SECTION REPORT
FAMILY LAW
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IN THIS MONTH'S REPORT

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NEWSLETTER EDITOR
Georganna L. Simpson
Georganna L. Simpson, P.C.
1349 Empire Central Drive, Ste. 600
Dallas, Texas 75247
214.905.3739 • 214.905.3799 (fax)
georganna@glsimpsonpc.com

COUNCIL ADMINISTRATIVE ASSISTANT
Christi A. Lankford. christil@idworld.net
Section Wear and Publications

MESSAGE FROM THE CHAIR

Just when you thought things were beginning to thaw….

As we move toward the end of a very cold Q1 2014, it is a great time to reflect on the successes of 2013 and the goals for the Family Law Section in 2014.

CLE

The Family Law Section of the State Bar of Texas continues to produce some of the largest and most impressive CLE in the country. The year 2013 saw new speakers, more seminars, and exciting venues. Following the success of New Frontiers in Marital Property in Napa Valley in October, in December Advanced Drafting was held at the Hotel Palomar in Dallas. Unfortunately, it was held the same weekend that all of north Texas became the frozen tundra. So for those of us who were forced to stay for the duration without escape, a special thank you goes out to Karl Hays for putting together an informative and entertaining program.

During 2013, three live seminars were held in Dallas, Houston, and Austin to provide an update on the legislative changes made during the 83rd Legislative Session. The purpose of the Advanced Drafting course was to expand upon these seminars and to educate attorneys and paralegals on the impact the legislative changes will have on their practice. However, in December 2014, as a non-legislative year, the Section will again present its hugely successful Family Law and Technology seminar. As 2012 attendees can attest, whether you are technologically challenged or a techno guru, this program is not to be missed. Stay tuned for additional details as they become available.

Pro Bono and Family Law Cares

In 2013, the State Bar issued a challenge to all of its 50 sections to encourage pro bono services. As reported at the Council of Chairs meeting February 21, 2014, the Family Law Section accepted the challenge and reported more pro bono cases than any other section of the Bar.

For calendar year 2013, the Pro Bono Committee put together eleven seminars across the state resulting in access to justice for 540 indigents Texans. In 2014, the Section will continue its pro bono efforts, including the development of pro bono webinar. As with its live program, the goal of the webinar will be to provide free CLE to attorneys willing to take on pro bono cases. With the development of the webinar, the eleven seminars presented in 2013 will be made available to attorneys across the state resulting in unlimited access to justice for families in need.

Further evidence of the Section's commitment to pro bono is Family Law Cares, a website under development by the Family Law Section to provide attorneys of all disciplines with the resources necessary to handle a pro bono family law cases. In late 2013, committee members met with legal aid providers across the State to begin work on the next phase of Family Law Cares, which includes making information regarding active cases from all legal service providers across the State available online.

Member Services

In 2013 the Family Law Council reaffirmed its commitment to member services with new publications and updated resources. As previously reported, the latest version of the Family Law Practice Manual is nearing completion, a new Section website will be launched next quarter, and new resources for family law practitioners will be ready for release by Advanced in August.

Upcoming Events

Mark your calendar for the following family law events:
April 24-25, 2014: Marriage Dissolution Seminar, Sheraton at the Capitol, Austin
June 26-27, 2014: State Bar of Texas Annual Meeting, Austin Convention Center
August 4-7, 2014: Advanced Family Law Seminar, Marriott Rivercenter, San Antonio
October 23-24, 2014: New Frontiers in Marital Property, Hyatt Regency, Lake Tahoe
December 4-5, 2014: Family Law Technology, AT&T Executive Center, Austin

On a final note, I want to express my honor at being able to serve as Chair of the Family Law Section. As a young family law attorney, I know that I took the benefits provided to me as a member of the Section for granted. The State Bar has a full staff of lawyers, authors, editors, and other professionals that put this all to-

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gether for us, right? Wrong! The 20 working committees of the Family Law Section are comprised of fellow family lawyers with busy practices of their own who donate their time and expertise for the benefit of other family lawyers. I also want to acknowledge the former Chairs that continue to dedicate their time year after year for the benefit of our Section.

In 1983, as many questioned the pecuniary wisdom of making forms and other resources available to fellow family law attorneys, then Section Chair Ken Fuller argued that good lawyers are hired not because of the forms they draft, but based upon their intelligence and creative problem solving. This spirit of professionalism and dedication to the practice of family law has been continued by many of the Chairs that followed Ken and, on behalf of the 5,700 members of the Family Law Section, I thank you. Your wisdom, leadership, and tireless commitment are truly the secret to the success of the Family Law Section.

Ken, you will be missed.

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

2014 Recommended Nominations Slate
State Bar of Texas Family Law Section

Pursuant to Article VI, Section 1 of the Bylaws of the State Bar of Texas, Family Law Section, the Nominating Committee of the Section hereby forwards the following names for the following positions on the Family Law Council:

Officers		**Nominations to the Class 2019**
Chair:	**Jimmy Vaught**	**1. Laura Arteoga (Houston)**
Chair-Elect:	**Heather King**	**2. Erin Bowden (Abilene)**
Vice-Chair:	**Kathryn Murphy**	**3. Christina Molitor (San Antonio)**
Treasurer:	**Cindy Tisdale**	**4. Ann McKim (Lubbock)**
Secretary:	**Steve Naylor**	**5. Kyle W. Sanders (Houston)**
Immediate Past Chair:	**Sherri Evans**	

Kristal C. Thomson is nominated to fill the vacancy in the Class of 2016.
The election will take place on April 24, 2014 at the section meeting during Marriage Dissolution.

TABLE OF CASES

In the Law Reviews and Legal Publications

LEAD ARTICLES

The Changing Role of Consultants in Family Law, Family Advocate Winter, 2014 36-WTR Fam. Advoc. 10.

Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 Regent U. L. Rev. 209 (2014).

Randi P. Glanz, The Evolution Of Family Law Cases, 2013 WL 7121058, Aspatore, December 2013.

Rebecca A. Provder, *Current Ethics Issues And Trends In Family Law*, 2013 WL 7121057, Aspatore, December 2013.

Rhonda McMillion, *A Push for Adoption ABA Backs Bipartisan Bill Supporting Permanent Families for Foster Children*, ABA J., January 2014.

ASK THE EDITOR

***Dear Editor*:** I was just retained in a suit post-judgment. The former attorney withdrew and a default judgment was granted against my new client. I filed a Motion for New Trial, but the trial judge will not grant me a hearing. Am I absolutely entitled to a hearing on my motion for new trial? *Frustrated in Frisco*

***Dear Frustrated in Frisco*:** Generally, a hearing on a motion for new trial is not mandatory. *Landis v. Landis*, 307 S.W.3d 393, 394 (Tex. App.—San Antonio 2009, no pet.). A trial court is only required to conduct a hearing on a motion for new trial when a motion presents a question of fact upon which evidence must be heard. *Id.*; s*ee, e.g.*, Hensley v. Salinas, 583 S.W.2d 617, 618 (Tex. 1979) (holding trial court was required to conduct hearing on motion for new trial challenging agreed judgment); Navistar Int'l Corp. v. Valles, 740 S.W.2d 4, 6-7 (Tex. App.—El Paso 1987, no writ) (holding trial court was required to conduct hearing on motion for new trial challenging attorney ad litem fees).

Therefore, to get a hearing you need to frame your Motion for New Trial such that it presents a question of fact upon which evidence must be heard. If you are within the 30 days following the signing of the judgment, amended your Motion for New Trial. If you are outside that time frame, file a brief in support of your motion and try to characterize what you did file as raising a question of fact upon which evidence must be heard. If the trial court has already ruled on your Motion for New Trial, file a Motion for Reconsideration in which you argue that you are entitled to Motion for New Trial because you have raised a question of fact upon which evidence must be heard.

IN BRIEF

Family Law From Around the Nation
by
Jimmy L. Verner, Jr.

Agreements: In a case in which the divorce court approved the parties' stipulation that the father would pay child support in an amount less than that required by Iowa's child support guidelines, the trial court erred when it later refused to modify child support per the guidelines because, despite the agreement, a significant increase in the father's income could result in a finding of a substantial change in circumstances warranting an increase in child support. *In re the Marriage of Mihm*, ___ N.W.2d ___, 2014 WL 265485 (Iowa 2014). The Mississippi Supreme Court reversed a trial court that considered the father's agreement to pay at least $3,000 per month in child support unmodifiable, holding that "support obligations most certainly can be modified when there is a finding of a material change in circumstances, which was not foreseeable at the time of the judgment of divorce." *Short v. Short*, ___ So.3d ___, 2014 WL 464747 (Miss. 2014). The Montana Supreme Court ruled that a father who promptly paid his child support arrearage but was erroneously reported to be delinquent, and accordingly lost several opportunities to become employed by law enforcement agencies, did not state a claim for relief in his complaint against the state but in the interest of justice ordered the state to change its records to show that the father never had been delinquent. *Kenck v. State of Montana, Child Support Enforcement Div.*, 315 P.3d 957 (Mont. 2013).

Criminal conduct: Maine's Supreme Judicial Court upheld a trial court's decision to deprive a father of overnight visitation with his children even though the trial court based its decision, in part, on the father's conviction for offensive touching of a child, when the father had not been convicted but had successfully completed deferred adjudication, yet the record included other evidence supporting the trial court's decision. *Gordon v. Cheskin*, 82 A.3d 1221 (Me. 2013). The Court addressed criminal conduct again the following month, holding that in divorce proceedings, "although courts may not consider a party's criminal behavior to establish fault or marital misconduct, courts *must* consider the *financial* consequences of criminal conduct as

relevant factors in the division of marital property." *Lesko v. Stanislaw*, ___ A.3d ___, 2014 WL 117351 (Me. 2014) (emphasis in original).

Employee benefits: The Alaska Supreme Court held that in the absence of an express understanding to the contrary, "an agreement for equitable division of retirement benefits earned during a marriage presumptively encompasses survivor benefits," such that a trial court did not err in dividing survivor benefits equally between the parties when the parties' settlement agreement awarded each party 50% of the husband's military pension benefits but was silent on survivor benefits. *Glover v. Ranney*, 314 P.3d 535 (Alaska 2013). The Colorado Supreme Court held that accrued vacation and sick leave is martial property subject to division upon divorce, provided that the spouse with the leave "has an enforceable right to be paid for accrued vacation or sick leave, as established by an employment agreement or policy." *In re the Marriage of Cardona and Castro*, 316 P.3d 626 (Colo. 2014) (en banc). The Tenth Circuit affirmed the dismissal of a former wife's complaint that her ex-husband "improperly administered the pension trust of his medical practice to deny her funds and an accounting" because the medical practice's employees were only the ex-husband and ex-wife, such that ERISA did not apply to the pension trust. *Dahl v. Dahl*, ___ F.3d ___, 2014 WL 643017 (10th Cir. 2014).

Enforcement: A Maine trial court erred when it sentenced an obligor to ninety days in jail for failure to pay child support, but suspended the sentence subject to the obligor making timely payments for three years, because the order was necessarily premised upon a finding that the obligor would have the ability to comply with his child support obligations in the future, a conclusion it was not possible for the court to reach. *Murphy v. Bartlett*, ___ A.3d ___, 2014 WL 418182 (Me. 2014). The Mississippi Supreme Court reversed a trial court that held an obligor in willful contempt when the parties had entered into an agreed order to reduce the father's child support obligation but the attorneys never presented the agreed order to the trial court for signature. *Brewer v. Holliday*, ___ So.3d ___, 2014 WL 68878 (Miss. 2014) (en banc). A divided Minnesota Supreme Court reversed a trial court that convicted an obligor of felony nonsupport because the pertinent statute required that the state prove that an obligor failed "to provide care and support" and although the record showed that the obligor was $83,470.27 in arrears in child support, there was no showing that the obligor failed to provide nonmonetary care to his children. *State v. Nelson*, ___ N.W.2d ___ 2014 WL 551642 (Minn. 2014).

Grandmothers: A grandmother who had "butted heads a lot" with her daughter failed to obtain visitation with her grandchildren when she had previously sent an email to all her daughters that she wanted no further contact with them and it had been more than four years since she had seen the grandchildren, the Alaska Supreme Court concluding that the grandmother had not proved, by clear and convincing evidence, that the children's best interests would be served by visitation with her. *Hawkins v. Williams*, ___ P.3d 1202 (Alaska 2013). After a Montana mother's death in a fire, the maternal grandmother "took control" of her grandchildren and refused to permit the father, who had only supervised visitation with his children as a result of pending divorce proceedings, to see them, but did not succeed in obtaining a parental interest in the children because she was unable to establish the existence of a parent-child relationship with the children under Montana law. *In re the Parenting of S.J.H.*, ___ P.3d ___, 2014 WL 631220 (Mont. 2014). A split Arkansas Supreme Court held that a trial court erred when it awarded a grandmother permanent custody of her grandson, despite the mother's problems with alcohol, because the mother had made "some good progress" on her reunification case plan although not enough progress to regain her child's trust. *Contreras v. Arkansas Dep't of Human Res.*, ___ S.W.3d ___, 2014 Ark. 51 (2014).

Traditional marriage: An opinion that begins by observing that Julia Roberts, in *Notting Hill*, said "Happiness isn't happiness without a violin-playing goat" must be read, especially when a goat was part of the dowry in a traditional marriage ceremony in Zaire. In the parties' subsequent divorce, filed by the wife after the husband allegedly brandished an AK-47 at her, the husband argued unsuccessfully that the marriage was invalid because he had participated in the ceremony only by telephone. *Tshiani v. Tshiani*, 81 A.3d 414 (Md. App. 2013).

COLUMNS

OBITER DICTA[1]
By Charles N. Geilich[2]

Like you, I worry that our Texas courts are not entertaining enough. Oh, sure, family law cases spawn odd stories with which we regale and horrify our own families at night over dinner. I'm sure you've had conversations at the table when, after your 6-year-old asks "So which drug- addicted cheating spouse got the kids today, mommy?" you thought, hm, maybe I talk too much about work. Of course, it's even more fun at a restaurant when your waiter is bringing a drink refill and overhears: "So I said to the other attorney, well at least my guy didn't molest the family dog!" Ha, ha!

But that's not what I mean. I'm talking about the sheer amusement value of our judicial proceedings. In fact, in true lawyerly fashion, I propose forming a study committee to look into this and report back. Because you don't want to wait for that report, though, I shall anticipate what it will say.
Muppets. We need more Muppets in our courtrooms, and by "more" I mean any at all because I hardly ever see Muppets in a courtroom. Here's what I propose. In a pilot project, let's install in at least one district court the two old men Muppets who sit in the gallery and insult everyone. What could go wrong? They can assist the trier of fact, be it judge or jury, in assessing the credibility of witnesses. "You're terrible, get off the stand" I can hear them saying. I like that kind of immediate feedback.

Clowns might be nice, too, and I mean professional ones, not just lawyers acting like clowns. Of course, real clowns scare some people. So, instead, let's consider jugglers, who would only perform with heavy copies of the Texas Family Code between direct and cross examination, so as not to be disruptive.

Lest you think this would detract from the decorum of the courtroom, let me remind you that the circus has a long and noble history. Besides, have you watched how our judges have to campaign to get elected? If you don't see the circus-like aspects of that, you may not be paying attention.

And consider the benefits of theme songs. Each lawyer could come up with a soundtrack to accompany his or her entrance to the courtroom, or an already-existing song could be repurposed. Personally, I prefer "Sympathy for the Devil" for myself, so that one is taken, although it is a bit cumbersome just to get my name and who I represent on the record ("Please allow me to introduce myself, I'm a man of wealth and taste…"). And please, judges, be more original than "Back in Black."

It would help, too, if appellate opinions could be written more like movie reviews. "Given the material she had to work with, Judge Jones turned in a solid performance in the Blackacre case, although we'd like to see a bit more evidence used in future efforts. The Petitioner's counsel is a real up and comer, who, paired with the right witnesses, could be a real star. The bailiff's role could have benefitted from more dramatic assertiveness."

Look for the report soon.

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[1] Obiter dicta is Latin for a word said "by the way", that is, a remark in a judgment that is "said in passing." It is a concept derived from English common law.

[2] Mr. Geilich is a writer, family lawyer, and full-time mediator in the DFW Metroplex. He's doing what he can with what he's got and can be reached at cngeilich@gmail.com. His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

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RELIABILITY AND EXPERTS: DON'T GET BOGGED DOWN

By John A. Zervopoulos, Ph.D., J.D., ABPP[3]

We know that admissible expert testimony must be relevant and reliable. But helping a trial judge to determine whether mental health testimony is reliable can confuse the best of us. Further, even admitted evidence may not be sterling. You can clear the confusion by re-orienting your thinking about reliability and its purpose. Understand what reliability really means, use that understanding to organize your critiques of mental health testimony, and you'll sharpen your legal arguments, whether for admissibility or for the weight the court should give to already admitted evidence.

Too often when challenging the reliability or quality of mental health testimony, we resort to grinding through the *Robinson/Daubert* list of reliability factors, one at a time, to find one factor—error rates? testability? peer review?—that the expert will stumble on or can't apply to her testimony. Usually this process bogs down the cross exam's Q-and-A. More importantly, this approach does not comport with caselaw that stresses that not all *Daubert*-related reliability factors necessarily apply or are relevant in every instance in which testimony is challenged. *Kumho Tire Co. v. Carmichael*, 526 US 137, 151 (1999).

When you get bogged down in your *Robinson/Daubert* analyses, step back and consider *Daubert*'s key definition of reliability: evidentiary reliability equates to "trustworthiness." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 n.9 (1993). Or, Is the expert's testimony sufficiently trustworthy to assist the court? This question should be your touchstone and an oft-used phrase in your briefs and courtroom arguments. Reliability, as a legal term, seems clinical, even complicated, certainly abstract. "Trustworthiness" feels right; it nails what the court really seeks from experts.

But trustworthiness must be more than a feeling. You still must show why the court should trust an expert's testimony or where the testimony falls short. A caselaw-based plan will organize your efforts and provide a framework for your legal arguments.

To set the table, conduct thorough discovery of the expert and her work in the case. In addition, use your consulting expert to gain thorough knowledge of the testimony's subject matter. These initial steps are critical. Without them, your efforts towards exposing the trustworthiness of the expert's testimony will be less effective.

Then unwrap reliability by focusing on two caselaw-based reliability categories: *methods reliability* and *reasoning reliability*. To explore *methods reliability*, determine what methods the expert chose to develop her opinion and the bases for using those methods. Here, skillful use of *Daubert*-related factors that apply to the testimony will expose whether the expert's methods can yield trustworthy data: e.g., Are the methods generally accepted? peer reviewed? clearly communicated? Use the factors as tools to illustrate how trustworthy the testimony is, not as ends in themselves.

To explore *reasoning reliability*, ask how the expert makes sense of her data. Is the reasoning sufficiently supported in the professional literature? Did the expert consider alternative explanations of the data? *EI du Pont de Nemours & Co. v. Robinson*, 923 SW 2d 549, 559 (Tex. 1995). Have judgment biases (e.g., confirmatory bias, hindsight bias, overconfidence bias) infected the opinion? And make sure that the expert ties her reasoning to her data—no "yawning" analytical gaps between opinions and data allowed. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W. 2d 713, 726 (Tex. 1998). Flawed reasoning, even if based on data derived from reliable methods, can't be trusted to inform a court's decisions. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

In sum, trustworthy testimony reflects sufficiently reliable methods *and* reasoning—"evidentiary reliability equates to trustworthiness." Try this approach and language to organize your critiques of mental health testimony and to sharpen your legal arguments.

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[3] *John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs PSYCHOLOGYLAW PARTNERS, a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. His second book, How to Examine Mental Health Experts: A Family Lawyer's Guide to Issues and Strategies, is newly published by the American Bar Assn. Dr. Zervopoulos is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

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RETIREMENT PLAN DISTRIBUTIONS

By Christy Adamcik Gammill, CDFA[1]

Many, if not most of us, have taken advantage of one or more of the many options the IRS provides in terms of Qualified ERISA plans or Traditional IRA's. As these plans have grown in popularity, so have their regulations and subsequent advantages and disadvantages. Furthermore, these advantages and disadvantages can vary from plan to plan, depending on whether an individual is participating in a Qualified Plan or a Traditional IRA.

The most notable difference between Qualified Plans versus Traditional IRA's is that Qualified Plans are established by employers, while Traditional and Roth IRA's are established by individuals. SEP and SIMPLE IRA's however, are alternative plans that follow IRA rules, but are setup by employers for the benefit of the employees. A Qualified Retirement Plan must follow the rules of the Employee Retirement Security Act of 1974, "ERISA", which was enacted to protect employees from discriminatory or unfair employer practices. ERISA sponsored plans must also protect the spouse of an employee as the beneficiary of the retirement plan. In this case, waivers must be signed to designate a non-spouse beneficiary or specify distribution options that do not benefit the spouse, if an annuity or payment stream from the plan is elected.

Although all of these broad category plans allow for pre-tax saving or 100% deduction off of your current tax return and tax-deferral of the growth and income generated, they all have very strict rules when it comes to distributions. Because income tax was not paid prior to contribution, all distributions on pre-tax plans and IRA's will be taxed at the ordinary income tax rate at time of distribution. In most cases, "premature" distributions taken before the age of 59 ½ come with an additional 10% tax penalty. Therefore, if you are thinking about taking a pre-mature distribution, you may want to think again. Of course, there are certain exceptions to this 10% penalty rule, which are listed here.

Qualified ERISA and Traditional IRA Plan Exceptions

- Death
  - If a plan participant, i.e. the employee, dies and a distribution is made to the estate or a designated beneficiary, the 10% penalty will not apply.
- Disability
  - The 10% penalty will not apply if the participant must take a distribution due to certain qualified disabilities.
- Medical Expenses
  - Some distributions for large medical expenses in excess of the deductible amount may be eligible for an exception.
- Substantially Equal Periodic Payments
  - 3 methods apply in this circumstance and other factors will be taken into consideration, such as the number of accounts owned by the employee.
  - Substantially Equal Periodic Payments must be taken for at least 5 years or until the employee reaches age 59 ½, whichever period is longer. For example, if a 52 year-old woman begins taking distributions, she must continue doing so until age 59 ½, while a 58 year-old would need to take until she was 63.
  - Of all the exceptions to the 10% penalty rule, this one is the most complicated. Consulting your tax and investment advisor is essential.

Exceptions for Qualified Plans only

- Age 55 & Separation of Service
  - The employee will not be hit with the 10% penalty if he or she is taking distributions after termination or retirement from a former employer in which the plan was administered.

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

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- Distributions Incident to Divorce A.K.A. Qualified Domestic Relations Order
  - Payments resulting from a Qualified Domestic Relations Order (QDRO) carry a one-time distribution exception.
  - However, if funds are rolled from a participant's Qualified Plan to a traditional IRA, those distributions taken from an IRA will not qualify for an exception and the 10% penalty will apply. Again, taking pre-mature distributions must be done properly to comply with IRS guidelines.
- IRS Levy
  - Payments as a result of an IRS lien are excluded from penalty.

Exceptions for Traditional IRA's only

- Higher education expenses
  - College expenses for self or immediate family members are exempt from the penalty.
- First-time Home purchase
  - Up to $ 10,000 may be withdrawn without penalty for first-time homebuyers, and the purchase must be for a primary residence.
- Health Insurance
  - Unemployed persons may take distributions for certain health insurance costs.

When looking at options for funding an unexpected expense such as early layoffs, increases in college tuition rates or disability, it is best to consult your financial advisor and tax expert for professional advice. Your advisors are instrumental in helping you access these funds, while minimizing the impact on your pocket book.

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ARTICLES

Two Year Conditional Residence for Married Couples and the Role of Family Attorneys in the Immigration Process
By David Swaim[1]

1. BACKGROUND

There are three steps used by the Immigration Service (CIS) and the Courts to establish a "valid" marriage under the Immigration and Nationality Act, as amended, (INA): the marriage must be valid where it is celebrated; the marriage cannot violate any categorical public policies of the jurisdiction in which the couple will establish a domicile; and the marriage must be "bona fide" as defined by CIS and the Courts.

Traditionally, issues arising under the first two elements have been addressed using standard comity and conflicts analysis. This is particularly true in the same sex marriage area, which is discussed in detail through a series of questions and answers from CIS that were recently released after the Supreme Court's decision striking down the Defense of Marriage Act (DOMA). Those questions and answers are included in this brochure.

[1] Mr. Swaim is board certified in Immigration and Nationality Law by the Texas Board of Specialization and is partner in Tidwell, Swaim & Associates, P.C. He can be reached at jds@tsalaw.com.

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For the purposes of our discussion, however, the focus is on the "bona fide" nature of the relationship and the tests used by the CIS to determine whether or not the marriage is valid. For an excellent discussion of these issues in the immigration law context, see, The *Meaning of Marriage: Immigration Rules and their Implications for Same-Sex Spouses in a World Without DOMA, 16 Wm. & Mary J. Women & L. 537(2010)*,http://scholarship.law.wm.edu/wmjowl/ vol16/iss3/3; and *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution, Marcel de Armas, American University Journal of Gender, Social Policy and the Law, volume 16.*

In reference to the third element, the bona fides of the marriage, CIS (and legacy INS) have consistently maintained that marriage fraud in the immigration context is one of the more serious problems created by the "family reunification" policies inherent in the INA. Whether this conclusion is valid, as well as the questionable methods used by the CIS to address the "marriage fraud" issue, is beyond the scope of this article.

What we are concerned with is the conditional permanent resident status created by § 216, INA, and the role of family lawyers in assisting foreign nationals to obtain the removal of conditions and ultimately the "permanent" permanent residence.

Please note the CIS and Board of Immigration Appeals (BIA) refer to the actual sections of the INA rather than the U.S. code.

2. WHAT IS CONDITIONAL RESIDENCE IN THE MARRIAGE CONTEXT?

Section 216 (INA), establishes a statutory scheme to combat the alleged prevalence of marriage fraud in the immigration context . The primary tool created by § 216 is the establishment of a special immigration status referred to as "conditional residence" or the more curious "conditional permanent residence." Conditional residence is a two-year period granted to a foreign national who is the spouse of a U.S. citizen (or in rare cases a permanent resident) during which the conditional resident is free to live and work in the United States without restriction. However, 90 days before the second anniversary of the grant of conditional residence, the foreign national is required to file a "joint petition" to remove the conditions and obtain "permanent residence." See, INA § 216(c). The joint petition is used by the conditional resident and the U.S. citizen when they are still married and residing together. Although the Immigration Service has never provided reliable statistics, an experience based guess would be that the vast majority of conditional residents remove the conditions through the joint petition process.

3. WHAT HAPPENS IF THE CONDITIONAL RESIDENT IS NO LONGER MARRIED TO OR LIVING WITH THE U.S. CITIZEN SPOUSE?

If the marriage has been terminated for any reason other than the death of the U.S. citizen spouse, or the couple is no longer residing together, the conditional resident must file a "waiver" in lieu of the "joint petition." It is the waiver process that brings together the expertise of the immigration lawyer and family lawyer in order to establish the "bona fides" of the marriage despite the fact the couple is no longer married or living together.

There are three types of waivers available to remove the conditions from the conditional residence. INA §216(c)(4) allows the foreign national to prove "extreme hardship if the alien is removed"," the qualifying marriage was entered into in good faith but terminated other than through the death of the U.S. citizen spouse", or the conditional resident meets the definition of a "battered spouse." For the purposes of this article, we are not addressing the issue of "extreme hardship" nor the "battered spouse" waiver.

Neither the statute and regulations (8 CFR §216.5, et. seq.) define the term "good faith" but the sources of law clearly requires the "good faith" determination to be made based upon the reasons the couple entered into the marriage. In other words, the reasons for the termination of the marriage are only relevant insofar as it impacts the analysis of the reasons for the formation of the relationship and the marriage. It is assumed for our discussion the pleadings do not contain allegations that would negatively impact the "good faith" determination.

