three weeks. Trial court then granted the finding as against Mother. At trial, a Caseworker testified that during supervised visits with the two Children, Mother "went through the motions" with the Children but did not seem loving or attached to them. Father frequently arrived late, left early, and occasionally one or both parents did not show up for visits. Father frequently directed Mother to take Children and did not spend much time interacting with them. A Caseworker testified that although Mother said she was living with the Grandmother at the time of trial, a home visit showed that Mother and Father were still living together in the same apartment where the Newborn Child died. Trial court terminated Mother's parental rights under TFC 161.001(1)(M) and found that termination was in the best interest of the Child. Mother appealed, arguing the evidence was factually and legally insufficient to support the finding that termination was in the best interest of the Child.

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). Mother did not challenge trial court's finding and therefore conceded the statutory predicate for termination. There is a strong presumption that it is in the child's best interest to allow the natural parents to retain custody, but this can be rebutted by evidence presented to the contrary. Direct evidence during testimony showed that Mother told the Department she was living with Grandmother before the trial, but the Department found that she was still living with Father in the same apartment as before, and with only one bed and a playpen for the newborn baby. Mother remained with Father, even though Mother admitted there was family violence and that Father was a drinker. Mother had a history of substance abuse and frequently relapsed. The Caseworker testified that Mother was unable to meet the Children's physical or emotional needs, and that her previous termination of parental rights further showed this. All the evidence, including Mother's history of family violence and substance abuse, supported the finding that termination was in the Child's best interest.

MOTHER'S PROSTITUTION IN THE FAMILY HOME, HISTORY OF DRUG ABUSE, AND DESIRE TO RECONCILE WITH HUSBAND WHO HAD A LENGTHY CRIMINAL RECORD, SUPPORTED TERMINATION OF MOTHER'S PARENTAL RIGHTS

¶13-3-16. ***In re N.K.,*** -- S.W.3d --, 2013 WL 1197803 (Tex. App.—Amarillo 2013, no pet.) (3/25/13).

Facts: Mother had two Children and lived with Father and a female Roommate. Father was the biological Father of the youngest Child. The Department had previously investigated Parents based on reports of physical abuse, sexual assault, unsanitary living conditions, and suspected prostitution. That investigation was closed due to insufficient evidence of sexual assault. The Department opened a new investigation year later, and Parents were arrested after admitting that they engaged in prostitution at their home. The Children were removed and placed in foster care. The Department Investigator testified that on the night of the arrest, the older Child was dirty and not dressed appropriately for the weather, and that the house was also dirty, with food and clothing everywhere. A Psychologist testified that Mother was chemically dependent on methamphetamine and would need to be in a drug recovery program for the rest of her life. Father also had a history of drug abuse and a criminal record that included sexually oriented offenses, and had been incarcerated approximately 50 times. Father had previously confessed to sexual contact with the older Child, but recanted that story. Father testified that Mother had once tried to choke him after discovering Father had inadvertently sent a text message to an underage female. At trial, Mother and Father were separated, but Mother wanted to reconcile and claimed that she had no concerns regarding Father's parenting abilities. Two counselors testified that the older Child exhibited emotional disregulation and was diagnosed with adjustment disorder and disturbance of emotions, conduct, and mood. Since the older Child had been placed in a residential treatment facility, she showed sexualized behavior, extreme tantrums, night terrors, verbal and physical aggressive behavior, self-inflicted harm, and post-traumatic stress disorder. After hearing this evidence, trial court terminated Mother's parental rights under Texas Family Code 161.001(1)(D), (E), and (O), and found that termina-

tion was in the best interest of the Children. Mother appealed, challenging the factual and legal sufficiency of the evidence.

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). Mother engaged in prostitution from the family home for a number of months, exposing the Children to the dangers of having strangers come to the home. Mother admitted that her prostitution likely contributed to the older Child's behavioral problems. The prostitution combined with evidence of the violent, unstable, and unsanitary living conditions of the home, supported termination of Mother's parental rights.

In its analysis of whether termination was in the Children's best interest, COA weighed factors including Mother's parenting abilities, her acts or omissions demonstrating that the parent-child relationship was improper, and any excuses she has offered for her acts and omissions. There is a strong presumption that it is in the child's best interest to allow the natural parents to retain custody, but this can be rebutted by evidence presented to the contrary. The older Child's behaviors indicated that she was subjected to a chaotic home environment, physical abuse, and sexual abuse, and Mother was not equipped to meet the Child's continued emotional and physical needs. Mother's attempts to seek reunification with Father, despite the fact that he had been diagnosed as a "high-risk individual," demonstrated a lack of understanding of how to protect the Children from physical and emotional risks.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS V. DENIAL OF COUNSEL

¶13-3-17. ***P.W. v. DPFS,*** -- S.W.3d --, 2013 WL 1740047 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.) (4/23/13).

Facts: In 2007, Mother brought her child to a drug deal and was arrested in a narcotics sting. She received deferred adjudication in 2009, a few months before her second child was born. TDFPS ("the Department") opened a case shortly after Mother's arrest in 2007. Mother failed to work with the Department, and also failed to abide by court orders that ordered her to refrain from using drugs and to attend in-patient rehabilitation. Mother also failed to report to her community service officer (as required as a part of her deferred adjudication); as a result, in January 2011, Mother was adjudicated guilty on the possession charge and was sentenced to four years imprisonment.

In June 2011, a bench trial was held regarding the termination of Mother's parental rights. Mother was represented by appointed counsel ("Counsel"). Counsel cross-examined the case-worker that was the Department's main witness, Counsel objected to some of the questions posed to the witness by the Department and the ad litem for the children, Counsel conducted a direct examination of Mother, and Counsel presented a closing argument. The trial court found grounds for termination, and found that termination was in the children's best interest. Mother appealed.

Holding: Affirmed

Opinion: In Texas, per *Strickland v. Washington*, there is a statutory right to effective counsel for indigent persons in parental-rights termination cases. A right to effective counsel is different from the *United States v. Cronic* decision, which applies when there has been an actual or constructive denial of counsel. To show ineffective assistance of counsel under *Strickland*, the defendant has the burden to show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) there was a probability sufficient to undermine confidence in the outcome (i.e. but for counsel's unprofessional errors, the result of the proceeding would have been different). Additionally, when the record is silent, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, includ-

ing the possibility that counsel's actions are strategic. *Cronic*, on the other hand, applies when there has been an actual or constructive denial of counsel. A defendant is denied counsel when her attorney is physically absent from the proceeding, or when her attorney is mentally absent (i.e. counsel is asleep, unconscious, or otherwise *non compos mentis*). Bad lawyering, regardless of how bad, does not support the *Cronic* presumption; more is required.

Mother asserted in her appeal that (1) Counsel allied herself with the proponents of terminating Mother's parental rights, (2) Counsel failed to inquire into why Mother's relatives were rejected as care-givers, and (3) Counsel's questioning of the Department's main witness actually supported the Department's request for termination of Mother's parental rights. The COA held that the *Strickland* rule applied to Mother's appeal because in order to evaluate Mother's argument, it must review counsel's actual performance (versus complete and utter non-performance) at trial. The COA held that Mother did not satisfy the first prong of *Strickland* because the record is silent (i.e. there was no motion for new trial and there was no affidavit from trial counsel) about trial counsel's reasons for the challenged conduct. The COA found that it was not permitted to speculate to find counsel ineffective on a silent record. The COA also held that Mother did not satisfy the second prong of *Strickland* because her termination was based on the undisputed fact that Mother had been sentenced to four years imprisonment, and Mother did not contend that anything her counsel did or failed to do would have affected that determination. Finally, the COA held that the evidence supported a finding that termination of Mother's parental rights was in the best interests of the children, and Mother (1) did not dispute the evidence, (2) did not contend that the evidence was admitted due to her trial counsel's deficient performance, or (3) identify any favorable evidence that her counsel should have introduced, but did not. The COA, negating mother's ineffective assistance of counsel claim, affirmed the trial court's judgment.

FATHER'S REFUSAL TO SEPARATE FROM ALCOHOLIC MOTHER SUPPORTED TERMINATION OF HIS PARENTAL RIGHTS

¶13-3-18. ***In re O.N.H.,*** -- S.W.3d --, 2013 WL 1749419 (Tex. App.—San Antonio 2013, no pet. h.) (4/24/13).

