SECTION REPORT
FAMILY LAW
http://www.sbotfam.org Volume 2014-3 (Summer)

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IN THIS MONTH'S REPORT

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Section Wear and Publications

MESSAGE FROM THE CHAIR

Summer is upon us, and I hope that everyone will have a chance to get away and relax – preferably someplace cool.

CLE

In case you missed Marriage Dissolution in Austin, Dick Sutherland and his planning committee put together a terrific program. The Advanced Family Law Course will be in San Antonio on August 4-7, 2014, at the Marriott Rivercenter. Charla Bradshaw and Kyle Sanders are the Course Directors, and they have planned a fabulous course and I hope that you will join us for the most intensive CLE of the year.

In addition to the Advanced Family Law Course, our upcoming CLE seminars include:

- New Frontiers in Marital Property Law – October 23-24, 2014, Lake Tahoe, Course Directors: Sherri Evans and Heather King
- Family Law and Technology – December 4-5, 2014, Austin at the AT&T Center, Course Director: Mark Unger
- Texas Academy of Family Law Specialists Trial Institute – January 16-17, 2015 in New Orleans, Course Directors: Cindy Tisdale and Angela Pence
- Marriage Dissolution – April 9-10, 2015, Dallas

Pro Bono

The goal of the Family Law Section is to provide every indigent Texan access to an attorney. I know that this is a lofty goal, but the Section has been working toward this goal for some time and will continue to do so.

As you probably know, the Family Law Section has a very active Pro Bono Committee. For example, in 2013, the Pro Bono Committee put together 11 seminars across the state. The price of admission to the seminar, which qualifies for mandatory CLE credit, is the commitment to handle two family law pro bono matters in the next twelve months. These seminars resulted in access to justice for more than 540 indigent Texans. In 2014, the Pro Bono Committee has put together 6 seminars across the state in Conroe, Corpus Christi, El Paso, San Angelo, Tyler and Weatherford. The Section will continue its pro bono efforts including the development of a pro bono webinar. As with its live seminars, the goal of the webinar is to provide free CLE to attorneys willing to take on pro bono cases. With the development of the webinar, the seminars presented in 2014 will be made available to attorneys across the state resulting in almost unlimited access to justice for families in need. Thank you to the Pro Bono Committee and the many volunteers who donated their time to make our pro bono efforts successful.

The Section has also created Family Law Cares, a website under development to provide attorneys of all disciplines with the resources necessary to handle pro bono family law cases. The Section is working 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.

Legislative Committee

The Legislature will return to Austin in 2015 and it should be a very interesting session. The Legislative Committee of the Family Law Section has prepared the legislative package for 2015, and we have 12 proposed bills. Steve Bresnen, the lobbyist for the Texas Family Law Foundation, will be finding bill sponsors for each of our proposed bills. If you would like to get involved in the Family Law Foundation, please go to the website at www.texasfamilylawfoundation.com. Thank you to the Legislative Committee and all of those who donated their time to the Texas Family Law Foundation to make our legislative efforts successful.

Finally, I want to thank Sherri Evans, Immediate Past Chair for all of her hard work on behalf of the Family Law Section. I also want to thank the many family lawyers and paralegals who gladly volunteer their time to do the heavy lifting on the 20 working committees of the Family Law Section. This should be an interesting and challenging year, and I promise to work hard to continue representing our Section. See you at Advanced Family Law in San Antonio!

----------**Jimmy Vaught, Chair**

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TEXAS ARTICLES

Michael D. Ellis, Comment, *A Need for Clarity: Assisted Reproduction and Embryo Adoption in Texas*, 66 Baylor L. Rev. 164 (2014).

LEAD ARTICLES

Thomas M. Michael, *Stay Away: The Availability and Use of Stays in Family Law Cases and Appeals*, 36 No. 4 Family Law Advocate 22 (Spring 2014).

Eva M. Guzman, *Seeking Review in Courts of Last Resort, Appeals*, 36 No. 4. Family Law Advocate 40 (Spring 2014).

Ann Crawford McClure & J. Christopher Nickelson, *The Difference is Deference: Appellate Standards of Review*, 36 No. 4. Family Law Advocate 45 (Spring 2014).

Georganna L. Simpson & Steven R. Morris, *Participation in Appeals as Amicus Curiae*, 36 No. 4. Family Law Advocate 50 (Spring 2014).

Lorelei Laird, *$plit$ville A New Documentary Takes on the "Divorce Business"*, ABA J., March 2014, p. 9.

Yitshak Cohen, *Issues Subject to Modification in Family Law: A New Model*, 62 Drake L. Rev. 313 (2014).

John E.B. Myers, *"I Won't Pay Child Support, but I Insist on Visitation." Should Visitation and Child Support Be Linked?*, 45 McGeorge L. Rev. 695 (2014).

ASK THE EDITOR

***Dear Editor*:** My client was offered a partnership interest in his law firm in August 2005. In September 2005, he accepted the offer and signed a letter to that effect. In October 2005, he got married and began receiving his partnership benefits and salary. In January 2011, wife filed for divorce and claims that her husband's partnership interest is community property. My client thinks that it is his separate property. Who's right? *Puzzled in Palo Pinto*

***Dear Puzzled in Palo Pinto*:** Your client is right. His acquisition of his partnership interest is governed by the inception of title doctrine. As a general rule, property possessed by either spouse during or on dissolution of marriage is presumed to be community property, and a spouse must present clear and convincing evidence to establish that such property is separate property. *See* Tex. Fam. Code § 5.02. To overcome this presumption, the spouse claiming certain property as separate property must trace and clearly identify the property claimed to be separate. *See McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

The character of property as separate or community is determined at the time of inception of title. Inception of title occurs when a party first has a right of claim to the property by virtue of which title is finally vested. *Wierzchula v. Wierzchula*, 623 S.W.2d 730, 731-32 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). Importantly, the inception of title is determined not by the acquisition of the final title, but by the origin of title to the property. *Roach v. Roach*, 672 S.W.2d 524, 530-31 (Tex. App.—Amarillo 1984, no writ). The inception of title doctrine applies to earnest money contracts, contracts for deeds, working interests in mineral deeds, and interests in corporations and **partnerships.** Koons, Don, 33 Tex. Prac. Handbook of Texas Family Law § 9:16 (2010-11 Ed.).

By way of example, the husband in *Wierzchula*, entered into an earnest money contract to purchase real property before the marriage. *Wierzchula*, 623 S.W.2d at 731. Afterward, the husband and wife married, how-

ever, the deed to the real property was not conveyed to husband until after marriage. *Id.* Following divorce, the wife claimed the real property was community property. *Id.* at 732. The trial court disagreed finding that the inception of title occurred when husband deposited earnest money. *Id.*

Here, the record is clear that Husband obtained his partnership interest in August 2005. The record is also clear that Husband and Wife married nearly two months later in October 2005. Pursuant to the inception of title doctrine, Husband's interest in his law firm is his separate property. Wife is entitled to no portion thereof.

IN BRIEF

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

Agreements: The Nebraska Supreme Court ruled that a former wife who made a claim as beneficiary to her ex-husband's life insurance upon the ex-husband's death one week post-divorce must withdraw her claim because by "the four corners of the property settlement agreement," the former wife "clearly and unambiguously relinquished her beneficiary interests" in the ex-husband's life insurance policies. *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014). In a later case, the court upheld an agreed divorce decree, even though the former wife did not sign it, because the wife's attorney drafted it and at a hearing to require the wife's signature, the wife did not present any evidence that she had "changed her mind about or disagreed with the settlement for any reason" but merely wanted to receive the property awarded to her before signing. *Kibler v. Kibler*, 287 Neb. 1027, 845 N.W.2d 585 (2014). The Georgia Supreme Court reversed a purported "Consent Final Judgment," which was based on a disputed settlement agreement, when the trial court signed the final judgment, supplied ex parte by the ex-husband's attorney, and signed only minutes after the ex-wife's attorney moved to set aside the settlement agreement, without holding a hearing on whether the final judgment correctly reflected the terms of the settlement agreement. *Buckner v. Buckner*, 294 Ga. 705, 755 S.E.2d 722 (2014).

Dog custody: In a dispute over which party should have a beloved family dog upon divorce, a Vermont trial court appropriately based its decision on "which spouse was most active in caring for the dog during the marriage," finding in favor of the husband. The trial court correctly refused to impose a visitation order for the dog because, under the law, animals are property, such that any visitation order would be unenforceable. *Hamet v. Baker*, ___ A.3d ___, 2014 VT 39, 2014 WL 1657535 (2014).

Domestic violence: A Minnesota man, who had repeatedly violated an order for protection, unsuccessfully challenged an extension of the order for fifty years on double jeopardy and ex post facto grounds because Minnesota law permits such an extension when a person violates an order for protection "on two or more occasions." *In re Rew*, ___ N.W.2d ___, 2014 WL 1696179 (Minn. 2014). The Utah Supreme Court held that a "reasonable person" standard must be applied in a proceeding for a stalking injunction when a man whose mother called him nearly every day claimed that her phone calls were causing him emotional distress. *Baird v. Baird*, 2014 UT 08, 322 P.3d 728 (2014). In West Virginia, a termination petition is not barred by res judicata or collateral estoppel based on an earlier domestic violence proceeding, even when the facts are the same, because the two proceedings are "substantially different." *In re B.C.*, 755 S.E.2d 664 (W. Va. 2014).

Federal cases: According to the United States Supreme Court, the one-year period within which a parent must seek return of a child under the Hague Convention on the Civil Aspects of International Child Abduction is not subject to equitable tolling even when the abducting parent conceals the location of the child. *Lozano v. Alvarez*, 133 S.Ct. 1624 (2014). The Eighth Circuit held that although one ex-spouse may agree that the other ex-spouse may have the dependency exemption for a child, the IRS need not honor that agreement unless the spouse claiming the exemption attaches a Form 8332 ("Release of Claim to Exemption for Child

by Custodial Parent") to his tax return. *Armstrong v. Commissioner*, 745 F.3d 890 (8th Cir. 2014). The Fifth Circuit held that an award of attorney's fees under the International Child Abduction Remedies Act does not require a finding of wrongful removal or retention of the child but only an order that the child be returned, even when by agreement. *Salazar v. Maimon*, ___ F.3d ___, 2014 WL 1688197 (5th Cir. 2014).

Imputed income: Given an obligor's occupational and professional qualifications, his work experience and education, his spending too much time on an unprofitable real estate business in which he owned an interest and his "very confusing record keeping," a Montana trial court did not err when it imputed income to the obligor of $52,000 per year for child support purposes rather than the $24,000 the obligor claimed to earn. *In re Marriage of Carter-Scanlon*, 2014 MT 97, 322 P.3d 1033 (2014). The Mississippi Supreme Court reversed a trial court's decision to impute income to a husband upon divorce, based on the husband's parents' payment of his living expenses, "including rent, automobile payments, insurance premiums, cable and internet charges, and cell phone charges," because there was no showing that the husband actually had cash to pay the $3,000 per month maintenance payments the trial court ordered. *Huseth v. Huseth*, 135 So.3d 846 (Miss. 2014).

McCustody: The Georgia Supreme Court rejected a mother's contention that a trial court erred by awarding custody of the parties' child to the father based on "factors other than the best interest of the child" when the trial court considered the relative qualities of the schools the child would attend, that the father worked from home and thus could spend more time with the child, that the child behaved better in the father's presence and that the husband "claimed that he fed the child healthy, home cooked meals; but wife fed the child fast food, as well as processed, pre-packaged food, far too often." *Rose v. Rose*, 294 Ga. 719, 755 S.E.2d 737 (2014).

Medical maintenance: An Iowa trial court did not err when it increased the amount of alimony payable to a former wife and ordered the alimony paid for the rest of her life when, on a motion to modify, the former wife's evidence showed that she had incurable blood cancer and likely would live only an additional five or seven years, perhaps more. *In re Marriage of Sisson*, 843 N.W.2d 866 (Iowa 2014). A Montana trial court abused its discretion when it refused to grant maintenance to a wife who could not support herself because of a serious head injury suffered during marriage, based on the trial court's conclusions that the wife had been "disingenuous" and "profligate" with her $97,000 insurance payout and that Social Security would care for her. *In re Marriage of Novak*, 374 Mont. 182, 320 P.3d 459 (2014).

Social Security as division factor: Social Security benefits are not divisible upon divorce. But two recent decisions addressed whether Social Security benefits can be considered as a factor in dividing the marital estate. In *Manning v. Schultz*, 2014 VT 22, ___ A.3d ___, 2014 WL 840815 (2014), the Vermont Supreme Court reversed a trial court that credited a husband's share of the marital estate with $88,158, and allowed an equivalent offset to the wife's estate, the $88,158 representing the difference between the present value of the parties' respective projected Social Security benefits, because Social Security benefits can be revised "at congressional will" and therefore cannot be valued "without excessive speculation." But in *In re Marriage of Herald & Steadman*, 355 Or. 104, 322 P.3d 546 (2014), a divided Oregon Supreme Court affirmed a trial court's decision to reduce a former husband's share of a former wife's pension by the amount of Social Security benefits the former wife would have received had her federal employment allowed her to contribute to Social Security in lieu of pension contributions, the trial court reasoning "that it would be unjust for husband to receive half of the value of wife's CSRS pension at her retirement and, at the same time, enjoy his own full share of Social Security benefits."

COLUMNS

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

As I write this, Mother's Day has just been celebrated for another year, Hallmark has hit its numbers for production, and sure enough, I've been thinking about mothers. In fact, when I ate lunch today at La Madeleine, stuffed into a small space with pairs of mothers to each side of me (they often lunch together in coveys), I couldn't help but overhear their respective conversations. Or, as my daughter said in preschool, "I didn't overhear, they were overtalking." Ah, the things a 5-year-old can say that would get a grown man slapped.

Let me paraphrase the conversations I heard. By way of disclosure, though, I should point out that some people in my household do not believe I am a good paraphraser. Here's an example, in which, let's say, the role of my wife is played by my wife, who, we'll say, is briefly out of town: Wife: "Jack has been sick, and he needed to take his medicine before going to school. And if he was too sick, he needed to stay home. How was he this morning?" Me: "Jack essentially says he's fine." You see? I've done the cognitive crunching so my listener doesn't have to. Am I thanked for this? Almost never. Well, never.

Okay, so back to La Madeliene, where I am cheek to jowl (chic to joule?) between two pods of mothers, each engaged in earnest conversation. Whilst keeping my eyes on my phone and pretending to read War and Peace in 35-word-per-page increments, I'm actually listening to them overtalk. "So I put Hunter in a new play group. His old one was too aggressive, and even though I interfaced with one of the moms, I couldn't reconcile our preferences." Who talks like this? Today's moms do, although I'm paraphrasing here. To assure a scientifically valid sample, I tuned in to the other table. "Sorry I'm late. Madison threw up in the car, and I had to clean it up while I was on a conference call with my company's CFO and the head of the legal department. It was no problem, I always carry three types of stain remover in my purse, and I had all the financials in a protective plastic cover." Or something to that effect.

And that's when it hit me: Mothers can handle anything. Of course Hillary Clinton and Condoleeza Rice were effective Secretaries of State. Sorry, John Kerry, but could you do this: "Vladimir, stop it! I will put you in time out if you do that again! Where's the Kim Jong Un kid? Ah, there you are. Now put those down this instant, they're dangerous. Don't make me come over there." Now, I know all mothers are not like this, despite my scientific study. I mediate CPS cases, so believe me, I know. But the good ones are. And if only some of these moms were given motherly authority over the Federal Reserve, the US military, and, most importantly, the Dallas Cowboys ("Now Jerry, honey, I told you not to put any more tight ends in the shopping cart, we have plenty at home"), this would be a better world.

And let me just say that, after showing a draft of this to someone I know, she said, "You can't write this. It's dated, stereotypical, trite and sexist." What I heard was, and I'm paraphrasing here, "You're sexy, and I want to date you." That's inappropriate, but thanks.

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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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DO PSYCHOLOCAL TESTS CATCH LIARS?

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

Representing a mother in a child custody case, Ms. Smith grew concerned when the judge ordered her client, her client's ex-husband, and the two children to undergo a psychological evaluation. Ms. Smith shared her client's concern that the ex-husband might use his salesman-like charm to "snow" the evaluator and hide his "anger problem." She insisted that the evaluation include psychological testing that would catch the ex-husband's attempts to lie to the evaluator.

Ms. Smith's concerns raise several questions about psychological testing—also applicable to other civil and criminal cases. Can psychologists determine which parent is telling the truth? Do psychological tests catch liars?

These questions reflect common sense notions, supported by research and professional writings, about child custody litigants who undergo psychological evaluations. These litigants approach court-ordered evaluations in characteristic ways: they are defensive, or self-protective; they gloss over, if not deny, problems; and they often cast their soon-to-be or ex-spouses in a negative light. When parents view litigation as a high stakes, win-lose gamble, they conform their behaviors towards that end.

Evaluators often are expected to sort through dueling allegations and then use psychological testing to tell which parent is telling the truth—sometimes, both are telling the truth from their own perspectives. But psychologists do not have fool-proof abilities to discern whether people are telling the truth or deceptively shading the truth or outright lying.

No psychological test—even the MMPI-2 and its validity scales—reliably detects lies. Instead, adequately designed validity scales incorporated into tests may broadly reflect the examinee's "response style" or approach to test questions. Further, the evaluation's context may affect the examinee's test response style. For instance, examinees answer test questions as parents in child custody suits, as plaintiffs in sexual harassment lawsuits, or as criminal defendants. Depending on the context, examinees may try to look too well-adjusted, to exaggerate or make up problems, or to reflect accurately their emotional condition. Determining the examinee's response style and its meaning are the first steps to accurate test interpretation.

Unfortunately, not all tests contain equally reliable or sensitive response style measures. The MMPI-2's measures, encompassing several validity scales, are comparatively well-developed and provide useful response style information. Yet much of the research supporting these measures is inconclusive. Further, these measures by themselves may not always accurately reflect the examinee's true approach to the test questions—for instance, a naïve approach to test questions may be mistaken for trying to look too well-adjusted, or a profile that appears to indicate an examinee's attempts to feign psychological symptoms may actually reflect a "cry for help."

Compared to the MMPI-2, the response style measures of the MCMI-III and the Personality Assessment Inventory (PAI) are less developed. And response style measures of other tests, composed only of transparent questions that attempt to catch examinees in obvious falsehoods—e.g. "Have you ever told a lie?"—are as useless as tests with no response style measures. Testing without adequate response style measures are vulnerable to evidentiary reliability problems.

With this background, lawyer Ms. Smith will shed the simplistic notion that psychological tests are "truth-detectors." Instead, with her consulting expert's assistance, she will develop four lines of questions to begin cross-examining experts about test results that inform their opinions:

1. Do the administered tests assess the examinee's response style?
2. If so, how accurately, according to the research, do the tests' response style measures assess the examinee's approach to the test questions?
3. What does the examinee's measured response style say about her approach to the testing?
4. How does that approach, then, affect the expert's test interpretation?

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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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Reliable test interpretation cannot begin without first addressing the response style issue. Answers to these questions will help Ms. Smith better understand how the expert interpreted test results and how those results informed the expert opinion.

* Adapted from John A. Zervopoulos, *How to Examine Mental Health Experts* 69–74 (ABA, 2013).

NAVIGATING THROUGH THE FINANCIAL ASPECTS OF DIVORCE…DURING AND AFTER

By Christy Adamcik Gammill, CDFA[1]

Divorce is emotionally and financially taxing for most, no question about it. Having a team of professional advisors guide divorcing parties through this process provides a solid foundation for the client to understand their existing financial circumstances and paint a picture of what the post-divorce financial life will look like. Attorneys and clients have found that as the legal world evolves, financial advisors are becoming increasingly more crucial to the divorce process, whether you litigate or collaborate.

The role of the financial advisor in this process is often times a bit vague. To add some clarity to the overarching mystery, listed below are the 5 steps in the financial advisor divorce process.

I. The Introduction Meeting
- ❖ The purpose of this meeting is to gather information about the client, their goals, and interests, as well as get a snapshot of the financial resources of the estate from 10,000 feet above. From here, the advisor is able to gage where in the process the client stands, emotionally, financially and legally. All of these answers are variable depending on what stage of the divorce process the client is in, however it is most often in the best interest of the client to have a financial advisor on board before the property settlement has been finalized.
- ❖ If the client, attorney and financial advisor decide together they are a fit for one another, the advisor will be retained often at an hourly rate of $175-$350. If it is pre-divorce, the advisor provides a checklist of homework to gather documents, and asks the client to begin working through a detailed expense worksheet. Budgeting for many clients may be a foreign concept, furthering the importance of the advisor's role.

II. Identifying the Estate and/or Budgeting and Expenses Meeting
- ❖ Now that we have groundwork, what is the client currently spending? Do they imagine maintaining a similar or different lifestyle moving forward?
- ❖ It is the financial advisor's job to get an accurate depiction of all expenses, not just for temporary orders during divorce proceedings but also to create a uniquely tailored financial plan for the client's future.
- ❖ As documents are transmitted by the client or attorney's office to the advisor, the advisor reviews the financial documents in detail. This includes anything from basic checking accounts to retirement plan assets (these can be simple 401(k)'s or complicated defined benefit plans or annuity contracts) to executive compensation plans such as restricted stock, stock options and deferred compensation plans. The advisor may need more information from the financial institution or company depending on the complexity of the asset. Once a suitable amount of information is gathered, the advisor prepares a Family Coded Asset & Liability Worksheet as a framework to work and build from.

III. Preparing the Settlement Strategies
- ❖ The process of understanding exactly what is in the estate may take some time, sometimes months. In more complex cases a forensic CPA or an accredited business valuation "ABV" expert may be retained if tracing or understanding the value of a business is a part of the marital estate equation.

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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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- ❖ Depending on whether the process is litigation or collaborative, parties will work with their professional team of advisors to articulate financial needs, interests and relevance of particular assets within the investment pie to be divided.
- ❖ After meeting with the client and their attorney, possible mental health professional, forensic or ABV expert, the financial advisor can fully analyze all external factors.
- ❖ Through the use of the advisor's expertise on the various asset types and their after-tax or liquidation values, he or she will take a look at all available resources of the parties. These may be derived from the estate in the form of asset liquidation, investment income, earned income, mineral interests, partnership interests, social security or a myriad of other income sources. Backing into the overall financial resources and goals of the parties, the advisor will assess liquidity needs of the client, now and later, and work with the client and advisor to ultimately design a settlement package that benefits both the parties financially.
- ❖ A professional financial analysis or plan is done on behalf of the divorcing party to work through realistic assumptions of income and expense flows, assigning particular assets to the client with investment rates of return and inflation adjustments. These rates based on the backward and forward looking asset class rates of returns to match the client's time horizon and tolerance for risk.
- ❖ These reports may serve as a tool used to propose a settlement package to the opposing party based on the needs of the client, tying in the introduction meeting needs analysis as to whether the client may need income now versus later, retirement planning, and tax concerns.

IV. The Post-Divorce Settlement Meeting(s)

- ❖ Once attorneys and clients come to an agreement, financial advisors aid in moving the QDRO and transferring of funds processes along.
- ❖ From there, the financial advisor who represents the spouse with 'money-in-motion' typically switches hats, moving from the role of divorce financial consultant to a wealth advisor. When a client receives a certain investment, it is typical to take advantage of the many divorce tax/penalty exceptions. The advisor can perform penalty free rollovers, transfers, and design a customized portfolio that keeps assets in tact while reallocating others to meet the new financial needs and risk tolerance of the party.

V. The Client Account Review Meetings

- ❖ Each client with an account will receive yearly, semi-annual, or quarterly meetings to review how the client's new investment portfolio is coinciding with the financial plan previously agreed upon.
- ❖ The advisor can make adjustments as necessary, and even revise the financial plan to account for life's big surprises.