The Role of a Family Lawyer in the Removal of Conditions Waiver Process

In the vast majority of cases, the immigration practitioner first becomes involved in a "conditional residence" case when the couple has separated and either is contemplating divorce or has already initiated divorce

proceedings. Assuming the termination of the marriage through divorce is the final decision of the couple, the immigration practitioner must explain to the conditional resident that the only legal means to remain in the United States is to remove the conditions from the current status. In other words, except in rare circumstances, there are no other legal immigration options available to a conditional resident except by obtaining a waiver of the conditional status. In most cases even a marriage to a subsequent U.S. citizen will not provide legal status.

Since the statute and regulations make it clear the conditional resident must prove the marriage was entered into in "good faith", the conditional resident must begin obtaining documentation and other evidence regarding the formation of the relationship. The regulations are of limited value as they simply refer to evidence "relating to the degree to which the financial assets and liabilities of the parties were combined", documentation evidencing the "length of time the parties cohabited after the marriage and after the alien obtained permanent residence", the "birth certificates of children born to the marriage" and "other evidence deemed pertinent by the director." 8 CFR §216.5(e)(2).

Experience has taught immigration practitioners that there are two types of evidence that much be obtained for a successful waiver case. Both of these types of evidence, in almost every case, can only be obtained during divorce proceedings while the conditional resident has some leverage to acquire documentation from the U.S. citizen spouse.

The first type of evidence is referred to in the regulations and is basically joint accounts. This documentation can take the form of bank accounts, credit cards, utility bills, insurance and any other type of financial obligation that shows both parties were or are liable. If the conditional resident is not in possession of these documents or does not have access to the accounts for any reason, the evidence must be obtained from the U.S. citizen spouse in the divorce proceedings.

The second and most important type of evidence for a waiver case is the sworn statement from the U.S. citizen spouse (and preferably his or her family members) regarding the "good faith" intentions of both parties at the formation of the relationship and the marriage. The U.S. citizen spouse will present varying degrees of resistance in preparing the sworn statement but it is critical to the waiver case that will subsequently be filed with the Immigration Service after the divorce is final. Furthermore, the conditional resident will have no leverage whatsoever at the conclusion of the divorce proceedings to have this sworn statement prepared, making it the most critical issue in the divorce proceedings from an immigration law perspective.

There are an infinite number of variables that can arise in the waiver/divorce context. In some cases the U.S. citizen spouse may have already provided the Immigration Service with a statement in which he/she claims the marriage was fraudulent from its inception and he or she was duped into the marriage. This type of marriage fraud (called "one way" as opposed to "two way" that involves both parties in the fraud) also subjects the conditional resident to the possibility of a marriage fraud finding, which in addition to the loss of conditional resident status also results in a permanent bar to any immigration status in the U.S. in the future. In these cases, the divorce proceedings provide the only means to counteract the previous statement provided to the government by the U.S. citizen spouse, assuming that is even a remote possibility. Another variable involved in these cases is the "arranged marriage" in which neither the U.S. citizen nor the conditional resident had any intention to be married other than through religious or cultural custom. In these situations it is difficult to draft a "good faith" statement regarding the formation of the marriage without implicating both parties and undermining the subsequent waiver case with the Immigration Service. It is preferable in these cases to obtain statements from both parties' parents but that is usually difficult at best and requires creative lawyering from the family law attorney.

CONCLUSION

During the two-year conditional residence period, the U.S. citizen and conditional resident may decide to divorce, or at least separate. If divorce proceedings are initiated, it is imperative for the success of the later immigration waiver case for the immigration and family law attorneys to work together during the divorce proceedings. Documentation and sworn statements must be obtained that support the conclusion the parties entered into the relationship and marriage in "good faith" with the intention to establish a life together.

[A note about the legal implications of the phrases "fraudulent marriage" and the "bona fides" of a marriage. Our firm currently has an appeal pending in the 5th Circuit, Tinashe Mangwiro, et. al., v. Napolitano, et. al., 3:12-cv-01903-L, which involves the CIS' and legacy INS' use of these phrases as legal standards in

addition to other "marriage validity" tests such as the "establish a life together" and "marriage entered into solely to obtain immigration benefits" tests.

What is clear from the research for our 5th Circuit case is that the government (Immigration Service, BIA and Federal Courts) do not consistently utilize any of these standards or tests and in fact use them interchangeably.

Further, Congress clearly intended for §216, as implemented by the Immigration Marriage Fraud Amendments of 1987 to the INA, to replace the hodge podge of administrative and Federal Court decisions with a two-year conditional period followed by an examination of the "good faith" of the parties at inception, if the parties are separated or divorced.

Interestingly, the Immigration Service routinely denies the first determination for conditional residence using the tests listed above. This is the crux of the Mangwiro case. The Service rarely questions the "good faith" of marriages, no matter how short, if we obtain joint accounts and sworn statements during the divorce proceedings. It is our assertion in Mangwiro that the Service has their analysis out of line with the INA, at least since 1987. Section 216 places the adjudicating emphasis on the removal of conditions process after two years of conditional residence. CIS rarely denies the 216 waiver cases but routinely denies the grant of conditional residence in the first instance.

TEMPORARY EMERGENCY JURISDICTION UNDER THE UCCJEA: THE BERMUDA TRIANGLE OF CHILD CUSTODY DETERMINATIONS

By Benjamin Goodman[1]

I. INTRODUCTION

Child custody proceedings and determinations are unfortunate realities of human drama and society. During emotional disputes, structure and processes are needed to resolve child custody issues in the most ordered, fair, and clear-headed manner possible. Establishing legitimate processes becomes complicated as parents and their children move in and out of various state jurisdictions—a result of society's ever-increasing ease of mobility. In fact, familial conflicts often spur migratory action, creating interstate parent-child relationships. The Uniform Child Custody Jurisdiction and Enforcement Act (1997) [UCCJEA] addresses issues related to the interstate child and strives to bring order to the distressing nature of child custody determinations.[2] It aims to avoid and resolve jurisdictional conflicts relating to child custody proceedings and determinations.[3] It also seeks to foster cooperation among courts and prevent dilatory or unjustifiable forum shopping.[4]

When children are in danger, it is easy to see how judiciousness and procedure can be thrown to the wind. Emotion and disorder are inflamed. At these junctures, the judicial setting benefits from processes, order, and rationality. Section 152.204 of the UCCJEA grants courts jurisdiction to issue temporary orders in situations where the court might otherwise have no authority to protect a child in an emergency situation.[5] Temporary emergency jurisdiction is an "extraordinary jurisdiction reserved for extraordinary circumstances."[6]

A court has temporary emergency jurisdiction over a child who is present in the state and has either been abandoned or is subjected to or threatened with mistreatment or abuse.[7] Under such circumstances, the court

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[1] Benjamin Goodman is a second-year law student at The University of Texas School of Law and is expected to graduate in May 2015. He may be reached at Benjamin.Goodman@utexas.edu.

[2] Sampson & Tindall's Tex. Fam. Code Ann. ch. 152, Commissioners' Official Prefatory Note to UCCJEA, at 529 (West 2012).

[3] Sampson & Tindall's Tex. Fam. Code Ann. § 152.101, Commissioners' Comment, at 532.

[4] *Id.*

[5] *See* Tex. Fam. Code Ann. § 152.204.

[6] Sampson & Tindall's Tex. Fam. Code Ann. § 152.204, Commissioners' Comment, at 545 (quoting Professor Bodenheimer).

[7] Tex. Fam. Code Ann. § 152.204(a) ("A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.").

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exercising temporary emergency jurisdiction may issue a temporary order to protect the child.[8] If a prior custody determination or proceeding exists in another state, the temporary order must have an expiration date, and it seemingly can never become final.[9] It either lapses on its own terms or terminates when a court with more permanent jurisdiction under Sections 152.201-.203 intervenes.[10] Nevertheless, questions remain whether a court with temporary emergency jurisdiction can also issue a permanent order or modify a preexisting one. Another question is how, if ever, a temporary order can become permanent, especially if it would modify or supersede a preexisting order from a sister state.

The UCCJEA took effect in Texas on September 1, 1999.[11] Under Section 152.204(c)-(d), when a prior custody determination has been made in another state (i.e., the decree state), Texas courts appear in theory to have two methods for issuing a custody determination: issue a temporary emergency order under Section 152.204 or modify the initial custody determination by applying Section 152.203.[12] In practice, these requirements may be burdensome and difficult to satisfy, especially in emergency situations.

This article will begin by surveying pre-UCCJEA law to demonstrate what issues the UCCJEA sought to remedy and how it seeks to accomplish these goals. The article will then pinpoint the problems with temporary emergency jurisdiction when a prior custody determination or proceeding exists in another jurisdiction. Next, the article will reveal why these issue are worth considering. The article will subsequently provide an overview of jurisdictional authorities under Sections 152.201-.203 of the UCCJEA. It will then hone in on how courts use temporary emergency jurisdiction and, specifically, Sections 152.204(c)-(d). Most importantly, the options Texas courts have for modifying a preexisting order or issuing an independent permanent order will be explored. Finally, the article will address how Section 152.204 can be improved to best protect a child's safety while maintaining the purposes of the UCCJEA.

II. HISTORICAL DEVELOPMENTS OF INTERSTATE CHILD CUSTODY JURISDICTION

A. Uniform Child Custody Jurisdiction Act [UCCJA]

The Uniform Child Custody Jurisdiction Act (1968) was promulgated by the Uniform Law Commission in 1968 and ultimately became effective in all 50 states.[13] The UCCJA sought to prevent parents from forum shopping. Formerly, parents would physically move their child from state to state[14] to obtain a favorable custody determination, thereby creating conflicting state custody orders.[15] States, however, passed different versions of the UCCJA.[16] This hindered its goals and caused jurisdictions to claim conflicting custody-determination power.[17]

B. Parental Kidnapping Prevention Act [PKPA]

The federal Parental Kidnapping Prevention Act (1980)[18] attempted to clarify interstate custody issues left unresolved or generated by the UCCJA.[19] The PKPA prioritized "home state" over "significant connection" jurisdiction, which authorized the child's home state to obtain exclusive continuing jurisdiction so long as one parent remained there.[20] Unfortunately, this led to inconsistent application of the UCCJA and the PKPA.[21]

C. Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]

Promulgated in 1997 and enacted in Texas in 1999,[22] the UCCJEA swooped in 30 years later and replaced the UCCJA. It sought to solve continuing problems with interstate child custody jurisdiction. The

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[8] Tex. Fam. Code Ann. § 152.204.
[9] *Id.* § 152.204(c).
[10] *Id.*
[11] Sampson & Tindall's Tex. Fam. Code Ann. ch. 152, Introductory Comment, at 527.
[12] Section 152.203 is non-emergency jurisdiction that would in effect require jurisdiction akin to initial jurisdiction under Section 152.201.
[13] Sampson & Tindall's Tex. Fam. Code Ann. ch. 152, Commissioners' Official Prefatory Note to UCCJEA, at 529.
[14] 33 Judge Don Koons, *Texas Practice Series: Handbook Of Texas Family Law* § 27:38 (2012-2013 ed.).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See* 28 U.S.C. § 1738A (2012).
[19] 33 Judge Don Koons, *supra* note 14.
[20] Sampson & Tindall's Tex. Fam. Code Ann. ch. 152, Commissioners' Official Prefatory Note to UCCJEA, at 529-30.
[21] *Id.* at 529 (citing American Bar Association's Center on Children and the Law, *Obstacles to the Recovery and Return of Parentally Abducted Children* (1993)).
[22] Sampson & Tindall's Tex. Fam. Code Ann. ch. 152, Introductory Comment, at 527.

UCCJEA clarifies initial jurisdiction,[23] prescribes exclusive continuing jurisdiction,[24] and refines modification jurisdiction.[25]

More relevant to this article, the UCCJEA moved the discussion of temporary emergency jurisdiction to its own section—Section 152.204—rather than discussing it in what is now Section 152.201.[26] The purpose was to show that the authority to protect a child in an emergency does not include the power to enter or modify a permanent order. Section 152.204 expanded the discussion of temporary emergency jurisdiction and resolved many of its issues. Problems do, however, persist.

III. CURRENT PROBLEMS UNDER THE UCCJEA

When no prior out-of-state order exists, a temporary order can fruitfully blossom into a permanent one.[27] A problem under the UCCJEA arises, however, when emergency child protection litigation in State B collides with a prior custody order from State A. In emergency situations, the UCCJEA employs Section 152.204(c)-(d). The UCCJEA intended to make it clear that temporary emergency orders are just that: temporary. A court with temporary emergency jurisdiction can only issue a temporary order; it cannot issue or modify a permanent one.

By its nature of being emergency authority when no other jurisdictional grounds exist, temporary emergency jurisdiction tends to step on the toes of the other jurisdictional authority, such as exclusive continuing and modification jurisdiction. When a prior order exists, the temporary order either expires after a specified period or dissolves once the court with Sections 152.201-.203 jurisdiction intervenes.[28] The first problem, therefore, is that a court exercising temporary emergency jurisdiction in State B seemingly cannot issue a permanent order when State A has made a previous custody determination. The order will inevitably expire.

A second problem arises because, under Section 152.204(c)-(d), sister state courts must communicate and cooperate. The state exercising temporary emergency jurisdiction and the state that issued the initial custody order must collaborate to resolve the emergency and establish the duration for the temporary order.[29] In emergency situations this may not always be feasible. It requires that both courts have initiative, time, and a dedication to protecting the child.

Thirdly, and as a combination of the first two problems, expiring orders and mandated court cooperation can create a Bermuda Triangle for custody determinations—a grey zone where a child's protection may get lost or perpetually stalled. If a temporary order expires and the court with initial jurisdiction fails to act, necessary protection would end and the child would be back at risk. A court with temporary emergency jurisdiction cannot unilaterally modify a prior order or issue a permanent one. If the state with jurisdiction under Sections 152.201-.203 does not act, protection is lost. Section 152.204 ostensibly does not provide a court with authority to protect the long-term interests of a child when a prior order exists.

IV. RELEVANCY AND SCOPE OF THE PROBLEM

Problems with temporary emergency jurisdiction are not unanswered and relevant only in Texas. Fifty-one of the 53 U.S. jurisdictions have enacted the UCCJEA.[30] The other two, Puerto Rico and Massachusetts, introduced the act during 2013 (but failed to enact the bill).[31] Therefore, the revised uniform law affects nearly every state (both Puerto Rico and Massachusetts have the UCCJA). Furthermore, both acts require state

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[23] Section 152.201 prioritizes home state jurisdiction in accordance with PKPA; *See* Tex. Fam. Code Ann. § 152.102 ("'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or a person acting as a parent. A period of temporary absence of a parent or a person acting as a parent is part of the period.").
[24] *See* Tex. Fam. Code Ann. § 152.202.
[25] *See id.* § 152.203.
[26] *Compare* UCCJA § 3(a)(3), *with* Tex. Fam. Code Ann. §§ 152.201(a), 152.204.
[27] *See* Tex. Fam. Code Ann. § 152.204(b).
[28] *Id.* § 152.204(c).
[29] *Id.* § 152.204(c)-(d).
[30] UNIFORM LAW COMMISSION, LEGISLATIVE FACT SHEET - CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, *available at* http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act.
[31] *Id.*

courts to communicate and cooperate—specifically in emergency situations under Section 152.204(c)-(d). It is important that any questions or inconsistencies in the UCCJEA or UCCJA are resolved.

Consistent application is important for statutes that not only deal with interstate child custody determinations, but also govern children's safety in exigencies. Resolving ambiguous provisions also promotes uniformity and better protects children's and parents' rights. Finally, consistency fosters respect among courts in competing jurisdictions that must cooperate.

Resolving the UCCJEA's questions are also important because, unfortunately, reported cases of child maltreatment are significant throughout the United States. In 2011, Child Protective Services [CPS][32] offices nationwide received more than 3.4 million referrals, estimated to include 6.2 million children.[33] Two million of those referrals were screened in, had a CPS response, and received a disposition.[34] The estimated total number of individual child victims was 681,000.[35] Over 80 percent of the time a parent was the perpetrator.[36] Legal and law enforcement personnel were the single largest constituents of report sources (16.7 percent in 2011).[37]

For Texas, in 2011 the state had a child population of 6,960,738.[38] Of those children, 272,553 received a CPS response.[39] Furthermore, there were 63,474 individual child victims in Texas in 2011.[40] That same year, there were 10,842 child victim cases that needed court action.[41]

Of course, this means that child custody proceedings and determinations make up a substantial portion of state agency litigation, legislation, and debate.[42] Section 152.204 is frequently used in child custody litigation, especially for attorneys at the Texas Department of Family and Protective Services [DFPS].[43] Furthermore, subsection (c) is used whenever a prior "custody determination" has been made or a "custody proceeding" has commenced in another state. These actions are defined broadly,[44] which means that a laundry list of situations will trigger the section's applicability. Therefore, courts and state practitioners use this emergency authority relatively often.[45] Needless to say, the UCCJEA and Section 152.204 are important foundations of interstate child custody determinations and resolving any issues or inconsistences is vital.

V. JURISDICTION IN NON-EMERGENCY SITUATIONS

Authority to make a child custody determination is subject-matter jurisdiction. Personal jurisdiction is neither sufficient nor required for initial custody determinations.[46] In non-emergency situations, the UCCJEA has rather adequately addressed jurisdiction for interstate custody determinations, whether it be initial, exclusive continuing, or modification jurisdiction.

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[32] In Texas, local CPS offices are units of the Texas Department of Family and Protective Services [DFPS]. Legal jargon in Texas case law typically refers to the local office, CPS. The statewide agency described in the Texas Family Code, on the other hand, is the Texas Department of Family and Protective Services (usually referred to as "DFPS" or "the department.") These names are used interchangeably, for the most part, although an order for temporary managing conservatorship [TMC] names DFPS as the TMC.

[33] U.S. DEP'T OF HEALTH & HUMAN SERVS., *Children Maltreatment 2011*, at viii, *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm11.pdf.

[34] *Id.* at 6.

[35] *Id.* at 20.

[36] *Id.* at 23.

[37] *Id.* at 8.

[38] *Id.* at 31.

[39] *Id.*

[40] *Id.* at 32.

[41] *Id.* at 92.

[42] Telephone Interview with Pamela K. Parker, Special Projects Attorney, Office of General Counsel, Texas Department of Family and Protective Services, Austin, Texas (Sept. 2013).

[43] *Id.*

[44] *See* Tex. Fam. Code Ann. § 152.102(3) ("'Child custody determination' means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child. The term includes permanent, temporary, initial, and modification orders…"); *See id.* § 152.102(4) ("'Child custody proceeding' means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence . . . ").

[45] Telephone Interview with Pamela K. Parker, *supra* note 42.

[46] Tex. Fam. Code Ann. § 152.201(c).

A. Initial Child Custody Jurisdiction: Section 152.201

For initial determinations, first, a child's "home state" has jurisdiction to issue a permanent custody order.[47] Second, a court also has initial jurisdiction if a child's home state declines to exercise jurisdiction, there are significant connections to the state, and substantial evidence is available there.[48] Third, a state may have initial jurisdiction if no other court has it under the first basis and that state has significant connections and substantial evidence.[49]

B. Exclusive Continuing Jurisdiction: Section 152.202

A court that makes a custody determination under Section 152.201 or .203 has exclusive continuing jurisdiction under Section 152.202.[50] Once established, and under usual facts, only that state can divest itself of exclusive continuing jurisdiction. It can do so by finding another state to be a more convenient forum.[51] Or, it can determine that the child and one parent no longer have significant connections with the state and substantial evidence regarding the child is no longer available there.[52] Finally, there is one caveat whereby a court of State B can determine that State A no longer has exclusive continuing jurisdiction. State B (or State A) may determine that the child and *none* of his or her parents, or anyone acting as a parent, physically reside in the state.[53]

C. Jurisdiction to Modify Determination: Section 152.203

When a determination is made in State A, State B may obtain jurisdiction to modify State A's order pursuant to Section 152.203. Meeting these requirements is a tall order. State B must establish jurisdiction to make an initial determination under 152.202(a)(1) or (2).[54] Pursuant to Section 152.203(1), State A must then determine that it no longer has exclusive continuing jurisdiction or that State B would be a more convenient forum under Section 152.207.[55] Only State A can make either of those determinations.[56] One exception is that, under Section 152.203(2), State B (or State A) could determine that the child and none of his or her parents still live in State A.[57] When making such a determination it is important that State B is certain of the case's facts.[58]

Modification jurisdiction essentially supplants initial jurisdiction. It has the same requirements of initial jurisdiction, plus the home state must lose its designation as such or relinquish its jurisdiction. A court with modification jurisdiction obtains exclusive continuing jurisdiction.[59]

The UCCJEA provides competent procedures for making initial determinations and preventing competing orders. The processes, however, are not as clear when a court exercises temporary emergency jurisdiction.

VI. TEMPORARY EMERGENCY JURISDICTION

A. 152.204(a)

Under Section 152.204, a court has jurisdiction to protect a child although it has neither home state nor significant connection jurisdiction.[60] A temporary emergency order issued to protect a child takes precedence

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[47] *See id.* § 152.201(a)(1).

[48] *See id.* § 152.201(a)(2) (explaining that a court may decline jurisdiction if the home state is an inconvenient forum under Section 152.207 or a party acted unjustifiably under Section 152.208).

[49] *Id.*; *See also id.* § 152.201(a)(3)-(4) (defining additional ways to obtain initial jurisdiction).

[50] *See id.* § 152.202(a).

[51] Tex. Fam. Code Ann. § 152.202(a)(1).

[52] *Id.*

[53] *Id.* § 152.202(a)(2).

[54] *Id.* § 152.203(1).

[55] *Id.*

[56] *Id.*; *See* Saavedra v. Schmidt, 96 S.W.3d 533, 541 (Tex. App.—Austin 2002, no pet.) (explaining that a Texas court's determination that it should have modification jurisdiction was irrelevant since a California court still had exclusive continuing jurisdiction and only the California court could make the determination to relinquish its jurisdiction).

[57] Tex. Fam. Code Ann. § 152.203(2).

[58] *See* In re L.R.J., No. 11-08-00279-CV, 2010 WL 549293, at *2 (Tex. App.—Eastland Feb. 18, 2010, no pet.) (explaining that the Texas court's use of Section 152.203 to modify a prior custody determination from Michigan was reversible error. Although the Texas court had initial jurisdiction and found that no party resided in Michigan, according to the appellate court the father technically resided in Michigan (despite being in a West Virginia prison) so Michigan had to make the determination to relinquish its jurisdiction).

[59] *See* Tex. Fam. Code Ann. § 152.202(a).

[60] Sampson & Tindall's Tex. Fam. Code Ann. § 152.204, Commissioners' Comment, at 545.

over a court's statutory duty to recognize, enforce, and not modify a permanent order of the decree state.[61] Courts are given "broad discretion in issuing orders for immediate protection of a child."[62] The logic is that an order of this nature is only temporary until a court with jurisdiction under Sections 152.201-.203 can intervene.

A court obtains temporary emergency jurisdiction when a "child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."[63] State B can exercise authority over a child even if the maltreatment occurred in State A, so long as the child is present in State B when it invokes jurisdiction.[64]

B. 152.204(b)

If no prior custody proceeding or determination exists, a temporary emergency order will remain in effect until an order is entered from a court with non-emergency jurisdiction.[65] A temporary order may, in fact, become permanent if a state with jurisdiction under Sections 152.201-.203 does not commence a proceeding or make a determination.[66] If neither occurs, a temporary custody order may become final if the issuing state becomes the child's home state.[67]

C. 152.204(c)-(d)

If a proceeding or determination exists before a court invokes temporary emergency jurisdiction, a temporary order seemingly can never become final solely under Section 152.204.[68] When a prior order exists, any temporary emergency order must specify a period for which it will remain authoritative.[69] Ideally, this would be until a court with jurisdiction under Sections 152.201-.203 issues a permanent order. A temporary order will expire in one of two ways: a court with non-emergency jurisdiction enters an order to resolve the issue; or, the time specified in the order expires.[70] When the temporary order expires, the initial or modified order need not be reconfirmed.[71]

Section 152.204(d) states that any court exercising temporary emergency jurisdiction, upon being informed of a prior custody determination or proceeding in another state, "shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order."[72] Reciprocally, upon being informed of a court exercising temporary emergency jurisdiction, a court with jurisdiction pursuant to Sections 152.201-.203 shall do the same.[73] Subsections (c)-(d) must be read concurrently. By directing each court to act *sua sponte*, subsection (d) attempts to ensure that courts will cooperate. Taken together, (c)-(d) prohibit a court exercising temporary emergency jurisdiction from entering a permanent custody determination. That responsibility falls to the court with Sections 152.201-.203 jurisdiction. A few hypotheticals may illuminate how Section 152.204 (c)-(d) are to function.

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[61] *Id.*; Sections 152.201-.203 all begin with this: "Except as otherwise provided in Section 152.204 . . . . "
[62] Schmidt, 96 S.W.3d at 544.
[63] Tex. Fam. Code Ann. § 152.204(a); Note that a court has jurisdiction over a child even if it is that child's parent or sibling who is subject to an emergency situation—it need not be the child.
[64] In re NC, 294 P.3d 866, 874 (Wyo. 2013) (describing that it is not necessary for the "mistreatment, abuse or other conduct endangering the child" to have occurred in the state attempting to exercise temporary emergency jurisdiction so long as the child is currently in that state).
[65] Tex. Fam. Code Ann. § 152.204(b).
[66] *Id.*
[67] *Id.*; *See id.* § 152.102(7) (defining "home state"); In re J.C.B., 209 S.W.3d 821, 823, n.4 (Tex. App.—Amarillo 2006, no pet.) ("[T]he concept of 'home state' differs when jurisdiction is invoked under § 152.204(a) and omits the requirement that the six months of residence occur before the proceeding is commenced. If this were not so, then there could be no home state for purposes of finalizing orders rendered via emergency jurisdiction since the proceeding began before the child had resided with a parent or parent surrogate in Texas for six months.").
[68] Tex. Fam. Code Ann. § 152.204(c).
[69] *Id.*
[70] *Id.*
[71] Sampson & Tindall's Tex. Fam. Code Ann. § 152.204, Commissioners' Comment, at 546.
[72] Tex. Fam. Code Ann. § 152.204(d).
[73] *Id.*

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VII. EMERGENCY SITUATION HYPOTHETICALS

A. First hypothetical: temporary emergency jurisdiction in Texas, a prior custody determination in Nevada; one parent remains in Nevada, the decree and home state

1. Facts

Tony and Sarah were high school sweethearts. They grew up in Nevada, and, shortly after graduating college, they got married and began a life together in Nevada. In due course, they had a child, Jimmy. Everything was going well until some of Tony's high school friends moved back home. Tony frequently went out drinking with them and often found himself in trouble. He was constantly having run-ins with the law and returning home drunk and disruptive. His aggressive behavior started seeping into his life at home with Sarah and Jimmy. After repeated attempts to quell Tony's disorderly ways, Sarah could no longer tolerate his behavior. She filed for divorce. As part of the divorce, Sarah and Tony were awarded joint legal[74] and physical[75] custody of Jimmy. Sarah, however, was awarded primary physical custody of Jimmy, subject to the visitation rights of Tony.[76]

After Tony and Sarah had married, Sarah's parents moved from Nevada to the Louisiana coast. As a result, after the divorce Sarah decided to move to Texas with Jimmy to be closer to her parents. Tony stayed in Nevada. Three months after arriving in Texas, Sarah was pulled over for speeding. A search of her car revealed that she possessed illegal drugs, which resulted in her arrest. Jimmy was turned over to the local unit of Texas CPS. The government immediately brought a lawsuit for the protection of Jimmy.

2. Applying the first hypothetical

Texas district courts are courts of general jurisdiction. The presumption of subject-matter jurisdiction is not applicable under Chapter 152.[77] CPS has authority to file a suit affecting the parent-child relationship [SAPCR], including a request to take possession of the child.[78] The government's lawsuit to protect Jimmy will be filed in a court with SAPCR jurisdiction in the county where the "abused or neglected" child is found.[79] The suit need not be filed in a court with exclusive continuing jurisdiction.[80] Whether another state has jurisdiction under Sections 152.201-.203 is important for determining whether to apply Section 152.204(b) or (c)-(d).