Facts: Father and Mother were married in 2001 and had three children together. The investigation that led to the children's removal stemmed from a report that Mother had taken alcohol into a Salvation Army Center in a child's sippy-cup, passed out, and left the children unsupervised. Ultimately, the TDFPS ("the Department") filed a petition to terminate both parents' parental rights. Both parents and two caseworkers testified at trial.

Father testified that Mother had struggled with alcoholism for over ten years, and that the longest period of sobriety he could remember was for nine months when she was pregnant. Father testified that he called the police several times to assist him in leaving the house when Mother was intoxicated due to her physical assaults. Father also testified that their two-month old had died, and that Mother had been drinking the night of the death; the child's death certificate noted that neither SIDS nor asphyxiation due to co-sleeping could be ruled out. Father testified that he would leave children with Mother when he went to work, even though he knew that Mother started drinking before he got home. Father testified that, in the past, he would purchase alcohol for Mother. Father's testimony established that he had taken steps to increase his awareness of the effects of alcoholism and to stop being an enabler. However, his testimony also reflected that he had yet to make significant changes in how he would attempt to protect his children from Mother's alcoholism. Father repeatedly accepted Mother's relapses and continued to live with her in spite of them, and Father even specifically testified that he was determined to continue living with Mother as long as she was making efforts to fight her alcoholism.

Mother testified that she drank in response to depression and stress and that sometimes she drank so excessively that she lost consciousness and could not remember what happened. Mother also testified that she tended to relapse after three or four months of sobriety, and that she had drank alcohol the weekend before the second hearing of the trial. Additionally, evidence was presented that Mother had been picked up from the Department's offices by the police because she was intoxicated while on a visitation with her children; she had brought a sippy-cup full of beer and refused to leave a bathroom stall to take a drug test. Finally, evidence

was presented that while Mother had participated in four different rehabilitation programs, she did not complete any of them.

The caseworkers testified at trial that one of the children stated that she did not like it when her parents fought, and that Mother and Father both "f[ou]ght and slap[ped] each other." The caseworkers also testified that the family's domestic violence issues were tied up in Mother's alcoholism. The caseworkers testified that Father's continuous minimizing of Mother's problems and his stated intention to continue living with Mother raised valid concerns about his ability (or lack thereof) to care for the children. The caseworker also testified that Father had fulfilled many of the requirements of his service plan, but not all of them. Father failed (1) to demonstrate the ability to protect the children from abuse or neglect and show concern for the children's future safety; (2) to demonstrate the ability to put the children's needs ahead of his own; (3) to actively participate in therapy to address his issues with domestic violence and how it is impacting his family; (4) to demonstrate the ability to parent and protect his children; (5) to attend A1-Anonymous meetings as frequently as his plan called for; and (6) to identify a "positive support system" (i.e. a local person who would provide child care in the event of an emergency of if Father felt overwhelmed).

Some evidence was presented that termination was not in the children's best interests, including evidence that (1) Father had a stable job and a stable residence, (2) both children expressed a desire to return home with their parents, (3) the children suffered unexplained scratches and bruises while they were living with their initial foster family, (4) the children became less outgoing after they had been removed, and (5) at the time of trial, there was also no set plan for the children's immediate adoption.

Mother and Father's parental rights were terminated in 2012 and Father appealed, asserting that the evidence was legally and factually insufficient to find that termination was in the children's best interests.

Holding: Affirmed

Opinion: One parent's endangerment of a child by continued exposure to the other parent's uncontrolled drug habit is a relevant consideration in determining a child's best interest. The COA affirmed the trial court's judgment, finding that the evidence showed that Father did not adequately grasp the severity of Mother's alcoholism and the danger it posed to the children's emotional well-being and physical safety. Furthermore, the evidence showed that Father placed the priority of maintaining the family unit over the priority of protecting his children. Although there was some evidence that termination would be against the children's best interests, the COA held that their only duty was to review whether a reasonable fact-finder could have formed a firm conviction or belief that termination was in the children's best interest, even if some evidence pointed the other way. Based on all the evidence, the COA affirmed, holding that a reasonable fact-finder was justly entitled to find that the alcohol abuse and domestic violence in the home created an unstable and dangerous environment for the children.

VOIDABLE SAPCR JUDGEMENT CAN ONLY BE SET ASIDE ON DIRECT ATTACK

¶13-3-19. ***Jones v. DPFS,*** -- S.W.3d --, 2013 WL 1831625 (Tex. App.—Austin 2013, no pet. h.) (4/25/13).

Facts: In July 2009, the TDFPS ("the Department") filed a petition in Williamson County seeking conservatorship and termination of the parent's rights to two children, F.A. and C.A. The Department stated in its petition that it would request that the bureau of vital statistics to confirm that the children had not previously been the subject of a suit resulting in a different court becoming the court of continuing, exclusive jurisdiction. Although judgments involving F.A. and C.A. had in fact previously been rendered by a court in Travis County, the bureau, in response to the Department's request, sent a letter to the Department in August 2009 stating that according to its file, neither F.A. nor C.A. had been the subject of a SAPCR in which a judgment was entered. The Department failed to file the bureau's letter with the Williamson County court. In October 2010, Jones filed a petition in intervention in the Williamson County SAPCR, seeking to be appointed SMC of F.A. and C.A. Jones's petition was ultimately dismissed, and her motion for a new trial was overruled. Jones filed

a notice to appeal, but it was dismissed for want of prosecution. The Williamson County court signed a final order in December 2010 and appointed the Department as permanent managing conservator of F.A. and C.A.

Afterwards, Jones filed two petitions in Travis County to modify the earlier Travis County orders regarding the conservatorship of F.A. and C.A. The Travis County trial court concluded that because the Department failed to file the information it received from the bureau with the Williamson County court, the Williamson County court's final order was voidable. The Travis county court further concluded that a voidable order may be set aside only be a direct attack, not a collateral one. The Travis County court dismissed Jones's petitions as impermissible collateral attacks on the Williamson County court's final order. Jones appealed.

Holding: Affirmed

Opinion: The family code provides that "if a court of this state has acquired continuing exclusive jurisdiction, no other court of this state has jurisdiction of suit with regard to that child except as provided by this chapter." The family code expressly permits a court to rely on the bureau when assuming jurisdiction over a SAPCR and provides that the court "shall have jurisdiction over a suit if it has been, correctly or incorrectly, informed by the bureau of vital statistics that the child has not been the subject of a suit and the petition states that no other court has continuing exclusive jurisdiction over the child." Moreover, a court having exclusive, continuing jurisdiction of a SAPCR loses its jurisdiction to modify its earlier orders if "another court assumed jurisdiction over a suit and rendered a final order based on incorrect information received from the bureau of vital statistics that there was no court of continuing jurisdiction." Finally, the family code provides that if a request for information from the bureau has been made, the court may not render a final order until the information is filed with the court. The COA appeals held that since the Department did not file the bureau's letter with the Williamson County court before the court rendered its final order, the Williamson County court's order was not "based on" incorrect information from the bureau, and thus, the Travis County court did not lose its continuing, exclusive jurisdiction when the Williamson County court rendered its final order. The COA found that the family code provides that in this situation, the Williamson County court's final order was therefore "voidable," not void (as Jones contested).

A collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific relief against which the judgment currently stands at bar. If a proceeding seeks to avoid the effect of a judgment but does not constitute a valid direct attack, it is a collateral attack. The COA held that Jones's pleadings filed with the Travis County court were clearly collateral attacks. Jones asserted that the Williamson County order was void and had no effect, and then sought to modify the Travis County court's orders. This effectively sought relief against the Williamson County court's final order, which would have served as bar (i.e. Jones sought to modify the Travis County court's orders that had been superseded by the Williamson County court order). Having established that the Williamson County court's final order was "voidable" and that the petitions Jones filed with the Travis County court constituted a collateral attack, the COA affirmed the Travis County court's dismissal of Jones's petitions as impermissible collateral attacks on the Williams County court's final order.

Editor's Comment: *A collateral attack is only permitted when an order is void and an order is void only when the court that signed the order lacked jurisdiction. Many orders are voidable, but very few wind up being void. (C.N.)*

THE FAILURE TO TERMINATE THE PARENTAL RIGHTS OF A PROBLEMATIC FATHER DOES NOT INDICATE THAT THE TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS NOT IN THE CHILD'S BEST INTEREST; TERMINATION IS BASED ON EACH INDIVIDUAL'S OWN CONDUCT.