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ARTICLES

DIGITAL AND VIRTUAL ASSETS IN DIVORCE

By Chris Meuse[1]

The digital revolution has been upon us. A recent poll conducted by the company McAfee found that, in the U.S., people value their digital assets at nearly $55,000.00; however, digital and virtual assets are often overlooked or go unvalued in divorce. As our daily lives are increasingly played out on digital and virtual landscapes, family law practitioners need to start thinking about digital and virtual assets when assessing marital estates.

The first step, as with any asset in divorce, is determining whether a party has any digital or virtual assets and identifying what those assets are. Digital assets are intangibles that only exist in a digital form (i.e. data in the form of binary digits). Such assets may include: e-mail and social network accounts; websites; domain names; digital media, such as pictures, music, e-books, movies, and video; blogs; reward points; digital storefronts; artwork; and data storage accounts. These assets, although intangible, are marital property and are subject to characterization, valuation and division, during divorce.

Virtual assets are intangibles used in virtual worlds or massively multiplayer online role-playing games ("MMORPGs" for short). Popular, online communities, such as World of Warcraft, Second Life, and Entropia, draw millions of users worldwide, who spend billions of dollars each year within these virtual realms. In 2009, 3.8 billion dollars were spent on MMORPGs, with over $100 million going towards virtual assets in these online communities. These assets range from virtual pets; avatars; accessories for those avatars (clothing, weapons, etc.); prizes; virtual real estate; to virtual currency. The popularity of these virtual worlds and games is only growing, and family law attorneys must realize these assets are out there and should start asking if they are a part of marital estates.

After a digital or virtual asset is identified, its separate or community property character must be determined, as well as its value. Since this is still an emerging issue, national case law is sparse on what divorce courts are doing with digital and virtual assets; however, there is no indication that a digital or virtual asset would be characterized differently than a tangible asset. Thus, Texas courts should apply characterization techniques and law, such as tracing and inception of title, as if the digital/virtual asset were any other tangible property. For example, if a blog was started during the marriage, it should be considered community property. If a blog were started before the marriage, but it was monetized and produced income during the marriage, that income would likely be considered community property. And, if the spouse who did not come into the marriage with that blog contributed to it by posting to it, editing it, or advancing it in any way, the community estate may have a reimbursement claim against the other spouse's separate property estate for increase in value to that blog.

How one values a digital or virtual asset varies, depending on the asset. Many personal, digital assets, such as photos or videos, have little to no market value but have great sentimental value to parties. Other digital assets, such as websites, personal blogs, or domain names can have great value. For instance, the most expensive domain name ever sold, vacationrentals.com, went for $35 million in 2007. Many web-based services are available to value digital assets, and many of those same services can be used to sell such assets. The value of virtual assets can often be determined in the virtual marketplace. Thousands of transactions take place daily for virtual goods, and like digital assets, the value of virtual goods should not be underestimated. In 2010, for example, a virtual nightclub, Club Neverdie, ran by Jon Jacobs in the virtual Entropia Universe (a virtual world with a real-cash economy) sold for $635,000.00.

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After a digital or virtual asset is identified and its character and value determined, parties must still figure out how to assign or divide that asset. Some digital assets, such as airline miles or membership points, can be transferred. Other digital assets, like digital photos or videos can be copied. But some assets, like e-books or other digital media files cannot be transferred. When parties own digital or virtual assets that cannot be transferred or copied, practitioners must value such assets, award them to one party, and provide value to the other party, in lieu of those digital/virtual assets.

The world of digital and virtual assets is vast, and as we continue to spend more time and money on digital and virtual goods, family law attorneys must be asking the questions to discover digital and virtual assets. If these assets are overlooked, attorneys and parties could be leaving real, not virtual, dollars on the table.

CLASSIFICATION OF VIRTUAL ASSETS UNDER THE TEXAS COMMUNITY PROPERTY REGIME

By Eric Gutierrez[1]

I. INTRODUCTION

Property interests that have come to be known as "virtual assets" are now an integral part of most modern Americans' lives. In fact, many aspects of everyday life have some relationship to virtual assets, also known as digital assets. Just like a residence, the family car, or a retirement account, these virtual assets represent cherished property to the owning individuals. Unlike traditionally viewed assets however, no court in any United States jurisdiction has analyzed virtual assets in the context of marital property rights. With the rise in the use of digital assets, why should they not be sought after in a divorce, just like real world tangible assets? A simple yet essential beginning for delving into the world of virtual assets is to identify an appropriate definition. Virtual assets are the body of nontangible, digital properties that individuals create and store on computers or the Internet. Common examples of virtual assets include an iTunes media library, a website, an online blog, or a Facebook profile. Virtual assets are usually significant to an individual in one of two ways: either they are personal property or they are utilized in the course of an individual's business.

This article will explore the possible alternatives in characterizing virtual assets in a divorce. It will begin by discussing the role of technology and the Internet in both creating and ending relationships. Then, specific virtual assets will be identified and explained. A short overview of important community property principles will be provided, followed by how courts have divided other unique assets. The article will close with a discussion of how virtual assets could potentially be characterized and possible issues that may come with the characterization of these nontangible assets.

A. Online Relationships

Meet Julian and Elizabeth, both in their late-20's and both uninterested in developing relationships (either platonically or romantically) with people they attend school or work with. In fact, neither Julian nor Elizabeth has gone out socially to a gathering in over six months, effectively turning themselves into social hermits. The thought of going out to meet new people frankly gives both of them anxiety that neither of them are willing to deal with. Besides, both parties were busy with their careers: Julian recently opened a small candy shop (and concocted a recipe for a candy bar that proved to be quite popular), Elizabeth just graduated from college with a dual Photography and Creative Writing degree. Instead of attending events and dating like most other 20-somethings, Julian and Elizabeth have both delved into the vast virtual reality that the Internet has provided. The Internet and its accompanying technologies have replaced almost all forms of social contact for these two individuals. Why go out to see a movie at the theatre, when you can view one in the comfort of your own home? Why go out to play a game of touch football on a beautiful, sunny day when you can become your favorite quarterback (and acquire all of his talent – of which, you have none) in a quick, 20-minute game on your Xbox 360 while enjoying the blasting A/C on your couch?

In the first years of the 21st Century, many people have effectively substituted their real life social interactions with virtual ones. Dating is no exception. A 2013 national study revealed that more than a third of

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marriages between 2005 and 2012 began online.[2] When compared to marriages that began "off-line," online marriages were rated as more satisfying and were also less likely (albeit slightly) to result in a marital break-up, either a separation or divorce.[3] The authors of the study were not able to identify why online relationships were more successful, but suggested reasons such as the strong motivations of online daters, the convenience of advance screening of dates, and the sheer volume of opportunities that are presented online.[4]

So, like many of the successful online relationships that developed before them, Julian and Elizabeth created eHarmony, Match.com, and OkCupid profiles. After sifting through several mismatches, they discovered each other. After a reasonable amount of time, Elizabeth moved into Julian's apartment. Julian proposed shortly after her moving in and they were married.

B. Internet's Increasing Role in Ending Relationships

Julian and Elizabeth's marriage was great – until Elizabeth came home early one day. Waiting for her husband to get home, Elizabeth decided to pass the time on her husband's iPad, listening to music and browsing the vast wonders of the Internet. She noticed his Facebook Messaging app had a notification on it and innocently tapped it to see what hilarious antics her husband and his friends were up to. What she saw however, was neither innocent nor hilarious. A picture of his scantily clad assistant materialized – along with a message: "Had a great time this weekend – hopefully this will make our time apart more manageable." Disgusted at her husband, Elizabeth immediately threw the iPad to the floor and confronted Julian as soon as he arrived home. Julian admitted that for the past few months, instead of working late or over the weekend as he had told his wife, he had been having an affair with his assistant. Devastated, Elizabeth told her cheating husband she wanted a divorce. Understanding the pain he put Elizabeth through, Julian decided it would be best to stay with his parents for the time being.

What happened to Julian and Elizabeth's relationship is becoming more common. Internet infidelity is already widespread, but with Facebook and other social media websites, there is now an additional medium that facilitates Internet infidelity. According to a 1997 study, marital therapists rated extramarital affairs as the second most damaging problem to relationships, outranked only by domestic violence.[5] Internet infidelity, and specifically Facebook infidelity, presents unique complications that did not previously exist. A study in 1999 predicted that cybersex would become a major factor in deteriorating marital relations and therefore, a cause of relationship distress and divorce.[6] Additionally, a study in 2003 found that if a partner left his computer accessible or the password is known to his significant other, the partner will often engage in investigatory behaviors that sometimes lead to the discovery of infidelity activities.[7]

C. Evidence

With the increase in discovering infidelity activities online, it is no wonder that attorneys have begun seeking online activity and records in divorce proceedings. In 2010, the American Academy of Matrimonial Lawyers found that 81% of divorce cases handled by their attorney members included social media posts as evidence in divorce proceedings over the past five years.[8]

Let's turn back to the crumbling relationship of Julian and Elizabeth. Both hired attorneys to represent them in their divorce proceedings. After initial consultation and subsequent meetings with their clients, both attorneys realized that Julian and Elizabeth viewed unconventional resources as property that they insisted on

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[2] John T. Cacioppo et al., *Marital Satisfaction and Break-ups Differ Across On-line and Off-line Meeting Venues*, Proceedings of the National Academy of Sciences, June 18, 2013, at 10135, 10138.
[3] *Id*. at 10139.
[4] *Id.*
[5] M.A. Whisman et al., *Therapists' Perspectives of Couple Problems and Treatment Issues in Couple Therapy*, Journal of Family Psychology, Sept. 1997, at 361, 362.
[6] A. Barak et al., *Sex, Guys, and Cyberspace: Effects of Internet Pornography and Individual Differences on Men's Attitudes Toward Women*, Journal of Psychology and Human Sexuality, 1999, at 63, 65.
[7] M.T. Whitty, *Pushing the Wrong Buttons: Men's and Women's Attitudes Toward Online and Offline Infidelity*, Cyberpsychology, Behavior, and Social Networking, Dec. 2003, at 569, 572.
[8] *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, aaml.org, http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey- (last visited January 1, 2014).

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being assured will be theirs to keep. Of these unconventional properties listed by Julian and Elizabeth were: an iTunes account (and all media associated with the account), a blog, and a Facebook profile page.

II. IDENTIFICATION OF VIRTUAL ASSETS

This section provides a small overview of a handful of selected virtual assets. A small variety of the countless virtual assets in existence were chosen in order to analyze how distinct characteristics of each asset could play a significant role in its classification. Each virtual asset grants the individual user some form of property interest, either an ownership interest or a license to use the service.

A. iTunes/Kindle Libraries

Virtual media libraries, such as Apple's iTunes and Amazon's Kindle libraries, are the modern way to store a media collection. Music, movies, and books are now able to be stored on applications such as iTunes on an individual's computer, cell phone, or any other supportable device. In addition to adding media already owned, a user can download content; in the context of iTunes, the iTunes Store allows easy access to purchase a variety of media with a simple click.

Most companies, including Apple and Amazon, provide their software to individuals, not to couples or families. For example, the iTunes software license agreement states:

> The software, documentation and any fonts accompanying this License whether on disk, in read only memory, on any other media or in any other form (collectively the "Apple Software") are licensed, not sold, to you by Apple Inc. ("Apple") for use only under the terms of this License, and Apple reserves all rights not expressly granted to you. The rights granted herein are limited to Apple's and its licensors' intellectual property rights in the Apple Software and do not include any other patents or intellectual property rights. You own the media on which the Apple Software is recorded but Apple and/or Apple's licensor(s) retain ownership of the Apple Software itself. The terms of this License will govern any software upgrades provided by Apple that replace and/or supplement the original Apple Software product, unless such upgrade is accompanied by a separate license in which case the terms of that license will govern.[9]

When the company provides their software to individuals, the individual receives a license to use or rent the software, not to own it. So an individual using iTunes really owns a legal right to *use* the product, not outright ownership of the product. The registered user is also the only individual actually allowed to use the product – not the individual's significant other or family members. Companies attempt to limit and control the use of their content with security features consisting of a class of technologies called digital rights management (DRM).[10] DRM allows companies to remain in control of viewing, copying, printing, and altering content.[11] A majority of companies, such as AT&T, AOL, Apple, Inc., Sony, and Google, use DRM to protect content.

Early on in Julian and Elizabeth's marriage, Julian opened an iTunes account on his iMac and began purchasing and enjoying music on it. Since Julian was not one to enjoy music on the go, he had no problem letting his wife use his account to transfer the music he downloaded onto her iPhone. Elizabeth also used his account to purchase music more to her liking and transferred the music onto her iPhone. After a few months, the amount of music Elizabeth purchased greatly outweighed the amount of music Julian purchased. Eventually, only Elizabeth was using the account.

B. Blogs

Blogs are websites that consist of discussions that are typically displayed in reverse chronological order.[12] Blogs can serve a variety of functions: they can serve as an individual's published journal, provide in-

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[9] *Software License Agreement for iTunes* (September 10, 2013), Apple, Inc., http://www.apple.com/legal/sla/docs/iTunes.pdf (last visited Nov. 3, 2013).
[10] Qiong Liu et al., *Digital Rights Management for Content Distribution*, ACSW Frontiers, 2003, at 49, 52.
[11] *Id.*
[12] Dictionary of Computer and Internet Terms 58-59 (Barron's 10th ed. 2009).

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formation that the blogger wants to share with his audience, or have a particularized focus.[13] Essentially, a blog can be anything that the author wants it to be. Blogs are distinct from traditional websites in that they are much simpler. They usually consist of a single page of entries; some blogs have archives of older entries, but the main page of current entries is the main focus of the blog. Blogs are also traditionally public and open for anyone to view. Most blogs are also in the form of "stream-of-consciousness," the blogger usually adds any topic they feel like posting in no particular order.[14] Blogs have been successful for a variety of reasons, including their constant changing and providing their audience with new, interesting information.[15]

Elizabeth, a regular surfer of the Internet, was no stranger to blogs. After her marriage, Elizabeth decided to start a hybrid blog. She posted original photography of subjects that she encountered in everyday life and also wrote short stories to accompany her photographs.

C. Facebook

Social networking sites, most notably Facebook and Twitter, are platforms to build social networks among people. These sites allow users to share ideas, pictures, posts, activities, events, and interests with people in their network.[16] Upon registering and creating a personal profile, users can do a variety of things such as update their information, add other users as "friends," message other users, and create events to invite their friends to.

Facebook and other social networking sites can provide much more than just social interaction to users. In addition to personal Facebook profiles, individuals can create business pages that can be "liked" and followed by users. Facebook business profiles help the entity communicate and engage with its audience, and capture new audiences virally.[17] Once a business profile is "liked," users will be updated on all news the business provides on its page, including sales, coupon codes, special events, and new arrivals.

Facebook business profiles give both small and large businesses access to viral marketing that helps reach potential and existing customers without having to spend large sums of money. The importance a Facebook page can have to businesses and how to effectively use Facebook to promote a business was extensively analyzed in Clara Shih's book, *The Facebook Era: Tapping Online Social Networks to Market, Sell and Innovate*.[18] Shih discussed the importance of networking for a successful business and how networking can have a far more extensive reach online. Sales depend on referrals, recommendations, and word of mouth marketing – all of which can successfully be developed through a Facebook business profile.[19] As Shih discusses, after opening a Facebook business profile, a business gains a key component in advertising and marketing to the public. This is just as much of an asset to a business as any identifiable, tangible asset.

After witnessing first-hand the benefits other small businesses nearby had after opening Facebook business profiles, Julian decided to open one for his candy store just after his marriage. Julian regularly updated his business's Facebook profile. Additionally, Julian posted Facebook-exclusive content, posted recipes for homemade candy, and held contests through Facebook with prizes to help generate more customers for his shop.

III. THE TEXAS COMMUNITY PROPERTY REGIME

Texas utilizes the community system of property rights of a husband and a wife. Under a community property regime, two property classifications exist: a spouse's separate property and the married couple's joint community property. All property of any kind acquired by the husband and wife, or either of them, during the marriage other than that specifically declared to belong to one of them, becomes the community property of the two.[20] Although the Texas marital property law has experienced substantial changes over more than a cen-

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[13] *Id.*
[14] *Id.* at 374.
[15] *Id.* at 60.
[16] Clara Shih, *The Facebook Era: Tapping Online Social Networks to Market, Sell and Innovate* 18-19 (Mark Taub et. al. eds., 2nd ed. 2010).
[17] *Id.* at 23.
[18] *Id.*
[19] *Id.* at 25.
[20] *Arnold v. Leonard*, 273 S.W.2d 799, 801 (Tex. 1925).

tury of constitutional amendments, legislative enactments, and judicial decisions, the community property regime is a concept rooted in Spanish-Mexican civil law that was the governing law prior to 1840.

In 1840, the Congress of the Republic of Texas adopted the English common law – which limited the traditional Spanish-Mexican community property system that was in place prior to 1840.[21] The first state constitution of Texas reinstated the traditional Spanish-Mexican community property system by restoring the fundamentals of the community property system to all matrimonial property.[22] Following the adoption of the Texas Constitution, the Texas Legislature in 1848 integrated relatively simplistic constitutionally based definitions of both separate property and community property.[23] Separate property was defined as all property owned prior to marriage and all property acquired during marriage by gift, devise or descent.[24] Community property was defined as all other property acquired during the marriage and considered to be owned equally by the spouses.[25] These rudimentary definitions provided the framework to classify new types of property that was created in coming years.

The current Texas Family Code defines a spouse's separate property as the property owned or claimed by the spouse before marriage, the property acquired by the spouse during marriage by gift, devise, or descent, and the recovery for personal injuries sustained by the spouse during marriage, except any recover for loss of earning capacity during marriage.[26] Community property is defined by the Family Code as the property, other than separate property, acquired by either spouse during marriage.[27] In a suit dissolving a marriage, the court is prohibited by law and the Constitution from divesting a spouse of title to his or her separate property by awarding it to the other spouse.[28] In other words, only the community estate of the spouses may be the subject of a court-ordered division. Another important rule is inception of title: the character of property is determined at the earliest moment to which the claimant can legally claim title.[29]

A. Revenue from Property

Two categories of revenue, earnings and profits, are going to be relevant when it comes to determining how virtual property could potentially be categorized. A discussion of how each of these categories have previously been characterized and the reasoning behind it will help address how courts may address the issue of virtual assets.

1. Earnings

The earnings of either spouse during their marriage are considered community property. As stated in *Vallone*, "it is fundamental that any property or rights acquired by one of the spouses after marriage by toil, talent, industry, or other productive faculty belongs to the community estate."[30] A salary is the most common example of earnings. The salary that Julian pays himself and takes home from his candy shop is considered his earnings because it was created by his labor. During his marriage, Julian's salary is community property – both he and Elizabeth have an undivided interest in the salary, although Julian has full managerial rights of it.

2. Profits

Profits are distinct from earnings. Profits generally consist of dividends, interest, and rents. Whereas earnings are what a spouse gains based on his effort, skill, or industry, profits are what a spouse gains from things *without* exerting effort, skill, or industry and without diminishing the substance of the underlying thing.[31] All community property regimes classify the profits of community property as community property. However, two rules have developed with regards to the profits of separate property: the Civil Law Rule and the American Law Rule. According to the Civil Law Rule, the rents, issues, and profits of all property, both separate property and community property, are community property.[32] The determination of profits from sep-

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[21] Act of Jan. 20, 1840, 1840 Tex. Gen. Laws 3, 2 H. Gammel, Laws of Texas 177-80 (1898).
[22] Tex. Const. Art. VII, § 19 (1845).
[23] Act of March 13, 1848, 1848 Tex Gen. Laws 77, 3 H. Gammel, Laws of Texas 77-79 (1898).
[24] *Id*.
[25] *Id*.
[26] Tex. Fam. Code Ann. § 3.001 (Vernon).
[27] Tex. Fam. Code Ann. § 3.002 (Vernon).
[28] *Cameron v. Cameron*, 641 S.W.2d 210, 219-220 (Tex. 1982); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977).
[29] Tex. Fam. Code Ann. § 3.006 (Vernon).
[30] *Vallone v. Vallone*, 644 S.W.2d 455, 458 (Tex. 1982).
[31] Tex. Fam. Code Ann. § 3.002
[32] *Moss v. Gibbs*, 370 S.W.2d 452, 455 (Tex. 1963).

arate property as community property is without regard to the profit being attributable to community labor or a return on separate property capital. The Civil Law Rule is derived directly from Spanish civil law. Under Spanish law, a wife was given a share of the fruits resulting from property that not shared with the wife just as she was entitled to a share of the fruits of all other goods whatsoever, acquired during the marriage.[33] Texas, along with Louisiana, Idaho, and Wisconsin, follow the Civil Law Rule. In our ongoing story, the profits from Julian's candy shop are classified as community property.

According to the American Law Rule,[34] income generated during marriage from separate property is separate property, except to the extent that the income is generated from community property skills and labor. Arizona, California, Nevada, New Mexico, and Washington follow the American Law Rule.

B. Unrealized Gain

In addition to earnings and profits, increases in value and goodwill represent unrealized gain that have the potential to play a role in determining how virtual assets may be characterized.

1. Increases in Value

Property can also increase in value along with creating a profit. A troublesome issue associated with increases in value is when there is an increase in the value of separate property due to community labor (labor exerted by one spouse during the marriage). Two approaches have developed to deal with this issue: either a property right is created or a right to reimbursement is created. Texas follows the approach that creates a right to reimbursement.[35] Under this approach, the underlying classification remains the same and the community is entitled to be reimbursed for the reasonable value of the time and effort of both or either of the spouses that contributed to the increase in value.[36] The reasoning behind the adoption of this approach is community labor may increase the value of separate property, but it does not change the underlying classification of the property itself. However, if an increase in value is due to market conditions and not a spouse's effort, then no right to reimbursement exists. This approach is followed by all community property states, including Texas, except for California and Wisconsin. The other approach, the community ownership theory, holds that any increase in the value of the stock as a result of the time and effort of the owner spouse becomes community property.[37]

Under a right to reimbursement theory, an increase in the value of Julian's candy shop due to his efforts needs to be reimbursed, whereas an increase in the value attributable to market conditions (e.g., property value of the land under the shop) does not need to be reimbursed.

2. Goodwill

Goodwill is the value of a business beyond the liquidation value of the capital stock, funds, and property used in the business.[38] Goodwill generally reflects the favorable consideration of customers for a well-conducted business.[39] It can be based on several factors such as location, reputation for skill, demonstrated punctuality, or even celebrity.[40] There are two types of goodwill: commercial goodwill and professional goodwill.

Commercial goodwill is required to be considered in the valuation of a company's stock or partnership's interest. In order to be considered in the valuation of a company, goodwill must be independent of the personal ability of the spouse (in other words, not professional goodwill) and have commercial value in which the marital community is entitled to share.[41]

Professional (or personal) goodwill, as opposed to commercial goodwill, attaches to an individual rather than a trade or business.[42] It is the result of confidence in an individual's professional skill or ability and has

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[33] William Q. De Funiak & Michael J. Vaughn, *Principles of Community Property* § 71 (2d ed. 1971).
[34] Information regarding rules outside of Texas, such as the American Law Rule, is provided throughout this article to inform readers of rules that exist outside of Texas. Analysis regarding these rules is not considered as part of the scope of this article.
[35] *Jensen v. Jensen*, 665 S.W.2d 107, 109 (Tex. 1984).
[36] *Id.*
[37] *Id.*
[38] *Finn v. Finn*, 658 S.W.2d 735, 742 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).
[39] *Austin v. Austin*, 619 S.W.2d 290, 292 (Tex. App.—Austin 1981, no writ).
[40] *Id.*
[41] *Finn*, 658 S.W.2d at 740.
[42] *Nail v. Nail*, 486 S.W.2d 761, 763-64 (Tex. 1972).

no value apart from that individual.[43] The Texas Supreme Court determined that the goodwill of one's professional practice was not property subject to division upon divorce as part of the community estate.[44] In *Nail v. Nail*, the wife sought to recover a community interest in the value of the goodwill of her husband's medical practice.[45] The Court, recognizing the impracticalities of placing a dollar value on such an interest, held that the goodwill of a professional practice is only an expectancy, not a vested property right, and therefore is wholly dependent upon the continuation of existing circumstances.[46]

For Julian's candy shop, it is unlikely (based on the facts presented) that the candy shop business is directly related to Julian's personality compared to the location of the shop and the merchandise sold.