Problematically, whether a non-Texas court has exclusive continuing jurisdiction is often discovered, if at all, only after a full adversary hearing.[81] After such a hearing, DFPS must request from the bureau of vital statistics identification of the court that last had exclusive continuing jurisdiction, if any.[82] The bureau, however, only has data of exclusive continuing jurisdiction within Texas. Although no other Texas court may have exclusive continuing jurisdiction, as in this hypothetical, another state court may. Assume that DFPS was able to find out from Sarah, who is currently in jail, that Nevada had issued a prior custody determination. Note, if she did not acknowledge this fact the process will grind to at least a temporary halt.

Due to Nevada's previous determination, a Texas court may protect Jimmy with a custody order in one of two ways: issue a temporary order under Section 152.204(c); or, modify the prior order under Section 152.203. Given the facts, any Texas court's attempt to modify Nevada's prior custody determination under Section 152.203 should fail. Texas is required to show initial jurisdiction under Section 152.201(a)(1) or (2).[83] Texas, however, is not Jimmy's home state as required by (a)(1).[84] Texas also cannot retain initial jurisdiction per (a)(2) because Tony still lives in Nevada. Nevada, therefore, initially continues to be Jimmy's home state

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[74] In Texas, "Legal custody" is defined as a "managing conservatorship of a child." Tex. Fam. Code Ann. § 152.102(12).
[75] In Texas, "Physical custody" is "the physical care and supervision of a child." Tex. Fam. Code Ann. § 152.102(14).
[76] In Texas, therefore, Sarah and Tony would share a joint managing conservatorship of Jimmy, with Sarah having the primary right to Jimmy's physical care and supervision.
[77] In re M.G.M., 163 S.W.3d 191, 196 (Tex. App.—Beaumont 2005, no pet.).
[78] Tex. Fam. Code Ann. § 262.001.
[79] *Id.* § 262.002.
[80] S.C. v. Tex. Dep't of Family & Protective Servs., No. 03-12-00518-CV, 2013 WL 150290, at *2 (Tex. App.—Austin Jan. 10, 2013, pet. denied) (mem. op.); *See* Tex. Fam. Code Ann. § 152.204.
[81] Tex. Fam. Code Ann. § 262.202.
[82] *Id.* § 155.101.
[83] *See id.* § 152.203 (requiring initial jurisdiction per 152.201(a)(1) or (2) as one requisite for modification jurisdiction).
[84] *See id.* § 152.102(7) (defining "home state").

under (a)(1). Finally, the hypothetical assumes that the Nevada court did not defer jurisdiction to Texas under Sections 152.207-.208.

As in this case, resorting to Section 152.203 after establishing temporary emergency jurisdiction will sometimes prove unfruitful.[85] Section 152.203 does not provide guidance or leniency in its application to emergency situations and Section 152.204 likewise does not reference 152.203; they are disparate sections.

Texas, however, has temporary emergency jurisdiction over Jimmy under Section 152.204(c), despite not having either home state or significant connection jurisdiction. Firstly, Jimmy's situation is an emergency under subsection (a) because Jimmy was "abandoned."[86] Although Sarah did not purposefully or forgetfully leave Jimmy anywhere, she was arrested and no other parent or guardian was able to care for Jimmy, who obviously was unable to care for himself and subject to mistreatment or abuse if left alone.[87] Additionally, as in Jimmy's situation, a protective services agency will often take possession of a child pursuant to an emergency order issued by the court.[88] To receive this power, a court would necessarily find that an emergency existed, thereby simultaneously conferring temporary emergency jurisdiction.[89]

After qualifying the situation as an emergency under subsection (a), Texas would next discern whether a sister state court has jurisdiction over Jimmy under Sections 152.201-.203. The facts reveal that Nevada issued an initial custody determination as Jimmy's home state. Nevada has exclusive continuing jurisdiction because Nevada is still Jimmy's home state.[90] Although at the time Sarah was arrested in Texas neither Sarah nor Jimmy lived in Nevada, Tony still did. And, Jimmy had only been absent from Nevada for three months. Therefore, Jimmy was still within Nevada's six-month extended home state status because Tony lived there.[91] Nevada retains exclusive continuing jurisdiction as long as Tony resides there, absent the court relinquishing such.[92]

Because of Nevada's prioritized authority, Texas has jurisdiction to assist Jimmy under 152.204(c). Texas has a *parens patriae* duty to children within its borders.[93] Emergencies necessitate action despite another state having preferential authority.[94] Even the duty to recognize and enforce another state's custody determination yields to a temporary emergency order issued to protect a child.[95] Texas, therefore, has jurisdiction over Jimmy under Section 152.204(c).

Texas now has authority to enter a temporary custody order to protect Jimmy. Since there is a prior custody determination, Texas's order must state a specific duration for which the order will remain effective.[96] Considerations for the duration of the order include how long it would take the Nevada court to resolve Jimmy's custody determination under the new circumstances. It is therefore incumbent upon the Texas court, pursuant to Section 152.204(d), to immediately contact the Nevada court. Likewise, the Nevada court must immediately answer the call and work to "resolve the emergency, protect the parties and the child, and determine a period for the duration of the temporary order."[97] For example, the Texas court, after speaking with the judge in Nevada, may issue a temporary order making Tony the sole managing conservator of Jimmy for a period of six months—a period that the Texas and Nevada courts jointly believe is sufficient for the Nevada court to resolve the dispute with a permanent order. The temporary order will remain authoritative until the time period in the order expires or the Nevada court issues an order.[98] Under this fact scenario, Texas would

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[85] Since modification jurisdiction requires a court to have initial jurisdiction, in addition to several other requirements, it is tough authority to attain. It is often unachievable for a court exercising temporary emergency jurisdiction to obtain modification jurisdiction since Section 152.204 was created to provide authority to states that otherwise would not have such.

[86] *See* Tex. Fam. Code Ann. § 152.201.

[87] *See* In re J.C.B., 209 S.W.3d at 823-24.

[88] *See* Tex. Fam. Code Ann. § 262.102.

[89] *Id.*

[90] *See id.* § 152.202(a)(1).

[91] *See id.* (providing the initial jurisdiction state with extended home state status for six months after the child leaves if one parent remains).

[92] The Nevada court could relinquish its exclusive continuing jurisdiction pursuant to Sections 152.207-.208.

[93] Schmidt, 96 S.W.3d at 544.

[94] *Id.*

[95] *Id.* (citing Sampson & Tindall's Tex. Fam. Code Ann. § 152.204, Commissioners' Comment, at 545) (showing that although Sections 152.303 and 152.306(b) would require Texas to give full faith and credit to another state's custody determination, Section 152.310 provides an alternative to rendering a final order on a petition to enforce when a court has temporary emergency jurisdiction).

[96] *See* Tex. Fam. Code Ann. § 152.204(c).

[97] *See id.* § 152.204(d).

[98] *See id.* § 152.204(c).

have temporary emergency jurisdiction, cooperate with Nevada to bring Jimmy safety, and enter a *temporary* order that could never become permanent.

B. Second hypothetical: temporary emergency jurisdiction in Texas, a prior custody determination in Nevada; one parent remains in Nevada, the decree state, but Texas is now the home state

1. Facts

Take the same initial basic hypothetical facts as above: Jimmy and Sarah move to Texas, and Tony remains in Nevada. This time, however, by the time Sarah is arrested, she and Jimmy had lived in Texas for six or more, rather than three, months.

2. Applying the second hypothetical

Under this new scenario, Texas is now Jimmy's home state because he has lived with a parent for at least six months in the state.[99] Because a prior court custody order exists in Nevada, however, Texas still has to satisfy the requirements of Section 152.203 to assert modification jurisdiction. Section 152.203 requires, as an initial ticket-to-entry, that Texas meet the standards set forth in Section 152.201(a)(1) or (2). Since Texas is Jimmy's home state, Texas satisfies (a)(1) (but (a)(2) is another matter entirely).[100] Next, Section 152.203 requires that Texas fulfill either Section 152.203(1) or (2). Because Tony still lives in Nevada, Section 152.203(2) is inapplicable.[101] Under subsection (1), the Nevada court has sole authority to determine if Texas should obtain modification jurisdiction.[102] Assuming that Tony objects, the Nevada court must decide whether to relinquish its exclusive continuing jurisdiction. Nevada's failure to relinquish its jurisdiction means that Texas is not authorized to assert modification jurisdiction.

Therefore, so long as Tony lives in Nevada, the outcome may be the same irrespective of whether Texas is Jimmy's home state: Nevada retains exclusive continuing jurisdiction and Texas can only temporarily protect Jimmy under Section 152.204. The Nevada, not Texas, court determines whether Texas can obtain authority to permanently modify Jimmy's custody determination. It is worth considering, however, whether there are means by which the Texas court may enter a permanent order, rather than relying on the Nevada court to do so.

C. Third hypothetical: Texas has temporary emergency jurisdiction; neither parents nor child reside in the state with exclusive continuing jurisdiction

1. Facts

Use the same initial hypothetical facts: Sarah and Tony are divorced in Nevada, and Sarah and Jimmy move to Texas where Sarah subsequently gets arrested. This time, however, imagine that Tony moved to Arizona after their divorce. Therefore, none of the parties still live in Nevada. Additionally, Jimmy and Sarah had lived in Texas for six months or more prior to Sarah's arrest.

2. Applying the third hypothetical

As in the first and second hypothetical, Texas has temporary emergency jurisdiction over Jimmy under 152.204(c). The Texas court learns, however, that Jimmy, Sarah, and Tony have all moved out of the decree state—Nevada. Therefore, the Texas court will be able to establish modification jurisdiction under Section 152.203.

For Section 152.203, the Texas court will first have to establish initial jurisdiction under Section 152.201(a)(1) or (2). Assuming that Jimmy and Sarah have lived in Texas for six months or more, Texas is now legally considered Jimmy's home state.[103] Next, the Texas court will have to be satisfied that Section 152.203(2) applies. Unlike subsection (1), in subsection (2) Texas is authorized to make the determination

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99 *See* Tex. Fam. Code Ann. § 152.102(7) (defining "home state").
100 *See id.* § 152.203.
101 *See id.* § 152.203(2).
102 *See id.* § 152.203(1) ("[T]he court of the other state determines it no longer has exclusive continuing jurisdiction under Section 152.202 or that a court of this state would be a more convenient forum under Section 152.207.").
103 *See id.* § 152.201(a)(1). Note that even if Sarah and Jimmy had not lived in Texas for six months, it is likely that they would be able to establish initial jurisdiction under Section 152.201(a)(2), as required for modification jurisdiction. Nevada would no longer be Jimmy's home state since Tony had also moved away. Furthermore, a Texas court could find significant connections with and substantial evidence of Jimmy and Sarah since they lived in Texas and the arrest occurred in Texas.

that neither Jimmy nor his parents reside in Nevada.[104] Texas has modification jurisdiction.[105] It can enter a permanent modification order to protect Jimmy. Texas is also granted exclusive continuing jurisdiction since it made a modification determination.[106] Texas no longer needs to exercise temporary emergency jurisdiction. It can operate under more permanent and powerful authority.

The previous hypothetical fact situations detail the most frequent and obvious ways for a state to obtain jurisdiction in an emergency situation where a prior proceeding or custody determination exists. The first and second scenario permitted a temporary order, whereas the third scenario allowed a permanent one. There is another method, albeit more unconventional, for a court to permanently protect a child in an emergency situation. The time has come to venture outside of Chapter 152.

D. Fourth hypothetical: temporary emergency jurisdiction and Chapter 161; parent residing in the state with exclusive continuing jurisdiction will not accept responsibility

1. Facts

Return to the facts of the first hypothetical: assume that Tony remained in Nevada; Jimmy and Sarah moved to Texas; Sarah was arrested in Texas; CPS files a suit to protect Jimmy in Texas; and, Texas obtained temporary emergency, but not modification, jurisdiction. This time, after Sarah notified the agency of the prior custody order, Tony received notice of the proceeding and was also ordered to appear. For whatever reason, Tony has no interest in going to Texas to protect or take possession of Jimmy. Finally, assume that Texas is Jimmy's home state.

2. Applying the fourth hypothetical

The Texas court serves Tony with official notice of the commenced proceeding pursuant to Section 152.108.[107] Because the notice was reasonably calculated to give actual notice of the proceeding,[108] Tony is bound to notice of the lawsuit but not to personal jurisdiction. Additionally, CPS issued Tony notice that Jimmy is under its care.[109] Despite these notices, Tony has no desire to go to Texas for the proceedings or to pick up Jimmy and bring him back to Nevada. Under Section 152.210, the Texas court orders Tony to appear in person and informs him that failure to appear may result in an adverse decision.[110] He refuses to comply or appear in person.

At this point, a new option could be available for the court to enter a permanent order to protect Jimmy. Incensed by Tony's refusal to cooperate, and given his past disorderly ways and repudiation of his intent to play any role in Jimmy's life, the court and CPS could decide that it would be best to terminate Tony's parental rights. In fact, it is likely that CPS has already initiated a termination case against Sarah, since CPS typically files for termination simultaneously (and in the alternative) when it removes a child in these situations and files a suit under the UCCJEA.[111]

Chapter 161 governs termination of the parent-child relationship. Although CPS initially sought to exercise jurisdiction over Jimmy using Chapter 152, due to Tony's recalcitrance it has now decided a proceeding under Chapter 161 is also appropriate. This could effectively and permanently change the parent-child relationship. In Jimmy's situation, the court could order the involuntary termination of Tony's father status.[112] Arguably, CPS could plead Sections 161.001(1)(D), (E), (N), and (O) to assert a request to terminate Tony's rights.

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[104] *See id.* § 152.203(2). Remember that, typically, the decree state must make the determination that a subsequent state can take jurisdiction from it. The exception is when the child and the child's parents no longer live in the decree state. In that case, the second state or the decree state can determine when the original decree state has lost its jurisdiction.

[105] *See* In re S.L.P., 123 S.W.3d 685, 688-89 (Tex. App.—Fort Worth 2003, no pet.) (showing how a Texas court may exercise modification jurisdiction when no party resides in the decree state and/or state with exclusive continuing jurisdiction).

[106] *See* Tex. Fam. Code Ann. § 152.202.

[107] *See id.* § 152.108 (describing notice for persons outside of the state where the proceeding is commenced); *See id.* § 152.205.

[108] *See id.* § 152.108.

[109] *See id.* § 262.109 (describing that written notice must be issued when "a representative of the Department of Protective and Regulatory Services or other agency takes possession of a child under this chapter").

[110] *See id.* § 152.210.

[111] Telephone Interview with Pamela K. Parker, *supra* note 42.

[112] Since the court decided to place Jimmy in the care of DFPS under Chapter 262, a subsequent hearing to review the decision would likely occur under Chapter 263. In addition to Section 161.001, Section 263.006 also says that a court should inform parents that parental rights may be subject to restriction or termination unless the parent or parents are willing and able to provide the child with a safe environment.

CPS often pleads Section 161.001(1)(D)-(E) together,[113] provisions generally known as the abuse and neglect, or endangerment, grounds.[114] Under these grounds the court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has neglected or abused the child either personally or constructively.[115] In the instant hypothetical, CPS would argue that, by refusing to take custody of Jimmy or appear to resolve the emergency, Tony knowingly allowed Jimmy to remain in a situation that endangered his physical and emotional well-being.[116] Although the shoe does not always fit so snuggly, courts are rather malleable in applying these provisions.[117]

In the alternative, CPS could anticipatorily allege that Tony violated Section 161.001(1)(N), often used when the case for (D)-(E) is weak. If the time frame fits, the court could find that Tony "constructively abandoned" Jimmy, either by: allowing Jimmy to remain in CPS care for at least six months while CPS attempted to return the child; or, because Tony did not regularly visit or maintain significant contact with Jimmy.[118] In the present hypothetical, assuming that the proceeding lasted for six months or more, this fact pattern would seemingly fit the allegation.

Additionally, the court could sever Tony's parental rights using Section 161.001(1)(O), which also focuses on children who are in CPS care as the result of alleged child abuse or neglect. Under (O), the court could determine that Tony failed to comply with a court order requiring him to appear or take possession of Jimmy, and Jimmy was in the temporary managing conservatorship of DFPS for not less than nine months pursuant to Chapter 262.[119] It would appear that (O) also could apply if the time requirement was fulfilled. Finally, if Tony was truly averse to remaining Jimmy's father, he could simply execute an affidavit relinquishing his parental rights to avoid litigation.[120]

Regardless under which Chapter 161 provision the court or DFPS decides to entertain a termination action, the effect is the same: Jimmy's case is now an issue of parental rights. Although a termination proceeding does not remove the case from the UCCJEA's grasp,[121] it does provide alternative means to obtain jurisdiction over Tony and Sarah—which could ultimately change the parent-child relationship without modifying the Nevada court's custody order. Texas is Jimmy's home state, Sarah committed a crime in Texas, and, as a result, Jimmy is now in the state's custody. Since Sarah's actions gave rise to a termination proceeding[122] and the state likely pleaded such when it brought suit to protect Jimmy, one could argue that Texas's interest in terminating Sarah's parental rights trump the Nevada custody order. The same could be said for Tony. Although Tony did not live in Texas, his refusal to cooperate with the state, follow court orders, or protect Jimmy after Jimmy came into the state's possession could provide authority to terminate Tony's rights. Texas could claim, once again, that its interest in protecting Jimmy and terminating Tony's parental rights (as a re-

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113 Sampson & Tindall's Tex. Fam. Code Ann. § 161.001, Comment, at 869-870.

114 *Id.* at 869.

115 Tex. Fam. Code Ann. § 161.001(1)(D) ("knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child"); Tex. Fam. Code Ann. § 161.001(1)(E) ("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").

116 Tex. Fam. Code Ann. § 161.001(1)(D)-(E).

117 Discussion with Professor John J. Sampson [Jack Sampson], William Benjamin Wynne Professor, The University of Texas School of Law (Nov. 2013) (Professor Sampson is a leading expert on Texas family law. He is co-author of Sampson & Tindall's Tex. Fam. Code Ann., and he has served as the editor of the *State Bar Family Law Section Report* from 1976 through 2007 (circulation approximately 5,000). Professor Sampson has been extensively involved in drafting family law legislation in Texas for nearly forty years. Since 1990, he has also served as reporter for the National Conference of Commissioners on Uniform State Laws (NCCUSL). More information on Professor Sampson's experience is available at: http://www.utexas.edu/law/faculty/jjsamp/).

118 *See* Tex. Fam. Code Ann. § 161.001(1)(N).

119 *See id.* § 161.001(1)(O); Temporary managing conservatorship may have been granted in *ex parte* orders under Chapter 262, Subchapter B, or it might not be granted until the conclusion of a full adversary hearing.

120 *See* Tex. Fam. Code Ann. § 161.001(1)(K).

121 *See id.* § 152.102(4) (Under the UCCJEA, a "'[c]hild custody proceeding' . . . includes a proceeding for . . . termination of parental rights . . . ").

122 Methods for terminating Tony's parental rights were previously discussed. Possible ways to terminate Sarah's parental rights include: Tex. Fam. Code Ann. § 161.001(1)(P), (Q) (drug-related provisions) and In re K.R.G., No. 02–11–00421–CV, 2012 WL 1739910 (Tex. App.—Waco May 17, 2012, no pet. hist.) (mem. op.) (terminating mother's parental rights due to drug history); Tex. Fam. Code Ann. § 161.001(1)(D)-(E) (abuse and neglect, or endangerment, grounds); Tex. Fam. Code Ann. § 161.001(1)(N) (constructive abandonment while the child is possessed by DFPS).

sult of his actions relating to Texas) trump the Nevada court order.[123] Under Chapter 161, therefore, Texas could permanently protect Jimmy and likely establish exclusive continuing jurisdiction for the parentage determination.[124] In fact, if the Texas court issued a negative determination for Tony, he would have to appear legally in Texas to adjudicate his parental rights; Nevada does not have jurisdiction over the parental rights determination.[125]

Furthermore, after terminating parental rights, Texas could possibly obtain jurisdiction to enter a custody determination. One could argue that, since Sarah and/or Tony are no longer parents, the Nevada court order is impotent and no longer controls. This would give Texas a clean slate with which to operate. In the current hypothetical, since Texas is Jimmy's home state, Texas could issue a new custody determination under Section 152.201(a)(1). Even if Texas was not Jimmy's home state, it is likely that Nevada would defer its jurisdiction to Texas given the events that unfolded in Texas since the Nevada court's determination.[126] Or, if neither Nevada nor Texas were Jimmy's home state, Texas could likely establish significant connections and obtain initial jurisdiction.[127] In effect, Texas, although technically still operating under the UCCJEA, can overcome the limits of the prior custody order by commencing a parental-rights case.

Importantly, in a parental termination proceeding DFPS could be appointed managing conservator.[128] For example, if the Texas court decides to terminate both Tony's and Sarah's parental rights, DFPS in this hypothetical may be appointed managing conservator.[129] Perhaps more importantly, even if Texas denies termination, it can still make DFPS Jimmy's permanent managing conservator.[130] The state could lose a suit for termination but still prevail on the main issue: custody.[131] Therefore, not only could a termination proceeding give the Texas court permanent, authoritative jurisdiction, DFPS also has a permanent means to care for the child.[132]

E. Fifth hypothetical: temporary emergency jurisdiction and Chapter 161; parent residing in state with exclusive continuing jurisdiction wants to appear personally but is financially unable to do so

1. Facts

Assume the same facts as the previous, fourth hypothetical. In this instance, however, Tony desires to travel to Texas, appear in court, and even to take custodial possession of Jimmy. There is one problem. Tony has no financial means to travel to Texas and obtain counsel. DFPS, however, is unaware of Tony's renewed paternal awareness and believes that Tony is willfully ignoring Jimmy's emergency and the court order. DFPS commences a proceeding to terminate the parent-child relationship.

2. Applying the fifth hypothetical

The court and DFPS handle the situation similarly to the previous, fourth hypothetical, and Texas has jurisdiction to make a parent-child relationship determination under Chapter 161.[133] Rather than attempt to modify the preexisting custody order, the Texas agency originates a new, independent proceeding to terminate Tony's parental rights, asserting that he constructively abandoned Jimmy, violated endangerment grounds, or violated another provision under Section 161.001(1).[134] Tony is provided notice. Once he learned of the parental rights proceeding, he was enraged. He contacts the Texas court and makes it aware of his desire to appear in Texas and bring Jimmy back to Nevada—a desire hampered by monetary restraints. Tony may be in luck.

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[123] It is important to note that the UCCJEA does not explicitly contain a trump clause, yet this theory may prove persuasive to Texas courts in this situation.
[124] *See* Tex. Fam. Code Ann. § 155.001.
[125] *Id.*
[126] *Id.* § 152.201(a)(2).
[127] *Id.*
[128] *Id.* §§ 161.207-.208.
[129] *Id.*
[130] *See* Sampson & Tindall's Tex. Fam. Code Ann. § 161.205, Comment (Although, in order "to prevail on conservatorship, the department would have to rebut the parental preference under § 153.131").
[131] *Id.*
[132] *See infra* VII.E (DFPS's priority is to return the child to his or her parents, family, or another suitable adult—as will be seen in the next, fifth hypothetical).
[133] *See supra* VII.D.
[134] *Id.*

Chapter 107 dictates the special appointment of an attorney *ad litem*[135] in SAPCR proceedings. Specifically, "[i]n a suit filed by a governmental entity under Subtitle E in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney *ad litem* to represent the interests of...an indigent parent of the child who responds in opposition to the termination or appointment."[136] Fortunately for Tony (as seen throughout the previous hypotheticals), CPS took possession of Jimmy pursuant to Section 262.102, Subtitle E, Title 5, seeking to terminate Tony's parental rights under Chapter 161. In sum, Jimmy's case was brought by a government entity, under Subtitle E, to terminate the parent-child relationship, and, Tony is indigent. Tony qualifies to receive assistance from an attorney *ad litem*.[137] Furthermore, after DFPS takes possession of a child pursuant to Chapter 262, the court reviews placement under Chapter 263. An indigent parent will once again be reminded of the opportunity to have an attorney *ad litem* for representation pursuant to Chapter 107.[138]

In addition to legal support, the legislature also generally directs DFPS to reconnect children with a parent, family member, or other suitable adult.[139] The state and its agencies believe that maintaining a managing conservatorship over a child is not in the state's or child's best interest. Rather, the child should be reunited with an adult out of the state's care. Title 5—under Chapter 153, 161, 263, and more—consistently explains the court's preference for attaching a child with a suitable adult, rather than a state agency.[140]

For example, initially DFPS must make a "diligent effort" to locate a "relative," which includes a parent, grandparent, adult sibling, or adult child.[141] This includes the obligation of the agency (and of a parent) to "identify, locate, and provide" information to such relatives.[142] If diligent efforts fail, the department must even use a "parental locator service" to attempt to identify a relative.[143] Furthermore, when a state agency takes possession of a child, the department "shall" contact "each adult the department is able to identify and locate who: (A) is related to the child within the third degree by consanguinity[144] . . . and (B) is identified as a potential relative or designated caregiver."[145] It also "may provide information . . . to each adult . . . who has a long-standing and significant relationship with the child."[146] The required diligence and breadth of sought-after contacts are vast, exemplifying the desire to notify and involve nearly any suitable adult rather than rely on the state to care for the child.

If a court does in fact terminate the parent-child relationship, the court is only instructed to appoint, among other options, "a suitable, competent adult."[147] The legislature even allows children to be placed with "fictive kin," individuals who are friends of the family and function like relatives.[148] As a result, the Texas

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[135] Tex. Fam. Code Ann. § 107.001(2) ("'Attorney ad litem' means an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.").
[136] *Id.* § 107.013(a)(1); the appointment of an attorney *ad litem* for an indigent parent in a DFPS case is not constitutionally mandated. It has, however, been statutorily mandated in Texas since 1979. Sampson & Tindall's Tex. Fam. Code Ann. § 107.013, Comment, at 500.
[137] *See* Tex. Fam. Code Ann. § 107.0131 (explaining the powers and duties of an attorney *ad litem* for a parent).
[138] *See id.* §§ 263.0061, .203, .301.
[139] *See, e.g., id.* §§ 161.107, 263.007.
[140] Note, for these provisions to apply in Tony's favor, Sarah must be involved in the abuse or neglect case and either have her rights terminated or, at the very least, be declared unfit as a managing conservator (which, in effect, is a custody determination). Tony is then left standing and an acceptable option to the Texas court without strictly modifying the Nevada order; *See supra*, note 122, VII.D.
[141] *Id.* § 161.107(b)-(c).
[142] *Id.* § 263.007.
[143] *Id.* § 161.107(d).
[144] TEXAS STATE UNIVERSITY, *Consanguinity and Affinity Relationship Chart* (Oct. 16, 2010), http://www.hr.txstate.edu/compensation/Nepotism.html (grandparents, great grandparents, uncles and aunts, adult siblings, and more).
[145] Tex. Fam. Code Ann. § 262.1095(a)(1).
[146] *Id.* § 262.1095(a)(2).
[147] *Id.* § 161.207(a).
[148] *See Id.* §§ 264.751-.759; TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., *The Texas Practice Guide for Child Protective Services Attorneys*, Section 12: Resources, at 29 (last updated Mar. 2012), *available at* http://www.dfps.state.tx.us/documents/Child_Protection/Practice_Guide/Section_12_Resources/Resources.pdf (defining "fictive kin").

Family Code authorizes CPS to place a child with a non-relative "designated caregiver," defined as "an individual who has a longstanding and significant relationship with a child . . . . "[149]

These statutes contain a quasi-preferential hierarchy for with whom the child should be placed. Options, and an implicit hierarchy, include connecting a child with a parent or other individual from whom the child was removed, a grandparent, adult sibling, or adult child, another suitable individual (not a family member), or "another planned, permanent living arrangement for the child" (presumably with a state agency or other arrangement).[150] This last option is disfavored, as evidenced by the requirement of a "compelling reason" to utilize it. All of the above evidences the state's desire to place children out of its care, even if not with a parent or relative.