¶13-3-20. ***C.V. v. DPFS,*** -- S.W.3d --, 2013 WL 1829824 (Tex. App.—El Paso 2013, no pet. h.) (04/30/13).

Facts: TDFPS (the "Department") sought to terminate the parental rights of Mother to their 6 children. The Department's investigation began after a report that Child 1 had been hit with a belt by Father. During the

investigation, Mother tested positive for drugs and Child 6, baby, tested positive for cocaine. The Department, unable to find any suitable placement options, sought temporary managing conservatorship, and the children were placed in foster homes. The Department established a safety plan, requiring Mother to do the following: (1) attend all of the children's medical appointments; (2) attend a psychological evaluation; (3) attend a drug and alcohol assessment; (4) attend parenting classes; (5) submit to random drug testing; (6) refrain from using illegal substances; (7) refrain from associating with individuals having a history of using illegal substances; (8) attend therapy sessions; (9) obtain stable employment and provide proof; (10) obtain stable housing; (11) attend and complete domestic violence classes; and (12) attend and complete anger management classes. Of these requirements, Mother completed the psychological evaluation, the drug and alcohol assessment, three parenting classes, random drug testing, and therapy sessions. She failed to attend more than ten of the children's medical appointments. Additionally, Mother's visitation with the children (if it was not cancelled due to her tardiness) was characterized by her passive observance of the children's aggressive behavior towards each other, including constant fighting, punching, scratching, and biting. Mother was eventually permitted to visit with the children unsupervised, but unsupervised visitation was terminated when Mother again tested positive for drugs and permitted family members to visit the children even though they had allegedly sexually assaulted Child 1. Mother admitted that the children sometimes overwhelmed her and that she turned to drugs to alleviate the stress.

At trial, Child 1's therapist testified Child 1 suffers from anxiety, depression, nightmares, and outbursts of anger. She has a history of self-harm by cutting and has been hospitalized due to outrageous anger, which involved hitting and kicking walls. There was also testimony of the Child's severe aggression, assaultive behavior, severe emotional problems, sexualized behavior, and lack of boundaries. She is unable to follow instructions, respect limits, or abide by social order, and she shows no empathy for the feelings of others. Consequently, she has been medicated and hospitalized at University Behavioral Hospital in El Paso at least five times. Her most recent hospital stay lasted four weeks. Child 1's sexual behavior involves pole dancing, inappropriately rubbing against other children, and acting out sexually against a sofa. Child 1 told her therapist that she had observed her cousins' sexual actions and had witnessed her mother engage in sexual relations at a cantina in Juarez. She made an outcry of molestation by her cousin and her uncle to her mother, but Mother apparently did not believe her. On the other hand, she also alleged sexual abuse by one of her foster fathers, which was disbelieved by the foster mother. Child 1 described a crowd of people at the family home who repeatedly "fought" and "hit each other." She related incidents of domestic violence in the family home to her foster mother and expressed fear that visitors in the home were affiliated with gangs. The therapist also addressed the issue of family violence, reciting that the child observed physical violence and she and her siblings would hide under the bed. When asked whether these incidents would negatively affect the children, the therapist emphatically answered yes.

Child 2, although doing well in school, had been diagnosed with ADHD and aggression, and had significant psychological and behavioral issues. He was prescribed multiple psychotropic medications and on four occasions, his foster mother took him to University Behavioral Hospital due to his suicidal thoughts, threats to others, and self-harm. The latest hospitalization lasted for six days and Dr. Moreira diagnosed him as bipolar. The foster mother explained that most of Child 2's behavioral problems occurred before and after visits with his mother, but she acknowledged this behavior could be related to his wanting to stay with her since he had a pathological bond to his Mother. Child 2 was placed in a residential treatment center about 70 miles from Lubbock in July 2011 because he was having idealizations of killing the foster parents and foster siblings. A psychological evaluation revealed that Child 2 suffered from anxiety, depression, anger, disruptive behavior, and temper deregulation disorder. Child 2 also displayed odd and dangerous behavior; he ate two tubes of toothpaste, he put a nail clipper in an electrical socket (causing an electrical short), he lies frequently, and he provokes fights with other children.

Child 3 had been diagnosed with mild mental retardation, an anxiety disorder, ADHD, hearing loss, and asthma. Mother admitted that Child 3's behavior included aggression, tearing his pants, and biting his shirts. Additionally, Mother admitted that Child 3 suffered from encopresis but had never had him evaluated by a doctor. Child 3's therapist testified that Child 3 made substantial progress in foster care, specifically in his moral development and behavior. Child 3's foster mother and a clinical treatment coordinator at the El Paso

Center for Children noted that Child 3 often chewed foreign items. He also arrived to the foster mother's house very dirty and soiled, and would spread feces in the bathroom at the El Paso Center for Children.

Child 4 exhibited severe hyperactivity, impulsiveness, competitiveness, aggression, sexual awareness, anxiety, destructive tendencies, and outbursts of anger with tantrums lasting up to 45 minutes. Although Child 4 was highly intelligent, he required very close supervision due to poor judgment.

Child 5 exhibited severe hyperactivity, physical violence, anger, poor judgment, nightmares, difficulty sleeping, fighting with siblings, inability to follow instruction, and was diagnosed with mood disorder. Additionally, Child 5 required speech therapy and psychiatric services. Child 5's foster mother notes that he played games that included inappropriate sexualized behavior with his sibling.

Child 6 exhibited non-stop crying, suffered from a disturbance of her autonomic nervous system, and could not stand to have anyone touch her. In addition, Child 6 often pulled her hair and hit herself. Even while medicated, Child 6 continued to show instability and emotional deregulation. Child 6 was developmentally delayed and in need of speech, psychiatric, and occupational therapy.

At trial, the caseworker, psychologist, therapist, and treatment coordinator all testified about the children's needs. They explained that the children needed stability, constant attention and supervision, and a nonthreatening environment. The Department's plan for the children was to seek adoption. However, that plan was complicated by the fact that Father, who was in prison during most of the proceedings, did not have his rights terminated. Mother's parental rights were terminated and Mother appealed, challenging the legal and factual sufficiency of the evidence to support that termination was in the children's best interest.

Holding: Affirmed

Opinion: Although parental rights are constitutionally mandated, they are not absolute. When seeking to terminate parental rights, the petitioner must establish with clear and convincing evidence: (1) one or more of the acts or omissions enumerated as grounds for termination under section 161.001(1) of the Texas Family Code; and (2) that of the parent-child relationship is in the child's best interest. The COA affirmed, holding that a fact-finder, after reviewing the evidence, could reasonably have formed a firm belief or conviction about the truth of the Department's allegation that termination was in the best interest of the children. Child 1 had made outcries of sexual abuse, engaged in sexualized behavior that she claimed she learned from her Mother, and was afraid of her parents. Mother repeatedly missed the children's medical appointments and visitation appointments, and admitted that she is overwhelmed and unable to handle the children. As a result, Mother relapses and returns to drug usage. Mother's support system is comprised of relatives that have caused harm to the children, including relatives who have (1) allegedly sexually abused one of her children, and (2) neglected her children. Mother continuously failed to accept responsibility for her missteps regarding the care of her children; rather, she blamed others. Mother was unable to properly direct the children when fits of violence erupted, and overall, Mother did not grasp or understand the severity of the children's physical, neurological, psychological, and physical problems. Furthermore, evidence was presented that Mother was unable to provide the children with a consistent, stable, and nonthreatening environment in which they could properly develop.

In response to Mother's argument that there was no plan for permanency since Father's rights were not terminated, the COA countered that it need not consider the couple when addressing the parenting ability of each individual seeking custody. Just because the trial court was willing to give Father a second chance does not mean that termination of the Mother's rights was not in the children's best interest based on her own conduct, behavior, circumstances, and justifications.

WHEN A PRIOR ORDER DENYING TERMINATION EXISTS, COA CANNOT PRESUME THAT JURY AT SUBSEQUENT TERMINATION TRIAL MADE THE REQUISITE FINDINGS NECESSARY TO SUPPORT AN ORDER TERMINATING PARENT-CHILD RELATIONSHIP

¶13-3-21. ***In re D.N.,*** -- S.W.3d --, 2013 WL 1964813 (Tex. App.—Amarillo 2013, no pet. h.) (05/09/13).