IV. POTENTIAL AREAS OF LAW FOR GUIDANCE

As previously mentioned, no court in any United States jurisdiction has addressed the classification and subsequent division of virtual assets as marital property. By seeing how courts have classified and divided other non-traditional assets, one can gain perspective on how courts could potentially deal with virtual assets, if they are determined to be property.

A. Intellectual Property as Marital Property

Intellectual property is the closest relatable type of property that may provide guidance for classifying virtual property. Because intellectual property inherently involves intangible assets, it is likely to be one of the first areas a court dealing with virtual assets will turn to. Intellectual property is a legal concept that refers to creations of the mind for which exclusive rights and protections are recognized. There are three areas of intellectual property that may help shed light on how a court will deal with virtual assets: copyright law, patent law, and trademark protection. All three forms of statutory protections for intellectual creations fit well under the category of property rights in that each provides valuable and exclusive rights to the owner, such as the power to exclude and the right to the exclusive use of the protected matter.

Intellectual property is virtually indistinguishable from other marital property subject to division. Like ordinary assets, intellectual property is acquired by the labor of one of the spouses. Additionally, a spouse would have the same expectation to share as fully in intellectual property as all other property acquired. Moreover, many intellectual properties owned by an individual are often associated with their business – which already has the potential to be characterized as marital property.

1. Copyrights

Copyright law protects works of authorship, including literary, musical, dramatic, pictorial, graphic, and sculptural works, motion pictures, and sound recordings.[47] Discussion of whether copyrights can constitute marital property in Texas has focused primarily on the U.S. Fifth Circuit Court of Appeals case *Rodrigue v. Rodrigue*.[48]

Rodrigue involved a wife claiming she had an undivided one-half interest in all of her husband's paintings created after the commencement of their marriage.[49] The husband created several paintings (intellectual properties) depicting a stylized image of a blue dog that were widely acclaimed.[50] The decision and documents before the *Rodrigue* court contains no information quantifying the value of the paintings or the interest being claimed. The husband contended that the Copyrights Act, a federal statute, preempted (or displaced) the Louisiana community property regime, making the paintings his separate property because he created them.[51] However, the court disagreed with the husband and found no language in the Copyrights Act expressing the desire of Congress to preempt state community property regimes.[52]

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[43] *Id.*
[44] *Id.*
[45] *Id.* at 763.
[46] *Id.* at 763-64.
[47] 17 U.S.C. § 102.
[48] *Rodrigue v. Rodrigue*, 218 F.3d 432, 434 (5th Cir. 2000).
[49] *Id.*
[50] *Id.* at 435.
[51] *Id.*
[52] *Id.* at 439.

The *Rodrigue* court found that the community estate had an interest in the copyright itself, but this interest did not mean that the non-creating spouse had authority over the copyright.[53] Essentially, the proceeds from the copyright are community property, but control of the copyright is vested in the creating spouse. Therefore, only the creating spouse could sell the copyright. Due to the community's interest in the copyright, the community also had an interest in the economic benefits generated by the copyrighted material during the marriage and an interest in the economic benefits of the works that were derivative of the intellectual property generated during the marriage.[54]

2. Patents

Patent law protects inventions, including any new and useful process, machine, manufacture, or composition of matter.[55] With respect to patents, several courts have concluded that patents earned during marriage constitute community property. In *Alsenz v. Alsenz*,[56] the Houston Court of Appeals was the first Texas court to hold that the traditional inception of title rule applies to patents.[57] *Alsenz* involved a husband's patents that were created prior to his marriage and were therefore his separate property.[58] However, the issue before the court was how to characterize the royalty payments received from the patents during the marriage, another issue that had not previously been addressed by a Texas court.[59]

The wife argued the important holding in *Arnold v. Leonard*,[60] income produced from separate property is considered community property, should apply to the patent royalty payments.[61] The husband argued that the patent royalty payments are equivalent to the exception to the *Arnold* rule that exists for oil and gas royalties: oil and gas royalties are separate property because they are payment for the extraction of the separate property oil and gas.[62] Since the value of a patent diminishes over time, similar to that of oil and gas, they should be treated the same.[63] Although the court agreed that a patent is similar to oil and gas in that it has a finite life, the court ultimately sided with the wife and held that income from intellectual property created during marriage is community property.[64]

3. Trademarks

Trademark protection extends to names, symbols, or designs used to identify products.[65] Two methods of analysis have been proposed in characterizing trademarks as marital property. Trademarks can either be treated as marital property under general property concepts, with analysis similar to the characterization of copyrights and patents discussed above, or they could be treated as goodwill, which could also subject it to being considered as marital property.[66]

In support of the first proposition, the *Alsenz* court that analyzed patents as marital property discussed their analysis with respect to general intellectual property.[67] Specifically, the court talked about how intellectual property, including trademarks, have their value based on the income that can be generated from the property.[68] Based on this language, it is not difficult to see a Texas court hearing a case involving trademarks in the future drawing similar conclusions as the *Alsenz* court.

Since trademark protection extends to names, symbols, or designs used to identify products or services, there is a minor prospect that companies with certain trademarks can have commercial goodwill based on the

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[53] Id. *at 438*.
[54] *Id.* at 443.
[55] 35 U.S.C. § 101.
[56] *Alsenz v. Alsenz*, 101 S.W.3d 648, 651 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).
[57] *Id.* at 652.
[58] *Id.*
[59] *Id.*
[60] *Arnold v. Leonard*, 273 S.W. 799, 803 (Tex. 1925).
[61] *Alsenz*, 101 S.W.3d at 653.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 654.
[65] 15 U.S.C. §§ 1051.
[66] *Intellectual Property Rights*, Intangible Assets: Recognition and Valuation, Valuation and Distribution of Marital Property (Matthew Bender 2013).
[67] *Alsenz*, 101 S.W.3d at 653.
[68] *Id.*

trademark. Recall that commercial goodwill requires the goodwill to be independent of the personal ability of the spouse and it must have commercial value.[69] It is conceivable, for example, for a cereal company, such as Kellogg's, to have commercial goodwill rooted in a popular brand of cereal due to the trademarked name of the cereal (such as Frosted Flakes) and also the trademarked characters on the cereal box itself (Tony the Tiger). Treating trademarks as commercial goodwill is an interesting alternative to the analysis involving copyright and patents, but it is unlikely to gain traction, due to the *Alsenz* court discussion with respect to intellectual property as a whole.

4. Potential Importance of Intellectual Property for Virtual Assets

Although there are only a handful of cases involving intellectual property as marital property, these cases may very well serve as guidance for future Texas courts faced with the difficult task of classifying virtual assets. Consider the *Rodrigue* court's decision regarding copyrights. This case will be relevant substantively because there are some virtual assets that are protected by copyright law, such as a blog containing original, copyrighted literary works. For these virtual assets, the case law and analysis contained in *Rodrigue* will be directly pertinent.

Additionally, *Rodrigue* remains relevant even for virtual assets that are not protected by copyright. The analysis provided in *Rodrigue* involved a novel issue for the court. The *Rodrigue* court provided an analytical framework for future courts faced with similar novel assets, such as those presented with the issue of virtual assets. The *Rodrigue* court went to great lengths to understand the nature and subtleties of copyrights and then applied this information to determine if copyrights are considered part of a community property regime.

When it comes to a court addressing virtual assets in the future, it will be essential to follow *Rodrigue*'s lead. Consideration of the virtual asset itself, along with laws pertaining to the virtual asset, will be essential in coming to appropriate decisions. It will be impossible for a court to address a subject as novel as virtual assets without obtaining a comprehensive understanding of the asset itself.

This remains true for virtual assets that are protected by patents and trademarks. Courts that have previously discussed these intellectual properties as marital property will be directly relevant to virtual assets containing these intellectual properties. As with the *Rodrigue* court, these courts' frameworks in discussing such complex subject matters will provide guidance to courts faced with virtual assets.

B. Frequent Flyer Miles

Businesses create programs that give customers points or credit toward future benefits. One of the most significant of these programs in terms of use and value is frequent flyer miles given by airlines and credit card companies. Frequent flyer miles have been held to constitute property and some courts have even suggested that the miles can be a marital asset.[70] Two court decisions divided the frequent flyer miles without consideration at the appellate level whether such a division was proper.[71]

A problem that arises with treating frequent flyer miles as property is that airlines and credit card companies reserve the right to change the program at will and can even repeal it completely. Additionally, there are a few airlines that have enacted rules stating that frequent flyer miles cannot be transferred, such as the European airline Lufthansa.[72] In *In re Marriage of Alford*, the Texarkana Court of Appeals determined it was proper to order a husband to take all steps necessary to accomplish a transfer of the Lufthansa frequent flyer miles to his ex-wife as stated in their divorce decree.[73] The court determined that the order was proper even if the transfer ultimately proved to be impossible due to Lufthansa airline's policy of not transferring miles between individuals and not allowing individuals other than spouses to use an individual's mileage.[74]

However, the rule against the transfer of frequent flyer miles is sometimes waived, especially when requested by valued airline customers. Some airlines are even willing to make divorce-related transfers of frequent flyer miles on a case-by-case basis.[75] Additionally, the *Alford* decision involved Lufthansa airline,

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[69] *Finn*, 658 S.W.2d at 740.
[70] Brett R. Turner, *§ 5:11. Property – Interests Which May or May Not Constitute Property*, Equitable Distribution of Property (updated December 2012).
[71] *See Hakkila v. Hakkila*, 812 P.2d 1320, 1325 (Ct. App. 1991); *Williams v. Williams*, 1998 WL 775657, at *3 (Tenn. Ct. Ap. 1998).
[72] *In re Marriage of Alford*, 40 S.W.3d 187, 194 (Tex. App.—Texarkana 2001, no pet.).
[73] *Id.*
[74] *Id.*
[75] *See* James L. Dam, *New Asset in Divorce and Estate Planning: Frequent Flyer Miles*, 99 Lawyer's Weekly USA 1059 (Nov. 29, 1999) (determining that there is a significant difference between stated airline policy and what the airlines actually do).

which is predominantly a European airline. Many of the large American airlines, including Delta Airlines, United Airlines, and Southwest Airlines, currently allow transfers of frequent flyer miles. Each airline has its own restrictions as to whom the points can be transferred to, how many transfers are allowed, and a fee (typically small) for the transfer.

Similar to intellectual property cases, the most difficult issue arising out of frequent flyer miles cases is valuation of the miles. The programs are not all consistent with each other – one can obtain tickets with drastically different fair market values with the same amount of points. One case out of Alaska approved a trial court's usage and acceptance of expert testimony to settle the value of airline miles. In *Martin v. Martin*, the husband disputed the court's valuation of the Alaska Airlines' frequent flier mileage account at two cents per mile.[76] The husband argued that because the parties cannot sell the mileage, it has no fair market value.[77] The wife countered, and the court agreed, that market transferability is not a prerequisite to determine the value for property division purposes.[78] The court stated, "an asset need not be marketable if the court can objectively determine that it has value to its owner."[79] However, the opinion does not contain any information as to how the expert came up with the value stated. It is possible the price was taken from a "gray market" company[80] that permits transfer of miles in a manner directly contradictory to airline policy, but is tolerated by the airlines.[81]

In a more recent case, the Dallas Court of Appeals in *In the Matter of the Marriage of C.A.S. and D.P.S.* upheld a trial court's decision in dividing 15 different accounts between the divorcing couple.[82] The accounts had varying amounts of points, ranging from zero points in some accounts to as much as 283,047 points in one account.[83] The husband was awarded approximately half of the cumulative points, even though there was no evidence of the value of each account at the trial level.[84] The husband asserted that the trial court erred by failing to value the reward points.[85] The court disagreed, stating that the husband failed to establish that the trial court abused its discretion by not placing a value on the points that were awarded.[86] In other words, the trial court was not required to make a finding of the value of the points prior to awarding them to each individual.

This line of cases is important to virtual assets for several reasons. First, they show that a court may order the transfer of an asset, even if a transfer ultimately proves unsuccessful, similar to the *Alford* decision. Second, they show that valuation can be relied upon by expert testimony, even if the asset is not marketable, as was the case in *Martin*. Moreover, valuation of an asset may not be required at all in awarding certain assets, as in *C.A.S.* These implications to virtual assets will be discussed in more detail in the following section.

V. DIVISION OF VIRTUAL ASSETS

A. iTunes/Kindle Libraries

iTunes and Kindle media collections will probably be the virtual assets first held to constitute marital property by a court. An individual's media collection stored virtually should be considered to be as much as their property as an individual's actual DVD and CD collections. Individuals currently expend a similar amount on their virtual media collection (or more, considering how much easier it is to click and buy virtual media) as they previously had on physical media collections. Similar to the Alaskan case *Martin*, the fact that the virtual media collection cannot be sold should not preclude it from being property and considering what

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[76] *Martin v. Martin*, 52 P.3d 724, 731 (Alaska 2002).
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *See* Carole Gould, *Personal Finance; Dealing in the Airline 'Gray Market*, The New York Times (June 1, 1986), http://www.nytimes.com/1986/06/01/business/personal-finance-dealing-in-the-airline-gray-market.html (discussing broker businesses that specialize in frequent flier miles and points).
[81] Brett R. Turner, *§ 5:11. Property – Interests Which May or May Not Constitute Property*, Equitable Distribution of Property.
[82] *In re Marriage of C.A.S. and D.P.S.*, 405 S.W.3d 373, 389 (Tex.App.—Dallas 2013, no pet.).
[83] *Id.*
[84] *Id.*
[85] *Id.* at 388.
[86] *Id.* at 389.

price a buyer would pay for it. Moreover, it is possible that evidence of the value of the collection would not be required at all, similar to *C.A.S.*

The first place to look for a potential answer as to the division of virtual media collections is the software license agreement and terms of use provided by the company when downloading the software. For iTunes products, the iTunes software license agreement states:

> You may not rent, lease, lend, redistribute or sublicense the Apple Software. You may, however, make a one-time permanent transfer of all of your license rights to the Apple Software to another party, provided that: (a) the transfer must include all of the Apple Software, including all its component parts, original media (if any), printed materials and this License; (b) you do not retain any copies of the Apple Software, full or partial, including copies stored on a computer or other storage device; and (c) the party receiving the Apple Software reads and agrees to accept the terms and conditions of this License.[87]

For Kindle products, the Kindle Store Terms of Use states:

> Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Kindle Content or any portion of it to any third party, and you may not remove or modify any proprietary notices or labels on the Kindle Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the Kindle Content.[88]

After reading these clauses, one phrase stands out: a user may "make a one-time permanent transfer of all of your license rights to the Apple Software to another party."[89] This suggests that, although an iTunes library may not be divided between two users, it can be transferred completely to another individual. This phrase is absent from the Kindle Store Terms of Use.

Since Julian was the individual who initially opened and registered the iTunes software, the software and the virtual media collection will initially be considered his. This will come as a shock to Elizabeth, who believes the collection should be hers since she is the primary user of the account and also accumulated the majority of the huge collection.

However, similar to the frequent flyer miles situation in *Alford*, it is possible a judge may find Elizabeth's arguments convincing and order Julian to take all steps necessary to accomplish a transfer of the media collection to Elizabeth. Like in *Alford*, it may seem irrelevant to the judge if the transfer proves to ultimately be impossible due to the company not allowing the transfer, as long as Julian takes all steps necessary to attempt to transfer the account. This analysis is most likely to be unnecessary, since the iTunes software user agreement states a one-time permanent transfer is allowable. This one-time transfer may provide the perfect answer to Elizabeth in making sure her music collection stays with her.

This situation could come out in a variety of other ways, depending on a number of factors. Let's say that instead of an iTunes library, Julian registered a Kindle account to read books. However, Julian realized he was not fond of reading recreationally, and Elizabeth soon began to use his account to purchase books and magazines. This account would also be considered Julian's, because he was the individual who registered the account.

However, unlike the iTunes account, the Kindle Store Terms of Use has no language allowing for a one-time permanent transfer of the account. It is possible that this omission was intentional and Amazon has no intentions to allow a user to transfer his rights to another, even in a one-time permanent transfer. This could result in Julian ultimately keeping the account, even if ordered to do everything in his power to transfer the collection over by a court. Alternatively, Amazon may view Apple's solution of a one-time transfer as a sort of industry standard and follow Apple's lead. This would allow Elizabeth to successfully keep her literary collection.

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[87] *Software License Agreement for iTunes*, Apple, Inc.
[88] *Kindle Store Terms of Use* (September 6, 2012), Amazon, http://www.amazon.com /gp/help/customer/display.html?nodeId=201014950 (last visited Nov. 3, 2013).
[89] *Software License Agreement for iTunes*, Apple, Inc.

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B. Blogs

Elizabeth opened her blog after her marriage to Julian. The inception of title rule results in the blog itself being community property, since it commenced after her marriage to Julian. There are two main property rights that need to be classified with regards to Elizabeth's blog: the right to the blog posts themselves and the right to any revenues generated by the blog. The content of Elizabeth's blog posts would also be viewed as community property under the inception of title rule.

Note that if Elizabeth had begun her blog prior to her marriage, additional issues need to be addressed. A court would have to determine if there is a distinction between blog posts prior to marriage and those after marriage. If the court determines that there is no distinction, then the marital posts would simply constitute additions to Elizabeth's already existing separate property. If a court determines that there is a distinction, then Elizabeth's blog posts after her marriage could be determined to be new forms of property altogether. These marital posts would then be newly created community property because they were generated during the community.

A court addressing this issue would likely follow *Rodrigue*'s lead in analyzing novel assets. This court would be faced with a novel issue, as the *Rodrigue* court with the issue of copyrights, and also have to go through the difficult task of understanding the nature and subtleties of blogs. This court would likely draw comparisons to more traditional resources that blogs are based on. A court will have to determine if the blog posts are more similar to a diary (like most traditional blogs) or a publication resembling a newspaper. If a court adopts the former comparison, it is likely that her blog posts will be classified as a single unit (like a conventional diary) and therefore, be considered her separate property. If a court adopts the latter comparison, it is likely that her blog posts will be classified as individual, unrelated posts – which would make a distinction between pre-marital posts and marital posts.

A major consideration would be the subject matter of Elizabeth's blog. Since the blog revolved around separate and distinct photographs and stories that were unrelated, it is likely that a court would see the posts as distinct units, allowing a split of the posts between separate property posts and marital property posts.

The classification of the blog posts is an issue that seems irrelevant since the posts by themselves are not likely to be a valuable asset. What makes the posts valuable is what can come from the posts. Returning to the original facts (Elizabeth started her blog after her marriage), suppose a company contacts Elizabeth regarding an upcoming book they are publishing: a coffee table book consisting of a collection of short stories accompanied with photographs taken by the author. Elizabeth's blog posts intrigued the publishers and they would love to include her posts in their book. If a deal is reached, the money Elizabeth received would be her earnings that are due to her time, toil, and efforts in writing the stories and taking the photographs. The earnings would be community property, just like Julian's salary from his candy shop.

Additionally assume that Elizabeth has all of the content on her blog, both photographs and literary works, protected by copyright. This would require additional analysis to determine if income from her copyrighted material is similar to the money collected from her book deal. Any future money Elizabeth received from the subsequent reproduction of her copyrighted material is something that she gains *without* exerting effort, skill, or industry: it is money based in the copyrighted material. As in *Rodrigue*, the community estate will have an interest in Elizabeth's copyright and the proceeds from the copyright will be community property. Elizabeth will continue to be the sole individual in authority and control over the posts.

A final difficulty to consider with respect to blogs is revenue due to advertisements. If Elizabeth has advertisements placed on her blog that generates money, how should this be classified? There are two possibilities: earnings and profits. The most important factor in determining how the revenue should be classified is if Elizabeth exerted her time, toil, and effort to the advertisements. A court would have to look at if Elizabeth exerted effort towards the advertisements, along with efforts other individuals exerted towards the advertisements to determine a correct classification.

An important factor the court cannot ignore is Elizabeth's time, toil, and effort in the blog posts themselves that attracted her blog readers, who in turn viewed and clicked ads. After all, the readers would be unable to click on the advertisements to generate money if they were not at Elizabeth's blog in the first place. Her efforts in her producing a successful blog present an argument that the revenue should be classified as earnings.

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However, other factors may result in a court determining the revenue is profits. If a court determines that Elizabeth exerted little to no labor or effort to the advertisements, it is likely to be classified as profits. This would be the case if Elizabeth provided a limited amount of information to the advertising company and allowed the company to do the real work: selecting which advertisements to place on the blog and actually placing them onto the blog. Another aspect in favor of classifying the ad revenue as profits is the blog audience, who are the actual individuals exerting effort by viewing the ads and clicking on the ads that interest them. Since the majority of the effort with regard to the advertisements is with the advertising company and the blog audience (in this hypothetical), the revenue should be considered profits. Close attention to the individual circumstances surrounding a particular blog is essential to reaching the correct outcome, since blogs present issues that include aspects of both earnings and profits.

C. Facebook

Recall that Julian created his business Facebook page after his marriage to Elizabeth. Although the account was created during his marriage, it was registered under his name and this significant fact will result in the account likely staying with him. Similar to the way Apple limits iTunes accounts to one individual, Facebook also restricts the sharing and transferring of accounts by only allowing one individual to be the user of each profile.

Facebook presents analogous issues that have already been addressed. For example, is Julian's business Facebook page considered one entity as a whole or distinctive, individual pieces of property? Under the former theory, all of the content posted to a profile page is considered to be one piece of property. Under the latter theory, each Facebook wall post, message, and photo would be considered individual pieces of property. Under this approach, it would be conceivable to easily categorize the Facebook profile between content created prior to marriage and content created during the marriage, similar to the hypothetical involving Elizabeth's blog being created prior to marriage.

If Julian created the Facebook page prior to his marriage, could some of the content added during his marriage be deemed an increase in value? Since Julian actively posted content and added photos to the Facebook business page during his marriage, it is possible that this content created during the marriage could be deemed an increase in value. Texas follows the right to reimbursement approach; the community estate would be entitled to be reimbursed for the reasonable value of the Julian's time and effort that contributed to the increase in value. However, how is a court to go about valuing the content on a Facebook page, if it is found that the content created an increase in value? The value of the increase could potentially be shown through expert testimony, which could revolve around a showing that after Julian's post of a sale or a Facebook-exclusive coupon, traffic through his store increased more than on days where no sale or coupon was posted.

However, there are unique issues relating to Facebook, such as Facebook friends. Assume Julian had his business Facebook page prior to his marriage and he had 200 friends. During the course of the marriage, there is an increase to 500 friends. These additional 300 friends are unlike the content that Julian adds in posts and photos – they are not content at all. They are connections that Julian made. Should these additional friends be viewed as an increase in value, similar to the content that he posts? Or is it possible that these additional friends are goodwill? The circumstances surrounding the Facebook page determines if these additional friends can be characterized as an increase in value or goodwill.

Like any increase in value, Julian's Facebook page went up in value using community labor – he had to maintain his page and interact with the general public to get people to "like" or "friend" his page. Julian had to spend his time and energy finding new friends, requesting new friends, and accepting incoming friend requests. This labor would be characterized as community labor (if done during his marriage) and entitle the community to a claim of reimbursement for the reasonable value of Julian's time and effort that contributed to the increase in value.

Valuing the right to reimbursement the community has is a distinct issue. An attorney would likely include expert testimony to help demonstrate the value of the reimbursement claim. Exactly what type of expert testimony that a court would consider remains to be seen.

Viewing the additional friends as goodwill brings up its own issues. In adding the new friends, Julian increased his online presence in that more Facebook users will now be able to see his business and talk about it with their friends. Adding Facebook friends not only adds worth to Julian's Facebook profile, but it also

adds to his business. Every new friend added is potentially viral word-of-mouth publicity for his business, which could lead to new customers that would have otherwise not have been customers at all.