Thus, the combination of legal support under Chapter 107 and the state's desire to return a child to his or her parents weigh in Tony's favor. Given Tony's desire to take possession of Jimmy, the court and DFPS may reunite them. Under Chapter 161, the court could resolve the dispute in a more permanent manner.

In the end, under Chapter 161, a Texas court may be able to exercise jurisdiction over Jimmy where it otherwise would not be able to with temporary emergency jurisdiction. By initiating a parental rights proceeding under Chapter 161 the court could issue an independent order not subject to Nevada's exclusive continuing jurisdiction. Tony could receive representation from an attorney *ad litem*. He would also have DFPS's number one priority, to reunite child and parent, working in his favor. Therefore, under authority of Chapter 161, DFPS could possibly reposition Jimmy as it saw fit without having to modify Nevada's preexisting custody order under Section 152.204.

F. Sixth hypothetical: possibly the best, although highly unlikely, solution; father fights in Nevada, seeks modification of the custody determination in the decree state with exclusive continuing jurisdiction

1. Facts

Return to the facts of the initial basic hypothetical: Sarah and Tony divorced in Nevada; Sarah and Jimmy move to Texas, where Sarah is arrested after three months; CPS files a suit to protect Jimmy in Texas; Texas obtains temporary emergency, but not modification, jurisdiction; and, Tony remains in Nevada. Like the previous hypothetical, Tony desires to take custody of Jimmy and protect his son. But unlike the previous hypothetical, this time Tony does not fight for modification of the Nevada custody determination in Texas. Rather, he takes his battle to the Nevada court that issued the initial determination. Tony commences a modification proceeding in Nevada to modify the initial order while Texas is simultaneously exercising temporary emergency jurisdiction.

2. Applying the sixth hypothetical

Hearing that Jimmy is in danger and CPS care, Tony runs to the Nevada court that issued the initial custody determination and commences a modification proceeding. He asserts that the primary custodian, Sarah, is unfit and in jail, and he should become the primary custodian of Jimmy. Nevada has jurisdiction to modify the initial custody determination because Nevada has exclusive continuing jurisdiction under Section 152.202. Exclusive continuing jurisdiction is for a court to use or to lose; Section 152.202 outlines how a court can lose its exclusive continuing jurisdiction, not how to maintain it. Furthermore, since Tony still lives in Nevada, the Nevada court controls its own jurisdictional destiny and can maintain its authority.[151] Even if the Nevada court determines that Sarah and Jimmy no longer have "significant connections" with the state,[152] the Nevada court can still modify its initial determination since Nevada remains Jimmy's home state and Nevada has initial jurisdiction under Section 152.201(a)(1).[153] Therefore, in either event, Nevada has authority to modify its initial custody determination.[154]

With this authority, and at Tony's request, the Nevada court communicates with the Texas court to assess the situation in Texas with Sarah and Jimmy. Pursuant to Texas's temporary emergency jurisdiction under Section 152.204(c)-(d), the Texas and Nevada courts are required to communicate and cooperate. The Texas

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[149] Tex. Fam. Code Ann. § 264.751(1).
[150] *See id.* § 263.3026 (explaining that there must be a "compelling reason" for the department's permanency plan to be "another planned, permanent living arrangement for the child," rather than any of the other permanency goals identified in subsection (a)).
[151] *Compare id.* § 152.202(a)(1), *with id.* § 152.202(a)(2).
[152] *See id.* § 152.202(a)(1); it is unlikely that the court would determine it not longer has significant connections because Jimmy has been absent from the state for a short time—three months.
[153] *See id.* § 152.202(b).
[154] As time goes by, however, some of these factors erode and ultimately will disappear.

court fields the Nevada court's call and a discussion ensues regarding Jimmy's safety and Sarah's fitness as a custodial parent. After speaking with the Texas court, the Nevada court eventually sides with Tony, modifies its initial custody determination, and declares Tony to be the primary custodian of Jimmy. Tony is no longer the noncustodial parent, as he was under the initial order.

Armed with a modified order naming him the custodial parent, Tony heads to Texas to take possession of Jimmy and end the temporary emergency proceeding. Tony has the law on his side, as the PKPA and UCCJEA require that his custody determination be given full faith and credit in Texas.[155] The story could end here if Texas deferred to Nevada's order with full faith and credit so that Tony received possession and custody of Jimmy. This process—seeking modification in the state with exclusive continuing jurisdiction while another state simultaneously exercises temporary emergency jurisdiction—is an additional option whereby a parent, relative, or state agency could permanently protect a child in danger. Texas can relinquish its temporary emergency jurisdiction since the court with modification authority and exclusive continuing jurisdiction intervened to protect Jimmy and adjudicate Sarah's and Tony's parental rights.[156]

It is reasonable to assume, however (and for the sake of exploration the author will), that the Texas court does not acquiesce so easily. First and foremost, it is unlikely that Texas CPS would simply hand Jimmy over to Tony. In fact, it is very likely that CPS would first desire to do a home study, conduct a criminal background check, and take additional steps to assess Tony's fitness as a parent.[157] Additionally, it is also possible that the Texas court will not give the Nevada court's order full faith and credit—for whatever reason.[158]

In this hypothetical fact situation, imagine that this is precisely what occurs in Tony's case. The Texas court will not enforce the Nevada court's custody determination; the Texas court does not give Jimmy to Tony. Tony, however, is not without recourse. He holds a valid modified order from the Nevada court.

Tony can initiate a *habeas corpus* proceeding in Texas under Chapter 157, Subchapter H.[159] He can file the petition against the state and DFPS seeking to claim possession of Jimmy pursuant to a valid court order.[160] Under the *habeas* proceeding, Tony has a right to take possession of Jimmy.[161] Section 157.372 dictates the return of a child to a parent who received authority from a valid court order under Chapter 152 and the PKPA.[162] Tony's right to custodial possession of Jimmy "is governed by a [valid] court order," so the Texas court "shall compel return of the child to the relator . . . ."[163] Since the enactment of the UCCJEA, however, *habeas* proceedings have lost ground to more useful enforcement procedures under Chapter 152, Subchapter D.[164]

Under Chapter 152, a Texas court must enforce a valid court order from a sister state.[165] Generally, a Texas court's review of enforcement is limited—typically to whether the decree state had jurisdiction and complied with due process.[166] This is because the UCCJEA and PKPA usually prohibit an enforcing court to modify the sister state's custody determination.[167] Tony can register the Nevada court order in Texas[168] and then seek to have the registered determination enforced.[169] Furthermore, Section 152.308 allows expedited

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[155] *See* 28 U.S.C. § 1738A(e); *See* Rush v. Stansbury, 668 S.W.2d 690 (Tex. 1984).
[156] *See* Tex. Fam. Code Ann. § 152.204(c)-(d).
[157] *See* Schmidt, 96 S.W.3d 533 (outlining the court's and CPS's desire to conduct a home study before giving an out-of-state parent custody); *See* Tex. Fam. Code Ann. § 264.754 ("Before placing a child with a proposed relative or other designated caregiver, the department must conduct an investigation to determine whether the proposed placement is in the child's best interest.").
[158] Perhaps the Texas court finds the Nevada court's decision inadequate, believes that the emergency is ongoing and must retain temporary emergency jurisdiction to handle it, simply does not follow the law, or more.
[159] Note, because Tony is likely a party in the temporary emergency proceeding under Section 152.204, resorting to a *habeas* petition may be unnecessary, and he could simply rely on Chapter 152, Subchapter D's enforcement measures, which will be detailed shortly.
[160] *See* Tex. Fam. Code Ann. § 157.371(a).
[161] *See id.* § 157.372.
[162] *Id*.
[163] *Id.*
[164] Sampson & Tindall's Tex. Fam. Code Ann. ch. 157, subch. H, Introductory Comment, at 722.
[165] *See* Tex. Fam. Code Ann. §§ 152.303, .306, .313.
[166] Sampson & Tindall's Tex. Fam. Code Ann. ch. 152, Commissioners' Official Prefatory Note to UCCJEA, at 531.
[167] *Id.* at 531-32; *Id.* § 152.303, Commissioners' Comment, at 554.
[168] *See* Tex. Fam. Code Ann. § 152.305.
[169] *See id.* § 152.306.

enforcement of a child custody determination. It, in fact, is used primarily in interstate cases and produces "the child in a summary, remedial process based on habeas corpus."[170] At such a hearing, the child will be delivered to the petitioner barring any limited exceptions.[171] If the order is registered in Texas, the only defense to enforcement under Section 152.308 is that the order has been vacated, stayed, or modified since its registration.[172] At the enforcement hearing, "the court shall order that the petitioner may take immediate physical custody of the child . . . . "[173]

Whether Tony either initiates an independent *habeas corpus* proceeding, or seeks enforcement during the temporary emergency proceeding pursuant to Chapter 152, Subchapter D, he has viable means for having the Texas court enforce the Nevada court's modified order. Tony can obtain custodial possession of Jimmy. Furthermore, since the initial order was modified in Nevada, not Texas, Sarah would have to travel to Nevada to litigate her parental rights.

Despite the possible complications that may arise if a Texas court does not recognize a sister state's modified order, this process for protecting a child in an emergency situation may be the most beneficial and best solution. A parent, rather than relying on a court with temporary emergency jurisdiction, can go straight to the court with permanent modification authority. A court with exclusive continuing jurisdiction and/or modification jurisdiction could settle the matter in a more finite, swift manner. Such a court could adjudicate parental rights and protect the child more efficiently than a court maneuvering under Section 152.204(c)-(d).

Paradoxically, the best possible solution is perhaps also the most unlikely. Firstly, and sadly, parents that find themselves in Sarah's and Tony's position often arrive there precisely because they do not desire to be responsible or care for their child; both parents are often unfit. These circumstances, and the need to modify an order, rarely arise when a parent in Tony's situation visits the child frequently, provides financial support, and is generally a good parent in the legal and moral sense.[174] In fact, research revealed no Texas cases that illustrate this sixth hypothetical, where a parent seeks modification in State A with exclusive continuing jurisdiction after State B began exercising temporary emergency jurisdiction.[175]

Furthermore, even if a parent in Tony's position did seek to modify a custody determination in the decree state, it is time consuming, expensive, and resource intensive. Simply becoming aware of this possible solution would require outside legal counsel. For example, someone in Tony's situation would have to run the gamut of UCCJEA processes, which necessitates this: hiring a lawyer; having the lawyer explain the possible options; choosing this specific option; going to the Nevada court to give a description of the facts; filing a motion in Nevada to modify the initial custody determination; serving Sarah with notice of the modification proceeding and then once again with a subsequent hearing time at some point in the future; asking the Nevada and Texas court to cooperate; achieving cooperation; obtaining a modified order from Nevada; traveling to Texas with the order to reclaim Jimmy (because Texas would not send Jimmy to Nevada); having Texas recognize the Nevada court's modified order; and, so on and so forth.

In the end, having a parent who is responsible enough to seek modification in the decree state is not enough; the parent must also have the resources and desire to accomplish this goal. Alas, what may possibly be the best solution is also the most unlikely, as evidenced by a dearth of case law on the subject and from discussions with practitioners and academics.

VIII. PROBLEMS WITH SECTION 152.204

A. Determining when a prior custody determination or proceeding exists

One initial problem under Section 152.204 is identifying when a court with jurisdiction under Sections 152.201-.203 has made a prior custody determination or commenced a proceeding. In emergency situations, such as when a child is abandoned roadside at 2 a.m., this identification exercise is impractical and implausi-

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170 Sampson & Tindall's Tex. Fam. Code Ann. § 152.308, Commissioners' Comment, at 558.
171 Tex. Fam. Code Ann. § 152.308(d).
172 *Id.*
173 *Id.* § 152.310.
174 Discussion with Professor John J. Sampson, *supra* note 117.
175 *Schmidt*, 96 S.W.3d 533, was the closest Texas case to the legal processes used in the sixth hypothetical. In *Schmidt*, the father commenced a modification proceeding in the decree state prior to Texas's exercise of temporary emergency jurisdiction. The father did, however, recommence the modification proceeding in California after Texas began exercising temporary emergency jurisdiction. Nevertheless, and as will be seen shortly, *Schmidt* is a very bizarre, complicated, and unusual fact scenario and does not mirror the sixth hypothetical well. *See infra* Section VIII.C, IX.D.

ble. A law enforcement officer or caseworker will be more focused on providing the child safety than locating an absent parent or interstate record. Moreover, because a state's bureau of vital statistics only tracks its state's determinations, a court or DFPS often will not know about prior out-of-state determinations. This could cause a Texas court to erroneously operate under Section 152.204(b), rather than subsection (c). This would create two important mistakes. The Texas court would not cooperate with the Nevada court or specify an expiration period for its temporary order.

B. Specifying a time period in the temporary order

Under Section 152.204(c), it is unclear at what point in time an expiration period must be included in the temporary order. A question may arise as to whether a court may initially issue a temporary order without identifying a time period for expiration—in order to immediately protect the child—but then insert one afterward. The language of Section 152.204(c)-(d) appears to require the order and time period to be issued simultaneously.[176] As previously discussed, however, this does not always seem practical in emergency situations. Nevertheless, courts have held that a temporary order without a date specifying when it will expire is void.[177] Those courts reason that, even when authority is proper under Section 152.204(c), an order with no time limit essentially makes it permanent and an unauthenticated modification of a prior order.[178]

C. Court-to-court communication

Section 152.204(d) mandates court-to-court communication. A court exercising temporary emergency jurisdiction and a court with jurisdiction under Sections 152.201-.203 "shall immediately communicate."[179] The duty is reciprocal. For the most part, courts have interpreted this to be mandatory.[180]

In *In re M.G.M.*, the Texas appellate court in Beaumont found error in the trial court's failure to communicate with the appropriate out-of-state court.[181] The trial court, upon learning of an out-of-state custody proceeding, should not have issued a temporary protective order until it had communicated with the out-of-state court.[182] Just like the need to specify a time period in the temporary order, chronology matters.

Although practitioners and experts represent that courts are usually willing and able to abide by this requirement, it is not always so simple. A Texas court must first learn about another state's jurisdiction, a difficulty previously discussed. Successful implementation would next require not one, but two courts with the initiative to communicate and handle the situation.

To illustrate the difficultly, in *Schmidt*, a Texas court exercising temporary emergency jurisdiction strictly followed the statute. Among other things, the judge attempted to contact the California court with exclusive continuing jurisdiction to resolve the dispute.[183] In what the appellate court called "[a]n extraordinary twist…not contemplated by the UCCEJA," the California court continually refused to communicate with the Texas court regarding the child's safety.[184]

D. Practical implications

After speaking with practitioners, the author is informed that trial courts do not always follow 152.204(c)-(d). Rather, they do what is necessary to protect a child in an emergency situation. Case law shows that appellate courts nevertheless expect Sections 152.203-.204 to be followed strictly. A weighty practical problem is assuring that a child is permanently, not just temporarily, protected. Under temporary emergency jurisdiction, it is necessary and vital to ensure that a temporary order does not lapse before a court with proper jurisdiction can enter a permanent order. This necessitates that judges confer, cooperate, and more.

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[176] *See* Tex. Fam. Code Ann. § 152.204(c) (stating that any order issued "under this section must specify in the order a period"); *See* 152.204(d) (requiring that courts "shall immediately communicate" to "determine a period for the duration of the temporary order").

[177] LaRose v. LaRose, 71 So. 3d 651, 657 (Ala. Civ. App. 2011); In re Ruff, 122, 275 P.3d 1175, 1181-82 (Wash. Ct. App. 2012); In re State ex rel. M.C., 94 P.3d 1220, 1225 (Colo. Ct. App. 2004).

[178] LaRose, 71 So. 3d at 657; In re Ruff, 275 P.3d at 1181-82; In re State ex rel. M.C., 94 P.3d at 1225.

[179] Tex. Fam. Code Ann. § 152.204(d); Sections 152.110-.112 discuss the requirements for court communication, including the need to keep an adequate record.

[180] Schmidt, 96 S.W.3d at 545 ("This mandatory duty of cooperation between the courts of different states is the hallmark of the UCCJEA; it is this cooperation that is intended to lead to an informed decision on custody."); In re Ruff, 275 P.3d at 1181-82 (failing to communicate was error); In re M.G.M., 163 S.W.3d at 199 (failing to communicate before issuing a temporary order was error).

[181] In re M.G.M., 163 S.W.3d at 199.

[182] *Id.*

[183] Schmidt, 96 S.W.3d at 536.

[184] *Id.*

Furthermore, adherence to Section 152.204(c)-(d) requires substantial time and resources, even when courts cooperate in the best interest of a child. Resolving a situation could take months, if not years.[185] As Judge Don Koons writes:

> [I]t is certainly important to have a clear understanding with the client concerning the possibility of extensive preparation, the possibility of the need to retain out-of-state counsel and perhaps travel and other expenses. The probable results can be quite speculative. When the practitioner considers the existence of fifty states, the number of courts in existence, differing abilities and perhaps even the political considerations which might exist in another state (for instance, hearings in a small community), care should be taken when undertaking a case involving the UCCJEA.[186]

Despite practical hurdles that may occasionally frustrate the UCCJEA's operation, they ultimately stem from the statute's primary goal: to prevent conflicting interstate custody determinations and proceedings.

In sum, the means available to issue a permanent order are strictly limited by the terms of Section 152.204. As the hypotheticals show, however, avenues to more permanently protect a child do exist. A court can begin by exercising temporary emergency jurisdiction, but then later resort to either modification jurisdiction or Chapter 161 for more permanent authority to protect the child. As the next section discusses, there are also ways to extend the time a court can exercise temporary emergency jurisdiction—such as when an emergency persists and/or a state refuses to cooperate.

IX. POSSIBLE SOLUTIONS

Section 152.204 is a one-size-fits-all statute.[187] Its uniform application may lead to unwelcome and unfair results. One court noted that such problems nevertheless result from the legislature, not the courts.[188] It would follow that the fixes should be legislative, rather than judicial.[189] Although notionally sound, courts may be the most practical way to address these issues—especially since modification to the UCCJEA is largely unfeasible—and provide solutions that can shape and soften the harshness of a one-size-fits-all statute.

A. Court collaboration to protect the child

The most beneficial way to ensure long-term protection for a child under the current mold is to encourage court-to-court collaboration and strict adherence to Section 152.204. If courts accept the goals of the UCCJEA and commit to upholding the letter of the law, guaranteeing future protection for children could be achieved. The court that issued the initial determination should cooperate with the court exercising temporary emergency jurisdiction to formulate a plan that safeguards the child's best interests. Cooperation would lead to a temporary order that adequately protects the child and specifies a time period for that protection to last, which, at the very least, would be until the court with permanent authority could handle the situation. The court with permanent authority needs to make sure that a determination is made prior to the temporary order's expiration, thereby assuring a smooth transition from one court's temporary order to either its or another court's permanent protection of the child.

Abiding by the spirit and text of the statute would seem to fulfill the UCCJEA's and DFPS's purposes. A court could issue a temporary order and allow the state with exclusive continuing jurisdiction to permanently address the situation. As the previous hypotheticals show, however, this solution is complex and would require flawless execution. Even then, a child's home state cannot always obtain modification jurisdiction when the state with exclusive continuing jurisdiction does not relinquish control.[190]

B. Relinquishment of exclusive continuing jurisdiction in favor of a state exercising temporary emergency jurisdiction

Although not mentioned in Section 152.204, courts have held that a court may forfeit its jurisdiction under Sections 152.201-.203 pursuant to 152.207[191] or 152.208.[192] The court with temporary emergency juris-

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[185] *See* In re Gibson, 172 Wash. App. 1012 (Wash. Ct. App. 2012) (not designated for publication) (exemplifying how, even (and especially) when properly followed, resolving a custody determination arising from temporary emergency jurisdiction can take years).
[186] 33 Judge Don Koons, *supra* note 14.
[187] In re Ruff, 275 P.3d at 1182.
[188] *Id.*
[189] *Id.*
[190] *See supra* VII.B (Recall the second hypothetical where Texas, even as Jimmy's home state, did not have modification jurisdiction).
[191] *See* Tex. Fam. Code Ann. § 152.207 (enumerating considerations for finding that a state with jurisdiction under Sections 152.201-.203 is an inconvenient forum); *See* Barabarawi v. Rayyan, 406 S.W.3d 767, 774-75 (Tex. App.—Houston [14th Dist.] 2013, no pet.)

diction would then have to demonstrate that it independently possesses modification jurisdiction under 152.203. A court's temporary emergency jurisdiction could thereafter transform into exclusive continuing jurisdiction by using modification authority.[193] Although not technically authority under Section 152.204, this would be one method for issuing a permanent order after exercising temporary emergency jurisdiction. The decree state would relinquish jurisdiction and the subsequent state would establish modification jurisdiction.

C. Sufficient effort, refusal to cooperate, and ongoing emergency

Courts may be able to exercise discretion regarding the scope and span of their temporary emergency jurisdiction. For example, if a court with temporary emergency jurisdiction makes a sufficient effort to communicate with a court that has jurisdiction under Sections 152.201-.203, and that court refuses to cooperate, the court with temporary emergency jurisdiction could possibly continue to exercise authority for as long as necessary to protect the child. As mentioned previously, in *Schmidt* the Texas court with temporary emergency jurisdiction attempted to communicate—to no avail—with the California court holding exclusive continuing jurisdiction.[194] In the case the California court had awarded the mother physical custody of the children. The father was only given supervised visitation rights because he was a convicted child molester. Although the order prohibited the mother from fleeing California with the children, nevertheless she fled with them to Texas. The California court was enraged and awarded sole legal custody to the father—a convicted child molester. After Texas obtained temporary emergency jurisdiction, it refused to hand the children over to their father in California given his conviction. Despite the Texas trial court's best efforts, the California court would not cooperate and refused to assure the Texas court that it would adequately protect the children upon their return to California. Without this assurance or cooperation, the Texas court refused to enforce the California court's order and entered additional orders regarding the custody of the children.[195]

The Texas appellate court in Austin found that the Texas trial court was justified in its continued use of Section 152.204.[196] The court reached this decision given California's lack of cooperation and the ongoing emergency that would continue if Texas returned the children to California (i.e., granting a convicted child molester physical custody with no prior home study).[197] The appellate court reiterated, however, that the Texas trial court was without power to modify the California court's order.[198] Nevertheless, the appeals court ruled that, until the Texas court was satisfied that the California court had a legitimate transition plan in place to protect the children, Texas could exercise its temporary emergency powers for as long as necessary to protect the children.[199]

D. Chapter 161 jurisdictional authority from a parental rights proceeding

As seen from the fourth and fifth hypotheticals, another possible solution to protect the child by exercising more permanent authority would be to initiate a parental rights proceeding under Chapter 161—even after a court has already exercised temporary emergency jurisdiction. DFPS or the court could initiate this proceeding. The issue would be parental rights and a Texas court would ideally have independent jurisdiction. The parental rights proceeding would be exclusive to Texas, and it would have to be litigated and resolved in Texas. Although it may not directly impact the custody determination (although it is possible, as previously discussed), it would in effect change the parent-child relationship. This option, however, creates issues with the court that has jurisdiction under Sections 152.201-.203. Whether the initial, out-of-state court would recog-

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(rejecting mother's argument that Texas was an inconvenient forum); *See* In re Alanis, 350 S.W.3d 322, 326-29 (Tex. App.—San Antonio 2011, no pet.) (holding that Texas was an inconvenient forum).

[192] *See* Tex. Fam. Code Ann. § 152.208 (allowing a court to decline jurisdiction due to unjustifiable conduct by a party); Sampson & Tindall's Tex. Fam. Code Ann. § 152.202, Commissioners' Comment, at 544; *See* Rayyan, 406 S.W.3d at 776 (rejecting mother's argument that Texas should have declined jurisdiction because father's conduct was unjustifiable); *See* In re Lewin, 149 S.W.3d 727, 739-41 (Tex. App.—Austin 2004, no pet.) (holding that a party's unjustifiable conduct resulted in a relinquishment of jurisdiction in Texas); *See* In re S.L.P., 123 S.W.3d at 689-90 (holding that a party's unjustifiable conduct negated Texas's jurisdiction).

[193] *See* Tex. Fam. Code Ann. § 152.202(a) (explaining that exercising modification jurisdiction grants exclusive continuing jurisdiction); Sampson & Tindall's Tex. Fam. Code Ann. § 152.202, Commissioners' Comment, at 544.

[194] Schmidt, 96 S.W.3d at 536.

[195] *Id.*

[196] *Id.* at 549.

[197] *Id.*

[198] *Id.* at 548-49.

[199] *Id.* at 549.

nize such a tactic in Texas is unknown, although it is a necessary gamble under the obligation to protect the child. Nevertheless, a Chapter 161 proceeding and determination would give permanent authority to a Texas court, and it could circumvent temporary emergency jurisdiction.

E. Modification of the initial custody determination in the out-of-state court with jurisdiction under Sections 152.201-.203, rather than in Texas

A final option is to utilize the tactics from the sixth hypothetical, whereby an individual modifies the initial custody determination in the state with exclusive continuing or modification jurisdiction, instead of seeking to modify the order in the state with temporary emergency jurisdiction. The parent could obtain a modified order and then bring it to the state operating under Section 152.204 that harbors the child. The parent would then have a variety of options to enforce the out-of-state court's modified order and reclaim his or her child. As outlined previously, this option has the most upside and would potentially be the best solution for the issues arising under the UCCJEA. Unfortunately, this option would also require the most time, money, and other resources, in addition to a dedicated parent willing to do whatever is necessary to protect his or her child.

X. CONCLUSION

Temporary emergency jurisdiction undoubtedly has its problems. At the same time, deeper analysis shows that it serves it purposes quite well. Temporary emergency jurisdiction is intended to be just that: temporary. It is temporary authority so that pre- and post-UCCJEA problems do not occur, namely, having conflicting interstate custody determinations for the same child and family. Therefore, it is inherently antithetical to try and exercise permanent authority over a child who only comes under a state's jurisdiction pursuant to Section 152.204. Temporary authority permits a court to protect a child in an emergency situation, but it gives no more power than that. A court with jurisdiction under Sections 152.201-.203 will have to make the ultimate custody determination to permanently protect the child. As it stands, the processes make sense.

The practical implementation of this authority nevertheless creates issues. Discovering a prior determination is often difficult. Requiring courts to cooperate can be impractical. And expiring orders, regardless of whether plans for a child's future protection are in place, are troubling—specifically when the court with permanent authority has yet to act. Nevertheless, strict adherence to Section 152.204(c)-(d) would seemingly succeed to protect a child and uphold the statute's purposes. Allowing a court to extend its use of temporary emergency jurisdiction when a sister state court is not cooperating could also prove fruitful. A court could also attempt to establish modification jurisdiction, instead of temporary emergency authority. Artfully and imaginatively using Chapter 161 is another option. Lastly, an individual could seek modification in the state with jurisdiction under Sections 152.201-.203, rather than in the state with temporary emergency jurisdiction.

All in all, if the overriding goal of Section 152.204(c)-(d) is to prevent conflicting custody orders and therefore only grant temporary authority, the UCCJEA got it mostly right. Holes exist, and not strictly following the law can create problems. The biggest issue arises when a court with temporary authority cannot permanently protect a child, even if the court with permanent authority is not doing its job, is being uncooperative, or is not looking out for the child's best interests. In such instances, there are several options discussed throughout this article for the temporary court to grasp, and even bolster, what fleeting, temporal authority it possess—including by finding permanent authority when none seems to exist. In the cases where the UCCJEA is not espoused, courts and practitioners must do their best—possibly with tactics discussed herein—to assure that the child's future protection is not lost in the Bermuda Triangle of child custody determinations.