Facts: In February 2010, the police were alerted by a local day care facility that two children (one of whom was seriously ill) had been left at the facility and that no suitable arrangements had been made for them to be

picked up; Father no longer lived in town, Mother was out of town, and the person Mother wanted to pick the children up was not listed with the daycare as an authorized person. The day care delivered the children into the custody of the police, and the police delivered the children to the Texas Department of Family and Protective Services ("the Department"). The Department discovered during its investigation that Mother had engaged in various criminal activities that resulted in numerous arrests relating to controlled substances and assault. Mother failed to abide by the terms of community supervision imposed in connection with her criminal activity. This resulted in Mother being sentenced in January 2011 to five years' incarceration. The Department, however, remained willing to work with the family, and a court order was issued on August 2, 2011, denying the Department's request for termination of Mother's parental rights. The order instead named the Department as permanent managing conservator of the children, with Mother and Father being possessory conservators with rights of possession and access.

After the trial court issued its order, Father participated in only two of the ten scheduled visits and made a minimal effort to cooperate with the Department. Mother remained incarcerated. This prompted the Department to file a "Petition to Modify" on April 10, 2012. In this petition, the Department again sought termination of both parents' rights under section 161.001(1) of the Texas Family Code. The evidence presented in connection with the Department's first petition was used again in the second trial. The following new evidence was also presented: (1) Mother had gotten into a fight with a fellow inmate that resulted in a disciplinary report; (2) the children continued to improve; (3) the children did not react well during their two visits with Father; (4) Mother, in an attempt to comply with the Department's family service plan, had plans to obtain her GED while in prison; (5) Mother attempted to remain in contact with the children by sending letters, birthday cards, and Christmas cards to them at the Father's address; (6) Mother was unable to visit with children due to her incarceration. Evidence was also presented that Mother had failed to comply with the Department's family plan of service, although the record lacked information about the specific requirements of the plan, which requirements Mother failed to comply with, and how Mother failed to comply with those requirements. Additional evidence was also presented by both the Department and Mother in support of their respective arguments, although the record was unclear as to whether the events documented by the evidence occurred before or after the trial court's initial order denying termination of Mother's parental rights.

The issue of parental-termination requested in the Department's petition to modify was submitted to a jury who was charged only on Texas Family Code Section 161.001. The jury found that the parent-child relationship should be terminated. The trial court's judgment also appeared to only be based on § 161.001. Mother appealed, arguing that the evidence was insufficient to support the trial court's order of termination.

Holding: Reversed

Opinion: A trial court can terminate the parent-child relationship, even though it previously denied termination in another order, using section 161.001 alone if termination is sought on evidence of acts or omissions having occurred since the earlier order in which termination was denied. However, to rely on acts or omissions evidence that have been presented to the trial court prior to the earlier order denying termination, the Department must garner sufficient evidence of Texas Family Code § 161.004's elements. Section 161.004 of the Texas Family Code provides that a court may terminate the parent-child relationship after rendition of an order that previously denied termination of the parent-child relationship if (1) the petition is filed after the date the order denying termination was rendered, (2) the circumstances of the child, parent, sole managing conservator, possessory conservator, or other party affected by the order denying termination have *materially and substantially changed* since the date that the order was rendered, (3) the parent committed an act listed under section 161.001 before the date of the order denying termination was rendered, and (4) termination is in the best interest of the child. The trial court's order did not refer to section 161.004 as a basis for terminating Mother's parental rights; therefore, the COA was unable to consider the previously presented evidence of acts or omissions occurring prior to August 2, 2011, when the trial court's initial order that denied termination of Mother's parental rights (i.e. the COA could not consider the evidence that Mother was incarcerated, Father lived out of town, or that the children remained in foster care). Looking solely to the new evidence explicitly

occurring post-denial, the COA held that the Department failed to prove by clear and convincing evidence that Mother committed one or more of the enumerated acts or omissions and section 161.001 of the Texas Family Code and that termination of the parent-child relationship was in the best interest of the child.

The dissent found that the trial court's order on the Department's second petition should have been affirmed based on precedent set by the COA in *In re NRT*. In *In re NRT*, a petition to terminate the parent-child relationship had previously been denied. In a trial on a subsequent petition to terminate the parent-child relationship, evidence predating the initial order was again considered, and the trial court terminated the parent-child relationship. The COA affirmed the trial court's judgment despite the absence of findings on the requirements of section 161.004(a) under the Texas Family Code. The majority, however, countered that the judgment in *In re NRT* followed a bench trial, which allowed the COA to presume that the trial court made all findings of fact necessary to support the order of termination. The present case was a jury trial in which the jury was not charged on any issue related to section 161.004; the majority distinguished *In re NRT* from the present case on the basis that the COA is not allowed to presume, in the absence of explicit or implicit findings, that the jury made all findings of fact necessary to support the order of termination.

Miscellaneous

MOTHER'S OFFER OF PROOF WAS INSUFFICIENT BECAUSE IT WAS MISSING PAGES AND CONTAINED VAGUE ENTRIES THAT DID NOT PROPERLY SPECIFY WHAT AMOUNT OF MONEY FATHER OWED SPECIFICALLY FOR DAYCARE EXPENSES

¶13-3-22. ***McBride v. McBride,*** 396 S.W.3d 724 (Tex. App.—Houston [14th Dist.] 2013, pet. filed 04/15/13) (03/12/13).

Facts: Mother and Father filed an agreed dissolution of their marriage in 2000. Father was required to pay child support, and childcare expenses were ordered to be split approximately 60/40 between Mother and Father. In 2004, Father filed a SAPCR seeking to reduce his child support payments. Father's child support was increased, and Mother and Father were named JMCs, with Mother having the right to designate the Child's primary residence. Father was also ordered to pay 38.6% of the Child's daycare expenses, so long as Mother provided monthly invoices of the expenses to Father. In 2007, Father filed a motion to enforce the SAPCR, asserting he had been denied access to the Child, and that Mother had relocated with the Child without notifying Father. Mother filed a general denial, a motion for enforcement of the child support order, and a cross-motion for increased child support from Father. Father admitted that after Mother moved to Connecticut in 2004, Father stopped paying child support, but testified that he had not received information from Mother regarding medical expenses. In trying to prove up the child support arrearage from Connecticut, Mother used a different payment record as an offer of proof from that attached to her motion. Trial court found both Mother and Father in contempt. Mother appealed, alleging trial court erroneously granted Father's assertion of res judicata regarding the child support ordered by the Connecticut court before Texas obtained jurisdiction over the case and failed to include those amounts in the child support arrearage.

Holding: Affirmed

Opinion: An offer of proof will not preserve error adequately unless the record shows the nature of the evidence with sufficient specificity to allow the reviewing court to determine whether the trial court erred in excluding it. A copy of a payment record attached to a motion for enforcement is evidence of the facts asserted in the payment record and is admissible to show whether payments were made. However, the offer of proof Mother attached to her motion for enforcement was not the payment record she offered at trial. Instead, Mother's offer of proof was vaguely labeled "Delinquent Child Support Record," listed Father merely as "Obligor," listed various "unconfirmed obligations," and only included five of the nine pages of the entire document. Mother's offer of proof was inadequate to allow COA to evaluate whether trial court erred in excluding her evidence, and therefore Mother did not preserve the issue for appeal.

Editor's Comment: *Making an offer of proof can be tricky if you are doing it on the fly. If you believe that the trial court might exclude your evidence or witness, then it is best to have your exhibits, deposition excerpts, or witness questions ready to go in order to avoid leaving something out of the offer of proof. (C.N.)*

★★★TEXAS SUPREME COURT★★★

COMBINED FILING ENTITLED "MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, NOTICE OF APPEAL" WAS A BONA FIDE ATTEMPT TO INVOKE COURT OF APPEAL'S JURISDICTION

¶13-3-23. ***In re J.M.,*** 396 S.W.3d 528 (Tex. 2013) (03/15/13).