These additional friends, if viewed as goodwill, will have to be additionally characterized as commercial goodwill or professional goodwill. Remember that in order to be considered in a valuation, goodwill has to be independent of the personal ability of the spouse and have commercial value. It is conceivable that the way Julian interacts with individuals on Facebook can determine what type of goodwill is appropriate.

If his interactions are from his individual perspective, as opposed to the business's perspective, it is likely that the goodwill will be classified as personal goodwill attached to Julian. This is because the Facebook page is generating an image of Julian as an individual, more so than his candy shop. This would be the case if Julian often posts personal information that is irrelevant to the candy shop, for example. If his interactions are restricted to content regarding his candy shop (as the original hypothetical presents), it is likely that commercial goodwill will result. By posting homemade recipes for his followers and holding contests through Facebook, Julian is generating publicity for his candy shop, most likely in the hopes of drumming up customers. This is likely to be held by a court to have commercial value that is independent of Julian.

VI. CONCLUSION

This article discusses three examples of virtual assets and pursues what legal ramifications may follow if the assets are sought after in a divorce. Many other virtual assets are currently in existence, such as e-mail, websites, online game currency, virtual property solely accessible in virtual worlds/games, and Bitcoin digital currency. Each has unique characteristics that distinguish it from other virtual assets. A beginning examination should always be an understanding of what the virtual asset exactly is. An analysis of each virtual asset requires inquiry into the facts and circumstances surrounding both the asset and a spouse's actions concerning the asset.

Virtual assets and their role as marital property are likely to come before a Texas court in the near future; it is only a matter of time before judges are confronted with these unique assets. Divorcing spouses will soon begin to argue before courts that their virtual assets are too valuable to ignore in a division of their assets. It is fundamental for both courts and attorneys to understand virtual assets in order to be prepared for when the legal issue does come up. As this article demonstrates, current Texas community property law can provide resolutions for these new forms of property, just as current law provided resolutions for assets such as intellectual property. This may very well permit innovative attorneys to successfully argue in court that current law allows and even *requires* classification, valuation, and distribution of virtual assets.

ENFORCING CONTRACTUAL ALIMONY: A NEW WORLD OR A STEP TOO FAR?

By Travis Sheffield[1]

INTRODUCTION

Can a person be jailed for failure to pay support to a former spouse? Texas courts have recently struggled with interpreting the enforcement provisions in Texas Family Code Chapter 8, Maintenance. Texas has a relatively short history of allowing alimony or spousal maintenance. The idea of alimony has existed in the United States and England since before divorce was allowed. Texas law, on the other hand, has long considered such payments of support to be against public policy. It was not until 1967 that the Texas Supreme Court recognized that parties to a divorce could create such payments as a voluntary private contract if they chose to do so, and that such an agreement was enforceable and not against public policy.[2] In 1995 the Texas Legislature authorized limited spousal maintenance payments to be ordered by a divorce court in certain specifically defined situations.[3] The intention was for the support to continue only for the period necessary for the former spouse to acquire education and employment to enable that person to meet their own reasonable needs. Note

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[2] Francis v. Francis, 412 S.W.2d 29 (Tex. 1967).

[3] H.B. 691, 77th Sess. (Tex. 1995).

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that such an order may only be issued in connection with "a suit for dissolution," either as an initial portion of the suit or later when personal jurisdiction over the potential obligor is obtained.[4] Texas Law does not authorize spousal maintenance in the absence of dissolution of the marriage as is a regular aspect of family law in many other states in a "suit for separate maintenance.[5]

An order for spousal maintenance is enforceable by contempt as it is considered a legal duty arising out of the status of the parties.[6] Texas courts, in deciding how to enforce payments for support, must determine whether such payments are maintenance and or contractual alimony.[7] If the court decides it is maintenance, it can be enforceable by contempt,[8] but contractual alimony is considered a private debt. Therefore, clearly, until at least September 1, 2013, it was unconstitutional to hold a former spouse in contempt for failure to pay contractual alimony.[9] Whether that consequence remains in place is the subject of this article.

In the 2013 legislative session, House Bill 389 purports to put the enforcement of contractual alimony and court-ordered spousal maintenance on an equal footing.[10] Historically, in Texas contractual alimony has been treated as a contractual obligation and was enforced as a contractual debt, immune to contempt and wage withholding enforcement options available for court ordered maintenance.[11] Now, the legislature has created an expanded remedy in which a default on an obligation to pay contractual alimony contract can bring jail time through contempt if the payments are not made. This article will cover the history of spousal support in Texas and the difference between maintenance and contractual alimony. It will then describe how the courts have distinguished the two in enforcement practice, the constitutional issues that arise, and finally, the possible ways the court will interpret the new legislation.

HISTORY AND PURPOSE OF POST-DIVORCE SPOUSAL SUPPORT

To understand the Texas alimony statute, a brief review concerning the past attitudes toward alimony may be helpful. Marriage is considered a union or a partnership. This view requires that, if the partnership ends the assets accumulated during the marriage should be divided in a manner consistent with the process under which they were acquired. In many separations, however, the questions remain: do divorced spouses truly leave their marriage on an equal basis considering the growth and accumulations during the marriage? For example, how will the spouse who has decided against a career in order to invest her time and skills to make a home be able to support herself after divorce? Will a one-time property allocation or its lump-sum monetary award be enough to support her after the divorce? Nationally, alimony has provided some significant part of the solution to these questions in many cases.

Alimony, or "spousal maintenance" in the United States, has its roots in a time when a divorce was difficult and sometimes almost impossible to obtain, and husbands owned all the property and controlled all the income.[12] In extreme cases involving infidelity or desertion by the husband, a court could grant a "Divorce from Bed and Board" authorizing the spouses to live separately, but the husbands remained legally responsible for financially supporting their wives even if the couple was completely separated.[13] The husband's payment of support during separation was the original form of alimony.[14] Once divorce became possible for ordinary couples, the idea of continuing spousal support remained.[15] In the late 1960s and early 1970s, reforms such as the development of a no-fault divorce, and the judicial conclusion that the use of property division, rather than alimony, attempted to assure fair economic divisions in the divorce.[16] Alimony became less important both in theoretical and practical terms, but no state actually abolished it because reformers recognized

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[4] Homer Clark, *The Law of Domestic Relation in the United States* Vol 1 449-462 (West 2d ed. 1987)
[5] Id.
[6] Ex Parte Hall, 854 S.W.2d 656, 658 (Tex. 1993).
[7] In re Green, 221 S.W.3d 645 (Tex. 2007).
[8] Tex. Fam. Code § 8.059 (2013).
[9] Tex. Const. art. I, § 18 ("No person shall ever be imprisoned for debt.").
[10] H.B. 389, 83rd Sess. (Tex. 2013).
[11] *Green*, 221 S.W.3d at 645.
[12] Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 Duke J. Gender L. & Pol'y 41 (2011).
[13] Id.
[14] Id. at 44.
[15] Grace Ganz Blumberg, *The Financial Incidents of Family Dissolution, in Cross Currents: Family Law in England and the United States Since World War II*, 387, 393-392 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000).
[16] McMullen, *supra* note 11, at 81.

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that women were still not equals in the work place, and that fact could not be ignored as an element during the divorce decision making.[17] Since then, alimony has become less common of a remedy, and the case law has developed in a way that allows spousal maintenance payments to be used less as a remedy for restitution, and more for rehabilitation of the spouse.[18]

Restitution

Employed spouses accumulate various benefits from their employment during marriage, such as pensions and future earning potential.[19] One marital partner may benefit from career growth and future earning power, while the other partner who suspends her education or stays at home to raise the children potentially suffers from her own diminished earning capacity in a career setting.[20] Some jurisdictions justify that an alimony award for these purposes allows the supported spouse a share in the lifestyle she helped to create during the marriage, and may serve as *restitution* for the investment she was unable to make in herself.[21]

Rehabilitation

Today's culture in Texas and most other jurisdictions consider that the modern objective of alimony is to reduce the financial impact of divorce on the supported spouse.[22] It serves to *rehabilitate* that spouse and allows the disadvantaged spouse the opportunity to obtain the skills or education needed to support oneself. A rehabilitative alimony award is usually a temporary one, lasting only as long as the spouse needs to learn the skills and find a job providing self-support.[23]

Tax advantages of spousal support

The Internal Revenue Code outlines the requirements for alimony payments. Where there is a large disparity in incomes, alimony can often be used as a useful settlement tool by a beneficial income tax instrument and adding additional flexibility in the negotiation process. Because alimony is treated as taxable income to the obligee and deductible to the obligor, it can often be structured so that the alimony is advantageous to both parties of the divorce. It can especially be beneficial if there are a fair amount of illiquid assets, and one spouse has been an income earner and the other a stay-at-home parent. The assets may be hard to monetize and the homebound parent will appreciate establishing a cash flow after the divorce. For example, let's assume a party that has a considerably greater earning capacity in a high tax bracket can agree to make monthly alimony payments while receiving a more favorable property division from the spouse during divorce negotiations. Because the receiving party is in a lower tax bracket, the overall income tax paid could be significantly lower than it would be otherwise. Contractual alimony is a helpful settlement tool in these situations because the net effect of the transfer of income creates a benefit for both parties at the expense of the IRS. To illustrate, if the alimony payment is made by a person in the 35% tax bracket to a person in the 15% tax bracket, the IRS loses the 20% difference in tax liability. Through the deduction of the alimony amount by the paying party, the net cost of $1.00 paid is actually only $0.65, whereas the additional taxable income on the receiving party's tax return costs that person $0.15 while being able to keep the spendable income of $0.85. The IRS loses the potential $0.20 that could have been received if the obligor in the higher tax bracket kept the alimony as his own income, but it is unlikely that the parties involved will complain that the IRS isn't getting the full benefit of their divorce.

Spousal support in Texas

Texas was late to the party as it was the last state in the United States to allow some form of post-divorce spousal support.[24] Early Texas jurisprudence held that post-divorce payments to a former spouse, including

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[17] Id.
[18] Id.
[19] Michelle Murray, *Alimony As an Equalizing Force in Divorce*, 11 J. Contemp. Legal Issues 313, 314 (2000).
[20] Id.
[21] Ira Mark Ellman, *The Theory of Alimony*, 77 Calif. L. Rev. 1, 53 (1989) (emphasis added)
[22] Murray, *supra* note 18, at 317.
[23] Id.
[24] Denise Causey Haugen, *Texas and Alimony: The Possibility of a Constitutional Attack*, 34 Hous. L. Rev. 477, 478 (1997).

contractual agreements for such payments, were against public policy.[25] The Texas courts began to consider alimony as incompatible with a community property system, because it was thought Texans had "sufficient property to survive without alimony after divorce,"[26] and regarded the idea of alimony as against public policy.[27] This, in itself, isn't the strongest argument logically because there are eight other explicitly community property states, and all of them allow for some form of alimony after divorce.[28] In 1967, the Texas Supreme Court determined in *Francis v. Francis* that the public policy rationale disfavoring alimony only extended to court-mandated alimony.[29] The court held that if a divorce agreement included provisions for contractual alimony, the agreement would be enforceable under contract law and would not violate Texas public policy because the alimony was not court-ordered.[30] The *Francis* court held: "Approval of the agreement by the court should not be held to invalidate it as alimony. Amicable settlement by the parties of their property rights should be encouraged not discouraged."[31]

In *Francis*, the husband entered into a contractual agreement with his wife to pay her a sum in monthly installments for her to relinquish all right, title, and interest in his property.[32] Upon separation, the husband attempted to have the agreement declared void because it was against public policy.[33] The court explained that a contractual obligation to make future payments for a wife's support does not classify as alimony.[34] The court stated that only alimony payments that are "imposed by a court order or decree on the husband as a personal obligation for support and sustenance of the wife after a final decree of divorce" conflict public policy.[35] This statement by the court is a questionable justification for the differentiation of these two types of payments of support. The Texas Supreme Court definition contrasts with Section 71 of the Internal Revenue Code that defines "alimony" for tax purposes on a federal level.[36] Alimony, as defined in Section 71 would include both the definition considered against public policy by the Texas Supreme Court and the Francis agreement that the court holds as not alimony.[37] The Texas Supreme Court attempts to make their own illogical alimony definition that is different than the definition used for tax purposes. Nevertheless, the *Francis* court created a working definition that Texas courts continued to follow of the type of alimony that was against public policy as "an allowance for support and sustenance of the wife, periodic or in gross, which a court orders the husband to pay."[38]

For many years, there were outcries for Texas to align itself with the other forty-nine states that have provided for court-ordered alimony, which would be become known as spousal maintenance in Texas.[39] Before 1995, an alimony bill had been introduced in every session of the Texas legislature since 1971.[40] The leadership in the in the Texas House of Representatives was strongly against passing an alimony bill.[41] The last six times it was introduced as a spousal maintenance bill, it would pass in the Senate with a lopsided vote.[42] The bill then would go to the House, where it would disappear.[43] Usually it would be blocked in a committee, but sometimes it was placed so far down on the calendar that it could not get to the floor in time to be heard before the session ended, or it would be ruled out of order on a point of order.[44] From 1985 through

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[25] Id.
[26] Id.
[27] Cunningham v. Cunningham, 120 Tex. 491, 40 S.W.2d 46, 47 (1931) (citing public policy concerns dating back to 1841).
[28] *See generally* Hon. Bea Ann Smith, *Why the Community Property System Fails Divorced Women and Children*, 7 Tex. J. Women & L. 135 (1998).
[29] 412 S.W.2d 29 (Tex. 1967).
[30] Id.
[31] Id at 33.
[32] Id.
[33] Id.
[34] Id. at 32.
[35] Id. at 33.
[36] 26 USC § 71 (2013).
[37] Id.
[38] 412 S.W.2d at 32.
[39] Haugen, *supra* note 23, at 491.
[40] Id.
[41] James W. Paulsen, *The History of Alimony in Texas and the New "Spousal Maintenance" Statute*, 7 Tex. J. Women & L. 151, 154 (1998).
[42] Id.
[43] Id. at 155.
[44] Id.

1993 there was never a record of a debate on the House floor on alimony, much less a vote against spousal maintenance.[45] The Texas House of Representatives became an immovable object blocking an alimony bill.

In 1995, the bill started out the same way, passing through the Senate and sent into a trap committee to die without being presented on the House floor.[46] But one day during a debate for a welfare bill that had endured a debate of over fifty amendments, many of which had adopted as germane to the welfare bill, a longtime advocate for alimony in the House, Representative Senfronia Thompson of Houston, who had authored a bill in support of alimony many times in the House, stood to propose an amendment.[47] The Representative pointed out that forty-two percent of Texan homemakers are on welfare within three years after divorce, and she thought a good way to cut down on welfare would be by having alimony in Texas.[48] Representative Thompson's amendment to the welfare bill would amend the Texas Family Code to add provisions for court-ordered spousal maintenance in certain limited situations.[49] The Speaker of the House ruled that the amendment was germane, and the House, in the first ever vote on alimony, passed the amendment favorably, although no one called for a record vote.[50] The bill eventually passed in the Senate and was signed into law by Governor Bush.[51]

In sum, alimony debate in the Texas Legislature had gone through over 20 years of revisions and restrictions to encourage passage.[52] By the time the bill was passed in 1995, it was the most restrictive alimony statue in the country.[53]

SPOUSAL MAINTENANCE VS. CONTRACTUAL ALIMONY

Contractual alimony and court-ordered spousal maintenance have significant differences. The key difference is that court-ordered maintenance is for minimal support of the reasonable needs for a spouse who would be virtually destitute after marriage. Contractual alimony, on the other hand, is more commonly used as a settlement tool by middle class and wealthier couples to aide in property settlement and to take advantage of writing the payment off of taxable income. It is helpful to go into detail on them both separately.

Spousal Maintenance

As mentioned above, the bill in 1995 amended the Texas Family Code to add provisions for court-ordered spousal maintenance in certain limited situations. Generally, spousal maintenance is limited in duration and amount with the intention being for the support to continue only for the period necessary for the former spouse to acquire education and employment to enable that person to meet their own reasonable and necessary living expenses.[54] Exceptions are made for unlimited payments by an obligor if the oblige is physically or mentally unable to become self-supporting.[55]

In 2011, the state legislature made significant revisions to the spousal maintenance statutes; extending the allowed length of maintenance payments and raising the minimum monthly payments that a judge may order.[56] Although the revised law still remains very limited when compared to other states, the new revisions allow the judge more leeway to assist a former spouse.

Currently, the court may order maintenance for either spouse only if the spouse seeking maintenance will lack sufficient property, including the spouse's separate property, on dissolution of the marriage to provide for the spouse's minimum reasonable needs and:[57]

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[45] Id.
[46] Id.
[47] Id.
[48] Id.
[49] Id.
[50] Id.
[51] Id.
[52] Id at 156.
[53] Id.
[54] *See generally* Tex. Fam. Code § 8.001 – 8.055 (2013).
[55] Tex. Fam. Code § 8.054 (2013).
[56] Tex. Fam. Code § 8.054 - § 8.055 (2013).
[57] Tex. Fam. Code § 8.051 (2013).

> (1) the spouse from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence, as defined by Section 71.004, committed during the marriage against the other spouse or the other spouse's child and the offense occurred:
>
> (A) within two years before the date on which a suit for dissolution of the marriage is filed; or
>
> (B) while the suit is pending; or
>
> (2) the spouse seeking maintenance:
>
> (A) is unable to earn sufficient income to provide for the spouse's minimum reasonable needs because of an incapacitating physical or mental disability;
>
> (B) has been married to the other spouse for 10 years or longer and lacks the ability to earn sufficient income to provide for the spouse's minimum reasonable needs; or
>
> (C) is the custodian of a child of the marriage of any age who requires substantial care and personal supervision because of a physical or mental disability that prevents the spouse from earning sufficient income to provide for the spouse's minimum reasonable needs.

In sum, the only way to obtain court-ordered maintenance is if the other spouse was convicted in a crime of family violence within the last two years, or if the receiving spouse is disabled, married for longer than 10 years and lacks the ability to support oneself, or is unable to be employed outside of the home due to care for a child with a disability.[58] These are relatively uncommon fact situations with limitations that are difficult to meet for many average middle class divorces. In practice, the persons most often qualifying for spousal maintenance are stay-at-home mothers who have been out of the workforce for a considerable period of time to raise children.

If a spouse meets the eligibility standards for spousal maintenance, the court is limited to ordering a spouse to pay maintenance up to $5,000 per month, or no more than 20% of the spouse's average monthly gross income, whichever is less.[59] Additionally, except under unusual circumstances described above, the duration of payments is limited to no more than:[60]

> (1) Five years after the date of the order if the spouses were married to each other for at least 10 years but not more than 20 years; or
>
> (2) Seven years after the date of the order if the spouses were married to each other for at least 20 years but not more than 30 years; or
>
> (3) Ten years after the date of the order if the spouses were married to each other for 30 years or more.

Judges don't just look at the finances of the parties when calculating spousal maintenance. The Texas Family Code directs courts to consider "all relevant factors" along with eleven specific factors which include: the parties ability to provide for their own needs; education levels of each party; length of the marriage; the obligee's age, employment history, mental and physical abilities; the effect of child support payments on the obligor; whether either spouse wasted money or assets; whether the obligee helped pay for the obligor's education; value of each party's separate property; whether the obligee was a stay at home mother; cruelty between spouses; and family violence history.[61] The court will limit the duration of maintenance to the shortest reasonable time that allows the spouse to earn sufficient income to provide for the spouse's minimum needs.[62] The court will terminate the maintenance obligation on the death of either party, remarriage of the obligee, or if the obligee is found to be living with a partner that she is dating or in a romantic relationship with.[63]

If the spouse required to pay maintenance fails to pay the court-ordered amount the court may enforce the maintenance order by contempt.[64] The obligation that the law imposes on spouses to support one another, as well as on parents to support their children, is not considered a "debt" within the constitutional prohibition

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[58] Tex. Fam. Code § 8.051 (2013)
[59] Tex. Fam. Code § 8.055(a) (2013).
[60] Tex. Fam. Code § 8.054 (2013).
[61] Tex. Fam. Code § 8.052 (2013).
[62] Id.
[63] Tex. Fam. Code § 8.056 (2013).
[64] Tex. Fam. Code § 8.059(a) (2013).

against imprisonment for debt but rather a legal duty arising out of the legal status of the parties.[65] Therefore, failure to comply with a court order for spousal or child support is enforceable by contempt.[66] In 1998, the Texas Legislature amended the Family Code to allow wage withholding a remedy for court-ordered spousal maintenance and agreed spousal maintenance,[67] subject to passage of an amendment to the Texas Constitution.[68] Wage withholding is an available remedy for maintenance only when the maintenance payments are not timely made under the terms of the court order or the agreement specifically allows for wage withholding.[69]

Contractual Alimony

It wasn't until 1967 that the Texas Supreme Court in *Francis v Francis* distinguished the difference between contractual alimony and what is now known as spousal maintenance, which was long held as against public policy in the state of Texas.[70] These contractual agreements could even be incorporated into the divorce decree without being considered against Texas public policy.[71] Since then, it has long been held that such alimony agreements and other marital property agreements are enforceable as contracts and governed by private contract law.[72] The Austin Court of Appeals summarized the state of the law before the enactment of the Chapter Eight statutes regarding court-ordered alimony and contractual alimony agreements nicely:[73]

> Even before Texas courts could impose spousal support obligations at divorce, parties to a divorce could enter into written agreements providing for the maintenance of either spouse. The court could then incorporate the agreement into the final divorce decree. Before statutory approval of such agreements, the Texas Supreme Court had determined that settlement agreements between a husband and wife obligating one spouse to make periodic payments in support of the other spouse after divorce do not constitute court-ordered alimony and therefore are not void in the State of Texas. The fact that a court expressly approves such an agreement and incorporates it into the final divorce decree does not transform the contractual payments into prohibited court-ordered alimony.

So it is clear the Texas courts recognize a significant difference between agreed upon contractual alimony payments and court-ordered alimony payments, and they both can be incorporated in the court's divorce decree.

The Texas Family Code is very specific as to when the divorce court may impose spousal maintenance and the limits of that maintenance. As previously noted, a spouse rarely qualifies for spousal maintenance in Texas. On the other hand, contractual alimony is a private agreement between parties of the divorce, and it is not limited by any of the restrictions applicable to spousal maintenance.[74] The entire alimony agreement is designed to suit the needs of the particular parties involved in the divorce.

ENFORCEMENT OF CONTRACTUAL ALIMONY AND PROBLEMS WITH THE STATUTORY LANGUAGE

Once again, the maintenance statute allows for enforcement of a maintenance obligation by contempt of court.[75] However, the court's interpretation of the language of the statute regarding the difference between

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[65] In re Bielefeld, 143 S.W.3d 924, 928 (Tex. App.—Fort Worth 2004, no pet.) (citing Ex parte Davis, 101 Tex. 607, 111 S.W. 394, 395 (1908)).
[66] Id.
[67] Tex. Fam. Code § 8.101 (2013).
[68] Tex. Const. art. XVI, § 28 (The amendment passed overwhelmingly).
[69] Tex. Fam. Code § 8.101 (2013).
[70] Francis v. Francis, 412 S.W.2d 29 (Tex. 1967).
[71] Cardwell v. Sicola–Cardwell, 978 S.W.2d 722, 724 (Tex.App.-Austin 1998, pet. denied).
[72] *See, e.g.*, Allen v. Allen, 717 S.W.2d 311, 313 (Tex.1986); Bishop v. Bishop, 74 S.W.3d 877, 879–80 (Tex.App.-San Antonio 2002, no pet.); Hurley v. Hurley, 960 S.W.2d 287, 288 (Tex.App.-Houston [1st Dist.] 1997, no pet.)
[73] *Cardwell*, 978 S.W.2d at 724 (internal citations omitted).
[74] *See generally* In re Green, 221 S.W.3d 645 (Tex. 2007).
[75] Tex. Fam. Code § 8.059 (2013).

contractual alimony and spousal maintenance leaves unclear whether contractual alimony obligations fall within the purview of the statute's scope, even raising issues stemming from the Texas Constitution.