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

DIVORCE
INFORMAL MARRIAGE

TRIAL COURT DID NOT ERR IN FINDING NO COMMON-LAW MARRIAGE EXISTED BECAUSE WIFE FAILED TO PROVIDE DIRECT EVIDENCE THAT THE PARTIES AGREED TO BE MARRIED AND HUSBAND CONTROVERTED WIFE'S CIRCUMSTANTIAL EVIDENCE PERTAINING TO AN AGREEMENT.

14-2-01. ***Burden v. Burden***, __SW3d__, 06-13-00024-CV, 2013 WL 6858125 (Tex. App.—Texarkana, no. pet. h.) (12/31/13).

Facts: Husband and Wife formally married in 1998 and divorced in 2002. Several years after the divorce, Husband permitted Wife to move into his home because Wife needed a place to live. Afterward, Wife refused Husband's request that she leave the home. Eventually, Husband attempted to evict Wife. Wife resisted, claiming the parties' had entered into common-law marriage that vested her with an ownership interest in the house. Following a bench trial, the trial court found that no common-law marriage existed. Wife appealed.

Holding: Affirmed

Opinion: A common-law marriage exists in Texas if the parties (1) agreed to be married, (2) lived together in Texas as husband and wife after the agreement, and (3) represented to others that they were married. An agreement to be married cannot be inferred from the mere evidence of cohabitation and representations of marriage to others, but such evidence may be circumstantial evidence of an agreement to be married.

Here, Wife did not testify that she and Husband agreed to be married after their divorce, but only that she considered them to be in a marriage relationship and that Husband told her there were no changes in their relationship after they divorced. Husband specifically denied ever agreeing to be married to Wife after the 2002 divorce. Because Husband controverted Wife's circumstantial evidence pertaining to an agreement to be married and there was no direct evidence that the parties actually agreed to be married, the trial court did not err by finding no common-law marriage existed.

DIVORCE
VALIDITY OF MARRIAGE

HUSBAND FAILED TO OVERCOME STRONG PRESUMPTION OF VALIDITY OF HIS CURRENT MARRIAGE TO WIFE

¶14-2-02. ***In re A.M.***, __S.W.3d___, 2013 WL 6578769 (Tex. App.—Dallas 2013, no. pet. h.) (12/16/13)

Facts: At trial, Husband argued that his marriage to Wife was void because Wife allegedly never divorced her prior husband ("Firhaad"). In support, Husband provided documentation from the British and Pakastani governments showing no divorce between Wife and Firhaad. Wife, however, provided a document, signed by Firhaad, issued by an Islamic mosque in England reciting that Wife was "totally emancipated from the matri-

monial relationship" with Firhaad. Wife also provided a Pakistani divorce decree issued "in accordance [with] Mohammedan Law" which was also signed by Firhaad. Husband's expert testified that Firhaad's alleged signatures to those documents were likely not genuine. Despite Husband's evidence to the contrary, the trial court found that Wife was divorced from Firhaad when she married Husband—therefore the marriage between Husband and Wife was not void. Accordingly, the trial court granted the divorce between Husband and Wife and divided the community estate. Husband appealed.

Holding: Affirmed.

Opinion: When two or more marriages of a person to different spouses are alleged, there is strong presumption that the most recent marriage is valid against each marriage that precedes it, until one who asserts the validity of a previous marriage proves its validity. This presumption is one of the strongest known to law; it is, in itself, evidence; and it may even outweigh positive evidence to the contrary.

Here, although Husband presented evidence challenging the validity of his marriage to Wife, the record contains sufficient legal and factual countervailing evidence to support the trial court's conclusion that the marriage was valid. As fact-finder, the trial court was in the best position to weigh the parties' credibility and chose to believe Wife's evidence regarding her divorce from Firhaad. Therefore, Husband cannot complain about the division of property based on a void marriage.

Editor's comment: *The evidence regarding whether wife actually got divorced in a foreign country from her prior husband was conflicting. So, the presumption favoring the validity of the most recent marriage held up. M.M.O.*

TEXAS LAW NOW RECOGNIZES THAT AN INDIVIDUAL WHO HAS HAD A "SEX CHANGE" IS ELIGIBLE TO MARRY A PERSON OF THE OPPOSITE SEX.

¶14-2-03. ***In re Estate of Araguz,*** ___ S.W.3d ___, 2014 WL 576085 (Tex. App.—Corpus Christi 2014, no pet. h.) (2/13/14).

Facts: After Husband and volunteer firefighter died in the line duty, his mother ("Mother") filed this a suit to declare his marriage to Wife void as a matter of law on the grounds that it constituted a same sex marriage. Wife was born in California in 1975 with male sex organs and was designated as "male" on her birth certificate. At the age of twenty-one, Wife filed a petition in Harris County to have her name changed, stating that she was a woman with male anatomy and was working towards a sex change. The name change was granted, and Wife subsequently filed an application to amend her birth certificate to reflect the name change. After changing her name, Wife obtained a driver's license from Kansas with the designation that she is female. She then used the Kansas driver's license to obtain a Texas driver's license with the designation that she was female. On August 19, 2008, Wife presented her Texas driver's license to the County Clerk of Wharton County, Texas to obtain a marriage license. The marriage license indicated that Wife was a "woman." On August 23, 2008, Husband and Wife were married. After the wedding, Husband and Wife cohabitated as husband and wife. In October 2008, approximately two months after the wedding, Wife underwent "genital reassignment" surgery. The parties disputed whether Husband was aware of Wife's operation. Husband died on July 3, 2010. On July 15, 2010, Wife filed a petition in California requesting the issuance of a new birth certificate reflecting the change of her sex from male to female. Wife's petition was granted. After Husband's death, Mother and Husband's ex-wife ("Ex-Wife") sought to have Husband's marriage to Wife declared void on the ground that it constituted a same sex marriage. Both parties filed competing motions for summary judgment. On May 26, 2011, the trial court granted Mother and ex-Wife's traditional motions for summary judgment, voiding the marriage between Husband and Wife, and denied Wife's no evidence motion for summary judgment. Wife appealed.

Holding: Reversed.

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Opinion: The Texas constitution defines a marriage as the union of one man and one woman, thus making same-sex marriages presumptively invalid. Furthermore, the Texas Family Code provides that a marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state. The Texas Family Code also states that a license may not be issued for the marriage of persons of the same sex and it also provides that an informal marriage may exist only between a man and woman. The COA found that in granting the summary judgment, the trial court declared that Husband and Wife's marriage was void under Texas law. In doing so, it necessarily found that Wife was a man at the time of Husband's death such that the marriage was between two men in violation of the Texas Constitution and the Texas Family Code. The COA concluded that this was an error because the question of Wife's sex was a disputed issue of material fact that precluded Mother and ex-Wife's traditional motion for summary judgment.

Summary judgment was not proper based on *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App.—San Antonio 1999, pet. denied)(an informal marriage can only exist between a man and a woman). In 2009, the Texas legislature overruled *Littleton* and amended the Family Code to add a court order related to an applicant's "sex change" as a form of acceptable proof to establish an applicant's identity and age, and thus, eligibility, to obtain a marriage license. Tex. Fam. Code Ann. § 2.005(b)(8). Texas law now recognizes that an individual who has had a "sex change" is eligible to marry a person of the opposite sex.

Also, there was a fact issue that precluded summary judgment. Wife presented the expert report of Dr. Cole stating that sexuality per se is a complex phenomenon that involves a number of underlying factors, including chromosomes, hormones, sexual anatomy, gender identity, sexual orientation, and sexual expression. The COA held that this report was sufficient to raise a fact issue regarding Wife's sex.

Editor's comment: *This case is not as important as it is salacious. Several years ago, the Legislature added "a court order related to a sex change" as appropriate proof of identity to get a marriage license. This was a very quiet, innocuous change until the Araguz case came along. Now, everyone is like "how did that happen"?But, it did. Besides that interesting tidbit, the Araguz case is really just a summary judgment question. The mother/children of the deceased filed traditional summary judgment to invalidate the marriage. The problem with that is that their proof was insufficient to negate all grounds of relief, leaving a fact issue as to the sex/gender of Araguz. So, the court of appeals reversed the trial court's grant of MSJ. Araguz, then, asked the trial court to reverse and render on her MSJ, but the court of appeals couldn't do that because all Araguz filed was a no-evidence MSJ as to the mother/children's claims. Mother/children had enough evidence as to sex/gender to raise a fact issue to defeat Araguz' no-evidence MSJ. Since Araguz didn't file a traditional MSJ, she wasn't entitled to a render from the court of appeals. So, bottom line, the court of appeals told the trial court to have a trial where everyone presents evidence because there's too many fact issues to decide this case by MSJ. M.M.O.*

DIVORCE
STANDING AND PROCEDURE

A PARTY IS ESTOPPED FROM ASSERTING ANOTHER COURT'S DOMINANT JURISDICTION IF, AFTER FILING A PLEA IN ABATEMENT IN THE SECOND COURT, THE PARTY FILES PLEADINGS REQUESTING RELIEF IN THE SECOND COURT AND FULLY PARTICIPATES IN THE PROCEEDINGS.

14-2-04. ***Bonacci v. Bonacci***, __SW3d__, No. 08-11-00255-CV, 2013 WL 6835285 (Tex. App.—El Paso, 2013, no. pet. h.) (12/27/2013).

Facts: In May 2010, Husband filed a divorce petition in Montgomery County. In June 2010, Wife filed a separate divorce proceeding in El Paso County in response to which Husband filed a plea in abatement asserting

that he had previously filed for divorce in Montgomery County. Thereafter, in the El Paso court, Husband filed a counter-petition for divorce, entered into a Rule 11 agreement agreeing to venue in El Paso, and entered into an MSA regarding the terms of the divorce. In July 2011, the El Paso court held a jurisdictional hearing at which Wife testified she had been domiciliary of Texas for six months and had been a resident of El Paso County for ninety days prior to the date she filed for divorce. Husband did not object. Subsequently, the El Paso court entered a final divorce decree in which the court found it had jurisdiction over the divorce. Husband appealed arguing the El Paso court lacked jurisdiction to enter the divorce decree because he filed for divorce in Montgomery County first.

Holding: Affirmed

Opinion: When cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate. A party's conduct, however, may estop him from asserting dominant jurisdiction.

Here, despite filing a plea in abatement, Husband subsequently filed his counter-petition for divorce in El Paso praying for the court to grant affirmative relief. By doing so, Husband submitted himself to the El Paso court's jurisdiction. Additionally, Husband executed a Rule–11 agreement agreeing to venue in El Paso, participated in mediation, and executed a binding, irrevocable MSA. Husband's conduct estops him from asserting that Montgomery County had dominant jurisdiction.

Editor's comment: *This case reminds us that when filing a plea in abatement, similar to when filing a special appearance, you must be very careful in your subsequent pleadings and actions. It can be easy to waive your jurisdictional complaint or otherwise submit to the jurisdiction of the court, like the appellant did here. R.T.*

TIME SPENT BY A TEXAS DOMICILIARY OUTSIDE TEXAS WHILE IN THE SERVICE OF THE ARMED FORCES IS CONSIDERED RESIDENCE IN TEXAS.

¶14-2-05. *Vatcher v. Vatcher*, 04-12-00821-CV, 2014 WL 60917 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (1/8/14).

Facts: Wife was a German citizen. Husband was a U.S. citizen and active duty military who had designated Texas as his state of residence. Husband and Wife were married in 1994 in Denmark. Bexar County, Texas was the last county in which the parties lived prior to Husband's assignment to Germany where he, Wife, and their two children lived at the time of the commencement of Husband's lawsuit. Husband petitioned for divorce in Bexar County, Texas on September 16, 2011. Because the parties were living in Germany on a military installation at the time, Husband served Wife by certified mail at her Army post office ("APO") address on January 23, 2012.

On January 31, 2012, Wife filed a pleading entitled "Plea in Abatement" in which she argued that (1) Husband did not comply with The Hague Convention when he served her at her APO address, and (2) neither she nor Husband had been a domiciliary of Texas for six months preceding the filing of the divorce petition. In her plea in abatement, Wife asked that the cause be dismissed. Following a hearing on Wife's plea, the trial court denied her requested relief. The trial court later signed the final divorce decree. Wife appealed.

Holding: Affirmed.

Opinion: Wife also argued that neither she nor Husband met the dual requirement of being (1) a domiciliary of Texas for the six months preceding the filing of Husband's suit and (2) a resident of Bexar County for the ninety days preceding the filing. A suit for divorce may not be maintained unless at the time the suit was filed, either the petitioner or the respondent had been: (1) a domiciliary of Texas 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. However, the Texas Family Code contemplates that time spent by a Texas domiciliary outside Texas while in the service of the armed forces is considered residence in Texas. Husband claimed Texas as his state of residence, the parties owned property in Bexar County, and the parties resided in Bexar County prior to Husband's current as-

signment to Germany. Therefore, the COA held that Husband was a domiciliary of Bexar County, Texas. Although Husband, Wife, and children were stationed in Germany for a number of years when he filed his divorce petition, he was considered a domiciliary of Texas under Section 6.303 because he was in the service of the armed forces at the time. Accordingly, the COA held that the trial court did not err in denying Wife's jurisdictional challenge based on her contention that the domiciliary requirements of Section 6.301 were not satisfied.

Editor's comment: *The court also reminds us that defective service must be challenged by a motion to quash, not by a plea in abatement. J.V.*

DIVORCE
DIVISION OF PROPERTY

A COMPANY'S GOODWILL THAT EXISTS SEPARATE AND APART FROM A PROFESSIONAL'S PERSONAL SKILLS, ABILITY, AND REPUTATION IS DIVISIBLE UPON DIVORCE.

¶14-2-06. *Hill v. Hill*, 02-12-00332-CV, 2014 WL 92795 (Tex. App.—Fort Worth 2014, no pet. h.) (mem. op.) (1/9/14).

Facts: Husband, a non-CPA, became a Class B principal in KPMG, LLP. shortly after he married Wife. His partnership agreement indicated that each principal's relationship to the firm was intended to be that of a partner in a partnership with some limitations. One of the agreement's limitations in the definition of "principals" was that principals "shall not contribute to or have any interest in the capital of the Firm other than their contributions to their Deposit Accounts, which shall constitute loans to the Firm that shall be subordinated to other debts of the Firm as and to the extent provided in the By-laws." The agreement went on to say that when a member is "separate," the balance of his capital or deposit account, drawing account, and subordinated loan account "shall be liquidated and distributed to" him in exchange for his interest in the firm, and any amounts that he owes the firm at the time of separation "shall be paid prior to or simultaneously with payment" for the above accounts." Finally, the agreement noted that "if you cease to be a member of KPMG, you will be entitled only to the compensation that has been earned and accrued through the date you cease to be a member of the firm."

Wife's valuation expert testified that the fair market value of Husband's partnership interest was $2.4 million. KPMG's national director said that the percentage of Husband's capital or deposit account did not represent any equity or ownership interest in the partnership. The national director also said that in order to enter KPMG as a principal, Husband had to pay into the capital account, that Husband had secured a loan through a third-party lender to fund $715,000.00 that went into the capital account, and that Husband's loan balance for the account was $700,900.00. Husband's expert testified that the value of Husband's interest was $14,100.00, the value of the capital account less the loan against it. Husband's expert also testified about all of the substantive and procedural inaccuracies in the valuation prepared by Wife's expert. Wife's expert himself also admitted to these inaccuracies.

The trial court found that the partnership had a value of $14,000.00 and awarded Husband all interest he owned in KPMG, including his capital account and the loan against his capital account. Wife appealed.

Holding: Affirmed.

Opinion: Goodwill that exists separate and apart from a professional's personal skills, ability, and reputation is divisible upon divorce. To determine whether goodwill that is subject to division upon divorce attaches to a professional practice, first, goodwill must be determined to exist independently of the personal ability of the

professional spouse, and then if such goodwill is found to exist, the court must determine whether that goodwill has a commercial value in which the community estate is entitled to share. While a partnership agreement is only a factor to consider in the present value of the partnership interest, the questions of whether a business possesses goodwill and if so, what the value of that goodwill consists of, are fact questions for the trier of fact.

Based on the evidence presented to the trial court, if it determined that Wife's expert lacked credibility and chose to believe the testimony of Husband's expert and the partnership's national director, then it could have reasonably reached the conclusion that the partnership interest was worth $14,100.00, and that commercial goodwill, if any, was inaccessible at the time of the divorce based on the status of Husband's loan against his capital account (even though it may have value someday in the post-divorce future.

Editor's comment: *A must-read case on valuation of a spouse's partnership interest. While this case boiled down to a "battle of the experts" at the trial level, and thus a fairly straightforward abuse of discretion/credibility of the witnesses decision by the court of appeals, the opinion has a great outline of the law on goodwill and valuation concepts. It's a shame the Appellant's argument as to the "guaranteed compensation component" in the partnership agreement was not raised at the trial level, and as such could not be reviewed on appeal, as I would have liked to hear what the court of appeals had to say about it. R.T.*

CHARACTERIZATION OF PROPERTY IN INVENTORY AND APPRAISAL DOES NOT ALWAYS CONSTITUTE A JUDICIAL ADMISSION. LOAN TAKEN OUT AGAINST HUSBAND'S SEPARATE PROPERTY RESIDENCE AFTER MARRIAGE BY BOTH HUSBAND AND WIFE DOES NOT CHANGE RESIDENCE'S SEPARATE PROPERTY CHARACTERIZAION.

¶14-2-07. ***Rivera v. Hernandez,*** ___ S.W.3d ___, 2014 WL 130748 (Tex. App.—El Paso 2014, no pet. h.) (1/15/14).

Facts: Husband filed his original petition for divorce and pled that he had separate property. Wife filed her inventory on November 4, 2010, and her proposed property division on May 2, 2011. Attached to her proposed property division was a signed copy of Husband's inventory, which he signed on September 30, 2010, but did not file with the trial court clerk. Husband's inventory mistakenly identified the real estate in issue as community property and stated that he owned no separate property. Husband filed his proposed property division on May 10, 2011, alleging that the Sun Park home was his separate property (with minimum reimbursement to Wife). At trial, evidence was presented that the Sun Park was the homestead and had been used during their marriage as collateral for loans to both Husband and Wife. Husband was cross-examined concerning his inventory, which characterized the property as belonging to the community estate. Husband's attorney advised the trial court this was a mistake, and the trial court allowed Husband to amend his inventory and appraisal. The trial court's final judgment awarded Wife the Sun Park home, and Husband appealed.

Holding: Reversed and remanded.

Opinion: On appeal, Wife argued that Husband's sworn inventory constituted a judicial admission that the Sun Park property was community property. A judicial admission establishes the issue in dispute as a matter of law on behalf of the adversary of the one making such admission. The COA found that the trial court did not find that the inventory constituted a judicial admission, but rather that the inventory simply characterized the property as community property. The trial court also took judicial notice of the pleadings, but did not take judicial notice of the inventory, which was not filed or admitted into evidence. Taking all of these factors into consideration, the COA held that there was no cognizable judicial admission when (1) a litigant pleads separate property; (2) a litigant tenders requests for admission related to a claim for separate property; (3) a litigant discloses during discovery the documentary evidence to support the claim of separate property; (4) the party opposite files responsive pleadings concerning economic contribution and equitable reimbursement demonstrating a recognition of a separate property claim; (5) the litigant seeks leave of court to amend an inventory to correct an error; (6) the trial court grants leave to amend an inventory; and (7) there is no objection to the admission of contradictory evidence.

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The COA found that the trial court did err in finding that no other form of tracing or clear and convincing evidence was presented to overcome the community presumption. The evidence was not limited to Husband's testimony of the time and circumstances surrounding the purchase of the land. The deed of trust and release of lien were introduced into evidence without objection. That documentation establishes as a matter of law that the property was purchased before marriage and owned by Husband at the time of marriage. Furthermore, the property's characterization as the homestead and its use as collateral for loans taken out by Husband and Wife did not divest the property of its status as separate property. Because Husband had established his separate property as a matter of law and had been divested of it, the COA reversed and remanded the case.

Editor's comment: *This is a must read case about whether an allegation made in a sworn inventory and appraisement as to characterization of property constitutes a judicial admission. Chief Justice McClure once again helps those in the trenches see the big picture when it comes to this issue. C.N.*

Editor's comment: *So, if you make a mistake in your inventory and call something community that is really separate, the inventory admission is just "some evidence" and not conclusive in and of itself. If you have pleadings for separate property and have done discovery about it and the other side has filed responsive claims anticipating your separate property claim, then you can still offer your evidence at trial and win. Now, remember that this case Rivera is out of the El Paso court of appeals when you read the next case Richardson, which seems to be contradictory. M.M.O.*

Editor's comment: *The debate and confusion continues as to whether/how/when filing an inventory can constitute a judicial admission as to question of characterization. This case has a nice timeline description of the case law in this area, but, in my opinion, does little to clear up or streamline the issue. I particularly do not like how the court considered the fact that the opposing party filed reimbursement claims as "recognition of a separate property claim" and as support for a finding of no judicial admission. How is that relevant to the question of a judicial admission?! R.T.*

Editor's comment*: Compare this case with Richardson v. Richardson, infra, where the court mentioned Husband's four inventories listing the property as community as among the evidence supporting the trial court's conclusion that a debt was incurred during marriage. J.V.*

HUSBAND FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT DEBT ON MOBILE HOME WAS INCURRED PRIOR TO MARRIAGE AND WAS PARTLY OWED BY WIFE AS HER SEPARATE OBLIGATION

¶14-2-08. ***Richardson v. Richardson***, ___ S.W.3d ___ 2014 WL 465297, 08-12-00076-CV (Tex. App.—El Paso 2014, no pet. h.) (02-05-14)

Facts: In contemplation of their marriage, Husband and Wife purchased a mobile home. However, they did not take possession of the mobile home or start paying the mortgage until after they were married. The parties were married on November 29, 2002. Husband filed for divorce on February 16, 2011. After settling many issues through mediation, a final divorce hearing was conducted on August 3, 2011 solely on financial issues concerning the debt of the parties. The trial court signed the divorce decree on November 17, 2011, which awarded Husband the mobile home as his sole and separate property and ordered him to pay the balance due on the promissory note given as part of the purchase price on the mobile home. Husband appealed.

Holding: Affirmed.

Opinion: Husband argued that the trial court erred in ordering him to pay the entire mortgage loan debt on the mobile home awarded to him as his separate property in the divorce decree because a portion of the loan

was Wife's separate property debt prior to the marriage. In Texas, property possessed by either spouse during or on dissolution of marriage is presumed to be community property, absent clear and convincing evidence to the contrary. The community property presumption applies to both assets and liabilities. An obligation to pay that arises before marriage should be treated as the incurring spouse's separate debt and cannot be assigned to the non-incurring spouse. The record is devoid of any evidence establishing the origin of the funds used to make the down payment as separate property. In fact, sufficient evidence was presented at trial that allowed the trial court to conclude that the mortgage debt was a community liability.

Editor's comment: *Here, the husband also pleaded that an asset and its corresponding debt were community property in his inventory and sought to prove at trial that they were separate property. Sorry… Mr. Rivera could prove his separate property despite his inventory admission, but Mr. Richardson cannot. The El Paso court appears to completely throw out the fundamental inception of title doctrine in this case, instead instituting a new "when you actually take possession" rule. This appears to throw 100 years of Texas case law on its ear! Further, the court of appeals appears to have gotten confused between community/separate assets versus the characterization of debts. I especially like the court's analysis where they point out that husband paid the down payment on the mobile home before the marriage ever began yet they say "The record is devoid of any evidence establishing the origin of the funds used to make the down payment as separate property." Um… hello? The origin of funds was funds owned before the marriage, which is constitutionally his separate property. Inception of title doctrine means when they first had a right to title – which has been held to mean when they signed the contract. I just don't get this case. Maybe the lawyers will file in SCOTX and they will fix this mess of an opinion! M.M.O.*

Editor's comment: *Although the court did not consider them judicial admissions, see Rivera v. Hernandez, supra, the court relied on the fact that Husband characterized the mobile home as community property in the four inventories he filed. J.V.*

DIVORCE
RETIREMENT BENEFITS

QDROs MUST COMPLY WITH THE TERMS OF THE UNDERLYING DIVORCE DECREE.

¶14-2-09. ***Beshears v. Beshears,*** ___ S.W.3d ___, 2014 WL 345651 (Tex. App.—Dallas 2014, no pet. h.) (1/30/14).

Facts: Husband and Wife were married on July 20, 1977. In 1978, Husband began working for Company and participated in their retirement plan. In October 1998, Wife filed for divorce, and on February 5, 2002, the trial court signed a Final Decree of Divorce. The divorce decree provided that Wife was to receive 57.5% of Husband's retirement plan, and that Husband was to receive a Qualified Joint and Survivor Annuity ("QJSA") (i.e. the remainder). On February 5, 2002, the trial court also signed a QDRO, which provided, that Wife was assigned 57.5% of Husband's benefit accrued under the retirement plan as of November 8, 2001 and that Wife was to be treated as the surviving spouse of Husband, notwithstanding Husband's subsequent marriages, if any.

When Husband approached retirement, he learned from Company that, because Wife was named as his surviving spouse in the 2002 QDRO, he was required to choose an annuity option that provided for Wife to receive a benefit after his death. The cost of the survivor benefit reduced the monthly benefit Husband would otherwise receive. Husband also could not name his current spouse as his surviving spouse for purposes of receiving a benefit after his death.

On January 18, 2012, Husband filed a motion to vacate and void the 2002 QDRO, or in the alternative, modify the 2002 QDRO on the ground that it did not comport with the terms of the divorce decree. The trial court granted the relief sought in Husband's petition. The trial court signed an amended QDRO stating that

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Wife was not to be treated as the surviving spouse of Husband except with regard to the "Qualified Preretirement Survivor Annuity" to the extent of Wife's awarded benefits. Wife appealed.

Holding: Affirmed.

Opinion: Wife complained that the trial court erred by granting Husband's motion and amending the 2002 QDRO to state that Wife was Husband's surviving spouse only for purposes of the QPSA. Wife specifically contended that Husband failed to meet his burden of establishing the 2002 QDRO did not comport with the decree and that any QDRO that did not award her at least 57.5% of the surviving spouse benefit did not comport with the decree and is void. The only evidence before the trial court pertaining to the award of survivor's benefits was Husband's testimony that Company treated the QJSA as a separate benefit and that, by naming Wife as Husband's surviving spouse, the 2002 QDRO awarded Wife a QJSA. According to the evidence presented, the QJSA was an additional benefit to the property awarded to Wife in the decree and awarded Wife more property than she was awarded in the decree. Because the QJSA was actually awarded to Husband under the residuary clause in the divorce decree, the provision in the 2002 QDRO naming Wife as Husband's surviving spouse did not comport with the decree, and the 2002 QDRO was void as to the surviving spouse issue.

Editor's comment: *A must-read case! Drafting retirement language in the divorce decree is just as important, if not more important, than the QDRO language. It pays to spend a little more time, and a little more attention to detail, to get it right and avoid an appeal 12 years later, or even worse, a malpractice claim! R.T.*

Editor's comment: *The court also held that the divorce decree cut off Wife's interest in Husband's retirement as of the date of divorce even though the decree did not so state. This was a closely reasoned conclusion, relying on the rule that a court must construe a decree as whole to harmonize it and to give effect to the entire decree. The court distinguished Reiss v. Reiss, 118 S.W.3d 439 (Tex. 2003); Shanks v. Treadway, 110 S.W.3d 444 (Tex. 2003); and McCaig v. McCaig, No. 12-06-00374-CV (Tex. App. – Tyler June 20, 2007, pet. denied) (mem. op.). Compare another recent case, Foreman v. Foreman, No. 03-13-00245-CV (Tex. App. – Austin Feb. 19, 2014) (mem. op.), in which the court held that a divorce decree did not limit Wife's share of Husband's retirement to retirement earned during marriage. J.V.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

TRIAL COURT'S CONVERSION OF HUSBAND'S REQUIREMENT TO PAY A COMMUNITY DEBT TO ADDITIONAL SPOUSAL MAINTENANCE ALTERED THE DIVISION OF PROPERTY IN VIOLATION OF TFC 9.007

¶14-2-10. ***Everett v. Everett,*** ___ S.W.3d ___, 2014 WL 324577 (Tex. App.—El Paso 2014, no pet. h.) (1/29/14).