Facts: The Department filed a petition seeking to terminate Mother's parental rights. Before trial court signed the termination order, Mother's counsel filed a "Motion for New Trial or, in the Alternative, Notice of Appeal." Two days later, Mother's counsel filed a motion to withdraw, stating that Mother desired to appeal but that counsel "does not do appellate work." The motion to withdraw stated that "Motion for New Trial and Notice of Appeal has been filed." Trial court signed the termination order, granted the motion to withdraw, and appointed appellate counsel. Court of appeals dismissed the suit for want of jurisdiction, stating that the combined filing "Motion for New Trial or, in the Alternative, Notice of Appeal" was not a bona fide attempt to invoke the court of appeal's jurisdiction. Mother appealed.

Holding: Reverse and remand

Opinion: Under Tex. R. App. P. 25.1(b), a timely filed notice of appeal invokes the court of appeal's jurisdiction over the parties. The primary factor in determining whether jurisdiction was invoked is "whether the instrument was filed in a bona fide attempt to invoke appellate court jurisdiction." Here, the title of the filed document, and the fact that part of the document was addressed to the court of appeals, indicated that Mother was trying to file a notice of appeal. Therefore, Mother's filing was a bona fide attempt to invoke appellate jurisdiction.

JUDGMENT WAS NOT A WRITTEN ORDER UNDER TRCP 329B, AND THEREFORE AN ORDER SIGNED SEVEN MONTHS AFTER THE DOCKET NOTATION WAS MADE WAS VOID FOR LACK OF JURISDICTION

¶13-3-24. *In re Green*, 2013 WL 1274711 (Tex. App.—Dallas 2013, orig. proceeding) (mem. op.) (03/22/13).

Facts: Husband and Wife divorced. Trial court rendered a final divorce default decree on April 18. On April 20, Wife filed a motion to set aside the final decree and an order for additional access. Trial court did not actually sign an order, but on May 17th noted in a docket that the motion to set aside and vacate the judgment was granted. On June 22, Wife filed a motion to enter final decree, requesting that trial court enter a "clarified" decree. On December 22, trial court signed an order granting Wife's motion to set aside the final decree and a clarifying final decree of divorce. Husband filed a petition for writ of mandamus, alleging that trial court's plenary power had expired and therefore the December 22 order was void.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Under Texas Rule of Civil Procedure 329b, a motion for new trial or a motion to modify, correct, or reform a judgment is overruled by operation of law if the motion is not determined by written order within

seventy-five days after the judgment was signed. If a motion for new trial is timely filed, a court retains plenary jurisdiction until thirty days after the motion would be overruled by operation of law. Here, trial court's jurisdiction expired August 1, which was 105 days after the judgment was signed. A docket entry alone does not constitute a written order under TRCP 329b. Further, trial court's order included substantive modifications to the terms of the divorce decree, which was beyond the scope of the motion filed. Therefore, trial court's December 22 order was void for lack of jurisdiction.

DEFAULT DIVORCE WAS GRANTED IN ERROR BECAUSE FATHER DID NOT RECEIVE PROPER NOTICE OF THE DEFAULT JUDGMENT HEARING, WHICH WAS SCHEDULED DURING A HEARING FATHER DID NOT ATTEND

¶13-3-25. *In re Marriage of Villa*, 2013 WL 1838620 (Tex. App.—Dallas 2013, no pet.) (mem. op.) (03/25/13).

Facts: Husband and Wife filed competing petitions for divorce. Both parties contested the division of their community property, the division of their community debts, and conservatorship of their two children. After Husband's attorney was allowed to withdraw, Wife's attorney mistakenly informed Husband in a letter that a pre-trial hearing was scheduled for August 12 when the hearing was actually scheduled for August 22. Husband did not appear at the August 22nd hearing Trial court rescheduled the hearing for October 3. Husband failed to appear at the October 3 hearing. Trial court noted that Husband had previously been notified that his failure to appear would result in a default judgment and that Wife should appear on October 13 for a default hearing. On October 13, Wife's counsel presented prove-up testimony, and a final decree of divorce was granted and signed on that day. Father filed a notice of restricted appeal within six months of the default divorce decree.

Holding: Reversed and Remanded

Opinion: Father asserted that he did not receive proper notice of the default-judgment hearing, and therefore the default divorce decree should not have been granted. The only issue for COA to determine was whether error was apparent on the face of the record. Under TRCP 245, a party must be given forty-five days' notice of a trial setting, which includes default judgment hearings. The October 3 default-judgment hearing was scheduled during the August 22 pretrial-motion hearing, which Husband did not attend. Even if notice of the October 3 default-judgment hearing was sent to Husband immediately after it was scheduled on August 22, Husband would only have received forty-two days' notice. Therefore, the default divorce decree was granted in violation of Husband's due process rights.

★★★TEXAS SUPREME COURT ★★★

EMOTIONAL INJURY DAMAGES ARE NOT RECOVERABLE FOR THE NEGLIGENT EUTHANIZATION OF A FAMILY DOG

¶13-3-26. ***Strickland v. Medlen,*** -- S.W.3d --, 2013 WL 1366033 (Tex. 2013) (4/5/13).

Facts: Texas Animal Control picked up a dog that had escaped from Owners' backyard. Owners did not have the required fees to retrieve the dog, so the shelter put a "hold for owner" tag on the dog's cage so the dog would not be euthanized. However, Employee mistakenly placed the dog on the euthanasia list and the dog was put to sleep. Owners sued Employee for damages based on sentimental and intrinsic value. Employee specially excepted and contended that damages were unrecoverable in pet-death cases. Owners amended their pleadings and dropped the words "sentimental value" but re-alleged damages for the "intrinsic value" of the dog. Employee specially excepted again, and trial court dismissed the suit with prejudice, holding that (1) dogs are personal property, (2) the law does not allow for the recovery of emotional damages based on per-

sonal property, and (3) Owners had not stated a claim for damages recognized at law. COA reversed, holding that (1) dogs are personal property, (2) under common law, when personal property has little or no market value, and its main value is in sentiment, damages may be awarded based on the intrinsic or sentimental value, and (3) trial court erred in dismissing the lawsuit.

Holding: Reversed and Remanded

Opinion: Under *Heiligmann v. Rose*, the controlling case on whether damages may be recovered for the negligent destruction of a dog, damages in dog-death tort cases are limited to the "market value [of the dog], if the dog has any," or the "special or pecuniary value" linked to the dog's "usefulness and services." Historically, dogs are considered personal property for purposes of calculating damages. Damages must be related to the dog's economic value, not its sentimental value. Post-*Heiligmann* cases have allowed for damages beyond the mere market value of personal property if the personal property had "sentimental value," such as a family heirloom, but the loss of a beloved family pet is an "emotional value," not a "sentimental value." Therefore, post-*Heiligmann* cases allowing for damages beyond the market value of personal property do not apply to dog-death tort cases.

The SC also noted the public policy concerns behind allowing for the recovery of emotional-injury damages related to the negligent destruction of a dog. First, pet-litigation expenses would expose veterinarians, animal shelters, animal rescuers, and other animal-service providers to increased financial liability that will ultimately result in fewer free animal clinics, fewer animal shelters, fewer pet services, more abandoned animals, higher prices for veterinarian care, and an increase in the cost of insurance for veterinarians, homeowners, and automobile drivers. Second, damages for the loss of companionship of a dog are analogous to the loss of consortium. Damages for the loss of consortium are strictly confined to husband-wife and parent-child relationships. Thus, to allow the recovery of damages based on the loss of companionship of a dog, when such damages are not recoverable for the loss of consortium of a sibling, for example, would be to set aside public policy by valuing the life of a dog over the life of a human.

Lastly, the SC held that the legislature is best equipped to weigh and initiate broad changes to social and civil-justice policy that would relate to pet litigation in dog-death tort cases, including when to allow such damages, for which pets damages are recoverable, and the financial limits of the recovery. The SC held that, barring future legislation, emotional injury damages were not recoverable for the negligent destruction of a dog, and as a matter of law an owner's affection for a dog was not compensable.

Editor's Comment: *I was really hoping for a new "dog tort" – that would have been fun. (M.M.O.)*

WHEN DEFAULT JUDGMENT ATTACKED BY BILL OF REVIEW ACTION, TRIAL COURT IS NOT LIMITED TO FACE OF THE RECORD AS IN A RESTRICTED APPEAL AND MAY CONSIDER ADDITIONAL EVIDENCE TO DETERMINE WHETHER PROCESS SERVER COMPLIED WITH ORDER ALLOWING FOR SUBSTITUTE SERVICE

¶13-3-27. ***In re M.C.B.,*** -- S.W.3d --, 2013 WL 1606154 (Tex. App.—Dallas 2013, no pet.) (op. on rhrng) (04/11/13).