The new statutory language is:[76]

(a) The court may enforce by contempt against the obligor:

(1) the court's maintenance order; or

(2) an agreement for **periodic payments** ~~the payment~~ of **spousal** maintenance under the terms of this chapter voluntarily entered into between the parties and approved by the court.

(a-1) The court may not enforce by contempt any provision of an agreed order for maintenance **that exceeds the amount of periodic support the court could have ordered under this chapter or** for any period of maintenance beyond the period of maintenance the court could have ordered under this chapter.

(b) On the suit to enforce by an obligee, the court may render judgment against a defaulting party for the amount of arrearages after notice by service of citation, answer, if any, and a hearing finding that the defaulting party has failed or refused to comply with the terms of the order. The judgment may be enforced by any means available for the enforcement of judgment for debts.

(c) It is an affirmative defense to an allegation of contempt of court or the violation of a condition of probation requiring payment of court-ordered maintenance that the obligor:

(1) lacked the ability to provide maintenance in the amount ordered;

(2) lacked property that could be sold, mortgaged, or otherwise pledged to raise the funds needed;

(3) attempted unsuccessfully to borrow the needed funds; and

(4) did not know of a source from which the money could have been borrowed or otherwise legally obtained.

(d) The issue of the existence of an affirmative defense does not arise until pleaded. An obligor must prove the affirmative defense by a preponderance of the evidence.

Prior to this change in the Texas Family Code, which took effect September 1, 2013, contractual alimony had been generally understood to be enforceable only as a private debt. This prevented courts from holding ex-spouses in contempt if they failed to pay their agreed upon payments because the Texas Constitution states that "no person shall ever be imprisoned for debt."[77] But, this directive proved somewhat unclear in practice as demonstrated by the cases below.

In re Dupree

In 2003, the Dallas Court of Appeals considered whether a contractual alimony provision could be enforced by contempt of court.[78] *In re Dupree* involved a former wife who sought to have her ex-husband held in contempt for his failure to make contractual alimony payments.[79] The divorce decree stated that the alimony obligation was contractual in nature and entered under the provisions of the Internal Revenue Code.[80] The decree made no reference to the Chapter Eight statutory maintenance provisions in the Texas Family Code.[81] Additionally, the alimony provisions did not contain any order or language compelling the former husband to make the required payments.[82] Nonetheless, the trial court held the obligor in contempt for failure to pay the spousal support and sent him to jail pending the payment of the amount due to his former wife.[83] The Dallas Court of Appeals held that the payment obligation was undertaken as an agreement between the parties and

[76] Id. (New language is in bold. Deleted language is stricken through.)
[77] Tex. Const. art. I, § 18.
[78] In re Dupree, 118 S.W.3d 911 (Tex. App.–Dallas 2003, pet. denied).
[79] Id.
[80] Id. at 915.
[81] Id. at 916.
[82] Id.
[83] Id.

was unenforceable by contempt because it was a debt.[84] The appellate court held that the obligation did not qualify as statutory maintenance because the amount and duration exceeded the Family Code limitations and the decree failed to contain any indications that the former wife was eligible for maintenance set forth in the code.[85] Therefore, the alimony obligation was not enforceable by contempt and the former husband was ordered to be released.[86]

The agreement set out the Internal Revenue Code guidelines for income tax purposes, did not mention any of the hardship requirements required by the maintenance statutes, and did not fit within the statute's limitations for maintenance amount and duration. Further, the term "maintenance" was not used. This allowed the appellate court to hold that the agreement to make payments had nothing to do with spousal maintenance and was simply a private agreement between the two parties that was to be included in the divorce decree for tax purposes.

In re Taylor

Other suits to enforce by contempt have been less clear. In 2004, the Texarkana Court of Appeals distinguished the *Dupree* holding.[87] *In re Taylor* involved a divorce decree providing that the former husband would pay "contractual maintenance" to the former wife.[88] The Texarkana appellate court held that because the decree contained order language and because the obligation was termed "maintenance," the case was distinguishable from *Dupree*.[89] The court held that the maintenance provision, even though it was agreed on between the parties, was enforceable by contempt.[90] Unfortunately, the *Taylor* court failed to address the absence of evidence regarding the former spouse's eligibility for maintenance and that the duration of the maintenance agreement exceeded the statutory provisions.

McCollough v. McCollough

In 2006, the Austin Court of Appeals tried its hand at interpreting the statutes. In *McCollough v. McCollough*, [91] the Austin court held that "alimony agreements and other marital property agreements, even when incorporated into divorce decrees, are enforceable as contracts and governed by contract law."[92] Here, the husband sued to modify alimony payments he was required to make to his former wife under an agreement incident to their divorce.[93] He relied in part upon Texas Family Code Chapter 8, which allows the court to make adjustments to spousal maintenance payments if needed.[94] The husband contended that the statutory language in force at that time evidenced the legislature's intent that the Family Code embraced not only court-ordered "maintenance," but also alimony agreed to by parties and incorporated into a divorce decree.[95] At that time Section 8.059(a) provided: "[t]he court may enforce by contempt the court's maintenance order *or an agreement for the payment of maintenance voluntarily entered into between the parties and approved by the court*."[96] The husband argued that this reference to agreements for the payment of maintenance demonstrated legislative intent that the code applies to all forms of alimony, not only to court-ordered maintenance but also to all voluntary agreements for payment of support approved by the court.[97] The Austin court made a very important distinction regarding the language regarding the relationship of spousal maintenance in the Family Code and the long standing sanction of contractual alimony. The court held that the "legislature's evident intent in chapter 8 was to create narrow circumstances in which previously prohibited forms of spousal support

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[84] Id.; Tex. Const. art. I, § 18.
[85] *Dupree*, 118 S.W.3d at 915.
[86] Id. at 916.
[87] In re Taylor, 130 S.W.3d 448 (Tex. App.—Texarkana 2004, no pet.)
[88] Id. at 449.
[89] Id.
[90] Id.
[91] McCollough v. McCollough, 212 S.W.3d 638 (Tex. App.—Austin 2006, no pet.).
[92] Id. at 642.
[93] Id. at 640.
[94] Id.
[95] Id.
[96] Tex Fam. Code § 8.059(a) (2013) (emphasis added).
[97] *McCollough*, 212 S.W.3d at 640.

could be awarded, not to govern the forms of contractual alimony previously permitted."[98] The question for the court then fell upon whether the agreement was intended to be governed by Texas Family Code Chapter 8 or a private contractual agreement. The Austin court made an important clarification that there can be an agreed upon maintenance order that falls under the Texas Family Code and is enforceable by contempt as in *Taylor*. But Chapter Eight does not intend to regulate a contractual agreement for alimony created outside of the Texas Family Code, a format ratified ever since the *Francis* decision in 1967, even if it was incorporated in the divorce decree.[99] The *McCollough* decision ended by noting that the agreement showed no intent to be governed by Texas Family Code Chapter 8.[100] The agreement specifically stated it was to be enforceable as a contract, and the payments were "intended to qualify as contractual alimony as that term is defined in section 71(a) of the Internal Revenue Code of 1986."[101]

In re Green

In April 2007, the Texas Supreme Court finally stepped in to clarify the enforcement provision in Texas Family Code Section 8.059 as it related to enforcement of contractual alimony. *In re Green*, [102] held that under Section 8.059(a) a maintenance obligation, whether contractual or court-imposed, is punishable by contempt only if it meets Chapter Eight's other requirements for maintenance.[103] The trial court had sent the former husband to jail for criminal contempt based on seven instances of failure to pay a support agreement that was incorporated into the divorce decree.[104] The court held that a "court order to pay spousal support is unenforceable by contempt if the order merely restates a private debt rather than a legal duty imposed by Texas law."[105] In making its decision the Texas Supreme Court ultimately recognized what has troubled courts for a decade, to wit, the enforcement provisions in Section 8.059(a) can be read two ways.[106] One reading would say that *any* agreement to pay spousal support is enforceable by contempt, and the alternative interpretation is that "a maintenance obligation, whether contractual or court-imposed, is punishable by contempt *only if it meets Chapter Eight's other requirements*."[107] The court held that to enforce payments by contempt the obligation must meet all of Chapter Eight's requirements, and in *Green*, there were no findings that the wife was disabled, caring for a disabled child, or lacked sufficient earning ability.[108] The court decided this on three bases. First, a reading that any agreement to pay spousal support is enforceable by contempt "would make 'maintenance' under Section 8.059(a) inconsistent with the requirements of maintenance elsewhere in Chapter Eight."[109] Second, a reading of the enforcement provision in "Section 8.059(a) as applying to all contractual alimony agreements would clash head-on with Section 9.012(b), which provides generally that 'the court may not enforce by contempt an award in a decree of divorce or annulment of a sum of money payable in a lump sum or in future installment payments in the nature of debt.'"[110] As the court previously explained, a promise to pay contractual alimony creates nothing more than a debt. Third, the court held that reading Section 8.059(a) "as requiring imprisonment for breach of a contractual arrangement would surely make that section unconstitutional."[111]

The *Green* court made a huge distinction by clarifying the constitutionality problem that many courts had trouble with in the past. Additionally, it recognized and solidified that there are two kinds of agreements for support of an ex-spouse: (1) agreements that are structured following the maintenance statutes in the Texas Family Code, considered "spousal maintenance;" and, (2) agreements known as contractual alimony, that are purely contractual in nature, and therefore are considered a private debt unenforceable by contempt for constitutional reasons.

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[98] Id. at 645.
[99] Id. at 647.
[100] Id. at 648.
[101] Id. at 646.
[102] In re Green, 221 S.W.3d 645 (Tex. 2007).
[103] Id. at 648.
[104] Id. at 646.
[105] Id.
[106] Id. at 648.
[107] Id. (emphasis by the court).
[108] Id. at 647.
[109] Id. at 648.
[110] Id.
[111] Id. (referring to Tex. Const. art. I, §18).

NEW LEGISLATION

House Bill 389 passed during the 2013 legislative session.[112] It was authored by Representative Senfronia Thompson, (D. Houston), the same representative who has authored all of the spousal support bills since 1995.[113] The bill amends Chapters Eight and Nine of the Texas Family Code.[114] According to its author's bill summary, this bill's purpose was "to provide for the uniform enforcement of court-ordered, agreed, and contractual alimony regardless of whether the agreement is included in the decree or in a separate document."[115] The Texas Bar Journal has described the bill as follows:[116]

> This bill amends Section 8.059 of the Texas Family Code to include language establishing a maximum amount of agreed spousal support that may be enforced by contempt, not to exceed the "amount of periodic support the court could have ordered." This amendment allows a person to be held in contempt for failure to pay contractual alimony up to the amount, and for the amount of time, that the court could have awarded spousal maintenance. The court can even issue a wage-withholding order, at least to that limited amount, which it could not do before."

The analysis of the Texas Bar Journal along with the author's written statement of intent in the official bill analysis makes it clear that the purpose of the bill was to bridge the gap between the different enforcement practices of contractual alimony and maintenance that the Texas Supreme Court presented in *Green*.[117] It appears that it is highly likely there may be a misunderstanding between the Texas courts, including the Texas Supreme Court, and the legislature. The Texas Supreme Court made it clear that to enforce any spousal maintenance agreement by contempt it must comply with all the eligibility requirements for spousal maintenance.[118] If the maintenance agreement is not structured following Texas Family Code Chapter 8, the agreement is simply a contract that is only enforceable as a private debt.[119] It would be unconstitutional for a debt such as this to be enforced by contempt or wage withholding, as this bill also allows.[120] The courts have referred to such a debt agreement as contractual alimony since it was first allowed in *Francis v. Francis.* "Maintenance" has always been a reference to spousal support under Chapter Eight of the family code.[121] It is unlikely that the court would be willing to make the extension to enforce all contractual alimony and maintenance payments uniformly, ignoring whether the spouse is eligible for maintenance as this bill asks for, if the court continues to view contractual alimony as a private agreement separate from statutory spousal maintenance.

POTENTIAL OUTCOMES

These new amendments will ultimately be challenged in court the next time an obligor is in a similar situation as *Green, Taylor*, or *Dupree*. One possible way that the court would be willing to allow uniform enforcement is in the event the court was to change their interpretation of contractual alimony from a debt to another form of maintenance. The court would need to view contractual alimony that is incorporated into the decree and Chapter Eight maintenance as one in the same. The court looking at both forms of support as the same is unlikely to happen because such a decision would require the court to dramatically change its stance on what contractual alimony is from the *Green* decision. Historically, this kind of change would go against the policy concerns that the court laid out in *Francis* when contractual alimony was first recognized in Texas.

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[112] H.B. 389, 83rd Sess. (Tex. 2013).
[113] Id.
[114] Id.
[115] Bill Analysis for H.B. 389, 83rd Sess. (Tex. 2013) (Available at http://www.legis.state.tx.us/tlodocs/83R/analysis/html/HB00389E.htm).
[116] Brian L. Webb and Brant M. Webb, *Family Law* 76 Tex. B.J. 722 (2013) (citing section 8.059).
[117] 221 S.W.3d 645 (Tex. 2007).
[118] Id.
[119] Id.
[120] Tex. Const. art. I, § 18; Pappolla v. Simovich, 14-12-00418-CV, 2013 WL 2247389 (Tex. App. May 21, 2013) (Holding that wage withholding for contractual alimony is unconstitutional); Tex. Const. art. XV I, § 28 ("No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered: (1) child support payments; or (2) spousal maintenance.").
[121] In re Green, 221 S.W.3d 645 (Tex. 2007).

The *Francis* court wanted to encourage these kinds of agreements and changing their enforceability or the manner in which they may be entered into will discourage settlements of this type.

In reality, statutory spousal maintenance is not intended to be a common practice because the eligibility standards are very difficult, or perhaps even extraordinarily hard for a spouse to meet. Contractual alimony on the other hand, is a relatively common settlement arrangement because of the flexibility and tax advantages it provides to the parties involved in the agreement. It appears the legislature has tried to limit the ability to enforce by prohibiting the court from enforcing by contempt any agreed maintenance that "exceeds the amount of periodic support the court could have ordered under this chapter or for any period of maintenance beyond the period of maintenance the court could have ordered under this chapter."[122] What this limitation fails to address is that the *Green* court held that the other eligibility requirements also must be met in order for a court to enforce the order by contempt.[123] Limiting the amount and duration of the enforcement ability does not make the contractual alimony meet the eligibility standards needed in the *Green* decision.[124] The *Green* court required those eligibility standards to distinguish contractual agreements from maintenance enforceable by contempt in order to maintain constitutionality of the enforcement practices.[125]

A more likely scenario would be the court maintaining its standards from the *Green* and holding that all portions of the statute that refer to contractual alimony are unconstitutional because it would imprison parties for a debt. This is likely because although the bill analysis and summary uses the words "contractual alimony," the amendments themselves do not make many significant changes that include the use of "contractual alimony"[126] In fact, the new legislation did not change the language regarding only enforcing agreements formed "under the terms of this chapter"[127] This language is what the court has used to differentiate between contractual alimony and maintenance that was agreed under the terms in the Texas Family Code. If the court can continue to use the unchanged statutory language to differentiate between contractual alimony and spousal maintenance as they have in the past, it is likely that the court will continue to hold that contempt is an unconstitutional enforcement for contractual alimony.

If the legislature wants the court to enforce contractual alimony and spousal maintenance the same, as described in the bill analysis, it will need to pass legislation that uses the terms contractual alimony in the same manner that the courts have used the phrase. A constitutional amendment will also likely need to be passed in order to satisfy the courts' interpretation of contractual alimony. It is very clear that the legislature and the courts are working with different definitions of alimony, and the language needs to be clarified by the legislature before its goals are met.

Additionally, the legislature changing the enforcement of contractual alimony goes against many of the public policy concerns set forth in *Francis*. The *Francis* court wanted to encourage parties to reach settlement agreements, and it recognized that the tax advantages afforded by an alimony agreement would do just that. If the legislature is able to create a situation that makes these agreements enforceable by contempt, including time in jail, it will likely create another speed bump in the settlement process. Being able to be held in contempt will likely cause some parties to rethink whether they want to enter into such an agreement despite the attractiveness of the tax advantages.

The key for the court going forward with this new legislation and statutory language would not likely change. The court will still focus on how to distinguish between what is maintenance and what is contractual alimony. From there, they can decide on the enforcement practice based on the statutory language, the contractual language, and how the enforcement practices fall within the Texas Constitution.

CONCLUSION

The one relatively clear item that the courts and Texas Legislature are in agreement and on the same page on is that an obligor can be held in contempt and jailed if the obligor fails to make payments on a spousal maintenance obligation created by Texas Family Code Chapter 8. Beyond that, the courts have interpreted contractual alimony as a separate private agreement that must be enforced as a private debt, while the legisla-

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[122] Tex. Fam. Code § 8.101 (2013).
[123] *Green*, 221 S.W.3d at 648,
[124] Id.
[125] Id.
[126] Bill Analysis for H.B. 389, 83rd Sess. (Tex. 2013) (Available at http://www.legis.state.tx.us/tlodocs/83R/analysis/html/HB00389E.htm); H.B. 389, 83rd Sess. (Tex. 2013).
[127] Tex. Fam. Code § 8.059 (2013).

ture would prefer that all agreements, whether it is identified as alimony or maintenance, would be enforceable uniformly by contempt. The court has found that enforcing contractual alimony as a debt would raise concerns under the Texas Constitution. The new legislation is likely to be challenged again for constitutionality, and it will most likely be held that enforcement by contempt is still unconstitutional if the court continues to follow its previous logic of separating the definitions of alimony and support. If the Texas Legislature truly wants to create constitutional uniform enforcement, they must acknowledge the court's past decisions and change the language or pass an amendment to the Texas Constitution.

CHILD STARS LEFT EXPOSED TO EXPLOITATION IN TEXAS

by: Sarah Lancaster[1]

I. Introduction

In 1991, Dominique Moceanu[2] and her family relocated to Houston, Texas to allow Moceanu to pursue her dream of winning a gold medal in gymnastics.[3] Her dream came true when she and her six teammates won a team gold medal at the 1996 Summer Olympics in Atlanta.[4] The "Magnificent Seven" had just claimed one of the most coveted awards in amateur sports and were in the position to earn millions of dollars in endorsements.[5] Moceanu was only fourteen-years old and had just become the youngest American ever to win a gold medal in gymnastics.[6] She began appearing on television shows, magazine covers, and cereal boxes.[7] With her stardom, she began accumulating finances that most adults would have difficulty managing.[8] Apparently, her parents also had difficulty managing her money because in less than three years, they had squandered nearly all of her earnings that had been placed in a trust under their control.[9] Most of Moceanu's money was spent so that her father could open up a "two-million-dollar state-of-the-art gym."[10] Moceanu, being a Texas resident, had no recourse or way to keep her parents from her money except to file for emancipation. At seventeen years old, Moceanu obtained a court order to be emancipated from her parents and obtain legal status as an adult, entitling her to control over her earnings.[11]

This story is not rare, as many child celebrities have had their earnings squandered by their parents. Michael Jackson, Gary Coleman, Macaulay Culkin, Leann Rimes, and Shirley Temple, are only a few of the many child celebrities who were wronged by their parents.[12] Minors in the United States cannot claim the

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[2] Dominique Moceanu is the daughter of two athletic Romanian immigrants. Moceanu began taking gymnastic classes at the age of three in Highland Park, Illinois. In 1991, when Moceanu turned ten years old, her talent and athletic ability led her to word-renowned coach Bela Karolyi. Under Karolyi, Moceanu became the youngest gymnast to qualify for the U.S. National Team and also became the youngest to win a medal at the Junior National Championships. At age thirteen, Moceanu placed fifth in the all-around competition at the 1995 World Championships, earning the distinction of the best performance for an American that year. Moceanu went on to make the 1996 Olympic Team at the age of fourteen and once again became the youngest American to ever win a gold medal in gymnastics. Moceanu continued her gymnastics career after the Olympics with her biggest highlight coming when she claimed the all-around title at the Goodwill Games in 1998. Moceanu had intentions of participating in the 2000 Olympic trials, but she was forced to withdraw due to a sudden knee injury. Moceanu returned to gymnastics and competed in 2005 and 2006. Moceanu is currently married to Dr. Michael Canales and the couple has two children together. *Profile: Dominique Moceanu, 1996 Olympic Champion*, THE DOMINIQUE MOCEANU OFFICIAL WEBSITE, http://www.dominique-moceanu.com/sub.php?p=profile.php (last visited Jan. 2, 2014).

[3] Rob Trucks, *How A Career Ends: Dominique Moceanu, America's Youngest Gold-Medal Gymnast*, DEADSPIN (Aug. 2, 2012), http://deadspin.com/5931101/how-a-career-ends-dominique-moceanu-americas-youngest-gold+medal-gymnast.

[4] Erica Siegel, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT. L. J. 427 (2000).

[5] *Id.*

[6] *See* Trucks, *supra* note 2.

[7] *See* Siegel, *supra* note 3.

[8] *Id.*

[9] *Id.*

[10] Jere Longman, *Gymnastics; Moceanu Sues, Saying Parents Squandered her Earnings*, THE NEW YORK TIMES (Oct. 22, 1998), *available at* http://www.nytimes.com/1998/10/22/sports/gymnastics-moceanu-sues-saying-parents-squandered-her-earnings.html.

[11] Siegel, *supra* note 3.

[12] *Id.* at 428; Dave Ferman, *Child Celebrities Continue To Sue Their Parents*, CHICAGO TRIBUNE (May 30, 2000), *available at* http://articles.chicagotribune.com/2000-05-30/features/0005300010_1_leann-rimes-child-star-wilbur-and-belinda.

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money that they earn; instead it belongs to their parents.[13] For example, Texas Family Code Section 151.001(5) provides that a parent of a child has "the right to the services and earnings of the child."[14] Several states have laws in effect that offer some protection from the parents' entitlement to their child star's earnings.[15] California led the charge by enacting Coogan's Law in 1939,[16] and has made amendments over the years in order to ensure child stars are not left empty handed by their parents.[17] Florida and New York have modeled the protection they currently offer child stars off of California's Coogan's Law.[18]

Texas, however, currently has no protection in place other than allowing a child to file for emancipation in order to become a legal adult, thereby giving the individual control over his or her finances. This remedy is not adequate because children will usually not file for emancipation until after their parents have already squandered their money, leaving them no way to recover what they had rightfully earned. Also, many children are not ready for the demands of being an adult, depending on at what age stardom arrives.

This article will examine the laws that are currently in place to protect a child star's earnings in California, Florida, and New York and recommend a way for Texas to protect child stars in its state. Part II will explain the development of California's Coogan's Law and looks into the loopholes and deficiencies that exist within its current framework. Part III will explore New York and Florida's version of Coogan's Law and look into the loopholes and deficiencies that exist within their current structure. Part IV will examine what Texas offers in terms of protecting a minor's earnings. Part V shall propose a recommendations that would allow Texas to better protect child stars living within the state.

II. California's Protection of Child Stars

a. History of Coogan's Law

California was the first state to enact legislation to provide some degree of protection of child stars' earnings.[19] "This law, known as Coogan's Law, is derived from the California Civil Code, sections 35 and 36, which governs contracts for child actors."[20] Civil Code sections 35 and 36 were actually originally enacted to protect employers from a minor's right to void contracts.[21] This is because under the common law, minors have a right to disaffirm any employment contract at will.[22] In 1872, Civil Code sections 35 and 36 were enacted "to protect employers from the common law and statutory rights of minors to disaffirm contracts."[23] However, according to sections 35 and 36, minors could still disaffirm contracts if they were earning more money than needed to financially support themselves.[24] As child actors entered into the movie industry, this created a problem because sections 35 and 36 typically did not apply to child stars, which posed a major risk to child actors and movie producers.[25] The risk was that a child could void a contract upon obtaining stardom and switch to another studio, making studios hesitant to sign minors and invest time and money into their careers.