Facts: On April 15, 2010, Husband and Wife entered into a final decree of divorce. As part of division of the marital estate, Wife was awarded their Trophy Club residence as her sole and separate property and was given 12 months from the date of the final decree to secure financing to purchase the residence. The decree further provided that if Wife was unable or unwilling to secure financing to purchase the property, it would be listed for sale. As part of the debt division of the marital estate, Husband was ordered to pay all ad valorem taxes on the residence awarded to Wife for a 36–month period. The decree also ordered Husband to pay Wife spousal maintenance for a 36–month period.

On May 17, 2011, Husband filed a petition for enforcement of sale of the residence because Wife had not secured financing for the real property. The trial court granted Husband's petition, but also ordered that Husband continue to pay Wife a prorated portion of the taxes due on the residence as a form of spousal support even if the residence was sold prior to 36 months from the date of entry of the divorce decree.

On July 25, 2011, Husband filed a motion for reconsideration of the trial court's ruling. Husband maintained the trial court was not authorized to enter a clarification order under Texas Family Code § 9.008 and that the trial court's order to increase Husband's spousal maintenance payment could not be justified as a modification. On January 18, 2012, Husband filed a Motion to Modify, Correct, or Reform Judgment complaining that the trial court's January 5, 2012 order contained several errors. On February 16, 2012, the trial court entered a corrected order. The corrected order ordered Husband to pay each month to Wife, as additional post-divorce maintenance, an amount equal to one-twelfth of the total annual property taxes due on the marital residence. Husband Appealed.

Holding: Reversed.

Opinion: Husband argued that the trial court abused its discretion by entering a clarifying order that increased the amount of his spousal maintenance payments to Wife upon the sale of the property. Husband equated the trial court's conversion of his requirement to pay a community debt to additional spousal maintenance to an alteration of the division of property, which is prohibited by Texas Family Code § 9.007. If the trial court enters an order that amends, alters or changes the actual, substantive property division made or approved in the divorce decree, the order is beyond the trial court's power and is unenforceable. COA held that converting a debt into spousal maintenance is not merely a clarification, it is a change in the substantive division of property and cannot be enforced under the statute.

Editor's comment: *Ex-Wife may have fooled the trial court but she could not fool the appellate court. Converting a debt into spousal maintenance post-divorce is a naked modification of the decree especially where the decree clearly contemplated that Ex-husband's obligation to pay the ad valorem taxes on the house might terminate if the house was sold as a result of Ex-wife's failure to refinance the house. C.N.*

Editor's comment: *This is a case where the judge just said too much. If he had just increased spousal maintenance on modification without saying anything else, it probably wouldn't have been reversed. M.M.O.*

Editor's comment: *It seems so simple, yet it continues to show up over and over. The trial court can enforce and clarify its order, but it cannot change it. This case was an obvious change to the order, and thusly was properly reversed, but some cases are not so clear-cut. Do your research, and know how your court of appeals has handled these cases, before filing or defending a motion to enforce the property division. R.T.*

Editor's comment: *According to the court of appeals, the trial court "believed that the intent of the decree was for [Wife] to receive the additional financial assistance for 36 months whether in the form of property tax payments or additional spousal maintenance and that its order clarified this intent." J.V.*

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DIVORCE
SPOUSAL MAINTENANCE

A TEXAS COURT MAY ENFORCE AN MSA MODIFYING A SPOUSAL SUPPORT ORDER ISSUED BY A COURT IN ANOTHER; CONTRACTUAL ALIMONY IS NOT SUBJECT TO TFC CHAPTER 8 TERMINATION PROVISIONS.

¶14-2-11. ***In re L.T.H.***, __S.W.3d__, 2013 WL 6665084 (Tex. App.—Dallas 2013, no. pet. h.) (12/18/13)

Facts: In 2005, a California court granted a divorce between Husband and Wife and signed a decree incorporating a written settlement agreement in which Husband agreed to pay family support (child support + contractual spousal support). Afterward, the parties moved to Texas. In 2006, Husband petitioned a Texas trial court for divorce contending he and Wife had entered into a common-law marriage subsequent to the California divorce. In response, Wife registered the California decree under the Uniform Interstate Family Support Act (UIFSA). Afterward, the parties entered into an MSA modifying the California spousal support order. The trial court incorporated the MSA into a final order. Later, Husband refused to pay spousal support, and Wife petitioned to enforce. Following trial, the trial court issued a take-nothing judgment against Wife finding that it lacked subject-matter jurisdiction to reform the California spousal support order under TFC (UIFSA) 159.211; the MSA was unenforceable due to a mistake of fact regarding subject-matter jurisdiction; and Husband's obligation to pay spousal support terminated after Wife began cohabitating with another man. Wife appealed.

Holding: Reversed and Remanded.

Opinion: The California decree authorized the parties to modify the California spousal support order by agreement—a court order was not necessary for such modification. The MSA was a valid and binding modification of the California decree reflecting parties' intent to modify spousal support. Therefore, the trial court erred by refusing to enforce the MSA.

TFC (UIFSA) 159.211 prohibits a Texas court from "[modifying] a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state." An MSA, as with any other contract, will not be modified or set aside except for fraud, accident, or mistake of fact. To the extent the trial court lacked subject-matter jurisdiction to modify the California decree, such mistake was a mistake of law, not a mistake of fact.

TFC Chapter 8 does not apply to a divorce decree's alimony provision that restates the parties' contractual agreement for spousal support. The fact that a court approves contractual alimony and incorporates it into a final divorce decree does not transform contractual alimony into court-ordered spousal maintenance subject to TFC 8.056's automatic termination provisions including cohabitation. Here, neither the California decree nor the MSA provided for spousal support termination in the event Wife began cohabitation with a romantic partner. Therefore, the trial court erred by concluding Husband's spousal support obligation terminated when she began cohabitating with another man.

Editor's comment: *This case is decided based purely on contract law. The contract said they could modify by agreement, which they did in the MSA. The trial court in Texas has jurisdiction to enforce the contract between the parties. (I guess there wasn't a forum selection clause in it?). M.M.O.*

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SAPCR
STANDING AND PROCEDURE

THE DATE OF THE FILING OF AN ORIGINAL DIVORCE PETITION, EVEN IF FILED IN AN IMPROPER VENUE, IS THE REFERENCE POINT FROM WHICH TO DETERMINE THE HOME STATE JURISDICTION UNDER THE UCCJEA.

¶14-2-12. ***In re Milton***, __S.W.3d__, 2013 WL 6699507 (Tex. App.—Houston [1st Dist.] 2013) (orig. proceeding) (12/19/13)

Facts: On December 31, 2011, Mother, Father and Child moved to Fort Bend County from Harris County. On February 10, 2012, Father filed a divorce/SAPCR petition in Fort Bend, requesting custody of the Child. Although false, Father claimed that both he and Mother had lived in Fort Bend for the past 90 days. That same day, Wife fled with Child to Utah. In May 2012, Mother filed a special appearance arguing Texas lacked personal jurisdiction over her as a Utah resident. In August 2012, the Fort Bend court *sua sponte* transferred the proceeding to Harris County, even though no party resided or intended to reside there. On January 9, 2013, Father refiled/amended his petition for divorce in Harris County—falsely claiming he was a resident of Harris County for the preceding ninety-day period. Afterward, Mother amended her special appearance arguing that Texas lacked home state jurisdiction under the UCCJEA. The Harris County court denied Mother's special appearance, concluding that it had home state jurisdiction to render an initial child custody determination. Consequently, the Harris County court appointed Father as the Child's sole managing and conservator and awarded Mother supervised visitation. After Mother failed to deliver the Child to Father, the Harris County court issued a capias for Mother's arrest. Mother petitioned for mandamus relief arguing Texas lacked home state jurisdiction because Child resided in Utah, not Texas, for the six-month period preceding Father's January 9, 2013, amended divorce petition in Harris County.

Holding: Mandamus relief conditionally granted

Opinion: Under the UCCJEA, a Texas court has jurisdiction to make an initial child custody determination if Texas is the child's "home state ... on the date of the *commencement of the proceeding*." "Home state" is the state in which a child lived with a parent ... for at least six consecutive months immediately before the commencement of a child custody proceeding. "Commencement" is defined as the filing of the first pleading in a proceeding. The date of the commencement of the child custody proceeding is the reference point from which to determine the child's home state. Here, the Child was born in Texas and was eight months old when Father filed his original divorce petition. Therefore, Texas is Child's home state, and Texas courts have subject-matter jurisdiction to make an initial child custody determination under the UCCJEA.

However, because Father failed to satisfy Texas Family Code Section 6.301's 90-day residency requirement before he filed for divorce in the Fort Bend court, Fort Bend was not the proper venue. Further, because neither party resided nor will reside in Harris County for at least ninety days, abating the Harris County case will not cure the venue problem. Accordingly, the Harris County court should transfer the case back to Fort Bend County, where venue is proper.

Dissent: TFC 6.301 requires the residency requirements to be met "at the time the suit is filed." Typically, when the petitioner fails to satisfy the residency requirements as of the filing of the original petition, the trial court abates the suit so that the petitioner can meet the residency requirements. The petitioner must then file an amended petition to allow the suit to proceed. The petitioner's filing of an amended petition constitutes a new law suit.

Here, Father's February 10, 2012 Fort Bend divorce petition is invalid because Father falsely claimed he established residency in Fort Bend. But instead of abating the case so Father could satisfy the 90-day residency requirement, the Fort Bend court *sua sponte* transferred the case to the Harris court—where venue was improper. Father's January 9, 2013 Harris divorce petition is also invalid because Father falsely claimed he es-

tablished residency in that county (by then, Father had resided in Fort Bend since December 31, 2011). Because neither party intended to reside in Harris County, the residency impediment could not be removed by abatement—dismissal was the proper remedy. Father, therefore, failed to file a valid divorce petition in Texas. Because the Child has resided in Utah since February 10, 2012, Utah is now the Child's home state. Even if Father's January 9, 2013 Harris County divorce petition were valid—it would constitute the filing of a new suit. Therefore, Father could not establish home state jurisdiction in that petition because the child had been residing in Utah for more than six months prior. Consequently, the COA is without subject-matter jurisdiction to do anything other than grant a writ of mandamus and order the Harris County court to vacate its orders and dismiss the suit.

Editor's comment: *I think the court got confused on this one. The fact pattern is certainly confusing enough. But at the end of the analysis, the court of appeals seems to confuse non-jurisdictional county versus county venue requirements versus mandatory state versus state jurisdiction. The jurisdiction question is which state was the child's home state when the suit was filed per UCCJEA. The answer is that clearly Texas was the home state because the child was born here and lived here the eight months leading up to the father filing here. So, Texas has proper jurisdiction as of when the case was commenced under UCCJEA. Father picked the wrong county within Texas – that is venue, which is not jurisdictional. I agree with the fact that it was filed in the wrong county. Venue for 90-day residency was proper in Harris County at the time of filing, which is why the trial court sent the case to Harris. The trial court here got this one right and the court of appeals is wrong. I hope they filed for rehearing or in SCOTX so this gets fixed. M.M.O.*

SAPCR SUITS MUST BE TRANSFERRED TO A SUIT FOR DISSOLUTION OF THE MARRIAGE OF THE CHILD'S PARENTS IN ANOTHER COURT.

¶14-2-13. *In re Bigham*, 10-13-00355-CV, 2014 WL 285667 (Tex. App.—Waco 2014, orig. proceeding) (mem. op.) (1/23/14).

Facts: Father's sister filed a petition in Limestone County seeking sole conservatorship of Father and Mother's two children. Sister was granted temporary orders naming her SMC. Six days later, Father filed a petition for divorce from Mother in Dallas County and filed a motion in Limestone County to transfer and consolidate the SAPCR suit from Limestone County to Dallas County. Father's motion to transfer was denied on the basis that Limestone County had continuing, exclusive jurisdiction of the case. Father petitioned for mandamus relief.

Holding: Writ conditionally granted.

Opinion: Father argued that his motion to transfer was erroneously denied. The Texas Family Code provides for the mandatory transfer of a SAPCR suit to a suit for dissolution of marriage of the child's parent's in another court.

Editor's comment: *In short, a SAPCR follows the divorce case regardless of where the children live. J.V*

GRANDPARENTS HAD STANDING TO INTERVENE AND BE APPOINTED MANAGING CONSEVATORS BECAUSE EVIDENCE ESTABLISHED SPECIFIC ACTIONS AND OMISSIONS THAT DEMONSTRATED THAT AWARDING MOTHER CUSTODY WOULD RESULT IN EMORTIONAL HARM TO CHILDREN

¶14-2-14. ***Mauldin v. Clements***, ___ S.W.3d ___, 2014 WL 421292 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (02-04-14)

Facts: Following divorce decree appointing mother and father joint managing conservators of minor children, father filed petition for modification. Children's paternal grandparents filed petition in intervention requesting to be appointed joint managing conservators. Trial court appointed grandparents as managing conservators and limited mother's access to children to supervised visitation. Mother appealed.

Holding: Affirmed

Opinion: For a non-parent to establish standing they must offer evidence of specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child. The evidence must support a logical inference that the specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed," and evidence that "merely raises a surmise or speculation of possible harm" is insufficient to establish that inference. Furthermore, the nonparent's burden is not met by evidence that she would be a better custodian of the child, that she has a strong and on-going relationship with the child, or that the parent would not have been a proper custodian in the past.

Here, Amicus Attorney provided evidence regarding H.T.M.'s and C.T.M.'s poor school attendance and performance records and other evidence of the children's extreme behavioral issues during the time they were living with Mother. The record included evidence that the older child, C.T.M., had multiple absences in the semester immediately prior to the hearing and was failing several classes. There was also evidence that H.T.M. had shown behavioral problems at school that had led to lunch detentions and other disciplinary problems, that his grades were suffering, and that his bad behavior was escalating. When the trial court subsequently asked Mother about the reasons underlying the children's poor school performance and poor behavior, Mother recited numerous problems relating to previous disputes with Father and PGPs, some of which resulted in reports to DFPS or to police, but she did not acknowledge any failure of her own that contributed to the boys' attendance and school problems. She testified that she thought the boys had been doing better in the past month or two.

The Amicus Attorney also stated that Mother had not fully complied with the trial court's orders that the children attend counseling and was uncooperative in the investigation into the children's medical and school records. Mother acknowledged at the hearing that she had not had the children in counseling following DFPS's termination of their in-home services, but stated that she had attempted to set up more counseling. The Amicus Attorney also asserted that Mother involved the children in the on-going litigation to an unnecessary degree, and she gave the example that H.T.M. knew in advance that the Amicus Attorney would be meeting with people at his school and was very worried about what would happen. The Amicus Attorney stated that Mother's actions involving the children in the litigation caused the children emotional distress.

The Amicus Attorney and the DFPS caseworker both agreed that the children needed to be removed from Mother's custody. The DFPS caseworker cited "17 allegations and referrals [that] CPS has had to investigate over the past few years with this family" as causing "emotional trauma" for the children. However, there was no evidence that any of those allegations had been substantiated. The Amicus Attorney informed the court that residential treatment would help the children, but no one involved in the case could afford it. In light of those financial constraints, The Amicus Attorney believed placement with PGPs was in the children's best interest.

Two days later, when the court convened another hearing to enter the order giving PGPs temporary managing conservatorship of the children, The Amicus Attorney informed the court that Mother had again involved the children in litigation by giving them unnecessary details about the prior hearing. PGPs' attorney informed the court that Mother had concealed notes to the boys inside their stuffed animals, telling them that she loved them and to be good so that they could come back home, in spite of promising the court that she would not violate the court's order not to contact the children. These letters were introduced into evidence and

included in the record. Thus, the records of these hearings established specific actions and omissions that demonstrated that awarding Mother custody would result in emotional harm to C.T.M. and H.T.M. Therefore, a preponderance of the evidence supported the trial court's implied finding that Mother was not, at the time of PGPs' intervention, a suitable person to have custody of C.T.M. and H.T.M. and that appointing her as the children's managing conservator would have significantly impaired their emotional development. Accordingly, PGPs had standing to intervene in the suit.

Editor's comment: *This case lays out a great example of proving facts sufficient to obtain standing and overcome the presumptions that disfavor nonparents. M.M.O.*

SAPCR
CONSERVATORSHIP

STATUTE ALLOWS TRIAL COURT TO APPOINT GRANDMOTHER JOINT MANAGING CONSERVATOR WITH THE EXCLUSIVE RIGHT TO DETERMINE CHILDREN'S RESIDENCE ALONG WITH MOTHER AND FATHER AS NON-PRIMARY JOINT MANAGING CONSERVATORS.

¶14-2-15. ***Compton v. Pfannenstiel,*** ___ S.W.3d ___, 2014 WL 576175 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (2/13/14).

Facts: Grandmother sought conservatorship of Child 1 and Child 2. Grandmother testified that Mother used and sold drugs, placed children in dangerous situations, neglected children, failed to adequately feed or care for children, and did not meet children's medical needs. Grandmother further testified that Mother had been arrested four times during the six months prior to trial, and this allegation was corroborated at trial by a police officer. Father testified that Mother was not a fit parent and that she did not adequately feed the children. Father and Mother shared a drug problem, and Father was incarcerated for burglary for four years. Father testified that he believed Grandmother's conservatorship was necessary. Two school counselors also testified that they had concerns that Mother was not meeting the children's nutritional needs and that the children had an excessive number of absences. Mother's father and sister testified on her behalf, denying that she had a drug problem or neglected the children. Mother's father and sister did, however, acknowledge that Mother did not have employment or housing. The trial court awarded joint conservatorship of the children to Grandmother, Mother, and Father. The trial court granted Grandmother the exclusive right to determine the children's primary residence. Mother appealed.

Holding: Affirmed.

Opinion: Mother challenged the trial court's appointment of Grandmother as a joint managing conservator of Mother's children since parents are presumptively the managing conservators of their children. A trial court must appoint a child's parents to be joint managing conservators, or one parent as the sole managing conservator, unless it concludes that appointment of the parent or parents would not be in the best interest of the child, because the appointment would significantly impair the child's physical health or emotion development. The statue applies to the appointment of a non-parent in addition to both parents. The COA found that the evidence in this case satisfied the statutory threshold, including evidence of Mother's drug use, recent criminal arrests, and extreme neglect of her children. The trial court reasonably could find that the record demonstrated significant impairment of the children's health and emotional development. Father acceded to the necessity of the grandparent conservatorship in the children's interest. Therefore, the COA held that the

trial court was within its discretion in naming Grandmother as a joint managing conservator to protect the children's physical health and emotional development.

SAPCR
POSSESSION

IF POSSESSION ORDER DEVIATES FROM STANDARD POSSESSION ORDER, FINDINGS MUST BE REQUESTED WITHIN 10 DAYS OF HEARING AND PURSUANT TO TEXAS FAMILY CODE § 153.258.

¶14-2-16. *Pickens v. Pickens*, 2014 WL 806358, 12-13-00235-CV (Tex. App.—Tyler 2014, no pet. h.) (02-28-14)

Facts: In final divorce decree, trial court appointed Mother and Father joint managing conservators. The trial court also ordered that, failing mutual agreement, Father was to have possession of the child fourteen days out of every twenty-eight days, and must designate his days of possession at least two weeks in advance. Mother filed a request for findings of fact and conclusions law and a past due notice after the court failed to file findings of fact and conclusions of law. Mother appealed arguing that the trial court abused its discretion by entering a possession order that deviated from the standard possession order without a sufficient showing that such order was in the best interest of the child.

Holding: Affirmed.

Opinion: Mother's request for findings of fact and conclusions of law was made pursuant to Rules 296 and 297 of the Texas Rules of Civil Procedure. And these rules do not apply here. Mother did not request the trial court to set forth the reasons for deviating from the standard possession order, and she did not cite Section 153.258 of the Texas Family Code. Moreover, Mother's request was filed on June 6, 2013, more than ten days after the April 23, 2013 final hearing. Accordingly, the trial court was not required to enter findings and conclusions under that section of the family code.

Editor's comment: *This case is a great reminder that in family law we have several situations where findings of fact have special deadlines. Variation from the standard possession schedule is one of those times. The statute says the findings must be requested within 10-days of the hearing. My question is—what happens if you don't get a ruling at the hearing? What if the judge takes the case under advisement and issues a ruling 14 days later awarding less than SPO? I think the obvious answer is that the 10-days runs from the date of receipt of the ruling. Maybe someone on the section's legislative committee will propose a bill to clean up this statute's imprecise language. M.M.O.*

Editor's comment: *Remember that if you are complaining about the property division, a possession schedule that is not the standard possession schedule, or above or below guideline child support, you must make specific requests for findings of fact and conclusions of law under the Texas Family Code, NOT the ordinary TRCP. This matters because an appellate court will infer that the trial court made all the necessary findings to support its judgment, and it becomes even harder to win on appeal. And don't forget that these TFC findings of fact must be filed or requested VERY, VERY SOON after the final hearing—not the final order! Make it part of your "trial deadlines" checklist, and add it to your calendar the minute you get your final trial setting. R.T.*

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SAPCR
CHILD SUPPORT

THE INCOME OF A PARENT'S SPOUSE IS NOT TO BE CONSIDERED WHEN CALCULATING A PARENT'S CHILD SUPPORT OBLIGATION.

¶14-2-17. *In re Bromberg*, 03-13-00778-CV, 2014 WL 258998 (Tex. App.—Austin 2014, orig. proceeding) (mem. op.) (1/14/14).

Facts: Mother and Father were the parent of Child. In 2009, the trial court signed an order giving each parent two consecutive weekdays of possession and alternating weekend possession and providing that during the time each parent had possession of Child, that parent had the right to designate Child's primary residence within County. Mother got married in 2012, and in 2013 she filed a petition to modify the 2009 order. Neither Mother nor Father alleged that the present circumstances might significantly impair Child's physical or emotional well-being. The trial court signed a temporary order naming Mother and Father as JMCs, ordering Mother to pay Father child support, and including the standard possession order set out in the family code. Furthermore, the temporary order stated that during each parent's time of possession, that parent had the exclusive right to designate the child's primary residence within County. Mother filed a petition for writ of mandamus relief.

Holding: Conditionally granted in part and conditionally denied in part.

Opinion: Mother argued that the trial court erred in ordering her to pay child support because there was no evidence of her available resources or that the order was necessary for the child's safety and welfare. The court may provide for temporary support for the safety and welfare of the child. The income of a parent's spouse is not to be considered when calculating a parent's child support obligation. The COA held that in this case, there was no evidence that Mother had any net resources from which she could pay child support. There was evidence about her husband's income, but that evidence could not be used in calculating her support obligation.

Editor's comment: *Further, the trial court did not abuse its discretion when it changed the 2-2-3 visitation schedule to the standard possession order in the temporary orders because it did not change the designation of who had the exclusive right to designate the child's primary residence: Both parents remained joint managing conservators and retained the exclusive right to establish the child's residence during their periods of possession. J.V.*

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SAPCR
CHILD SUPPORT ENFORCEMENT

FOUR DAY DELAY BETWEEN ORAL RENDITION OF COMMITMENT AND SIGNING OF WRITTEN ORDER OF COMMITMENT TOO LONG—VIOLATED CONTEMNOR'S DUE PROCESS RIGHTS

¶14-2-18. ***In re Linan,*** ___ S.W.3d ___, 2013 WL 6504766 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (12/12/13)

Facts: On September 22, 2009, the trial court signed a SAPCR Order in which Father was ordered to pay child support in the amount of $338.35 per month to Mother. Father was also ordered to pay $116.69 every month as additional child support for health insurance reimbursement. On April 26, 2013, Mother sought enforcement of the order alleging that Father failed to pay or only partially paid the court-ordered child support and medical reimbursement for the months of December 2012 through March 2013. The motion requested 180 days jail for each violation. On July 2, 2013, Father appeared for a hearing before an associate judge on the motion for enforcement. At the conclusion of the hearing, Father was found in contempt for failure to make child support payments and failure to make medical reimbursement payments for the months of December 2012 through April 2013. On July 12, 2013, the associate judge signed an order granting a judgment for child support arrearages and medical support arrearages and sentencing Father to 180 days in Harris County jail for each violation, to run concurrently. The associate judge's order also specified that Father not be given good conduct time credit for the time spent in jail. Finally, the order suspended Father's jail sentence. The terms and conditions for suspended commitment included paying $50.00 per month towards Father's child support arrears, $25.00 per month towards relator's medical reimbursement arrears, $700.00 in attorney's fees, and continued payment of all child support as ordered by the associate judge. At the conclusion of the compliance hearing on September 12, 2013, the presiding judge—a retired district judge apparently sitting by assignment—found that Father had not complied with the terms of the July 12, 2013 order, revoked Father's suspension, and orally pronounced, "I reinstate the sentence of ... 180 days for each contempt violation, as set out in the judgment of July the 12th, 2013." The judge then remanded relator to the custody of the sheriff to be kept in jail until the terms of his sentence were complete or until Father was brought back to court for further findings. On September 16, 2013, the trial court signed the Order Revoking Suspension and for Commitment to County Jail. Father filed a petition for writ of habeas corpus.

Holding: Granted.

Opinion: A person may not be imprisoned for contempt without a written order of commitment. An arrest for contempt without a written commitment order is an illegal restraint from which a prisoner is entitled to habeas relief. However, a trial court may cause a contemnor to be detained by the sheriff for a short and reasonable time while the judgment of contempt and order of commitment are prepared for the judge's signature. Less than twenty-four hours to prepare a commitment order is a short and reasonable time. Two or three days between oral rendition of commitment and the signing of the written order of commitment, however, has been held to constitute an unduly delay that necessitates habeas relief. Because the trial court did not sign a written commitment order until four days after the oral rendition of commitment, Father's due process rights were violated and that the commitment order is void.

Editor's comment: *If you are asking for jail time, go to court with a written commitment order already drafted and ready to go. C.N.*

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SAPCR
MODIFICATION

★★★TEXAS SUPREME COURT ★★★

TEXAS FAMILY CODE DOES NOT AUTHORIZE AN AWARD OF ATTORNEY'S FEES AS ADDITIONAL CHILD SUPPORT IN NON-ENFORCEMENT MODIFICATION SUITS.

¶14-2-19. ***Tucker v. Thomas,*** ___ S.W.3d ___, 2013 WL 6509931 (Tex. 2013)(12/13/13).

Facts: Mother and Father divorced in 2005. In the divorce decree, the trial court appointed Father and Mother as JMCs of their 3 children, naming Mother as the parent with the exclusive right to designate the children's primary residence and granting Father visitation rights pursuant to a standard possession order. The trial court also ordered Father to pay child support. Three years later, Father sought modification of the decree, requesting that the trial court name him as the parent with the exclusive right to designate the children's primary residence. Mother filed a countersuit, requesting that the trial court modify the decree by naming her as SMC of the children, modify the possession order, and increase Father's child support obligation.

Following a bench trial, the trial court denied Father's requests for modification and granted part of the relief requested by Mother by increasing Father's monthly child support obligation and reducing Father's periods of possession. Additionally, the trial court found Mother's attorney's fees to be necessaries expended for the children's benefit. The trial court ordered Father to pay Mother's attorney's fees as additional child support, plus postjudgment interest. Father appealed the order that he pay Mother's attorney's fees.

The court of appeals held that the Family Code gives trial courts authority to order a parent to pay attorney's fees for legal services benefitting the children as additional child support in non-enforcement modification suits. While acknowledging that other Texas courts of appeals have held that the Family Code does not expressly grant trial courts authority to assess attorney's fees as additional child support when parties seek only modification of an order under Title 5 of the Family Code, the court reasoned that a parent's statutory duty to provide his or her children with necessaries evidences the Legislature's intent to grant trial courts broad discretion to assess attorney's fees as child support. Father filed a petition for review.

Holding: Reversed and remanded.