Facts: In June 2009, Mother filed a petition to modify the parent-child relationship. After five unsuccessful attempts to serve Father, the district court signed an order allowing service by attaching and affixing the citation to Father's front door. The return of service affidavit stated that delivery was made "by 106 to door of" Father's address. Father did not file an answer and a default hearing was held on July 21, 2009. At the default hearing, Process Server testified that (1) he talked with "the apartment people" and confirmed that Father still lived at the address he had on file, (2) he duct-taped the citation to Father's front door, and (3) he returned to Father's residence the following day, noticed the citation was no longer duct-taped to the door, and affixed a second citation to the front door "just because."

Trial court granted a default judgment in favor of Mother. Father filed a petition for a bill of review, asking that the default judgment be set aside since (1) the return of service did not strictly comply with the rules of civil procedure when it simply stated that it was executed "by 106 to door," (2) he did not have notice of the default judgment hearing, and (3) therefore, the trial court never had jurisdiction over him. Mother moved for summary judgment, arguing that (1) Father was properly served, (2) he never filed an answer, and (3) therefore, she was not required to give notice of the default judgment hearing. District court granted Mother's motion for summary judgment and dismissed Father's bill of review, finding that (1) Process Server's testimony regarding the method of service sufficed to show that service was effected properly, (2) Father did not file an answer with the court, and (3) therefore, Father was not entitled to notice of the default judgment hearing. Father appealed.

Holding: Affirmed

Opinion: When a default judgment is attacked by a bill of review, as opposed to a restricted appeal, a court may consider evidence beyond the face of the record, including affidavits, testimony, and exhibits to determine whether service of process was made in compliance with an order authorizing substituted service. Here, Process Server testified that he taped the service to Father's door, in strict compliance with the order authorizing substitute service. Therefore, Father failed to establish that the return of service did not strictly comply with TRCP 106, and trial court was free to consider Process Server's testimony.

ACCEPTANCE OF BENEFITS DOCTRINE DOES NOT MOOT REVIEW OF CONSERVATORSHIP ORDERS ON APPEAL FROM A DIVORCE DECREE

¶13-3-28. *Dorai v. Dorai*, 2013 WL 1694866 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.) (mem. op) (04/18/13).

Facts: Father and Mother had one Child. The Child lived with Mother during the pendency of the divorce. Mother asserted she and Father had a general agreement that she would have the right to designate their child's primary residence. At trial, Father requested joint managing conservatorship with Mother having the right to designate their child's primary residence. Mother requested sole managing conservatorship. Mother was sanctioned several times at trial because she had a mental disability that prevented her from following instructions and remaining focused during the one-day trial. Trial court appointed Father and Mother as JMCs, giving Father the right to designate the child's primary residence. Mother appealed. However, later that year, the parties requested that trial court sign an order requiring Father to execute a Special Warranty Deed to convey all rights, title, and interest in Father and Mother's Maryland home to Mother. Trial court signed the order. Mother maintained her appeal, asserting that the trial court (1) erred by mischaracterizing certain property as Father's separate property, (2) abused its discretion by denying Mother's motion for a new trial, (3) abused its discretion by assigning Father the responsibility of designating their child's primary residence, and (4) abused its discretion by denying her motion for continuance.

Holding: Affirmed in Part, Dismissed in Part

Opinion: Father argued that Mother could not appeal the conservatorship orders because Mother had accepted the benefits of the judgment. A party to a judgment accepts the benefits of the judgment when she seeks and obtains legal title to real property awarded in the judgment. Therefore, Mother accepted the benefits of the judgment by taking legal possession of the home awarded to her in the divorce decree. However, a parent's acceptance of the benefits concerning the division of the marital estate does not moot review of the best interest of the child. Mother argued that because the Child lived with her during the pendency of the divorce, Mother should have been granted the right to designate the Child's primary residence and that she and Father agreed she would have this right. However, without a written agreement, trial court must rule based on the best interest of the Child, and where the Child lived during the pendency of the divorce does not control which parent will have the right to designate the Child's residence after the divorce. Further, Mother had dif-

ficulty staying focused and following directions during the trial, which could reasonably have indicated to trial court that her mental disability could impair her ability to raise the Child.

BIAS IS NOT A CONSTITUTIONAL DISABILITY THAT REQUIRES DISMISSING A JUROR

¶13-3-29. ***In re M.G.N.,*** -- S.W.3d --, 2013 WL 1749406 (Tex. App.—San Antonio 2013, no pet. h.) (04/24/13).

Facts: Father and Mother divorced and were appointed JMCs of their Children. Later, Father and Mother both sought to be designated SMC of their Children, and agreed to have the issue determined by a jury. Following voir dire, twelve jurors and one alternate were selected. After the commencement of trial, it was discovered that one of the jurors knew Father's former employer and did not agree with Mother's insinuations that Father was responsible for his former employer's business troubles. Not wanting to risk impartiality or the possibility that this juror would introduce additional information to the other jurors, trial court dismissed the juror and replaced him with the alternate juror. On the last day of trial, the court dismissed another juror after he called in sick. Having already promised the remaining jurors that the trial would conclude that day, trial court proceeded with only eleven jurors despite Father's objections. The eleven-member jury denied both parties' requests for sole managing conservatorship. Father timely moved for mistrial and was denied. Father appealed, arguing that his constitutional right to a twelve-member jury was denied.

Holding: Reversed and Remanded

Opinion: A district court jury must consist of twelve jurors, unless not more than three of them die or become "disabled from sitting." A juror is disabled from sitting if there is an "actual physical or mental incapacity." A juror's bias or prejudice is not a constitutional disability. Here, the juror who knew Father's former employer was not disabled by a physical or mental incapacity, and therefore was improperly dismissed. After the second juror was dismissed due to illness, trial court erroneously allowed the trial to conclude with only eleven jurors, despite Father's motion for mistrial. Therefore, Father's constitutional right to a twelve-member jury was violated.

TRIAL COURTS MUST RULE QUICKLY ON CASES INVOLVING THE PARENT-CHILD RELATIONSHIP

¶13-3-30. *In re Bates*, 2013 WL 2107169 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (mem. op) (05/14/13).

Facts: Father and Mother were divorced in 2010. According to the parties' agreed decree, the parents were named joint managing conservators of their three minor children, and a modified possession order governed Father's periods of access. On March 2, 2012, Father filed a motion for enforcement of his possession or access, alleging that Mother failed and refused to surrender their then sixteen-year-old daughter to him for his regularly-scheduled possession periods in the month of February. On March 6, 2012, the trial court signed an order setting a hearing on the motion for April 6, 2012, and ordering Mother to appear. Mother filed an answer on March 25, 2012, and after the parties unsuccessfully attempted to mediate their dispute, a hearing on Father's motion was held on June 28, 2012. The trial court reserved ruling on Father's motion until it had decided Mother's two enforcement motions (which had been set for hearing on multiple occasions, but still had not been heard). After more than five months passed, Father filed a motion requesting a ruling on his pending motion, which had been set for hearing twice but continued to be reset due to Mother's absence. Father then filed a Writ of Mandamus on April 22, 2013.

Holding: Writ conditionally granted.

Opinion: A trial court commits a clear abuse of discretion when it refuses to rule on a properly filed motion within a reasonable time. Whether a reasonable period of time has elapsed is dependent on the circumstances of each case, but in a suit involving the parent-child relationship, justice demands a speedy resolution and mandamus may issue to protect the rights of parents and children. The COA held that the trial court had be given a reasonable time within which to perform its ministerial duty to rule on a pending motion, and that the trial court's delay was unreasonable in a case concerning parental rights and the best interest of children; Father had not had regular visitation with eldest child for over a year. Thus, the COA conditionally granted the petition for writ of mandamus and directed the trial court to rule on Father's pending motion within fifteen days of the date of its opinion.