As a result, in 1927, the California State Legislature amended section 36.[26] The amendment removed a minor's right to disaffirm contracts, which provided for the employment of "an actor, actress or other such dramatic service" if the employer obtained court approval.[27] This statute largely benefitted film makers and studios because there was no specific criteria for judges to apply, allowing them to use their discretion in de-

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[13] Shayne J. Heller, Legislative Updates, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL J. ART & ENT. L. 161 (1999).
[14] Tex. Fam. Code § 151.001 (5) (West 2012).
[15] Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 433-442 (2004).
[16] Cal. Civil Code § 36.1 and § 36.2.
[17] Siegel, *supra* note 3 at 428.
[18] Coogan's Law was enacted in response to Jackie Coogan, who stared as Uncle Fester in the Addams Family television show, because his parents spent most of his fortune before he turned the age of majority. *See id.*
[19] Siegel, *supra* note 3 at 431.
[20] *Id.*
[21] Danielle Ayalon, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 HASTINGS COMM. & ENT. L. J. 353, 356 (2013).
[22] Siegel, *supra* note 3 at 431.
[23] Ayalon, *supra* note 20.
[24] *Id.*
[25] *See id.*
[26] Ayalon, *supra* note 20.
[27] Cal. Civ. Code 36 (1872) (amended 1927), quoted in Siegel, *supra* note 3 at 432.

ciding whether to approve contracts that had been submitted for court approval.[28] Also, according to California Civil Code Section 197, "[t]he father and mother of a legitimate unmarried minor child [were] entitled to its custody, services, and earnings."[29] Therefore, at this point in time, the California Civil Code provided little protection to children in the entertainment business.

This all changed in 1938 when Jackie Coogan brought light to the problem.[30] Coogan starred in Charlie Chaplin films and later as Uncle Fester on The Addams Family television show.[31] When Coogan turned eighteen, he realized that his parents had squandered away nearly $4,000,000 of his earnings.[32] Coogan sued his parents in an attempt to recoup some of his earnings, but the court ruled in favor of his parents because a child's earnings belong to his parents.[33] After learning of Coogan's plight, the public grew discontent with the lack of protections for children in the entertainment business.[34]

The California Legislature responded a year later by enacting what has been coined as Coogan's Law under Civil Code sections 36.1 and 36.2.[35] "Section 36.1 granted a court the power to require the formation of a trust fund or savings plan in conjunction with the court's approval of a contract under section 36."[36] Additionally, section 36.2 allowed a court to have continuing jurisdiction "over the child's earnings, and the court has the power to terminate or amend the plan as long as it provided reasonable notice to the parties involved."[37] Although problems existed as changes took place within the entertainment industry, the enactment of Coogan's Law was a step in the right direction because it was the first time that child entertainers were afforded some degree of protection over their earnings.

However, even with the provision for the trust account, for the most part a child's earnings remained largely unprotected.[38] This is because the law remained in effect for sixty years and could not have anticipated the changes in the entertainment industry that would affect child stars.[39] The main change in the film industry was that there was a shift away from the use of long-term contracts to cultivate a young actor's career.[40] Instead, most contracts that children currently sign are to appear in a single film project or television commercial.[41] Short-term contracts give producers no incentive to seek approval of a contract because there is a small risk of disaffirmance by a minor.[42] Therefore, because the original law provided protection only for contracts that were "court approved," very few contracts were submitted to a judge and thus protected.

Another problem with the statute was that the law protected a percentage of a child's "net earnings," which were defined as "the income of the child, less taxes, support and care, expenses associated with the contract, and manager's and attorney's fees."[43] This substantially permitted parents to loot the child's income by inflating expenses and manager's fees before it would even become protected.[44] On top of this, the amount of income set aside was a "discretionary" percentage to be determined by a judge instead of a fixed proportion, leaving it up to the judge to determine how much he wanted a child star to retain.[45] Lastly, under the common law, parents still had a right to the income earned by their minor children.[46]

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[28] Ayalon, *supra* note 20.
[29] Siegel, *supra* note 3, at 432.
[30] *See* Siegel, *supra* note 3 at 433.
[31] Heller, *supra* note 12 at 166.
[32] Siegel, *supra* note 3 at 433.
[33] Heller, *supra* note 12 at 166.
[34] Siegel, *supra* note 3 at 433.
[35] *See id.*
[36] *Id.*
[37] *Id.* at 433-434.
[38] Ayalon, *supra* note 20 at 357.
[39] *See* Siegel, *supra* note 3 at 434.
[40] *Id.*
[41] *Id.*
[42] Ayalon, *supra* note 20 at 357.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 358.

b. Current State of Coogan's Law

For over sixty years, Coogan's Law remained unchanged except for being transferred to the newly enacted California Family Code in 1992.[47] Finally, in 2000, the California State legislature attempted to correct the problems that were evident in Coogan's Law.[48] The legislature passed another bill in 2004 making further revisions to the statute.[49] This recent revision as compared to previous versions has been more successful at protecting minors' financial assets.[50] In addition, as will be shown below, the new revised statute finally favors children over the entertainment industry.[51]

Previous versions of Coogan's Law only protected minors who entered contracts for artistic and creative services.[52] In contrast, the revised law now also protects minor's contracts in which a minor is employed to participate in a sport.[53] As a result, the majority of minors who could potentially enter into large contracts are protected under the statute. A minor is still not allowed to disaffirm a contract as long as a court in the county of the minor's residence has approved it.[54] However, a contract does not need to be court approved in order for the earnings of a minor to be subject to statutory protection.[55]

There are also other positive changes in the revised statute that provide greater financial protection for minors. For example, currently under the modern Coogan's Law, a child's earnings under Coogan contracts now belong solely to the minor.[56] The new revisions also require that all unemancipated minors who are residents of California no matter where they work, and any minors that work in California no matter where they are residents must have fifteen percent of their earnings placed in a trust.[57] This percentage is based on "gross earnings" rather than "net earnings."[58] Gross earnings are defined as "the total compensation payable to the minor under the contract."[59] In addition, the trustee must provide trust account information to the child's employer when the minor begins working.[60] "The employer is then required to deposit the mandated fifteen percent of the minor's gross earnings directly into the fund for the duration of the child's employment."[61] After depositing the funds, the employer's obligation to monitor or account for the funds ends.[62] The funds are to remain untouched until the beneficiary reaches the age of majority unless the child's parent or guardian can show good cause to amend or terminate the trust.[63]

The 2004 revisions to Coogan's Law were a further step in the right direction by the California Legislature as child stars now have some additional financial protection from their parents.[64] However, the law still has loopholes or deficiencies that inadequately protect the financial interests of children.[65] These include: (1) Coogan's Law only applies to contracts entered for employment and not to talent management contracts; (2) fifteen percent is too low of a percentage to be set aside in the trust; (3) an inherent conflict of interest arises from designating parents as trustees of the child's trust.[66]

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Cal. Fam. Code § 6750(a)(1) (West 2012).
[53] Cal. Fam. Code § 6750(a)(3).
[54] Ayalon, *supra* note 20 at 358.
[55] *Id.*
[56] Cal. Fam. Code § 771. A child's earnings under all other contracts still legally belong to their parents. *See* Siegel, *supra* note 3 at 358.
[57] Cal. Fam. Code § 6752; *See A Summary of Rules and Regulations for Employment of Minors in the Entertainment Industry*, ENTERTAINMENT PARTNERS, http://www.entertainmentpartners.com/EPPdfViewer.aspx/ThePaymasterMinorsSection?id=6247 (last visited Dec. 19, 2013).
[58] *Id.*
[59] Cal. Fam. Code § 6750.
[60] Cal. Fam. Code § 6752 (statutorily designates the minor's parent or legal guardian as trustee).
[61] Ayalon, *supra* note 20 at 359.
[62] *Id.*
[63] Cal. Fam. Code §§ 6752-6753.
[64] Ayalon, *supra* note 20 at 359.
[65] *Id.*
[66] *Id.*

c. Loopholes or Deficiencies in Current Coogan's Law Framework

i. Does Not Apply to Talent Management Contracts

The first problem with Coogan's Law is that it does not apply to contracts for which a minor pays fees in exchange for talent agency or management services. This means that when a minor enters into a contract with a talent agency, it is not subject to court approval and therefore is not protected against the minor disaffirming the contract. Because talent agency contracts are usually long-term in order to help grow and develop the child star, this makes talent agencies leery of entering into contracts with minors. Under the California Labor Code, talent agency contracts are subject to court approval only if the contracting party is licensed under the Talent Agencies Act, which most parties are not.[67] Instead, talent management services are enticed to enter into contracts with the minor's parents or guardians, creating a conflict of interest when the best interests of the child are different from that of their parents.[68]

Berg. v. Taylor[69] is an example of the conflict of interest presented in such a situation. In *Berg*, the mother signed an agreement for personal management services for her son, who was a minor.[70] The agreement specified that the mother would be liable as a party to the contract if the minor attempted to disaffirm the contract.[71] Subsequently, with the agreement still binding, the mother requested that the contract be canceled.[72] During arbitration, the manager was awarded damages from the minor defendant.[73] The minor petitioned to vacate the award based on his right to disaffirm the original agreement and the arbitration agreement.[74] The appellate court reversed the lower court's decision and held that as a minor, the child was entitled to disaffirmance of the original agreement and the arbitration agreement and that the mother would be liable to pay the arbitration award.[75] The court realized that "it was therefore not in [the mother's] interest to have [her son] disaffirm the agreement because [the manager] would look to her personally, for satisfaction of [the child's] obligation under the agreement. As such, the [mother's] interests in the lawsuit were in direct conflict with those of her son's."[76] Since the son did ultimately disaffirm the contract, in accordance with the court's order, the mother was liable for the resulting damages.[77]

This case illustrates how a parent might attempt to avoid liability by shifting it onto their son or daughter due to the circumstances. Although the minor in this case prevailed, he still had to endure litigation expenses and likely realized that his mother did not have his best interest in mind by attempting to shift the liability of the disaffirmed contract onto him.[78] Therefore, if Coogan's Law applied to talent management contracts then these companies would be able to enter into contracts with minors without the fear of them disaffirming the contract to sign with a competitor. At the same time, this would reduce the conflict on interest that is apparent from a parent having to endorse a contract for their minor child.

ii. Fifteen Percent is Not Adequate

A minor's employer is required to set aside fifteen percent of a child's gross earnings into the child's trust account, but the issue arises in regard to what happens to the remaining eighty-five percent.[79] While the remaining amount technically belongs to the child, if the remaining money is not put into the trust by his or her parents these earnings are not protected.[80] Parents will likely point to the special needs of a child working in the entertainment industry to obtain the professional services that were referred to above as an excuse for

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[67] *Id.* at 360.
[68] *Id.*
[69] *Berg. v. Taylor*, 56 Cal. Rptr. 3d 140 (Ct. App. 2007).
[70] *Id.* at 142.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 142-143.
[74] *Id.* at 144.
[75] *Id.* at 149-150.
[76] *Id.* at 149.
[77] *Id.*
[78] *See* Ayalon, *supra* note 20 at 361.
[79] *See id.* at 362.
[80] *Id.*

not placing all of the child's earnings into the trust.[81] Some potential costs that a child star might incur according to The American Federation of Television and Radio Artists (AFTRA) are: "agents, managers, attorneys, acting lessons, professional photographs, transportation costs, tutoring, publicists and accountants."[82] But do these services really account for the other eighty-five percent of a minor's income? This might be the case if a minor does not have an extremely lucrative contract, but for a minor who does, it is unlikely that these costs would drain the rest of his or her income.

Another issue is whether parents should be compensated for time spent helping further the child's career.[83] Parents usually have to be with the child while he or she is working.[84] However, parents are not compensated for the time they spend on a set or at practice.[85] Parents of child stars are therefore sacrificing their careers and income for their children.[86] "This creates a disproportionate problem in low-income families where a child's parent or guardian cannot support the child's career unless the parent is entitled to rely on income for his or her investment of time and labor."[87] A potential solution might be to increase the child's percentage of earnings that are set-aside in the trust to keep parents from becoming greedy and spending the surplus over fifteen percent.[88] At the same time, a portion of the earnings needs to be designated to the parent as income for the time and services provided to the child. This would help alleviate the problem of parents feeling entitled to some of the child's earnings for all of the hard work and effort they put into his or her career.

iii. Inherent Conflict in Designating Parents as Trustees

Another significant problem that Coogan's Law poses is that it requires "at least one parent or legal guardian . . . entitled to physical custody, care, and control of the minor . . . be appointed trustee of the funds."[89] Since Coogan's Law was enacted to protect minors from their parents squandering their assets, arguably it makes little or no sense that the people the child stars are supposed to be protected from are charged with the duty of protecting their child's assets by careful management.[90] The only way someone other than a parent or guardian will be appointed trustee is if "the court shall determine that appointment of a different individual . . . as trustee . . . is required for the best interest of the minor."[91] While this could conceivably solve the problem if the court evaluated the character of the parents, a minor is typically not in the position to seek court protection from his parents.[92]

For example, how would a baby or young child know how or when to petition a court to declare someone other than her parents to be trustees over her earnings?[93] Babies and young children are particularly vulnerable because they likely have no idea or ability to enforce their right to have someone other than their parents designated as trustee of their earnings.[94] Thus, the current law does not protect the very citizens it sets out to protect.[95] Appointment of a trust company as trustee of the child's account in limited circumstances may better protect a child star's earnings.[96]

d. Other States' Versions of Coogan's Law

While California has led the way in offering children financial protection from their parents, Florida and New York followed suit by enacting their own versions of Coogan's Law in an attempt to protect child stars within their borders.[97]

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[81] *See id.*
[82] *California "Coogan" Law*, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTS (AFTRA) (July 18, 2009), http://www.sagaftra.org/content/coogan-law-full-text.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] Cal. Fam. Code § 6752; *See* Ayalon, *supra* note 20 at 363.
[90] *See* Ayalon, *supra* note 20 at 363.
[91] Cal. Fam. Code § 6752.
[92] Ayalon, *supra* note 20 at 364-365.
[93] *See id.*
[94] *See id.*
[95] *Id.* at 365.
[96] *Id.* at 367.
[97] *See* Siegel, *supra* note 3 at 436.

i. Florida's Child Performer and Athlete Protection Act

Florida is home to Nickelodeon Studios and training facilities for young athletes hoping to turn professional one day, and thus has a large number of child stars living and residing in the Sunshine State.[98] Florida formerly followed the common law rule that a minor's earnings were not property of the minor, but instead belonged to his parents.[99] However, this changed when the 1995 Child Performer and Athlete Protection Act was passed by the Florida Legislature.[100] This statute was "in response to the expanding entertainment and sports industries in Florida, and to prevent enslavement of the minor through contracts that may not be in his or her best interest . . ."[101]

The Act made significant changes to the rights and protections afforded to child stars.[102] First, it allows the minor's earnings, royalties, or other compensation to become property of the minor instead of the minor's parents.[103] Interestingly, Florida, not California was the first state to allow minors to retain ownership over their earnings.[104] Second, it requires proof that the contract is in the best interest of the minor and that the minor's well-being will not be affected through continued performance of the contract.[105] Third, it does not allow for disaffirmance of a court-approved contract and allows an employer to obtain relief against the minor if there is a breach.[106] Lastly, it provides guidelines for creating a trust account, in which the minor's earnings are to be placed and held until age 18 unless otherwise provided by the court.[107]

It is clear that Florida has been taking steps in the right direction to offer protection to child stars.[108] Importantly, it offers a great deal of protection because it allows child stars to retain their earnings.[109] However, this rule only applies in Florida when a contract is submitted to a court for approval.[110] If a contract is never approved, then under common law the earnings still belong to the child star's parents.[111] As discussed above, there is little incentive for entertainment industry to receive court approval for their contracts, which are typically short-term, making this law not truly effective.[112] Since obtaining court-approval is not mandatory, parents who wish to loot their children's earnings are essentially still allowed to do so in Florida.[113]

ii. New York's Child Performer Education and Trust Act

New York is another prominent state that is home to child actors.[114] New York's answer to Coogan's Law offers minors a set-aside trust provision and prevents minors from disaffirming contracts they have entered into.[115] The Child Performer Education and Trust Act (CPET) was enacted in 2004 and applies to all contracts involving child performers under the age of eighteen.[116] The CPET is similar to Coogan's Law in the amount of money that must be placed in a trust, however, it differs in who can serve as trustee.[117]

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[98] *See* Krieg, *supra* note 13 at 438-439.
[99] *Id.*
[100] *Id.* at 439.
[101] *Id.*
[102] *See id.*
[103] Fla. Stat. ch. 743.08(3)(b) (West 2012).
[104] *See* Siegel, *supra* note 3 at 437.
[105] Krieg, *supra* note 13 at 439.
[106] *Id.* This helps entice employers to enter into contracts with child stars because they do not have to run the risk that the child star will later disaffirm the contract.
[107] *Id.*
[108] *Id.* at 440.
[109] Fla. Stat. ch. 743.08(3)(b).
[110] Krieg, *supra* note 13 at 440.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Heller, *supra* note 12 at 440.
[116] Ben Davis, Comment, *A Matter of Trust for Rising Stars: Protecting Minors' Earnings in California and New York*, 27 J. JUV. L. 69, 78 (2006).
[117] Krieg, *supra* note 13 at 441.

The CPET requires that the child's employer transfer at least fifteen percent of gross earnings to the trust account thirty days prior to the commencement of employment.[118] Fifteen percent is the minimum amount that must be put into the trust; however, a parent can request that a court order the employer to place a higher amount of gross earnings into the trust account.[119] It further requires that if the employment is greater than thirty days, the employer must make the requisite payments during each pay period.[120] Under CPET, the child's parent or guardian is allowed to serve as the trustee of the account; however, "once the child performer trust balance reaches $250,000 or more a trust company shall be appointed as custodian of the account."[121] This provision allows child stars entering into contracts in New York to avoid the potential conflict of interest that arises from a parent acting as trustee over their child's potentially lucrative trust account.[122] The CPET offers child stars in New York adequate protection over their finances and also takes into account educational issues that might arise.

Specifically, the CPET "requires an employer to provide a New York state-certified teacher, or teacher with credentials recognized by the state, when a child performer's work schedule results in missed classes."[123] New York's department of labor is able to monitor and enforce violations of child stars rights to education and will also enforce the requirements of the trust account.[124] Also, in order to work in the entertainment industry, a child star "must be issued a permit, which is granted by the mayor's officer. The permit will not be issued if it will intrude upon the welfare, development, or proper education of the child."[125] The New York Act has been applauded by the president of the Screen Actors Guild and the president of the American Federation of Television and Radio Artists as being a significant improvement to the financial and educational well-being of child stars.[126]

e. Texas's Current Protection for Child Stars

Texas has not enacted anything similar to Coogan's Law or the derivative laws in effect in Florida and New York. The only provision for child performers is found in the Texas Labor Code, which provides an exemption for a child under fourteen years old to be employed as an actor or performer.[127] This leaves child stars financial assets exposed to the threat of their parents squandering their earnings because under Texas law minors' earnings belong to their parents.[128] The only recourse a child has to block this from happening is to file for emancipation to have the disabilities of a minority removed.[129] This action is what Dominque Moceanu turned to when her father spent nearly all of her earnings on a state-of-the-art gym.

In order to petition for emancipation a minor must: 1) be a resident of Texas; 2) be seventeen years old, or at least sixteen years old and living apart from the parents or legal guardian; and 3) be able to self-support and manage financial affairs.[130] In order for emancipation to be granted, the court must find that it would be in the best interest of the child to have the disabilities of minority removed.[131] Because emancipation allows a child to have the power and capacity of an adult, a child star would be able individually to claim his or her earnings and enter into contracts.[132] However, this solution has many problems associated with it and is not an adequate protective measure for child stars in Texas.

First, emancipation offers no relief to children less than sixteen years of age who are child stars because they are not even able to petition for emancipation until they are sixteen years old. Additionally, emancipation is a large step for any child to take when considering being only sixteen years old and living on your own

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[118] Davis, *supra* note 115. This provision, like in California, is mandatory and not subject to court approval.
[119] N.Y. Est. Powers & Trusts Law § 7-7.1 (West 2012); *See* Davis, *supra* note 115.
[120] N.Y. Est. Powers & Trusts Law § 7-7.1; *See* Davis, *supra* note 115.
[121] N.Y. Est. Powers & Trusts Law § 7-7; *See* Davis, *supra* note 115.
[122] *See* Davis, *supra* note 115.
[123] *Id.*
[124] *Id.*
[125] Siegel, *supra* note 3 at 435-436.
[126] *See* Krieg, *supra* note 14 at 441.
[127] Tex. Lab. Code § 51.012 (West 2012). To date, there is no record of any cases that deal with the child performer exemption of the Texas Labor Code.
[128] Tex. Fam. Code § 151.001 (5).
[129] Tex. Fam. Code § 31.001.
[130] *Id.*
[131] Tex. Fam. Code § 31.005.
[132] Tex. Fam. Code § 31.006.

without any rules set by your parents. Even if a minor's parents have not done the best job of managing their child's money, it is hard to argue that living through important years in childhood development without parental influence is beneficial. Although parents are still able to have a role in the child's life, it is unlikely that the child will take the parent seriously or be enticed to follow specific rules if the child is already living alone and self-sufficient. In general, child stars might have a hard time having a "normal" childhood, but splitting with one's family only ensures that their childhood is far different from other children.

For example, consider Courtney Love, who filed for and was granted emancipation from her parents at age sixteen.[133] After being granted emancipation, Love decided to travel around the United States, England, and Ireland and live off of a trust fund set up by her adoptive parents.[134] It is hard to consider this behavior "normal" for a sixteen-year old girl. Therefore, it is not surprising that Love has been a victim of drug abuse problems throughout her career.[135] While it is not clear how helpful it is for a child star to grow up in a family with parental oversight, it likely would have helped Love's situation and personal development. Even with parental oversight, Justin Bieber has struggled to stay out of trouble and it is scary to think about what kind of trouble he could have found himself in without his mother around.[136] So, what can Texas do to offer children in the spotlight with options other than filing for emancipation?

f. Recommendation

It is somewhat surprising that Texas lags so far behind other states in enacting legislation to protect child stars in its borders. California realized the need early on, likely due to the fact that it is home to Hollywood and many child celebrities. This does not mean that there are not child stars living in Texas. The story of Dominique Moceanu has already been noted, but she is not the only child star that has been left with less than adequate protection in Texas. Leann Rimes, a famous country-pop singer, also filed suit against her dad at age seventeen, claiming that he had spent most of the fortune she had accumulated.[137]

While Texas may not be home to Hollywood, Nickelodeon Studios, or Broadway, it home to Austin, Texas, the self-proclaimed live music capital of the world.[138] Texas is also home to movie production companies and recording studios.[139] Additionally, the rise in popularity of reality TV shows could place a Texas family and importantly, their minor children, in the spotlight. Texas could also be the home of the next Serena Williams or Tiger Woods. Therefore, legislation similar to that of Coogan's Law is necessary to protect the future child stars of Texas from greedy parents.

i. Adopt Coogan's Law Legislation

If Texas follows a handful of other states and enacts legislation similar to California's Coogan Law, this would allow minors who are entertainers and athletes financial-asset protection and help them avoid conflicts of interests with their parents. It would also save them the stress of filing for emancipation and allow them to have the chance of obtaining some sort of normalcy while growing up. Because California has the most comprehensive legislation to protect child stars, it would be best to model Texas legislation after Coogan's Law. However, some changes to Coogan's Law should be addressed in Texas legislation to avoid the loopholes that were referred to in Section II part C. For the sake of the section, I will refer to Texas's potential legislation as the Texas Child Star Act.

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[133] *10 Celebrities Who Divorced Their Parents*, WEINBERGER LAW GROUP, LLC (Oct. 20, 2010), http://www.weinbergerlawgroup.com/blog/newjersey-child-parenting-issues/10-celebrities-who-divorced-their-parents/.