Opinion: In this issue of first impression, the Texas Supreme Court was asked to determine whether the Legislature authorized a trial court to award attorney's fees incurred by a party in a non-enforcement modification SAPCR as additional child support. In light of the Family Code's detailed scheme concerning awards of attorney's fees in SAPCRs, the Court held it is significant that the Family Code is silent as to whether a trial court may characterize attorney's fees as additional child support in non-enforcement modification suits. Since the Legislature expressly authorized the assessment of attorney's fees as additional child support in enforcement suits, but not in modification suits or under Title 5's general attorney's fees provision, the Court concluded that the Legislature did not intend to grant the trial court authority to characterize Mother's attorney's fees as part of Father's child support obligation. Except when a trial court finds that a party filed a non-enforcement modification suit frivolously or with the purpose of harassing the opposing party, no provision in Chapter 156 authorizes an award of attorney's fees in modification suits. Thus, trial courts must look to section 106.002—Title 5's general attorney's fee provision—for authority to award attorney's fees in most non-enforcement modification suits. Noticeably absent from section 106.002 is authority for a trial court to characterize an attorney's fee award as necessaries or as additional child support. In light of this absence of express authorization, the Court concluded that the Legislature did not intend to provide trial courts with discretion to assess attorney's fees awarded to a party in Chapter 156 modification suits as additional child support.

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Concurrence (J.Guzman): The Court gives a historical review of the doctrine of necessaries in SAPCR suits, after which it concludes the lack of uniformity in the courts of appeals after the recent statutory changes is attributable to the long history in Texas courts of applying the doctrine of necessaries to award attorney's fees as child support. Permitting trial courts to award such fees as child support, and thus exposing parties to the prospect of contempt if they should fail to pay, would certainly dissuade parties from filing frivolous or harassing lawsuits that serve only to further injure the children involved. Nevertheless, given the current statutory framework, in absence of express statutory authority, a trial court lacks the discretion to characterize the attorney's fees incurred in a suit for custody modification as necessaries or as additional child support.

Editor's comment: *The Texas Supreme Court reasoned that since Chapter 157 (enforcements) expressly allows a trial court to award attorney's fees as child support but Chapter 156 (modifications) does not, then the legislature must not have intended the trial court to have that power or the power to award attorney's fees as necessaries in a non-enforcement modification. If you landed on this planet yesterday, and knew nothing about family law or statutory construction, this conclusion might seem reasonable. However, to family lawyers fighting in the trenches the conclusion is not. The Texas Supreme Court ignores two fundamental principles of statutory construction in reaching its conclusion. The first principle is that a statutory remedy is regarded as cumulative of common law remedies unless it contains an express or implied negation of common law remedies. Indem. Ins. Co. of N. Am. v. S. Texas Lumber Co., 29 S.W.2d 1009, 1010-11 (Tex. Comm'n App.1930); Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co., 791 S.W.2d 241, 245 (Tex. App.—Texarkana 1990) aff'd, 823 S.W.2d 591 (Tex. 1992). The second principle is that statutes dealing with the same subject and having the same purpose are to be harmonized whenever possible rather than rendering a statute meaningless. Texas State Bd. of Pharmacy v. Kittman, 550 S.W.2d 104, 106 (Tex. Civ. App.—Tyler 1977, no writ). The Texas Supreme Court's analysis violates both rules and what's worse overturns the legislature's adoption of the Texas Supreme Court's own rule—that attorney's fees may be awarded as necessaries in SAPCR cases. I don't know about you, but my understanding of constitutional law is that if a court makes a rule of law and then the legislature adopt and codifies it, I don't think the court can "take back" its decision even if it has been 100 years and even if the law is subject to criticism by scholars writing law review articles. See Tucker, 2013 WL 6509931 at 6-7 (citing law review article). Perhaps a history lesson would help illuminate the subject:*

Early in this State's history, there were no statutes imposing a duty upon parents to support their children. Rather, it was held that a child's father had a duty to support his child pursuant to the common law doctrine of necessaries. See Gomez v. Perez, 409 U.S. 535, 536 (1973); Gully v. Gully, 111 Tex. 233, 231 S.W. 97 (1921); Rice v. Rice, 21 Tex. 58, 68 (1858); Hooten v. Hooten, 15 S.W.2d 141, 20 143 (Tex. Civ. App.1929) aff'd, 120 Tex. 538, 40 S.W.2d 52 (1931); Mary Fenlon, Garnishment of Wages to Enforce Child Support-A New Remedy for an Old Problem, 15 St. Mary's L.J. 381, 385-87 (1984). Under that doctrine, any person, including the divorced wife, who provided necessaries to a child could sue the father and recover the value of the necessaries provided. Gulley, 231 S. W. at 99-100, Hooten, 15 S.W.2d 141, 143.

In 1935, the legislature passed a statute that expressly stated, for the first time, that parents had a duty to support their children if they had the "ability" to do so and that trial courts had the power to make orders for post-divorce periodic payments of child support. See Act of March 19, 1935, 44th Leg., R.S., ch. 39, 1935 Tex. Gen. Laws 111-12; Fenlon, Garnishment of Wages, 15 St. Mary's L.J. at 386. The 1935 statute put to rest a dispute as to whether a non-custodial parent could be ordered to make periodic child support payments to a custodial parent after a divorce was granted. See e.g., Gully, 231 S.W. at 97, 100 (underlying order for periodic child support held void, thereby causing mother to bring suit for necessaries she furnished by her to children which was upheld); Hooten, 15 S.W.2d at 143 (recognizing that periodic child support could not be awarded in a divorce before 1935 statute). The 1935 statute expressly stated that the remedy provided by the statute was cumulative of other remedies that already existed, i.e., the necessaries doctrine. See Act of March 19, 1935, 44th Leg., R.S., ch. 39, 1935 Tex. Gen. Laws 111-12. In the decades following the adoption of the 1935 statute, the legislature amended the statute to delete the word "ability", and therefore made the parent's duty of support mandatory. See Act of May 14, 1953, 53rd, Leg., R.S. ch. 127, 1953 Tex. Gen. Laws 439.

During the period from 1935 to 1967, while the legislature was refining the law regarding child support and the duty of support each parent owed to their children, courts across this state routinely held that attorney's fees incurred in good faith and on probable cause in suits involving divorce, custody, or child support, were necessaries for which husband/father was liable to any person supplying such necessaries, including but

not limited to attorneys who represented wife/mother. See e.g., Roberts v. Roberts, 192 S.W.2d 774 (Tex. 1946)(divorce); Moore v. Moore, 192 S.W.2d 929, 932-34 (Tex. Civ. App.—Fort Worth 1946, no writ)(divorce); Schwartz v. Jacob, 394 S.W.2d 15 (Tex. Civ. App.—Houston 1965, writ ref., n.r.e.)(suit for modification of custody and support); Akin v. Akin, 417 S.W.2d 882, 885 (Tex. Civ. App.—Austin 1967, no writ)(suit to recover unpaid child support); 39 Tex. Jur. 3d, Family Law, §§ 616, 621-625 (2011)(citing cases).

In 1963, wife's disabilities, known as coverture, were removed. See Lee v. Hall Music Co., 119 Tex. 547, 551, 35 S.W.2d 685 (1931); Kitten v. Vaughn, 397 S.W.2d 530 (Tex. Civ. App.—Austin 1965, no writ). In 1967, the legislature overhauled the statutes imposing liability on spouses and parents, imposing equal duties of support on spouses and parents and, thus, making each spouse liable for necessaries provided to the other spouse and making each parent liable for the necessaries provided to a child. See Husband and Wife—Rights, Duties and Privileges, Act of May 27, 19677, 60th Leg., R.S., ch. 309, §1, 1967 Tex. Gen. Laws 736. Under the rules for statutory construction, it is presumed that the 1967 legislature enacted these statutes with full knowledge of the court decisions holding that necessaries included attorney's fees incurred by one party for the benefit of a minor child in SAPCR cases. Acker v. Texas Water Comm'n, 790 S.W.2d 299, 301 (1990).

Following the 1967 amendments to the rules regarding parental liability for necessaries, courts continued to hold that attorney's fees incurred in SAPCR cases could be recovered as necessaries upon proof that the legal services were necessary and rendered and performed for the benefit of the child. Noyes v. Jack, 443 S.W.2d 89 (Tex. Civ. App.—Beaumont 1969, error ref. n.r.e.); Tharp v. Tharp, 438 S.W.2d 391, 395 (Tex. Civ. App.—Houston [14th Dist] 1969, writ dism'd); Perkins v. Freeman, 501 S.W.2d 424, 429 (Tex. Civ. App.—Beaumont 1973), rev'd on other grounds, 518 S.W.2d 532 (Tex.1974).

In 1973, the legislature enacted the family code. See Act of June 15, 1973, 63rd Leg, R.S., ch. 543, 1973 Tex. Gen. Laws 1411. The early family code included a statute imposing liability on each parent to pay for the necessaries provided to his or her child, a statute permitting a court to award interim attorney's fees and expenses by way of temporary order during the pendency of the case, and a statute permitting a court to award attorney's fees as costs after a final trial in a SAPCR case. See Former Tex. Fam. Code. Ann. §§ 4.02, 11.11(a)(5), and 11.18(a); see also, Act of May 14, 1969, 61st Leg., R.S. ch. 888, 1969 Tex. Gen. Laws 2707, amended by Act of May 17, 1979, 66th Leg., R.S. ch. 193, 1979 Tex. Gen. Laws 421; Act of June 10, 1981, 67th Leg., R.S., ch. 355, 1981 Tex. Gen. Laws 942; Act of June 15, 1973, 63rd Le., R.S., ch. 543, 1973 Tex. Gen. Laws 1411.

The family code was re-codified in 1995. See Act of April 20, 1995, 74th Leg., R.S., ch. 20, 1995 Tex. Gen. Laws 113; Current Tex. Fam. Code Ann. §§ 151.001(a)(3), (b) and (c) (formerly § 4.02 and § 151.003(a)(3), (b), (c) in the 1995 re-codification); 105.001(a)(5) (formerly § 11.11(a)(5)); and 106.002 (formerly § 11.18(a)). The three statutes discussed, above, have been re-enacted with little change except for former section 11.18(a). In 1981, Section 11.18(a) was amended in order to overrule a line of cases that held that attorney's fees awarded as "cost" under the family code had to comply with the requirements for taxing costs under the rules of civil procedure and, therefore, attorney's fees could only be awarded to a prevailing party unless the trial court made an express finding of "good cause" as to why a non-prevailing party could recover attorney's fees.See e.g., Goheen v. Koester, 794 S.W.2d 830, 835 (Tex. App.—Dallas 1990, writ denied); Reamess v. Reames, 604 S.W.2d 335, 336-38 (Tex. Civ. App.—Dallas 1980, no writ). Further, in 2003, Section 106.002 (formerly 11.18(a)) was amended again so that it deleted all language declaring that attorney's fees could be awarded as "costs" and substituted language stating that a judgment for attorney's fees "may" be awarded directly to an attorney and the judgment "may be enforced . . . by any means available for the enforcement of a judgment for debt." See Tex. Fam. Code Ann. § 106.002.

Importantly, the statutes in the family code, from 1973 to date, which empower the trial court to award attorney's fees on an interim and final basis in SAPCR cases, i.e., §§ 11.11(a)(5) (now § 105.001(a)(5) and 11.18(a) (now § 106.002), contain no language, express or implied, indicating that the statutes on attorney's fees were intended, by the legislature, to abrogate the common law doctrine of necessaries that was codified in § 4.02 (now § 151.001(a)(3), (b) and (c)). See Indem. Ins. Co. of N. Am., 29 S.W.2d 1009, 1010-11 (holding that a statute is cumulative of other remedies unless it contains an express or implied negation of other remedies); Navistar Int'l Transp. Corp., 791 S.W.2d 241, 245 (same).

As a result, following the enactment of the family code, Texas courts continued to hold that attorney's fees incurred for the benefit of a minor could still be recovered as necessaries independent of the new statutes. See e.g., In re H.V., 252 S.W.3d 319, 327, n. 55 (Tex. 2008)(reaffirming that attorney's fees incurred for minor's benefit may constitute necessaries and fall within a parent's duty of support); Roosth v. Roosth, 889 S.W.2d 445, 456-57 (Tex. App.—Houston [14th Dist.]t.] 1994, writ denied) (holding that trial court did not abuse its discretion in ordering that father pay attorney's fees to mother as necessaries for the benefit of the children in divorce decree and citing statutory predecessor to section 151.001); Daniels v. Allen, 811 S.W.2d 278, 280 (Tex. App.—Tyler 1991, no writ) (holding that trial court did not abuse its discretion in ordering that father pay attorney's fees to mother as necessaries for the benefit of the children in paternity proceeding and citing statutory predecessor to section 151.001); Drexel v. McCutcheon, 604 S.W.2d 430, 434 (Tex. Civ. App.—Waco 1980, no writ)(holding that adoption of former § 11.18(a) did not abrogate the common law doctrine that attorney's fees incurred for the benefit of a minor may be recovered as necessaries under former § 4.02); Uhl v. Uhl, 524 S.W.2d 534 (Tex. Civ. App.—Fort Worth 1975, no writ)(awarding attorney's fees as necessaries despite enactment of former § 11.18(a)).

Fast forward to 2103 and the Texas Supreme Court holds that attorney's fees can no longer be awarded as "necessaries" in a modification case, relying on the absence of language in Chapter 156 allowing the trial court to award attorney's fees as child support. Simply because the legislature granted a trial court the power to award attorney's fees as child support in Chapter 157 does not mean that the trial court lacked the power to award attorney's fees as "necessaries" in a Chapter 156 modification case. This conclusion is not necessary or logical since the power to award attorney's fees as child support under Chapter 157 was added to the family code long after the power to award attorney's fees as "necessaries" in a SAPCR was recognized by case law and long after this rule was adopted by the legislature when it enacted the family code and since Chapter 157 expressly says that it's remedies are cumulative and not exclusive of any other remedy provided by law. Chapter 151 sets forth the general duties of parents and incorporates the law of" necessaries" which has existed in this state for over 100 years. It applies in all SAPCR cases (including both Chapter 156 and 157 cases) and therefore creates an independent basis for awarding attorney's fees that has never been abrogated by the legislature. Before Tucker v. Thomas, a trial court could award attorney's fees as a "debt" or as "necessaries" under Chapter 156. This is what the Court should have held, but for whatever reason it has decided to strike down 100 years of law and to "take back" its own decision that attorney's fees can be necessaries in SAPCR cases even though the legislature adopted its rule. The Court's decision violates the basic rules of statutory construction and the separation of powers doctrine. Moreover, it violates the basic rule we all learned as children on the play-ground—no "take backs." C.N.

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§ 155.201(b) DOES NOT INCLUDE A REQUIREMENT THAT, AFTER THE FILING OF THE LAWSUIT, THE CHILD IN A SAPCR MODIFICATION CONTINUE TO RESIDE IN THE COUNTY TO WHICH TRANSFER IS SOUGHT OR THAT AN ORIGINAL SAPCR COULD BE BROUGHT IN THAT COUNTY.

¶14-2-20. *In re Foreman*, 05-13-01618-CV, 2014 WL 72483 (Tex. App.—Dallas 2014, orig. proceeding) (mem. op.) (1/9/14).

Facts: Father and Mother were married from 1998 to 2009. Their final decree of divorce was signed on December 11, 2009 in Dallas County, Texas, at which time Father, Mother, and their children resided in Dallas County. On July 19, 2013, Father filed a petition to modify the parent-child relationship, and he concurrently filed a motion to transfer venue from Dallas County to Collin County. Mother filed an affidavit in response. On November 12, 2013, the trial court held an evidentiary hearing on Father's motion to transfer venue. The affidavits of the parties and undisputed evidence adduced at the hearing showed that both parties currently resided in Dallas County, the children resided and attended school in Dallas County, the children's lifelong pediatrician was located in Dallas County, Mother had sold her house in Collin County and did not intend to move back to Collin County. The undisputed evidence also showed that the children resided in Collin County from June 2011 through July 23, 2013—up to and including the date that Father filed his petition to modify the parent child relationship and to transfer venue, the children's school records for the previous two years were located in Collin County, the site of the children's extracurricular activities for the two years that the

children lived there was Collin County, and the children retained a few friends in Collin County. Neither party evidenced any intention of returning the children to Collin County. The trial court denied Father's motion to transfer venue. Father filed a petition for writ of mandamus.

Holding: Conditionally Granted.

Opinion: Family Code Section 155.201(b) provides that the court of continuing, exclusive jurisdiction shall "transfer the proceeding to another county in this state if the child has resided in the other county for six months or longer." This provision is mandatory, straightforward, and clear. It does not include a requirement that, after the filing of the lawsuit with a concurrently filed motion to transfer venue, the child currently reside in the county to which transfer is sought or that an original suit affecting parent child relationship could be brought in that county. In this case, the undisputed evidence showed that the children moved to Dallas County after the petition to modify and motion to transfer venue was filed. On the date that Father's petition and motion to transfer venue was filed, the children's principal residence on the date and during the six month period preceding the commencement of Father's suit was Collin County. Thus, the trial court was required to grant Father's motion to transfer venue under the plain language of Section 155.201(b) of the Texas Family Code.

Editor's comment: *The court declined to follow Martinez v. Flores, 820 S.W.2d 937, 940 (Tex. App. - Corpus Christi 1991, orig. proceeding), in which the court stated, "we believe that the child's principal residence is not determined by this six-month period, but that the six-month period may be a guide in determining whether a new county of residence is intended to be a principal, as opposed to a merely temporary, residence." J.V.*

CHILD MUST TAKE OATH WHEN GIVING OUT OF COURT TESTIMONY TO BE USED LATER IN SAPCR PROCEEDINGS; THE BEST INTEREST OF THE CHILD (NOT THE CHILD'S PREFERENCE) IS CONTROLLING

¶14-2-21. *Nichol v. Nichol*, ___ S.W.3d ___, 2014 WL 199652 (Tex. App.—Amarillo 2014, no pet. h.) (mem. op.) (1/15/14).

Facts: On September 13, 2007, a trial court signed a final decree of divorce appointing Mother and Father JMCs of Child. In May 2009, Father sought to modify the order and filed a motion to pre-record testimony of Child, which the trial court granted. However, Child's recorded statement was excluded at trial because no oath was administered and no preliminary questions were asked of Child which would indicate that Child understood that his testimony needed to be truthful. The trial court denied Father the exclusive right to designate Child's primary residence, increased his child support obligation, and ordered $20,000 in attorney's fees to Mother. The trial court also awarded Father additional possession time and ordered the Child continue to be enrolled at the private school he was already attending. Father appealed.

Holding: Affirmed.

Opinion: Father argued that the trial court erred by excluding Child's recorded statement. Before a child's recorded statement may be admitted into evidence, there must be a showing of competence at the time the testimony is given and a showing that an oath was given or some discussion had with the child about the issue of truthfulness. The transcript of Child's recorded statement reflected that Father's attorney began questioning Child without any oath or admonishment being given.

Father also asserted that the trial court erred in denying his request to modify the right to designate the primary residence of Child. COA found that even though Child signed an affidavit expressing his preference to have Father designate his primary residence, the modification was not in Child's best interest. Child suffered from dyslexia, anxiety, asthma, allergies, and hearing loss. However, Father wanted to remove Child from private school and enroll him in public school where his dyslexia might have gone untreated. Father also

wanted to terminate Child's treatment for anxiety, and disagreed with having Child repeat 5th grade even though that was the recommendation of educators, language therapists, and Mother. Finally, Mother and Father did not have an amicable relationship, which exacerbated Child's anxiety.

ALONG WITH A BEST INTEREST FINDING, A FINDING OF ONLY ONE GROUND ALLEGED UNDER SECTION 161.001(1) IS SUFFICIENT TO SUPPORT A JUDGMENT OF TERMINATION.

¶14-2-22. ***In re D.D.G.,*** ___ S.W.3d ___, 2014 WL 252090 (Tex. App.—Fort Worth 2014, no pet. h.) (1/23/14).

Facts: Mother had four children and was eight months pregnant with her fifth child. Child 1 lived with her grandparents because of Mother's alcohol abuse, and Child 2 and Child 3 had been placed in foster care because of Mother's methamphetamine use. Child 4, the child at issue in this case, tested positive for methamphetamine when he was born due to the fact that Mother smoked methamphetamine throughout her entire pregnancy. The Department filed a petition to terminate Mother's parental rights. Mother was unable to stop using methamphetamine completely, but stated that she had been clean for 5 months and therefore believed that she did not need drug treatment. Father was incarcerated at the time of trial, but evidence was introduced that he also smoked methamphetamine and obtained methamphetamine for Mother. Neither Mother nor Father completed the drug and alcohol assessment, individual counseling, family counseling, domestic violence counseling, or anger management counseling required by the plan. They also failed to provide documentation regarding their employment, and Mother missed at least 40% of her visits with Child 4. At the time of trial, Child 4 was in a foster home with Child 2 and Child 3, and the foster parents wanted to adopt all three children. The trial court terminated Mother's parental rights to Child 4 under 161.001(1)(D), (E), (M), and (R) of the Texas Family Code. Mother appealed.

Holding: Affirmed.

Opinion: Mother argued in first issue that the evidence was legally and factually insufficient to support the trial court's findings under 161.001(1)(D), (E), and (R) of the Texas Family Code. Along with a best interest finding, a finding of only one ground alleged under Section 161.001(1) is sufficient to support a judgment of termination. A parent's rights can be terminated upon a finding that the parent has been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by Section 261.001. A child is born addicted to a controlled substance if that child is born to a mother who used a controlled substance during her pregnancy and exhibits the demonstrable presence of a controlled substance in the child's bodily fluids after his birth. At trial, Mother admitted that she smoked methamphetamine during all nine months of her pregnancy with Child 4, and that she was aware that Child 4 tested positive for methamphetamine at birth (which she attributed to her own drug use). Medical records relating to Child 4's birth were introduced at trial to establish that both Mother and Child 4 had tested positive for methamphetamine at Child 4's birth. The COA concluded that the evidence was legally and factually sufficient to support the trial court's finding that Mother was the cause of Child 4 being born addicted to a controlled substance and overruled Mother's issue.

EVIDENCE SUPPORTS INJUNCTION PROHIBITING PARTIES FROM ALLOWING CHILD IN PRESENCE OF AN UNRELATED PERSON OF OPPOSITE SEX. ADMISSION OF EXPERT EVIDENCE NOT DETERMINED BY ADMINISTRATIVE CODE.

¶14-2-23. ***In re S.A.H.,*** ___ S.W.3d ___, 2014 WL 294547 (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (1/28/14).

Facts: Mother and Father were divorced on October 23, 2006 and named JMCs for Child. Three years later, Mother arranged for Great Aunt (who had only met Child one time) to take Child because Mother had recently broken up with her boyfriend and had no place to live. It was understood between them that Great Aunt

would keep Child until Mother "got her life together." Mother also signed a Durable Power of Attorney for Great Aunt so that she could care for Child. Great Aunt and her husband provided Child with a high quality of life, and when Mother only visited Child a handful of times and did not ask for Child's return after fourteen months, Great Aunt believed she would have Child forever. On January 1, 2011, without having made prior arrangements with Great Aunt, Mother arrived at Great Aunt's house to take Child back. However, Child was at a local restaurant celebrating his birthday. On January 3, 2011, Great Aunt filed a petition to modify the parent-child relationship and requested to be named SMC. The trial court found that Mother had voluntarily relinquished the primary care, custody, and possession of Child to Great Aunt for at least six months and named Mother, Father, and Great Aunt as JMCs, giving Great Aunt the exclusive right to designate Child's primary residence. Mother appealed.

Holding: Affirmed.

Opinion: Mother also asserted that the trial court abused its discretion in imposing an injunction prohibiting the parties from allowing Child to be in the presence of an unrelated person of the opposite sex with whom the party has a dating or intimate relationship with. A parent's living with a boyfriend or girlfriend, after having exposed a child to several different people in dating relationships, can support a finding that it is in a child's best interest not to visit with a parent while a non-relative boyfriend or girlfriend is present. Evidence was presented at trial that Mother had a history of serial relationships with live-in boyfriends, some of who had criminal backgrounds. Also, there was testimony from multiple sources regarding an incident in which Mother and a boyfriend forced soap into Child's mouth. Therefore, the COA held that the trial court did not abuse its discretion in imposing this prohibition.

Mother also complained that the trial court abused its discretion in permitting a licensed professional counselor to testify as an expert witness because his testimony violated the rules promulgated by the State Board of Examiners and Psychologists. The admission of expert testimony is not determined by an administrative code, but by principles governing the admissibility of evidence. Therefore, the COA overruled Mother on this issue.

Editor's comment: *The trial court has broad and wide discretion to craft orders for the protection of and in the best interest of the child. If that means the trial judge says you can't have sleep-overs with your boyfriend, then you have to pick between your kids and your sleep-overs. That's that. M.M.O.*

Editor's comment: *This case also discusses the parental presumption in the context of modification suits. The Family Code presumes that in an original SAPCR, a presumption exists that appointment of a child's parents as joint managing conservators is in the child's best interest. There is no parallel provision in the modification provisions of the Family Code. Mother argued that she had been unconstitutionally deprived of conservatorship because, for the first time, a nonparent sought conservatorship of her child and therefore she was entitled to the presumption. The court of appeals avoided the constitutional issue by holding that even if the Family Code's modification provisions did include the parental presumption, it had been rebutted by the fact that Great Aunt had had the child for at least a year – which is how the parental presumption can be rebutted in original SAPCRs. Accordingly, there was no need to address the constitutional issue. J.V.*

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MATERIAL CHANGE IN CIRCUMSTANCES MAY INCLUDE (1) REMARRIAGE BY A PARTY, (2) POISONING OF THE CHILD'S MIND BY A PARTY, (3) CHANGE IN THE HOME SURROUNDINGS, (4) MISTREATMENT OF THE CHILD BY A PARENT OR STEP-PARENT, AND (5) A PARENT'S BECOMING AN IMPROPER PERSON TO EXERCISE CUSTODY

¶14-2-24. ***In re S.N.Z.***, ___ S.W.3d ___, 2014 WL 295257 (Tex. App.—Dallas 2014, no pet. h.) (1/28/14).

Facts: In 2007, Mother and Child's Paternal Aunt and Uncle signed a MSA concerning conservatorship of Child. Mother was named a possessory conservator and granted 5 hours of supervised visitation with Child on the first, third, and fifth Sunday of each month. Mother's eldest daughter was selected as the visitation supervisor. In 2009, Aunt and Uncle sought to modify the agreement to (1) remove the prohibition on them from traveling outside the state with Child without Mother's consent, (2) remove the fifth Sunday of each month from Mother's periods of possession, and (3) remove the requirement for telephone access between Mother and Child. Mother filed a counter-petition and sought to be named SMC. At trial, Mother filed an objection to the assigned judge, but her objection was overruled. Mother then presented evidence that she a was a loving and caring mother and wanted to be the SMC so that she could develop a normal parent-child relationship with Child. Mother also testified that Aunt and Uncle were "poisoning [Child's] mind against" her. However, conflicting evidence was presented on this point by Child, Aunt, Uncle, Mother's eldest daughter, and numerous other people. The trial court denied Mother's counter-petition and substantively gave her the same possessory rights to Child. Mother appealed.

Holding: Affirmed.

Opinion: Mother also argued that the trial judge's refusal to modify the 2007 final order to allow her standard visitation was an abuse of discretion because there was no evidence or insufficient evidence to support the continuation of the requirement that her visits with S.N.Z. be supervised. A parent must show that modification would be in the best interest of the child and that the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date of rendition of the prior order. Material changes may include (1) remarriage by a party, (2) poisoning of the child's mind by a party, (3) change in the home surroundings, (4) mistreatment of the child by a parent or step-parent, and (5) a parent's becoming an improper person to exercise custody. In addition, a course of conduct pursued by a managing conservator that hampers a child's opportunity to favorably associate with the other parent may suffice as grounds for redesignating managing conservators. Mother's evidence focused on the fact that she cared about Child and wanted more unsupervised access to her so that she could develop a normal, parent-child relationship. Mother alleged that circumstances had materially changed because she believed that appellees were "poisoning the child's mind against her." However, at best, there was only conflicting evidence concerning Child's permission to send text messages or call Mother. There is no abuse of discretion when a trial judge bases his decision on conflicting evidence and chooses to believe one party over another. Therefore, the COA held that the trial court did not abuse its discretion and overruled Mother's second issue.