SERVICE OF PROCESS MUST BE SHOWN ON THE FACE OF THE RECORD OF TRIAL COURT THAT ISSUED FINAL JUDGMENT; A CERTIFIED COPY OF A RETURN OF SERVICE FILED IN A DIFFERENT COURT THAT TRANSFERRED THE CASE IS INSUFFICIENT

¶13-3-31. ***In re K.M.,*** -- S.W.3d --, 2013 WL 2106087 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (5/16/13).

Facts: In 2011, Father filed suit in Montgomery County petition to modify. A certified copy of return of service was filed in the trial court in Montgomery County. The case was then transferred to Brazoria County. The Brazoria trial court held a hearing, and Mother did not appear. Thus, the trial court granted a default judgment to Father naming him as Child's sole managing conservator and naming Mother as possessory conservator with supervised visitation. The judgment stated that Mother, "although duly and properly cited, did not appear and wholly made default." Mother filed a restricted appeal arguing that there was no affirmative showing in the record that she was duly served with process.

Holding: Reversed and Remanded

Opinion: To prevail on a restricted appeal, a party must establish that (1) the party filed a notice of restricted appeal within six months after the judgment was signed, (2) it was a party to the underlying suit, (3) the party did not participate in the hearing that resulted in the judgment that is the subject of complaint and did not file any timely post-judgment motions or requests for findings of fact and conclusions of law, and (4) error is apparent on the face of the record. The appellate court found that the first three elements were undisputed in favor of Mother, and therefore only analyzed whether the fourth element was satisfied. The face of the record includes all papers on file in the appeal, including the clerk's record and the reporter's record. The COA held that (1) the appellate record contained no affirmative showing that Mother was duly served with process, (2) the recital of service that was mentioned in the trial court's judgment was insufficient to establish an affirmative showing of service, and (3) even though Ex-Husband attached to his appellate brief a the return of service that was filed in the trial court in Montgomery County before the case was transferred, the return of service was not a part of the appellate record. Since the appellate record did not show that Mother made an appearance in the trial court or that she waived service of process, and there was no affirmative showing in the appellate record that Mother was duly served with process, the COA held that error was apparent on the face of the record and reversed the trial court's judgment.

TAKING ANOTHER LOOK AT RECUSING AND REFERING, MOTIONS FOR CONTINUANCE, AND DISQUALIFICATION

¶13-3-32. ***Litman v. Litman,*** -- S.W.3d --, 2013 WL 2075356 (Tex. App.—Dallas 2013, no pet. h.) (5/15/13).

Facts: Husband filed for divorce from Wife on January 21, 2010. After changing counsel three times, Wife sought and obtained a continuance of the trial; the trial was rescheduled from October 27, 2010 to December

15, 2010. On December 8, 2010, Wife filed a second motion for continuance of the trial date. After conducting an evidentiary hearing on that same day, the trial court denied the motion, and Wife concedes that the motion was facially deficient. After the hearing, Wife's counsel told Husband's counsel "don't work all weekend because I am going to file a Motion to Recuse." On December 14, 2010, the day before trial, Wife filed a third motion for continuance and requested a hearing. It was substantively the same as the second motion, but cured the facial deficiencies. The trial court denied Wife's third motion for a continuance without reviewing it or conducting a hearing. At 9:08 a.m. on December 15, 2010, prior to the trial commencing, Wife filed a motion to recuse the trial judge. Neither Wife nor her counsel appeared at trial. After hearing Husband's evidence, the trial judge stated on the record that the divorce was granted and that Husband's proposed division of assets was adopted. The trial judge then referred the recusal motion to the presiding judge of the administrative judicial district, but also struck the motion as untimely.

Two days later, on December 17, 2010, the Regional Presiding Judge denied the motion to recuse by written order. The order stated the Presiding Regional Judge "determined that the motion was based on legal rulings, was untimely filed," and was therefore "facially insufficient to merit a hearing." On December 21, 2010, the trial court signed a final decree of divorce, which failed to set forth any statement of good cause for the trial court proceeding with trial after the motion for recusal was filed.

Wife filed a timely motion for a new trial. The trial judge's term of office ended so a successor judge heard the motion for new trial and denied it, but signed an order vacating the December 21, 2010 decree and entering a modified decree on April 5, 2011, without any additional evidence being entered, which also failed to set forth any statement of good cause for the trial court proceeding with trial after the motion for recusal was filed. Wife filed a motion for a new trial objecting to the modified decree. The trial court signed amended findings of fact and conclusions of law on May 18, 2011. On June 23, 2011, five days after learning of the basis for disqualification, Wife filed a motion to disqualify the law firm that represented her Husband while a second motion for new trial was pending. The trial court heard the motion and denied it. This appeal followed.

Holding: Affirmed

Opinion: Wife complained that the December 15, 2010 proceedings were a nullity because they occurred while her recusal motion was pending. Therefore, Wife argued that no evidence supported the marital property division in the trial court's modified decree. Section 18d of the Texas Rules of Civil Procedure states that "except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion [of recusal] and prior to a hearing on the motion." However, a judge may determine whether the ten-day requirement of Rule 18a has been met before deciding whether to recuse or refer. Furthermore, the ten-day requirement should not be strictly enforced when the claimed event triggering the motion to recuse occurred less than ten days before the next scheduled hearing. The COA found that Wife failed to acknowledge that her attorney told Husband's attorney the week before that he planned to file a motion to recuse. In addition, the trial judge refrained from signing any order other than the referral order (in which he stated good cause for proceeding with the trial (i.e. that the motion was untimely filed)) until after the presiding judge had ruled on the motion to recuse. The presiding judge ultimately denied the motion two days later, concluding that no hearing was required because the motion was "facially insufficient." Shortly, thereafter, the trial judge's term of office ended, and a successor judge considered Wife's complaints and signed a modification decree. The COA held that under these circumstances, the rationale of the "recuse of refer" rule was not offended by the trial judge's actions, and affirmed the trial court's judgment.

Wife also argued that the trial court erred by denying her motion for new trial. In order to set aside a default judgment by motion for new trial, the movant must first establish, per *Craddock v. Sunshine Bus Lines, Inc.*, that the failure to appear was not intentional or the result of conscious indifference. Wife argues that her attorney mistakenly believed that because a motion to recuse had been filed, the case would not be heard, and that this negated "conscious indifference" element. However, Husband argued that Wife's attorney ignored the plain language of Rule 18a that allowed a trial court to proceed upon a finding of good cause. Additional-

ly, Husband testified to his belief that the motion to recuse was filed in an attempt to delay the proceedings further and obtain the continuance that the trial court had already denied. The COA (following the rule that it is within the discretion of the trial court to resolve conflicts in the evidence and to determine that the failure of Wife's attorney to appear for trial was the result of intentional conduct or conscious indifference) held that Wife did not meet her burden of proving the first element of *Craddock*, and affirmed the trial court's judgment.

Wife further argued that the trial court erred by failing to disqualify Husband's attorney. The burden was on Wife to establish with specificity a violation of one or more of the disciplinary rules. Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice. Furthermore, a party who does not file a motion to disqualify opposing counsel in a timely manner waives the complaint. The COA found that Wife did not file her motion to disqualify until six months after the first judgment was entered. At that time, Wife's first motion for new trial had been denied, and Wife's second motion for new trial, directed to an amended decree, was pending. The evidence offered at the hearing on the motion to disqualify showed that the attorney who entered an appearance as Wife's counsel (Attorney 1) worked at a firm with another attorney (Attorney 2) who spent approximately 1.5 hours on Wife's case; Attorney 2, with regards to Wife's case, conducted an interview with business valuation experts and reviewed and revised a motion to withdraw. Wife was promptly billed by the firm, and the bill indicated the Work that Attorney 2 had performed for Wife's case. Attorney 2 then, after three months of working for the same firm that Attorney 1 worked at, accepted a position with the firm representing Husband. Attorney 1 then withdrew from representing Wife. The trial court noted "the incredibly insignificant amount of work performed by [Attorney 2]" as well as "the decided lack of any credible testimony from either side that [Attorney 2] either did or could have acquired any information, confidential or otherwise, about the…case" over the two months the firm represented Wife. The COA found that Wife was also required to establish with specificity a violation of one or more of the disciplinary rules, or in this case, that Attorney 2 "personally…formally represented" Wife for purposes of Rule 1.09. The trial court found that, at most, there was only a remote possibility of a violation of the disciplinary rules, and that was insufficient to establish a disqualification. Also, Wife chose not to participate in the trial and did not substantially engage in or respond to proffered discovery during any time prior to trial. The COA held that under these circumstances, the trial court did not abuse its discretion by denying Wife's motion to disqualify Husband's counsel. Acting with reference to guiding principles, the trial court could have concluded that the denial of Wife's motion to disqualify was warranted by Wife's previous actions to delay trial and ultimate default, the absence of evidence that Attorney 2 personally represented Wife, and waiver due to Wife's lack of diligence in reviewing billing records specifically naming Attorney 2.