[134] *Id.*

[135] Courtney Love, WIKIPEDIA, http://en.wikipedia.org/wiki/Courtney_Love (last visited Dec. 19, 2013).

[136] McCarton Ackerman, *Justin Bieber Charged with Vandalism! Arrest, Jail Time Looming in Brazil Graffiti Tagging?*, HOLLYWOOD TAKE (Nov. 11, 2013), http://www.hollywoodtake.com/justin-bieber-charged-vandalism-arrest-jail-time-looming-brazil-graffiti-tagging-video-30290.

[137] Stef Macdonald, *Rimes Sues Dad, Manager*, PEOPLE (Sept. 18, 1998), *available at* http://www.people.com/people/article/0,,617754,00.html.

[138] *Live Music in Austin*, ABOUT.COM, http://austin.about.com/od/livemusic/ (last visited Nov. 26, 2013).

[139] *See Clients*, STINSON STUDIOS, http://www.stinsonstudios.com/ (last visited Nov. 26, 2013); *Production Companies in Texas*, PRODUCTIONHUB, http://www.productionhub.com/directory/profiles/production-companies-film/us/texas (last visited Nov. 26, 2013).

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First, the Texas Legislature needs to ensure that the Texas Child Star Act will apply to all employment contracts that involve a minor agreeing to render artistic or creative services, as well as contracts in which the minor agrees to participate in a sport. All of the contracts subject to the Texas Child Star Act should not allow minors to disaffirm contracts subject to court approval. Importantly, unlike California, Texas should also subject all other contracts that are related to the minors' employment, such as contracts for agent services, to its legislation.[140] By adding the additional requirement that agent contracts will be subject to the Act, the interests of children and their parents will not be opposed to one another because an agency will be more inclined to contract directly with the minor since the threat of them disaffirming the contract will not be present.[141] The Texas Child Star Act should also provide that the earnings of a minor pursuant to a contract under the Act shall become the sole property of the minor, without the need of court approval. This will help ensure that parents do not feel the entitlement to their child's earnings.

Second, the Texas Child Star Act needs to provide for a mandatory requirement of setting aside a certain percentage of the minor's earnings into a trust.[142] California currently provides that a minimum of fifteen percent be placed into the minor's trust account. However, this is not enough. Therefore, the Texas Child Star Act should require that a minimum of twenty-five percent of gross earnings be placed into a trust.[143] This takes into account the expenses that are incurred by a child star (management fees), while also helping secure their future.[144] It should also require an income designation for the child's parent or guardian.[145] An income designation is needed because parents are free to spend the earnings of their child that are not set aside in a trust and are more likely to do so if there is no way for them to earn a living if they are making every effort to support their child's career.[146] This would allow parents to be compensated for the time and effort they have put into their child's career, but at the same time not be unjustly enriched at their child's expense.[147] Parental income would need to be on a sliding scale based on the child's earnings, which would actually align the interests of children with those of their parents.[148]

Lastly, the Texas Child Star Act should follow the way that New York law handles appointing parents or guardians as trustees of their child's trust fund. This means that the Texas Child Star Act should specify that the child's parent or guardian can serve as trustee of the trust account, however, they are only allowed to serve until the trust reaches $250,000.[149] Once the trust reaches over $250,000, a trust company will need to be appointed as trustee over the account.[150] By following New York, the Texas Child Star Act will help solve the problem of potential abuse that arises from a parent or guardian acting as trustee to their child's account.[151] This is because parents are typically in the best position to manage their child's account, but their interests are more likely to become directly adverse as the trust accumulates more money.[152]

By enacting The Texas Child Star Act, Texas will be protecting child stars and their assets. Additionally, by addressing some of the loopholes that exist in Coogan's Law, Texas will be able to boast that they offer better protection to child star's than any other state in the Country. The appendix includes a Model Texas Child Star Act that incorporates the previous recommendations.

g. **Conclusion**

Dominique Moceanu would have benefitted from financial protection from her parents. However, Texas did not offer her any. If another Olympic gymnast comes forth in 2016, Texas currently would not offer her any protection and her parents would be free to claim her earnings and spend it on whatever they pleased, like a new house, car, or state of the art facility. Although Moceanu was able to turn to legal emancipation, the

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[140] *See* Ayalon, *supra* note 20 at 367.
[141] *See id.*
[142] Currently, California, New York, Louisiana, and New Mexico require Coogan Trust accounts to be set up for child stars working or living in their state. *Coogan Law*, SAG-AFTRA ONE UNION, http://www.sagaftra.org/content/coogan-law (last visited Jan. 2, 2014).
[143] *See* Davis, *supra* note 115 at 79.
[144] *See id.* 79-80.
[145] *See* Ayalon, *supra* note 20 at 367.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *See id.* at 367-368.
[150] *See id.*
[151] *See id.*
[152] *See id.* at 367-368.

process took a toll on her life and on her training.[153] Moceanu, was able to overcome a challenging childhood and has since reconciled with her parents and has begun a new family of her own with her husband, but what she went through is something that no child should ever have to experience.[154]

Texas needs to realize the potential harm and disservice it is doing to child stars living within its state and the potential for abuse with the lack of protection it currently offers. Texas provides for the well-being of minors through mandatory education rules and foster care systems and there is no reason that it should not also take into consideration the well-being and best interests of child stars. Enacting legislation similar to Coogan's Law will be a step in the right direction and will ensure that someone like Dominique Moceanu will not be taken advantage of by his or her parents in the future.

APPENDIX

Model Texas Child Star Act

§ XX.aaa. Types of contracts governed by chapter; Person or entity considered minor's employer; Minor's "gross earnings"

(a) This chapter applies to the following contracts entered into between an unemancipated minor and any third party or parties on or after January 1, 2014:

(1) A contract pursuant to which a minor is employed or agrees to render artistic or creative services, either directly or through a third party, including, but not limited to, a personal services corporation (loan-out company), or through a casting agency. "Artistic or creative services" includes, but is not limited to, services as an actor, actress, dancer, musician, comedian, singer, stunt-person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer.

(2) A contract pursuant to which a minor agrees to purchase, or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic properties, or use of a person's likeness, voice recording, performance, or story of or incidents in his or her life, either tangible or intangible, or any rights therein for use in motion pictures, television, the production of sound recordings in any format now known or hereafter devised, the legitimate or living stage, or otherwise in the entertainment field.

(3) A contract pursuant to which a minor is employed or agrees to render services as a participant or player in a sport.

(4) A contract pursuant to which a minor will endorse a product or service, or in any other way receive compensation for the use of right of publicity of the minor

(5) A contract pursuant to which a person is employed to receive compensation from the minor for services to the minor in connection with such performing or athletic services of the minor such as a coach, manager, agent, trainer, or otherwise to represent or advise the minor in connection with contracts therefor.

(b)

(1) If a minor is employed or agrees to render services directly for any person or entity, that person or entity shall be considered the minor's employer for purposes of this chapter.

(2) If a minor's services are being rendered through a third-party individual or personal services corporation (loan-out company), the person to whom or entity to which that third party is providing the minor's services shall be considered the minor's employer for purposes of this chapter.

(3) If a minor renders services as an extra, background performer, or in a similar capacity through an agency or service that provides one or more of those performers for a fee (casting agency), the agency or service shall be considered the minor's employer for the purposes of this chapter.

(c)

(1) For purposes of this chapter, the minor's "gross earnings" shall mean the total compensation payable to the minor under the contract or, if the minor's services are being rendered through a third-party

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[153] *Profile: Dominique Moceanu, 1996 Olympic Champion*, THE DOMINIQUE MOCEANU OFFICIAL WEBSITE, http://www.dominique-moceanu.com/sub.php?p=profile.php (last visited Jan. 2, 2014).

[154] *See id.; See Dominique Moceanu*, BIOGRAPHY, http://www.biography.com/people/dominique-moceanu-21210207.

individual or personal services corporation (loan-out company), the total compensation payable to that third party for the services of the minor.

(2) Notwithstanding paragraph (1), with respect to contracts pursuant to which a minor is employed or agrees to render services as a musician, singer, songwriter, musical producer, or arranger only, for purposes of this chapter, the minor's "gross earnings" shall mean the total amount paid to the minor pursuant to the contract, including the payment of any advances to the minor pursuant to the contract, but excluding deductions to offset those advances or other expenses incurred by the employer pursuant to the contract, or, if the minor's services are being rendered through a third-party individual or personal services corporation (loan-out company), the total amount payable to that third party for the services of the minor.

§ XX.bbb. Contract approved by court not subject to disaffirmance

(a) A contract, otherwise valid, of a type described in Section 6750, entered into during minority, cannot be disaffirmed on that ground either during the minority of the person entering into the contract, or at any time thereafter, if the contract has been approved by the superior court in any county in which the minor resides or is employed or in which any party to the contract has its principal office in this state for the transaction of business.

(b) Approval of the court may be given on petition of any party to the contract, after such reasonable notice to all other parties to the contract as is fixed by the court, with opportunity to such other parties to appear and be heard.

(c) Approval of the court given under this section extends to the whole of the contract and all of its terms and provisions, including, but not limited to, any optional or conditional provisions contained in the contract for extension, prolongation, or termination of the term of the contract.

(d) For the purposes of any proceeding under this chapter, a parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time of the proceeding shall be considered the minor's guardian ad litem for the proceeding, unless the court shall determine that appointment of a different individual as guardian ad litem is required in the best interests of the minor.

(e) If the court which has approved a contract pursuant to this section shall find that the physical or mental well-being of the minor is being impaired by the performance thereof or in violation of any child labor law, it may, at any time during the term of the contract during which services are to be performed by the minor or rendered by or to the minor or during the term of any other covenant or condition of the contract, either revoke its approval of the contract or declare such approval revoked unless a modification of the contract which the court finds to be appropriate in the circumstances is agreed upon by the parties and the contract as modified is approved by order of the court. Application for an order pursuant to this subsection may be made by the minor, or his or her parent or parents or guardian, or by the person having the care and custody of the minor, or by a guardian ad litem appointed for the purpose by the court on its own motion. The order granting or denying the application shall be made after hearing, upon notice to the parties to the proceeding in which the contract was approved, given in such manner as the court shall direct. Revocation of the approval of the contract shall not affect any right of action existing at the date of the revocation, except that the court may determine that a refusal to perform on the ground of impairment of the well-being of the minor was justified.

§ XX.ccc. Placement of percentage of minor's gross earnings in trust; Duties of trustee, parent or guardian, minor's employer, and Actors' Fund of America; Notice to beneficiary; Fiduciary relationship between parent or guardian and minor

(a) A parent or guardian entitled to the physical custody, care, and control of a minor who enters into a contract of a type described in Section 6750 shall provide a certified copy of the minor's birth certificate indicating the minor's minority to the other party or parties to the contract and in addition, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian.

(b) All earnings, royalties, or other compensation earned or received by the minor pursuant to a contract of a type described in Section 6750 shall become the property of the minor.

(c)

(1) Notwithstanding any other statute, in an order approving a minor's contract of a type described in Section 6750, the court shall require that 25 percent of the minor's gross earnings pursuant to the contract be set aside by the minor's employer in trust, in an account or other savings plan, and preserved for the benefit of the minor in accordance with Section 6753.

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(2) The court shall require that at least one parent or legal guardian, as the case may be, entitled to the physical custody, care, and control of the minor at the time the order is issued be appointed as trustee of the funds ordered to be set aside in trust for the benefit of the minor, unless the court shall determine that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor. Once the child performer trust account balance reaches two hundred fifty thousand dollars or more a trust company shall be appointed as custodian of the account.

(3) Within 10 business days after commencement of employment, the trustee or trustees of the funds ordered to be set aside in trust shall provide the minor's employer with a true and accurate photocopy of the trustee's statement pursuant to Section 6753. Upon presentation of the trustee's statement offered pursuant to this subdivision, the employer shall provide the parent or guardian with a written acknowledgement of receipt of the statement.

(4) The minor's employer shall deposit or disburse the 25 percent of the minor's gross earnings pursuant to the contract within 15 business days after receiving a true and accurate copy of the trustee's statement pursuant to subdivision (c) of Section 6753, a certified copy of the minor's birth certificate, and, in the case of a guardian, a certified copy of the court document appointing the person as the minor's guardian. Notwithstanding any other provision of law, pending receipt of these documents, the minor's employer shall hold, for the benefit of the minor, the 25 percent of the minor's gross earnings pursuant to the contract.

(5) When making the initial deposit of funds, the minor's employer shall provide written notification to the financial institution or company that the funds are subject to Section 6753. Upon receipt of the court order, the minor's employer shall provide the financial institution with a copy of the order.

(6) Once the minor's employer deposits the set aside funds pursuant to Section 6753, in trust, in an account or other savings plan, the minor's employer shall have no further obligation or duty to monitor or account for the funds. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to monitor and account for those funds once they have been deposited by the minor's employer. The trustee or trustees shall do an annual accounting of the funds held in trust, in an account or other savings plan.

(7) The court shall have continuing jurisdiction over the trust established pursuant to the order and may at any time, upon petition of the parent or legal guardian, the minor, through his or her guardian ad litem, or the trustee or trustees, on good cause shown, order that the trust be amended or terminated, notwithstanding the provisions of the declaration of trust. An order amending or terminating a trust may be made only after reasonable notice to the beneficiary and, if the beneficiary is then a minor, to the parent or guardian, if any, and to the trustee or trustees of the funds with opportunity for all parties to appear and be heard.

(8) A parent or guardian entitled to the physical custody, care, and control of the minor shall promptly notify the minor's employer in writing of any change in facts that affect the employer's obligation or ability to set aside the funds in accordance with the order, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order issued pursuant to paragraph (7) amending or terminating the employer's obligations under this section. The written notification shall be accompanied by a true and accurate photocopy of the trustee's statement pursuant to Section 6753 and, if applicable, a true and accurate photocopy of the new or amended order.

(9) A parent or guardian of the minor is entitled to petition the court to set aside a portion of the minor’s earnings pursuant to a minor’s contract of the type described in Section 6750 as “parental income.” The amount set-aside for a parent shall be determined by taking into account a number of factors such as: the amount of the contract, the size of the family, the needs of the family, and if the minor’s employment interferes with a parent being able to secure employment.

§ XX.ddd. Establishment of Coogan Trust Account for minor; Requirements for withdrawal; Provision of information to minor's employer; Management of funds

(a) The trustee or trustees shall establish a trust account, that shall be known as a Coogan Trust Account, pursuant to this section at a bank, savings and loan institution, credit union, brokerage firm, or company regis-

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tered under the Investment Company Act of 1940, that is located in the State of Texas, unless a similar trust has been previously established, for the purpose of preserving for the benefit of the minor the portion of the minor's gross earnings pursuant to paragraph (1) of subdivision (b) of Section 6752 or pursuant to paragraph (1) of subdivision (c) of Section 6752. The trustee or trustees shall establish the trust pursuant to this section within seven business days after the minor's contract is signed by the minor, the third-party individual or personal services corporation (loan-out company), and the employer.

(b) Except as otherwise provided in this section, prior to the date on which the beneficiary of the trust attains the age of 18 years or the issuance of a declaration of emancipation of the minor under Section 7122, no withdrawal by the beneficiary or any other individual, individuals, entity, or entities may be made of funds on deposit in trust without written order of the superior court pursuant to paragraph (7) of subdivision (b) or paragraph (5) of subdivision (c) of Section 6752. Upon reaching the age of 18 years, the beneficiary may withdraw the funds on deposit in trust only after providing a certified copy of the beneficiary's birth certificate to the financial institution where the trust is located.

(c) The trustee or trustees shall, within 10 business days after the minor's contract is signed by the minor, the third-party individual or personal services corporation (loan-out company), and the employer, prepare a written statement under penalty of perjury that shall include the name, address, and telephone number of the financial institution, the name of the account, the number of the account, the name of the minor beneficiary, the name of the trustee or trustees of the account, and any additional information needed by the minor's employer to deposit into the account the portion of the minor's gross earnings prescribed by paragraph (1) of subdivision (b) or paragraph (1) of subdivision (c) of Section 6752. The trustee or trustees shall attach to the written statement a true and accurate photocopy of any information received from the financial institution confirming the creation of the account, such as an account agreement, account terms, passbook, or other similar writings.

(d) The trust shall be established in Texas either with a financial institution that is and remains insured at all times by the Federal Deposit Insurance Corporation (FDIC), the Securities Investor Protection Corporation (SIPC), or the National Credit Union Share Insurance Fund (NCUSIF) or their respective successors, or with a company that is and remains registered under the Investment Company Act of 1940. The trustee or trustees of the trust shall be the only individual, individuals, entity, or entities with the obligation or duty to ensure that the funds remain in trust, in an account or other savings plan insured in accordance with this section, or with a company that is and remains registered under the Investment Company Act of 1940 as authorized by this section.

(e) Upon application by the trustee or trustees to the financial institution or company in which the trust is held, the trust funds shall be handled by the financial institution or company in one or more of the following methods:

(1) The financial institution or company may transfer funds to another account or other savings plan at the same financial institution or company, provided that the funds transferred shall continue to be held in trust, and subject to this chapter.

(2) The financial institution or company may transfer funds to another financial institution or company, provided that the funds transferred shall continue to be held in trust, and subject to this chapter and that the transferring financial institution or company has provided written notification to the financial institution or company to which the funds will be transferred that the funds are subject to this section and written notice of the requirements of this chapter.

(3) The financial institution or company may use all or a part of the funds to purchase, in the name of and for the benefit of the minor, (A) investment funds offered by a company registered under the Investment Company Act of 1940, provided that if the underlying investments are equity securities, the investment fund is a broad-based index fund or invests broadly across the domestic or a foreign regional economy, is not a sector fund, and has assets under management of at least two hundred fifty million dollars ($250,000,000); or (B) government securities and bonds, certificates of deposit, money market instruments, money market accounts, or mutual funds investing solely in those government securities and bonds, certificates, instruments, and accounts, that are available at the financial institution where the trust fund or other savings plan is held, provided that the funds shall continue to be held in trust and subject to this chapter, those purchases shall have a maturity date on or before the date upon which the minor will attain the age of 18 years, and any proceeds accruing from those purchases shall be redeposited into that account or accounts or used to further purchase any of those or similar securities, bonds, certificates, instruments, funds, or accounts.

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

DIVORCE
INFORMAL MARRIAGE

THERE IS NO COMMON-LAW DIVORCE IN TEXAS—ONCE A COMMON-LAW HUSBAND AND WIFE ESTABLISH THE "HOLDING OUT" ELEMENT OF A COMMON-LAW MARRIAGE, THEY CANNOT SUBSEQUENTLY UNDO THE MARRIAGE SIMPLY BY DENYING THE EXISTENCE OF THE MARRIAGE.

14-3-01. *McMaster v. Small*, No. 14-13-00069-CV, 2014 WL 950471 (Tex. App.—Houston [14th Dist.], 2014, no. pet. h.) (03/11/2014) (mem. op.).

Facts: Wife petitioned trial court for divorce alleging a common-law marriage to Husband. Jury found in favor of Wife, and Husband appealed. On appeal, COA reversed and remanded, holding that the evidence was factually insufficient to support the "holding out" element of a common-law marriage. On remand, Husband filed a no-evidence summary judgment motion on the "holding out" element. In her response, Wife attached transcripts from the original trial and affidavits containing her own testimony and the testimony of seven other individuals regarding the "holding out" element of the alleged common-law marriage. Nevertheless, the trial court granted the motion, and Wife appealed.

Holding: Reversed and remanded.

Opinion: On appeal, Husband argued that Wife failed to present any evidence of holding out occurring after 2005. The COA rejected Husband's argument. In her pleadings, Wife alleged that she and Husband married in December 1991 and ceased to live together as husband and wife in August 2004. Because there is no such thing as a common-law divorce in Texas, a common-law marriage, like any other marriage, may be terminated only by death or a court decree. Therefore, even if the spouses denied the existence of a marriage after August 2004, those denials cannot undo the marriage. Accordingly, Wife had no burden to prove there was holding out in 2005 or afterward. Consequently, because Wife adduced more than a scintilla of evidence on the holding out element, the trial court erred by granting Husband a no-evidence summary judgment.

DIVORCE
VALIDITY OF MARRIAGE

THE FACT THAT THE MARRIAGE BETWEEN HUSBAND AND WIFE WAS VOID WOULD HAVE HAD NO EFFECT ON HUSBAND'S BARGAINING POSITION IN AN MSA BECAUSE THE PARTIES WERE IN A PUTATIVE RATHER THAN MERETRICIOUS RELATIONSHIP.

14-3-02. *Davis v. Davis*, No. 01-12-00701-CV, 2014 WL 890899 (Tex. App.—Houston [1st Dist.], 2014, no. pet. h.) (mem. op.) (03/06/2014).

Facts: Husband filed for divorce from Wife. Before trial, the parties entered into an MSA dividing the property, leaving only the issue of child custody for trial. During the trial, Wife testified that before she married

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Husband, she was previously married in a religious ceremony to another man ("Mohammad"). Wife testified that she never officially divorced Mohammad because she believed that she and Mohammad were never legally married under Texas law. The trial entered a final decree declaring the marriage between Husband and Wife void, but also incorporating the MSA's property division. Husband appealed.

Holding: Affirmed.

Opinion: Husband argued that binding him to the MSA caused him financial injury because he negotiated the MSA under a mistaken belief that he was married and that and that the property at issue was community property, but that had he known the truth—he would have been less inclined to distribute as much property to Wife. However, the fact that the marriage was void would not have improved Husband's bargaining position because the trial court made no finding that the marriage between Husband and Wife was meretricious.

A meretricious relationship occurs when neither party has a good faith belief that they are entering into a legal marital relationship. In a meretricious marriage, each party owns only the property acquired in proportion to the value his (or her) labor contributed to the acquisition of it. A putative marriage, in contrast, is one that is invalid by reason of an existing impediment on the part of one or both spouses; but which was entered into in good faith by either one or both of parties. Putative spouses have same legal rights to community property as legal spouses.

Here, Wife testified without contradiction that she did not believe Texas recognized her marriage. Therefore, the parties were putative spouses—thus negating Husband's fraud claim. Accordingly, Husband's bargaining position would not have been improved had he been aware that the marriage was void.

Editor's comment: *This case makes sense: If the parties married in good faith, then negotiated a divorce settlement while still under the impression that they were married, what difference would it make to the settlement when it turned out that the wife was previously married after all? J.V.*

DIVORCE
STANDING AND PROCEDURE

MOTHER PREVAILED ON RESTRICTED APPEAL BECAUSE: (1) ALTHOUGH SHE FAILED TO FILE NOTICE OF RESTRICTED APPEAL WITHIN SIX MONTHS AFTER JUDGMENT, SHE FILED THE NOTICE WITHIN THE 15-DAY GRACE PERIOD; AND (2) THE TRIAL COURT'S CONSENT TO WAIVER OF THE MAKING OF RECORD IN A SAPCR HEARING WITHOUT MOTHER'S APPEARANCE CONSTITUTED ERROR ON THE FACE OF THE RECORD.

14-3-03. ***Wray v. Papp***, __SW3d__, No. 04-13-00374-CV, 2014 WL 2109129 (Tex. App.—San Antonio, no pet. h.) (05/21/2014).

Facts: In 2011, Mother and Father separated, and Father moved to Texas with the Child. In August 2012, Father filed for divorce, and Mother filed an answer. In October 2012, Father filed an amended divorce petition and send it to Mother via certified mail notifying her of a final hearing set for December 13, 2012. The record, however, does not contain a copy of the return receipt. Father appeared at the final hearing. Mother, who resided out-of-state, did not appear. That same day, the trial court signed a final divorce decree appointing Father as the Child's sole managing conservator and ordering Mother to pay child support. Additionally, although Mother was not present at the hearing, the divorce decree recited that the parties waived the making of a record with the consent of the trial court. Mother neither signed nor agreed to the divorce decree. On June 14, 2013, six months and one day after the Court signed the final divorce decree, Mother filed a restricted appeal.