ALTHOUGH FATHER HAD ALREADY MADE A LUMP SUM CHILD SUPPPORT PAYMENT FOR HIS CHILD PURSUANT TO THE PARTIES AGREEMENT, WHEN THE PARTIES LATER CONCEDED THAT THERE HAD BEEN A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES THE TRIAL COURT HAD THE AUTHORITY TO MODIFY THE PARTIES PRIOR AGREEMENT.

¶14-2-25. *Luckman v. Zamora*, 01-13-00001-CV, 2014 WL 554630 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (mem. op.) (2/11/14).

Facts: Mother gave birth to Child 1 in January 2005. On July 28, 2005, the trial court signed an "Agreed Child Support Review Order" adjudicating Father as the father of Child 1 and ordering him to pay a lump-sum child support payment of $30,000. The 2005 order stated that the payment would fully satisfy all present and future child support obligations. In 2007, Mother gave birth to Child 2, and on November 17, 2009, the

trial court signed an "Agreed Order in Suit Establishing the Parent-Child Relationship and in Suit for Modification." The 2009 order adjudicated Father as the father of Child 2 and found that Father had a duty of support. However, the order found that Mother and Father were living together as a family unit and that it was in the best interest of the children that no regular on-going child support be ordered. In September 2010, and after Mother and Father were no longer living together, Mother filed a motion to modify the 2009 order. On August 17, 2012, Father was ordered to pay $1,114.41 per month for the support of Child 1 and Child 2. Father appealed.

Holding: Affirmed.

Opinion: Father first argued that the trial court abused its discretion in ordering him to pay child support for Child 1 because the trial court found in 2005, based on Mother and Father's agreement, that a single lump-sum payment of $30,000 was in Child 1's best interest. The Family Code provides that to promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for support of the child and for modification of the agreement, including variation from the child support guidelines. If the parties agree to an order under which the amount of child support differs from the amount that would be awarded in accordance with the child support guidelines, the court may modify the order only if (1) the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition and (2) the modification is in the best interest of the child. The COA found that both parties conceded that the circumstances had materially and substantially changed since Father and Mother were no longer living together. Therefore, the COA held that the trial court did not abuse its discretion by requiring Father to make child support payments for Child 1 beyond the agreed upon lump sum payment he made in 2005.

Editor's comment: *This case is a little scary, and will make me think twice about ever advising a client to sign off on a child support order that provides for their paying a lump sum amount. Or what about the case where, in a divorce, the father agrees to take a disproportionate division in mother's favor because mother and he agree that he will never have to pay child support. Under this case's straightforward but limited analysis, and by the plain language of Chapter 154.124, the mother could renege on the deal after a few years, and get periodic child support, so long as she could show a material and substantial change in circumstances and a best interest finding. Would there be any way to add additional contractual language in the decree to try to avoid this scenario? This case is also yet another reminder to be very careful when filing your own countermotion to modify, as you will almost always be held to your concession as to a material and substantial change in circumstances. It would be interesting to know what Dad (the unluckiest "Luckman" I've ever heard of) was specifically asking to modify in his counterpetition, and whether it had anything to do with the child support from the 2009 order (doubtful, since that order said he didn't have to pay any child support for his second child with mom). R.T.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

THE LACK OF A BEST INTEREST FINDING AND ANY IDENTIFYING INFORMATION AND THE TRIAL COURT'S USE OF VAGUE ABBREVIATIONS FOR THE GROUNDS OF TERMINATION PREVENTED APPELLATE REVIEW

¶14-2-26. ***In re A.R.G.***, ___ S.W.3d ___, 2013 WL 6516419 (Tex. App.—San Antonio 2013, no pet. h.)(12/11/13)

Facts: The Department sought to terminate Mother's parental rights on seventeen different grounds. At the conclusion of the termination hearing, the associate judge hearing the case took the matter under advisement; therefore, there are no oral findings. The clerk's record contains a hand-written "Associate Judge's Report and Order" in which the trial court writes "Mother's parental rights terminated on grounds of c/a and fail [sic] to do FSP." The order does not identify the "Pat uncle & aunt" who were appointed as "Jt,M/C." The order does not identify the father who was appointed "PC." The order does not identify the mother whose parental rights were terminated. The order contains no identifying information about the children subject to the order. The order also contains no explicit finding that termination of appellant's parental rights is in the children's best interest. Finally, the order does not contain the section 161.206 findings. Mother filed an appeal on sufficiency grounds.

Holding: Reversed and remanded.

Opinion: An "Associate Judge's Report and Order" is a final appealable termination order. However, the appellate court, the parties, and any other interested party could only guess the meaning of the judge's shorthand, abbreviated notes and assume implicit findings. The lack of a best interest finding, the lack of any identifying information, and the trial court's use of vague abbreviations for the grounds of termination placed the appellate court in the position of reviewing the evidence in support of findings about which the appellate court must speculate because the findings are either vague or totally absent. Because the court could not conduct a proper review of the evidence based on this order, it reversed the judgment and remanded for further proceedings in the interest of justice.

FAMILY VIOLENCE BY BOTH PARENTS AND MOTHER ALLOWING FATHER AROUND CHILDREN SUPPORT TERMINATION.

¶14-2-27. ***D.G. v. TDFPS***, ___ S.W.3d ___, 2013 WL 6330656 (Tex. App.—El Paso 2013, no pet. h.) (12/5/13).

Facts: Mother had five children. The Department had initial contact with Mother in 2006 when her son, Child 1, suffered a broken arm and the hospital personnel discovered a previous ankle fracture. The second intake occurred in 2011 with regard to physical abuse by Father towards Child 3. During the Department's investigation, the children spoke out about recurrent family violence; violence by Father towards Mother and the children, and violence by Mother against the children. Mother denied all of the accounts. The Department moved forward. Mother's visits with Child 5 were supervised, and the caseworker often observed Mother texting while Child 5 played by herself. There were also several occasions when Mother did not attend her visitations. Mother continued to maintain a relationship with Father. At the time of trial for termination of Mother's parental rights of her youngest child, Child 5, she did not have custody of any of her children. Thus, despite the fact that Mother had (1) obtained employment, (2) obtained housing, (3) finished parenting classes, and (4) completed all of her service requirements, the biggest concern for the Department was the ongoing and abusive relationship with Mother and Father. The trial court granted termination on the basis that Mother had:

(1) Knowingly placed or knowingly allowed Child 5 to remain in conditions or surroundings, which endangered the physical or emotional well-being of the Child; (2) Engaged in conduct or knowingly placed Child 5 with persons who engaged in conduct which endangered the physical or emotional well-being of the child; and (3) Failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of Child 5. Mother appealed.

Holding: Affirmed.

Opinion: Mother challenged the sufficiency of the evidence to support the statutory findings regarding termination. Mother testified that her first and second husbands were abusive. The record contained evidence of police reports of domestic violence that Mother filed against other men she had dated. Additionally, multiple documents were introduced into evidence where Mother reported physical abuse, verbal abuse, and sexual abuse to places such as the Center Against Family Violence. Boxes were checked indicating that Mother had been pushed, shoved, bumped, slapped, chocked, strangled, restrained, kicked, and grabbed. There were attempts to run Mother over with a car and attempts to suffocate her. Mother had been confined against her will and property had been damaged or destroyed. Also, Mother was aware of Father's brushes with the law. Father had at least three convictions for possession of marijuana. Indictments were admitted into evidence related to burglary of a habitation and aggravated assault. Mother also knew that Father had failed to comply with the service plan. He did not comply with the Battering Intervention Program. He was asked to participate in individual or marriage counseling but he did not. Finally, he testified positive for marijuana, but did not comply with recommendations that he attend and complete outpatient therapy. Despite all this, Mother continued to allow Father to take her to visits, continued to allow Father to be in her apartment, and continued to have contact with him to the point of even calling him during one of her visits. COA concluded that the evidence was both legally and factually sufficient to support termination on all three grounds.

Mother also challenged the sufficiency of the evidence to support the trial court's finding that termination was in the child's best interest. Child 5 had been placed with her grandparents and her grandparents wanted to adopt her. Child 5 had stabilized emotionally and had been discharged from treatment. Child 5 had become immune to Mother's absence and inconsistencies with regard to visitation. Furthermore, the emotional and physical dangers to Child 5 in the future were enormous given Mother's and Father's track record and their failure to address their own parental shortcomings. Mother was a victim and an abusive parent. Father was abusive to Mother and Children, but he remained in the picture with Mother's approval and consent. Mother did not pursue a protective order or seek victim assistance. As for the stability of Mother's home, she had repeatedly dated, and married, abusive men since high school. Finally, at the time of trial, Mother still faced four counts of injury to a child. Mother's acts and omissions demonstrated that the existing parent-child relationship was not a proper one. COA held that the evidence was both legally and factually sufficient to support the trial court's finding that termination was in Child 5's best interest.

TEXAS FAMILY CODE SECTION 161.001(1)(M) MAY BE UNCONSTITUTIONAL IF APPLIED IN A CURRENT TERMINATION PROCEEDING TO A PARENT WHO HAD THEIR PARENTAL RIGHTS TO ANOTHER CHILD TERMINATED BEFORE SUBSECTION M WAS ENACTED.

¶14-2-28. ***In re N.L.T.,*** ___ S.W.3d ___, 2014 WL 130552 (Tex. App.—Dallas 2014, no pet. h.) (1/15/14).

Facts: In September 1987, Mothers rights to Child 1 were terminated under subsection (D) or (E) of Texas Family Code § 161.001(1). In 2012, twenty-five years later, the Department relied on the 1987 judgment as the sole substantive ground for terminating Mother's parental rights to Child 2 and Child 3, ages nine and seven respectively. Mother appealed.

Holding: Reversed and remanded.

Opinion: Subsection (M), which did not exist when Mother's rights to Child 1 were terminated in 1987, authorizes the termination of parental rights if a parent has had her rights to another child terminated previously based on a finding that the parent's conduct violated subsection (D) or subsection (E). The COA held that since subsection (M) had not been enacted when her parental rights to her first child were terminated in 1987, (1) there was nothing Mother could have done to conform her conduct to the statute once it was enacted and (2) Mother could never have expected such a result. Therefore, COA concluded that the Department's reliance on subsection (M) as the sole ground for termination was an unconstitutional retroactive application of the law as applied to Mother. Furthermore, COA held that counsel's failure to raise that constitutional issue at trial rendered his assistance ineffective and prejudicial.

FAILURE TO CONDUCT WRITTEN DISCOVERY OR RECONNECT BROKEN TELEPHONIC CONNECTION WITH INCARCERATED FATHER MAY NOT BE INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL TO TERMINATE PARENTAL RIGHTS.

¶14-2-29. ***In re K.S.***, ___ S.W.3d ___, 2014 WL 252105 (Tex. App.—Texarkana 2014, no pet. h.) (1/23/14).

Facts: Mother and Father were both incarcerated when Child was only one month old. The Department commenced legal proceedings to remove Child. When Father was released from jail, he began to complete some of the services prescribed by the Department. However, Father tested positive for methamphetamines on two random drug screens and was re-incarcerated on a separate five year sentence. The Department found a suitable placement for Child in Mississippi, and proceeded with its suit to terminate Father's rights. During the trial, Father was present via telephonic connection. However, the connection was broken and Father was not able to testify because his lawyer never reestablished the connection. Father's rights were terminated and Father appealed.

Holding: Affirmed.

Opinion: Father argued that he received ineffective assistance of counsel in the termination proceeding. To prevail on an ineffective assistance claim, an appellant must prove both Strickland prongs, establishing that counsel's performance was deficient and that counsel's errors prejudiced the appellant by depriving him of a fair trial with reliable results. The record did not contain any evidence that any written discovery was propounded, but there was also no evidence that written discovery was necessary or would have been beneficial. Father's counsel appeared at numerous hearings, and the record demonstrated that counsel was very familiar with the situation and the parties involved. Additionally, no testimony was elicited from trial counsel at the motion for new trial that could be used to determine whether there was any trial strategy involved in his failure to reconnect with Father and have him testify. Based on this evidence, the COA could not conclude that counsel was ineffective for failing to file formal discovery or other pretrial motions or for failing to call Father to testify.

INMATES DO NOT HAVE AN ABSOLUTE RIGHT TO APPEAR IN PERSON IN EVERY COURT PROCEEDING.

¶14-2-30. ***In re R.F.***, ___ S.W.3d ___, 2014 WL 301024 (Tex. App.—San Antonio 2014, no pet. h.) (1/29/14).

Facts: On June 26, 2012, the Department filed to terminate Father's parental rights. Father was incarcerated throughout the entire proceedings. The case was initially set for hearing on June 3, 2013. However, between June 3, 2013 and July 3, 2013, the case was continued multiple times due to Father's absence, and two bench warrants were issued to compel the warden to produce Father for trial. On July 19, 2013, Father was transferred to another facility in another state, and neither Father's counsel nor the Department was aware of the transfer. The case was continued to August 14, 2013, but no request was made to issue a new bench warrant for Father's appearance (either in person or by video link). On August 14, 2013, Father's counsel announced

"not ready" on the grounds that Father was not present. The court, however, continued with the hearing, and terminated Father's parental rights. Father appealed.

Holding: Affirmed.

Opinion: Father first argued that the bench warrant signed on July 3, 2013 was evidence that his presence was required, and that the Due Process clauses of both the United States and Texas Constitutions guaranteed him the right to participate in the hearing to terminate his parental rights. Father argued that his due process rights were violated when the trial court terminated his parental rights, in the face of a timely request for such participation, without providing Father any meaningful way to participate in the proceedings. Litigants cannot be denied access to the courts simply because they are inmates. However, an inmate does not have an absolute right to appear in person in every court proceeding. The inmate's right of access to the courts must be weighed against the protection of the correctional system's integrity. The Texas Supreme Court outlined the factors to be considered when a bench warrant is requested:

> [1] cost and inconvenience of transporting the prisoner to the courtroom; [2] the security risk the prisoner presents to the court and public; [3] whether the prisoner's claims are substantial; [4] whether the matter's resolution can reasonably be delayed until the prisoner's release; [5] whether the prisoner can and will offer admissible, noncumulative testimony that cannot be effectively presented by deposition, telephone, or some other means; [6] whether the prisoner's presence is important in judging his demeanor and credibility; [7] whether the trial is to the court or a jury; and [8] the prisoner's probability of success on the merits.

The inmate bears the burden to justify the necessity of his presence by producing the information showing the above listed factors. When Father's counsel originally requested the bench warrant, Father was being held at a facility in San Antonio. Therefore, the cost of procuring Father's presence was minimal. Yet, when the case was called on July 29, 2013, as well as on August 14, 2013, all parties understood that Father had been transferred out of the Texas facility and was presumably in another state. Without further evidence as to the judge's reasons for issuing the previous bench warrant or the location and costs associated with procuring Father's testimony at the time of the August 14th hearing, the COA could not assume the trial court would have made the same determination with regard to signing an application for a bench warrant. Additionally, Father's counsel neither (1) suggested that Father's testimony would have been different than the copious letters from him that were included in the record, or (2) made an objection to the trial court's failure to order a new bench warrant.

THE LAW DOES NOT REQUIRE THAT A CHILD SUFFER ACTUAL INJURY IN ORDER TO TERMINATE PARENTAL RIGHTS UNDER SECTION 161.001(1)(D)-(E); RATHER, IT IS ENOUGH WHEN THE PARENTAL CONDUCT PRODUCES AN ENDANGERING ENVIRONMENT.

¶14-2-31. ***In re M.Y.G.,*** ___ S.W.3d ___, 2014 WL 411536 (Tex. App.—Amarillo 2014, no pet. h.) (1/31/14).

Facts: In January 2012, law enforcement officers raided the home of Mother and Father and found marijuana, cocaine, and hydrocodone. Mother and Father's three children were present during the raid. The Department opened an investigation based on negligent supervision and filed a petition to terminate Mother and Father's parental rights. Both parents admitted to using marijuana. A service plan was created and the children were removed from the home. In October 2012, Mother and Father's home was raided again. Law enforcement officers found methamphetamine, marijuana, and cocaine. The second raid led to the arrest of four guests who were in Mother and Father's house at the time. Approximately one month later, Father was sentenced to eight years in jail due to the January 2012 raid. The children were eventually returned to Mother, but were removed

again after Mother and the people who were arrested in the second raid were involved in (but not arrested for) a shoplifting incident. Before trial, Mother only completed two out eight counseling sessions that had been scheduled for her as a part of her family service plan. The trial court entered an order terminating the parental rights of Mother and Father based on Section 161.001(1)(D)-(E) of the Texas Family Code (which allows a parent's rights to be terminated when there are endangering environments, conditions, or conduct). Mother and Father appealed.

Holding: Affirmed.

Opinion: Father and Mother argued on appeal that the evidence did not show any direct harm to the children, and therefore, the Department had not proved endangerment. The law does not require that a child suffer actual injury; rather, it is enough when the parental conduct produces an endangering environment. Based on this record, the COA held that the evidence was sufficient to show that Mother and Father's parenting fostered an endangering environment and that they allowed or took part in the endangering conduct.

ABSENT A FINDING OF GOOD CAUSE, TRIAL COURT WAS NOT AUTHORIZED TO RELIEVE INDIGENT FATHER'S ATTORNEY AD LITEM OF HIS DUTIES.

¶14-2-32. ***In re E.A.F.***, ___ S.W.3d ___ 2014 WL 715049 (Tex. App.—Houston [14th Dist.] no pet. h.) (02-25-14)

Facts: The record reflects that Father, who was not married to Child's mother and did not live with her, discovered his then one-year-old daughter home alone while Mother was at work. Upon arriving at Mother's apartment, he heard the child crying and broke down the door. Father notified the Department and the police, and he left the scene with the child. The evidence reflects that the Department's investigation of Father's background revealed that his parental rights to another child had been terminated in Bell County after the child was severely injured. That child's mother was later convicted for injuring the child. Father also has a conviction for assault of a military police officer at Fort Hood. Based on this history, the Department was appointed temporary managing conservator of E.A.F., and the child was placed in the home of her paternal aunt, where Father also resided.

On April 11, 2013 the case was called to trial. Prior to calling its first witness, counsel for the Department asked Father's court-appointed counsel, Shelton, if he still represented Father. Shelton responded, "my client has released me." Shelton explained that he was ready to proceed with trial and stated "It seems like there would be a full trial for the father that's required." He requested some clarification from the trial court before the trial started. He advised the court that he was ready to proceed, and Father said he wanted to represent himself, after which the trial court released Shelton, and he left. The record does not reflect that Shelton filed a motion to withdraw as counsel or that the trial court signed an order granting withdrawal. Father represented himself at trial, after which his parental rights were terminated. Father appealed.

Holding: Affirmed.

Opinion: The Texas Family Code provides that the trial court has a mandatory statutory duty to appoint an attorney ad litem for an indigent parent in an involuntary termination proceeding brought by a government agency. The plain language of the Code deprives the trial court of the authority to permit the withdrawal of such attorney ad litem absent a finding of good cause—a finding neither made nor requested in this case. As such, the court-appointed attorney ad litem's duties to appellant should have continued. Stated differently, Family Code § 107.016 did not allow appellant to release a court-appointed attorney ad litem. Father, however, did not make this complaint on appeal. Rather, he claimed that the trial court erred because it failed to give him a warning about the dangers of self-representation, warnings to which he was not entitled. Because Father did not complain about the trial court's release of his attorney without good cause, the court of appeals could not reverse on that basis.

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MISCELLANEOUS

AG DOES NOT HAVE TO RELEASE PRIVILEGED DOCUMENTS AND DOES NOT WAIVE PRIVILEGE WHEN IT CHOOSES TO RELEASE SOME, BUT NOT ALL, OF THE REQUESTED DOCUMENTS

¶14-2-33. *In re O.A.G.*, 2014 WL 491684, 02-13-00455-CV (Tex. App.—Fort Worth, 2014, orig. proceeding) (02-06-14) (mem. op.)

Facts: In February 2013, the AG filed suit to establish Rogers as the father of B.R. Rogers sent a request for disclosures, a request for production, and interrogatories to the AG. Rogers also requested that the AG produce B.R.'s mother's application for services submitted to the AG and all related documents. The AG provided some information but withheld the address and phone number of the mother and B.R.'s presumed father. The AG objected to the requests for production on the grounds of privilege and confidentiality. Rogers filed a motion to compel, which the district court granted. The trial court's order stated, according to Tex. Fam. Code § 231.108(c), the [AG] has the discretion to release communications it may receive from Mother in this case; therefore, the court may compel the [AG] to produce this information in discovery. The order compelled the AG to respond to Rogers's requests and interrogatories with the information that Mother provided the AG but not information the AG received from other government agencies. The AG then sought mandamus relief.

Holding: Mandamus granted

Opinion: Under the Family Code, "all files and records of services provided [to the AG] under this chapter, including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, are confidential." Tex. Fam. Code Ann. § 231.108(a). Subsection (b) states, "Except as provided by Subsection (c), all communications made by ... an applicant for or recipient of services under this chapter are privileged." *Id.* § 231.108(b). Subsection (c) provides that the AG "may" release the privileged or confidential information "for purposes directly connected with the administration of the child support [or] paternity determination." *Id.* § 231.108(c). Nothing in the statute requires it to release the information. Further, just because the AG released some information, the release did not preclude it from later claiming privilege as to other documents.

Editor's comment: *In short, the trial court could not compel the OAG to waive this privilege: "We have found no support for the trial court's reasoning that because a right* ***may*** *be waived, the trial court can* ***make*** *the party waive it." (emphasis in original). J.V.*

PURSUANT TO *SHARMA V. ROUTH*, BECAUSE THE TRUST WAS IRREVOCABLE AND HUSBAND HAD NO PRESENT POSSESSORY RIGHTS TO THE CORPUS BECAUSE THE TRUST ENTITLED HIM TO ONLY INCOME DISTRIBUTIONS, THOSE DISTRIBUTIONS WERE HIS SEPARATE PROPERTY

¶14-2-34. ***Benavides v. Mathis***, ___ S.W.3d ___ 2014 WL 547904, 04-13-00186-CV (Tex. App.—San Antonio 2014, no pet. h.) (02-12-14)

Facts: Husband and Wife have no children from their marriage; however, Husband has three adult children from his first marriage. Years before Husband and Wife's marriage, the Benavides Family Mineral Trust was created, in 1990, to

hold in trust, manage, and control approximately 126,000 acres of mineral estate for its beneficiaries. Husband, who is one of several participating beneficiaries under the trust, receives monthly payments of the net balance (after payment of certain expenses) of revenues from the trust estate.

On October 14, 2011, Mathis was appointed as temporary guardian of Husband's person and estate and notified the trust's co-trustees of her appointment and demanded that all funds distributable to Husband be distributed to her. In February 2012, Wife asked the co-trustees to deliver to her one-half of all distributions owed to Husband on the grounds that all trust distributions during the marriage were community property; thus, one-half of the distributions were owed to her. The co-trustees refused. About a month later, Wife made the same deman of Mathis, who also refused, to Wife filed the underlying lawsuit. Mathis subsequently filed an MSJ on Wife's tortious interference and money had and received claims, which the trial court granted without stating its grounds, and this appeal followed.

Holding: Affirmed

Opinion: Primary issue was whether income distributions paid to Husband from a family trust are his separate property or are community property. The COA agreed with the decision in *Sharma v. Routh* (302 S.W.3d 355) that trust distributions to a married beneficiary are separate property if the beneficiary has no present, possessory right to the trust corpus. Here, the Family Mineral Trust was irrevocable and the terms that allowed for its amendment did not in fact then make it revocable. Further, Husband had no present, possessory rights to the corpus because the terms of the trust entitled him only to income distributions. The COA rejected Wife's argument that Husband's ability to transfer his interest to others gave Husband a present, possessory right to the corpus and agreed that Husband was one of the "settlors" of the trust but he was not a current trustee. The COA noted that the fact that an income beneficiary might also hold title to the corpus as a trustee is not a controlling factor to determine marital property character of the income.

THERE IS NO RATIONAL RELATIONSHIP BETWEEN TEXAS CONSTITUTION SECTION 32 (BANNING SAME SEX MARRIAGE) AND A LEGITIMATE STATE INTEREST.

¶14-2-35. ***De Leon v. Perry***, ___ F.Supp. 2d___, 2014 WL 715741, SA-13-CA-00982-OLG (W.D. Tex. 2014) (injunction) (02-26-14)

Facts: Two homosexual couples, one wishing to marry in Texas and another seeking to have their Massachusetts marriage recognized under Texas law, brought action to challenge prohibition of same-sex marriage under Texas constitutional amendment. Couples moved for preliminary injunction to bar enforcement of prohibition.

Holding: Injunction granted.

Opinion: Applying the US Supreme Court's recent decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), Hon. Orlando L. Garcia ruled that Texas's prohibition on same-sex marriage conflicts with the US Constitutional guarantees of equal protection and due process, finding the Texas constitution and related family code statutes to be unconstitutional and granting a preliminary injunction prohibiting the named officials from enforcing those laws. Judge Garcia held that there is no rational relationship between Section 32 (banning same sex marriage) and a legitimate state interest, rejecting claims that the ban promotes responsible child-rearing; encourages procreation within marriage and upholds tradition. There was no evidence to support the notion that a gay parent is not as responsible as a heterosexual parent or that banning gay marriage promotes procreation, noting that such an idea would likewise prevent infertile persons and elderly persons from marrying because they too cannot bear their own children. Texas law violates a person's fundamental right to marry, a right of due process, holding that Texas law cannot define marriage in a way that denies its citizens the freedom of personal choice in deciding whom to marry or deny the same status and dignity to the decision they make. Additionally, the refusal to recognize a same-sex marriage sanctioned in another state is likewise improper and although DOMA gives each state the right to decide if they will recognize same sex marriage, this does not serve as a barrier to the equal protection and due process claims raised in this case. The court stayed execution of the injunction pending review by the 5th Circuit.

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,** (pet. granted, oral argument held on November 5, 2013) 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** (pet. granted, oral argument held on November 5, 2013) 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 K.L.*, 12-0728** (pet. granted, oral argument held on 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.

Father. Despite providing an address for service, the father was served by publication for status hearings and for the termination trial and appeared for trial after being subpoenaed. He told the court he was not aware that he had a right to an attorney. At the end of the first day of trial, the court told the father an attorney would have been appointed for him if he had appeared at a pretrial hearing and requested one, but at that point it was too late.

Mother. Before the state took possession of the child, the mother and grandmother executed a guardianship by which the grandmother had responsibility for the child. Child Protective Services took the child after she fell on stairs in the grandmother's loft apartment. In June 2010 the mother irrevocably relinquished her rights to the child. In July 2010 the county court ordered the mother placed under the grandmother's guardianship on evidence that the mother had an IQ of 57 and was bipolar.

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***In re S.H.R.*, 12-0968** (pet. granted, oral argument held on September 11, 2013) 01-10-00999-CV, 404 S.W.3d 612 (Tex. App.—Houston [1st Dist.] April 20, 2012, judgment set aside, opinion not vacated June 14, 2012) (Harris County).

A principal issue is whether the appeals court erred by not considering alternative grounds to terminate parental rights that were properly pleaded and supported by conclusive evidence.

***In re A.B.*, 13-0749** (pet. granted, oral argument set for April 22, 2014) 412 S.W.3d 588 (Tex. App.—Fort Worth 2013) (Tarrant County).

In this parental-rights termination, the issue is whether the appeals court, deciding this case en banc, erred in its factual-sufficiency review by failing to evaluate evidence on which a panel relied to reverse the termination order.