Editor's Comment: *Moral of the story—it is now okay for a non-governmental lawyer to do some work on a matter for one spouse, then go to work for the firm representing the other spouse without violating the disciplinary rules and burden of discovering the conflict now wholly on the client. Notably, the Dallas Court of Appeals failed to address or distinguish either its own precedent but more importantly that of the Texas Supreme Court and instead relied upon a decision involving an attorney, who left government employment, which we all know comes under a different disciplinary rule. Compare Tex. Disciplinary R. Prof'l Conduct 1.09 with Tex. Disciplinary R. Prof'l Conduct 1.10. Yes, a petition for review is going to be filed. (G.L.S.)*

Editor's Comment: *Not sure I'm familiar with the "remoteness" doctrine as it applies to the disciplinary rules. I always thought… if it's a conflict, then it's a conflict. But, apparently not. Now we know. (M.M.O.)*

SUPREME COURT WATCH

Following are some of the cases that are related to family law that are currently being considered by the Texas Supreme Court. Review has been granted and oral argument has been heard on some of these cases. The remainder of the cases are still somewhere in the briefing phase of consideration. The briefs that have been filed in these cases can be found on the Texas Supreme Court website, along with the oral arguments that have been presented.

***In the Matter of the Marriage of H.B. v. J.B.*, 11-0024,** (briefs on the merits filed in 2011, oral argument has yet to be set) 326 S.W.3d 654 (Tex. App.—Dallas Aug. 31, 2010) (reversed and remanded) (Dallas County) (amicus briefs filed by Texas State Representative Warren Chisum and the Honorable Todd Staples in support of the State of Texas).

The issue before the Court is whether a gay coupled married in another state is entitled to obtain a divorce in the State of Texas.

***State of Texas v. Naylor and Daly*, 11-0114** (briefs on the merits filed in 2011, oral argument has yet to be set) 330 S.W.3d 434 (Tex. App.—Austin Jan. 7, 2011) (dismissed WOJ) (Travis County) (amicus briefs filed by Texas State Representative Warren Chisum and the Honorable Todd Staples in support of the State of Texas).

The issue before the Court is whether an agreed final decree of divorce granted to a lesbian couple married in another state is void and should be set aside.

***In re Lee*, 11-0732** (oral argument held on February 28, 2012) 14-11-00714-CV, 2011 WL 4036610 (Tex. App.—Houston [14th Dist.] Sept. 13, 2011, orig. proceeding) (mem. op.) (denied) (Harris County) (amicus brief filed by the Family Law Council).

The issues before the Court was whether a trial court has a ministerial duty to enter judgment on an MSA it believes is not in the child's best interest and are MSAs now subject to a best interest review.

***OAG v. Richard Lynn Scholer*, 11-0796** (oral argument held on December 6, 2012) 352 S.W.3d 48 (Tex. App.—Fort Worth June 2, 2011) (reversed and remanded) (Clay County).

In this child-support action brought by the state, a principal issue is whether estoppel may be a defense for a father who signed an affidavit terminating his parental rights that he assumed was filed but never was. Sued over as much as $80.000 in unpaid child support, Scholer defended himself by contending he signed the affidavit his ex-wife's attorney prepared in answer Scholer's offer to terminate his rights in a dispute over his access to the child. The affidavit noted his child-support obligation would cease, that he did not want to appear in court or by counsel and that he knew he "may not be further informed about the termination suit" or any other proceedings affecting his son. In a hearing over the past-due support, Scholer testified he assumed his parental rights ended. His ex-wife testified she decided not to follow through with the termination, did not believe she had a duty to tell him and was unaware Scholer signed the affidavit. The trial court ordered Scholer to pay past-due support. The appeals court reversed, holding that estoppel was an available defense in the attorney general's enforcement action.

***Rosser Craig Tucker II v. Lizabeth Thomas*, 12-0183** (oral argument held on Feb. 5, 2013) __ S.W.3d __, 14-09-01081-CV, 2011 WL 6644710 (Tex. App.—Houston [14th Dist.] Dec. 20, 2011) (affirmed in part/reversed and remanded in part) (Harris County).

The issues are (1) whether the trial court has authority to award attorney fees as "necessities" for child support when the nature of the action is modification and not enforcement and, if so, (2) whether awarding 6 percent compound interest on those fees abused the trial court's discretion. Tucker sued his ex-wife, Thomas, to modify final orders to give him exclusive right to designate his children's primary residence. In her counterclaim Thomas sought sole managing conservatorship and increased child support from Tucker. The trial court denied Tucker's relief and Thomas's request to be appointed joint managing conservator, but increased Tucker's child support. The court awarded Thomas attorney fees as child support, finding the fees necessities benefiting the children. The appeals court affirmed in a split decision by the whole court.

***In re E.C.R.*, 12-0744** (oral argument held on April 23, 2013) 390 S.W.3d 22 (Tex. App.—Houston [1st Dist.] March 15, 2012) (affirmed in part/reversed and rendered in part) (Harris County).

The issues in this parental rights-termination suit are (1) whether the statutory provision permitting termination on a showing that a parent failed to comply with her service plan is applicable only to a child removed by the state because he was abused and neglected and (2) whether other grounds pleaded for terminating parental rights but not found by the trial court should have been considered on appeal to affirm the termination order. In this case the child subject to the termination proceeding was removed after his mother was accused of abusing his older sister. The trial court ordered the mother's parental rights terminated on two bases of several the state alleged: That she failed to follow the service plan the state established for the child's return to her care and that termination was in the child's best interest. On the mother's appeal that insufficient evidence supported the grounds on which the trial court relied, the court of appeals held that termination under the service-plan provision required evidence that the child's removal resulted from abuse or neglect of that child. The appeals court did not consider the state's argument that other pleaded grounds sufficed to terminate the mother's parental rights.

***In re K.L.*, 12-0728** (oral argument set for June 24, 2013) 09-11-00083-CV, 2012 WL 1951111 (Tex. App.—Beaumont May 31, 2012) (mem. op.) (affirmed) (San Jacinto County)

Among the issues in this parental-rights termination case are (1) whether a trial court had a duty to appoint the pro se father an attorney for trial when he failed to file an indigence affidavit or request an attorney until after the trial began and (2) whether the mother's affidavit relinquishing her parental rights was voluntary, knowing and intelligent when a month later a probate court appointed a guardian for her for mental-health reasons.

***In re Blevins*, 12-0636** (oral argument set for October 9, 2013) 10-12-00136-CV, 2012 WL 3137988 (Tex. App.—Waco Aug. 2, 2012, orig. proceeding) (mem. op) (denied) (Somervell County).

In this foster parents' challenge to an order placing children in Mexico with their father the issues are (1) whether the parental presumption applies in a modification suit and (2) whether the trial court abused its discretion by determining the children's best interest was served by ordering them to live in Mexico with their father.

***In re Scales*, 12-1035** (all briefs filed) 02-12-00477-CV, 2012 WL 6621783 (Tex. App.—Fort Worth Dec. 20, 2012, original proceeding) (mem. op.) (Denton County).

In this divorce action involving a special appearance, the principal issue is what is necessary to establish domicile and residence sufficient to file for a divorce in Texas.

***In re Blackmore v. OAG*, 12-0545** (Petitioner's brief on the merits filed on 04/29/13) 370 S.W.3d 94 (Tex. App.—Dallas May 23, 2012) (reversed and remanded) (Collin County).

The issue in this case is whether the OAG can seek child support for a mother who kidnapped the child and took the child to Guatemala, a non-Hague conference member state. The trial court initially dismissed the suit under the unclean hands provision of the UCCJEA. The Dallas Court of Appeals reversed the trial court's ruling stating that the unclean hands' provision of the UCCJEA does not apply under UIFSA, which controls because OAG only seeking child support.