Holding: Reversed and remanded

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Opinion: A party can prevail in a restricted appeal only if: (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.

Father argued Mother's restricted appeal was not timely filed. The Texas Rule of Appellate Procedure 26.1 requires an appealing party to file a restricted appeal within six months after the trial court signs its judgment. An appellate court may extend the time to file a notice of appeal if, within fifteen days after the deadline for filing the notice, the appealing party files a notice of appeal with the trial court and a motion for extension of time. A motion for extension of time is implied when an appellant acting in good faith files a notice of appeal beyond the time allowed by Rule 26.1, but within the fifteen-day grace period. Here, Mother's explanation that the late filing was due to a mistake in calculation and her inability to timely secure legal counsel was satisfactory. Accordingly, Mother timely filed her notice of appeal.

Father also argued that error was not apparent on the face of the record. Texas Family Code § 105.003(c) requires a record to be made in all SAPCRs unless waived by the parties with the consent of the court. Although the final divorce decree recited that the parties waived the making of a record, Mother was neither present nor represented by counsel at the hearing; therefore, the making of the record could not be waived as to Mother. Therefore the trial court erred in consenting to the waiver of the record. The trial court's error is constituted error on the face of the record because the COA could not evaluate the sufficiency of the evidence to support the trial court's order without a reporter's record.

Editor's comment: *Most appellate deadlines are expressed in days, not months, such that (for example) a filing June 1 is too late for a 30-day deadline beginning May 1. But the time period for a restricted appeal is expressed in months, so filing June 13 would have been timely as six months after December 13. Because the appellate courts will imply a request for extension of time if an appellant acting in good faith files a notice of appeal within 15 days after the deadline, the appellant was allowed to proceed with her appeal. J.V.*

IN A CASE INVOLVING A SAME-SEX PETITION FOR DIVORCE, TRIAL COURT ABUSED ITS DISCRETION BY DENYING A PARTY'S PLEA TO THE JURISDICTION BASED ON THE OPPOSING PARTY'S CONSTITUTIONAL CHALLENGES TO THE TEXAS CONSTITUTION AND VARIOUS PROVISIONS OF THE TFC BECAUSE NEITHER PARTY NOR THE TRIAL COURT PROVIDED NOTICE OF THE CONSTITUTIONAL CHALLENGES TO THE OAG PURSUANT TO TEXAS GOVERNMENT CODE SECTION 402.010.

14-3-04. *In re State of Texas*, No. 04-14-00282-CV, 2014 WL 2493910 (Tex. App.—San Antonio, orig. proceeding) (05/28/2014).

Facts: A.L.F.L. and K.L.L., a same-sex couple, married in Washington, D.C. in 2010. Subsequently, the couple returned to Texas and registered their out-of-state marriage license without objection. Additionally, K.L.L. gave birth to a Child conceived through artificial insemination. In February 2014, A.L.F.L. filed for divorce.

K.L.L. filed a motion to dismiss the divorce proceeding and a plea to the jurisdiction asserting that Texas laws prohibiting same-sex marriage and the recognition of out-of-state same-sex marriages preclude the trial court's authority to entertain the divorce action. A.L.F.L. responded by asserting, in part, that Tex. Const. Art. 1, § 32 and related provisions of the TFC were unconstitutional. Following a hearing, the trial court denied K.L.L.'s plea to the jurisdiction and signed an order holding that Tex. Const. Art. 1, § 32 and Texas Family Code Section 6.204 were facially unconstitutional and that Texas Family Code Sections 102.003 and 160.204(a)(1) were unconstitutional as applied. The OAG intervened in the trial court and filed petition for writ of mandamus in the COA arguing that the trial court abused its discretion by issuing a decision invalidating a state constitutional provision and a state statute without providing prior notice to the OAG.

Holding: Petition for writ of mandamus conditionally granted

Opinion: When a party to litigation files a petition, motion or other pleading challenging the constitutionality of a Texas statute, Texas Government Code Section 402.010(a) requires that the party or the court provide notice and a copy of the pleadings to the OAG "if the attorney general is not a party to or counsel involved in the litigation." The purpose of the statute is to provide the OAG with the opportunity to be heard on issues important to the laws of the state—the laws the OAG is charged with defending and enforcing.

Here, it is undisputed that A.L.F.L.'s pleadings contained constitutional challenges and that neither the parties nor the trial court followed the requirements of Texas Government Code 402.010. Although the statute provides that the failure to provide notice as required does not deprive the trial court of jurisdiction, the trial court's determination of the constitutional challenges without prior notice to the OAG deprived the State of an important right and constitutes an abuse of discretion for which mandamus relief is available.

A.L.F.L. argued, among other things, that the OAG was not entitled to notice because the Texas Court of Criminal Appeals ("CCA") in *Ex Parte Lo* held that Texas Government Code Section 402.010 creates an unconstitutional violation of the separation of powers. *See* 424 S.W.3d 10, 29 (Tex. Crim. App. 2013). Regardless, the CCA's holding in *Ex parte Lo* is not binding in a civil proceeding. Accordingly, the State is entitled to mandamus relief.

Dissent: The COA should have denied the State mandamus relief for the reasons expressed in *Ex parte Lo*. In that case, The CCA concluded that Texas Government Code Section 402.010 constitutes an unconstitutional violation of the separation of powers because the entry of final judgment is a core judicial power; it falls within that judicial realm of judicial proceedings so vital to the efficient functioning of a court as to be beyond legislative power and Texas Government Code Section 402.010's provision prohibiting entry of a final judgment absent 45-days' notice to the OAG creates a constitutionally intolerable imposition on a court's power to enter a final judgment.

Here, it is undisputed that the trial court heard argument from all parties before regarding the challenged statutes and proceeded to rule on the merits of the constitutional challenge without providing the OAG notice. Regardless, it is not within the judiciary's purview to accomplish the Legislature's goals, nor is it the judiciary's mandate to cooperate with the State's preferences. While the attorney general does have an interest in defending the state's laws, the judiciary's authority to consider and resolve constitutional issues should not take a back seat to legislative interests, nor be hindered by them.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT ERRED BY BASING FATHER'S CHILD SUPPORT ON A RULE 11 AGREEMENT BECAUSE FATHER HAD WITHDRAWN HIS CONSENT TO THE AGREEMENT BEFORE THE TRIAL COURT RENDERED A FINAL JUDGMENT

14-3-05. ***Woody v. Woody***, __SW3d__, No. 14-12-00762-CV, 2014 WL 1512395 (Tex. App.—Houston [14th Dist.], 2014, no. pet. h.) (04/17/2014).

Facts: The trial court entered a final divorce decree in 2008 ordering Father to pay child support to Mother. The decree also awarded Father the guns in Mother's possession. Subsequently, both parties filed various post-decree motions and petitions including Father's petition for post-divorce division of property—specifically guns that were allegedly not divided in the decree. During the pendency of these matters, the first child attained the age of majority and was no longer covered by the child support provisions of the decree, so that Father's child support obligation decreased. In the post-decree filings, Mother sought an increase in this amount and Father sought a decrease.

The parties attempted but failed to resolve the child support issue by mediation. However, at a subsequent hearing, the mediator appeared and reported to the trial court that the parties had reached an agreement to leave the child support obligation where it was under the original decree: $771.73 per month. At the same

hearing, Father consented to $771.73 per month. Regardless, the trial court set aside the issue and continued with other matters. At a later hearing, Father again requested a reduction in his child support obligation. In its final judgment the trial court ordered Father to pay $771.73 each month in child support stating that "the parties agreed during mediation and announced on the record in open court, that the current child support remain the same." Father appealed.

Holding: Affirmed in part, reversed and remanded in part

Opinion: Father argued the trial court erred by approving the parties' agreement on child support after Father had withdrawn his consent to the agreement. Mother conceded that the parties had not entered into an enforceable mediated settlement agreement, but argued that the parties entered into an enforceable Rule 11 agreement in open court.

Parties can enter into an enforceable Rule 11 agreement if it is made in open court and entered of record. If a party revokes its consent to a Rule 11 agreement at any time before the trial court renders judgment in the case, the agreement can no longer simply be "approved" by the court; instead, the enforcement mechanism is through a separate breach of contract action. Here, although the parties entered into an agreement in open court, Father subsequently requested a reduction in child support. Therefore, Father clearly withdrew his consent to that agreement before the trial court rendered judgment. Accordingly, the trial court erred by incorporating the child support agreement into the final judgment.

Editor's comment: *Unravelling a settlement: If there was an MSA, it was not in writing. If there was a Rule 11 agreement, the ex-husband withdrew his consent prior to judgment. The remedy for breaching a Rule 11 agreement is "a separate breach of contract action." Did things just get complicated? J.V.*

DIVORCE
DIVISION OF PROPERTY

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT WIFE AN OFFSET FOR THE COMMUNITY'S PAYMENT OF COMMUNITY EXPENSES AGAINST HUSBAND'S SEPARATE PROPERTY REIMBURSEMENT AWARD.

14-3-06. ***IMOMO O'Brien***, __SW3d__, No. 14-13-00283-CV, 2014, 2014 WL 1800268 (Tex. App.—Houston [14th Dist.] 2014, no. pet. h.) (05/06/2014).

Facts: Following a trial, the trial court found that Wife owned as her separate property certain real property where the couple resided during the marriage and that Husband had used $24,965.51 of his separate property to pay Wife's debt on her separate property. Accordingly, the trial court rendered a final decree granting Husband $24,965.51 in reimbursement for the payment of Wife's debt. The trial court denied Wife's various claims for an offset against the reimbursement. Wife appealed.

Holding: Affirmed

Opinion: Contending that the community estate's payment of $8,395 in rental fees for a storage unit containing Husband's separate property constituted an "unsecured liability" of Husband's separate estate, Wife argued that the trial court erred in failing to credit her for the community's payments. A claim for reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit; it is generally a matter of discretion for the trial court. Texas Family Code Section

3.402(a)(1) provides that a claim for reimbursement includes payment by one marital estate of the unsecured liabilities of another marital estate.

Here, Wife provided no authority or analysis supporting her assertion that monthly storage fees paid to house separate property during marriage is an "unsecured liability" of Husband's separate estate or that such storage did not benefit the community. Moreover, the trial court clearly rejected Wife's characterization of the storage unit's contents when it concluded that community funds were used to pay community expenses.

Editor's comment: *Not so sure this case holds that storage fees for separate property are not reimburseable. The court said the wife did not provide any authority or analysis to support that point, but the real kicker is that the wife is the only one who testified about this issue, and the trial court was free to disbelieve her testimony. J.V.*

TRIAL COURT ABUSED ITS DISCRETION BY CHARACTERIZING HUSBAND'S LUMP-SUM COMPENSATION FOR WRONGFUL CONVICTION AS LOST WAGES AND AWARDING WIFE A PORTION AS COMMUNITY PROPERTY.

14-3-07. ***Phillips v. Tucker***, __SW3d__, No. 05-13-00210-CV, 2014 WL xxxxxx (Tex. App.—Dallas 2014, no. pet. h.) (05/12/2014).

Facts: Husband and Wife married in 1980. Two years later, Husband was arrested, convicted, and ultimately incarcerated for certain criminal offenses. The parties divorced in 1992, while Husband was still in prison. Fifteen years later, Phillips was released from prison on parole after spending almost twenty-five years in prison. The next year, sixteen years after the divorce, Husband was exonerated by DNA testing. Thereafter, Husband applied for and received compensation through the administrative procedure set forth under Texas Civil Practice and Remedies Code Section 103.001–.154 also known as the Tim Cole Act.

In February 2010, Wife sued Husband for a portion of the compensation he received under the Act alleging the amount included lost wages related to Husband's first nine and three quarters years in prison before their divorce and as such constituted community property to which she was entitled her portion. The trial court agreed with Wife and rendered judgment in her favor for $114,459.50 plus attorney's fees and expenses. Husband appealed arguing that his compensation under the Act did not include any amount for lost wages during the period of his wrongful incarceration.

Holding: Reversed and rendered

Opinion: The Tim Cole Act provides a person who has been wrongfully incarcerated with an administrative remedy to seek monetary compensation from the State for the period of wrongful imprisonment. The compensation scheme under the Act is essentially liquidated damages for "the wrong done in the State's name" based on time served. The amount of the lump-sum compensation owed to an eligible exoneree is determined by multiplying $80,000 times the number of years served in prison, expressed as a fraction to reflect partial years. Thus, according to the plain language of the statute, the lump-sum compensation awarded under the Act's administrative remedy is based solely on the period of wrongful incarceration and is not based on, or related to, any particular exoneree's economic loss or lost wages while in prison.

The conclusion that the statutory lump-sum compensation does not include an amount for lost wages is also supported the legislative history. Prior to enactment of the Tim Cole Act, the wrongful imprisonment statute allowed an eligible exoneree to choose between an administrative remedy entitling the exoneree to $50,000 for each year imprisoned or filing a lawsuit against the State for economic damages, including lost wages. The Act abolished the cause of action for damages leaving only the administrative remedy and increased the amount of lump-sum compensation from $50,000 to $80,000 per year of imprisonment. Nothing in the legislative history indicates the increase in the lump-sum compensation was for lost wages.

BECAUSE THE TERM "BANK" ACCOUNT AS USED IN A PREMARITAL AGREEMENT IS A LEGALLY SEPARATE AND DISTINCT ENTITY FROM A "BROKERAGE" ACCOUNT, THE TRIAL COURT ERRED BY CHARACTERIZING PROCEEDS FROM THE SALE OF HUSBAND'S SEPARATE PROPERTY BUSINESS THAT WERE DEPOSITED INTO A BROKERAGE ACCOUNT AS COMMUNITY PROPERTY.

14-3-08. ***IMOMO*** ***McNelly***, __SW3d__, No. 14-13-00281-CV, 2014 WL 2039855 (Tex. App.—Houston [14th Dist.], no pet. h.) (05/15/2014).

Facts: Prior to Husband and Wife's marriage, Husband owned and operated a business. Husband and Wife executed a premarital agreement in July 2008. The premarital agreement provided that separate property funds and proceeds from the sale of separate property would remain separate property but also provided that those funds and proceeds "may be deposited into any bank account styled in their joint names" and that such monies "shall become and remain community property." The parties married later that same month. In September 2008 Husband sold his interest in the business for $1.3 million and later deposited $100,000 of the sale proceeds into two joint bank accounts and the remaining $1.2 million two separate joint brokerage accounts. Wife filed for divorce in 2010. Following the trial, the trial court found that Husband's owned and operated his business prior to the marriage, making his interest in the business Husband's separate property. However, the trial court concluded that Husband converted all $1.3 million in his separate property proceeds from the sale of his business into community property by depositing the proceeds into joint accounts and comingling the proceeds with community funds. Husband appealed, arguing that the trial court divested him of his separate property when it characterized the $1.2 million deposited into joint "brokerage" accounts as community property.

Holding: Reversed in part and remanded in part

Opinion: Under the plain language of the premarital agreement, the couple clearly intended that the fruits of the business, such as the earnings that might result from the sale of the business, should remain Husband's separate property. Resolution of the issue therefore turns on the meaning of "bank" in the premarital agreement.

Dictionaries generally define "bank" as a financial establishment for the deposit, loan, exchange, or issue of money and for the transmission of funds. In contrast, "broker" is defined as an agent who acts as an intermediary or negotiator, especially between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. These definitions illustrate that banks and brokers are distinguishable, particularly with respect to the scope of their respective services; banks tend to offer a broader spectrum of financial services than brokerage firms. Additionally, federal and state statutory definitions, including those under the U.S. Code Title 15 (Commerce and Trade), the Texas Finance Code, and the Texas Business and Commercial Code, illustrate that banks and brokerage firms generally fall under distinct statutory and regulatory regimes. Finally, federal case law suggests that mere overlap in the services provided by a nonbanking entity, such as a brokerage firm, with the services provided by a bank does not transform the nonbanking entity into a bank.

Here, the premarital agreement states that any separate-property funds deposited into joint "bank" accounts would become community property. The contested $1.2 million was into joint "brokerage" accounts not joint "bank" accounts. Therefore, that $1.2 million did not become community property. Accordingly, the trial court erred when, based on its erroneous interpretation premarital agreement, it characterized as community property the $1.2 million from the sale of Husband's separate property business.

Editor's comment: *I would bet that most people, lay people or lawyers alike, don't know or understand the hypertechnical difference between "bank" accounts and "brokerage" accounts. M.M.O.*

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TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DIVIDE COMMUNITY PROPERTY ALLEGEDLY NOT PREVIOUSLY DIVIDED BY THE DIVORCE DECREE BECAUSE WIFE FAILED TO PROVE WHETHER HUSBAND'S INCOME UNDER DISPUTE WAS STILL ON HAND AT THE TIME OF THE DIVORCE.

14-3-09. ***IMOMO Ford***, __SW3d__, No. 06-13-00109-CV, 2014 WL 2129520 (Tex. App.—Texarkana, no pet. h.) (05/22/2014).

Facts: After a 31-year marriage, and after having been separated for a little over three years, Husband and Wife divorced in April 2013. Two months later, Wife filed a petition for forfeiture alleging that Husband failed to disclose to her all his Social Security and pension income for the three years immediately preceding the divorce. At a hearing, Wife requested a division of the disputed income, or alternatively, a cancelation of a $25,000 judgment and lien awarded in Husband's favor in the divorce decree as part of the marital property division. The trial court denied Wife's requested relief finding that no pleadings supported cancelation of the $25,000 judgment and that it could not divide property that it was unsure even existed at the time of divorce or at the time of Wife's forfeiture petition. Wife appealed.

Holding: Affirmed

Opinion: Texas Family Code §§ 9.201 and 9.203 provide a procedure for the division of community property not previously divided by the divorce decree. Here, Wife provided in her forfeiture petition an IRS tax transcript evidencing Husband's receipt of a taxable pension and social security benefits for tax years 2010-2012. Husband, however, testified that he paid down $7,000.00 in tax penalties by applying the previous two year's refunds and that approximately $2,800.00 in tax penalties remained unpaid. Husband also testified without contradiction that during the three years the parties were separated, he continually supported Wife, paid some of her debts, and paid to have her truck repaired.

Wife provided no evidence whether any of the income Husband received during the parties' three-year separation was still on hand at the time of their divorce or the filing of Wife's forfeiture petition. With no evidence any of the income was still on hand at the time of the divorce, there was nothing establishing the existence of property not disposed of in the divorce decree, as contemplated by Texas Family Code § 9.023. Additionally, there was no basis to support any forgiveness of the debt awarded to Husband as secured by a lien imposed on the real property set aside to Wife in the divorce decree.

[In dicta, the COA noted that Wife failed to avail herself of relief under Texas Family Code § 7.009. Texas Family Code § 7.009 provides a vehicle for a trial court to reconstitute a marital estate upon a finding that a spouse has committed actual or constructive fraud on the community.]

Editor's comment: *Even so, sections 9.201 et seq. do not provide for "forfeiture" of undisclosed property but instead require a just and right division. Perhaps the parties signed an agreed decree that granted each party 100% of any undisclosed property held by the other party. J.V.*

THE TRIAL COURT ERRED BY IMPOSING AN EQUITABLE LIEN TO SECURE THE REIMBURSEMENT AWARD AGAINST ALL OF WIFE'S SEPARATE PROPERTY BECAUSE THE TEXAS CONSTITUTION PROHIBITED THE LIEN SPECIFICALLY AGAINST WIFE'S SEPARATE PROPERTY HOMESTEAD AND BECAUSE NONE OF HER SEPARATE PROPERTY WAS BENEFITED BY A CONTRIBUTION FROM HUSBAND'S SEPARATE PROPERTY.

14-3-10. ***Hinton v. Burns***, __SW3d__, 05-12-01494-CV, 2014 WL 2134555 (Tex. App.—Dallas, no pet. h.) (05/22/2014).

Facts: Husband and Wife married in 2009. Each party brought separate property into the marriage—Wife owned a home in Celina Texas prior to the marriage, and Husband owned several businesses and inherited approximately $288,000 from his family's estate. The parties formed an LLC during the marriage with each owning a 50% interest. In 2010, the LLC purchased real property (the "Ranch") valued at $307,428 at the

time of purchase. Wife filed for divorce in April 2012 and took up residence in her Celina home as her homestead. Husband counter-sued and sought reimbursement for $117,319.77 in contributions made from his separate property to the community estate and for $66,480 loaned to the community from Husband's separate property businesses.

At trial, Husband testified that during the marriage he contributed his entire inheritance to the community and that the community would periodically borrow money from his separate property business entities and that said monies were deposited into the community's checking account and used for community expenses. At the trial's conclusion, the trial court awarded the LLC, the Ranch, and the associated debt to Husband. The trial court also confirmed the Celina home as Wife's separate property. Additionally, the trial court found that Husband's separate estate was entitled to $57,000 reimbursement from the community estate for Husband's separate property contributions. The trial court awarded judgment in that amount to Husband and also imposed an equitable lien extending to "all property that [Wife] owns," including Wife's Celina homestead and her other separate property. The divorce decree also provided that "to the extent legally permitted, [Husband] is granted a possessory lien on these assets until the judgment is paid in full." Wife appealed.

Holding: Affirmed as modified

Opinion: Wife argued that the trial court erred by imposing a lien on her separate property to secure the reimbursement award contending that the imposition of the entire lien was error, and in particular, the lien imposed on her separate property homestead. Husband argued that the equitable lien was appropriate because the final decree of divorce grants the lien only "to the extent legally permitted."

A lien on a separate property homestead is invalid where the lien does not fit in any category allowed by Texas Constitution. Additionally, although the TFC previously provided that a contribution claim could be secured by an equitable lien "on the entirety of a spouse's property in the marital estate and is not limited to the item of property that benefited from an economic contribution," that section was repealed in 2009. Texas Family Code Section 3.406(a) now provides that "[o]n dissolution of a marriage, the court may impose an equitable lien *on the property of a benefited marital estate* to secure a claim for reimbursement *against that property* by a contributing marital estate." Although the court in *Dailey v. Dailey*, 02-12-00097-CV, 2013 WL 105667 (Tex. App.—Fort Worth Jan. 10, 2013, no pet.) has stated that "a trial court may impose equitable liens on one spouse's separate property as a means for securing the discharge of payments owed by one spouse to the other" that COA did not cite or discuss Texas Family Code Section 3.406(a).

Here, because the equitable lien does not fit any of the allowed categories under the Texas Constitution, it is invalid specifically as to Wife's separate property homestead. Moreover, there is no evidence that any of Wife's separate property was benefited by a contribution from Husband's separate property. Therefore, the trial court erred by extending the equitable lien to Wife's separate property. Accordingly, the trial court's judgment is modified to delete the imposition of the equitable lien on Wife's homestead and separate property.

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

BECAUSE FINAL JUDGMENT, IN WHICH TRIAL COURT REFUSED TO RECOGNIZE A COMMON-LAW MARRIAGE, CONTAINED NO ORDER DIVIDING ALLEGED COMMUNITY PROPERTY, WRIT OF PROHIBITION WOULD NOT ISSUE TO ENJOIN SECOND TRIAL COURT'S EXERCISE OF JURISDICTION OVER LIS PENDENS FILED PURSUANT TO DIVORCE PROCEEDING.

14-3-11. ***In re Miller***, __SW3d__, No. 01-13-00973-CV, 2014 WL 943135 (Tex. App.—Houston [1st Dist.], 2014, orig. proceeding) (03/11/13).

Facts: Wife filed a petition for divorce from Husband in the Harris County Court seeking dissolution of a common-law marriage and a distribution of the alleged community estate including a tract of real property located in Brazoria County. In a separate action, Wife filed a lis pendens on the real property in Brazoria County. Eventually, the Harris County Court severed out the common-law marriage issue from the property issues and ruled that no common-law marriage existed. Wife appealed that judgment. While the appeal remained pending, the record owner of the Brazoria County property, ("Partnership") sued Wife in Brazoria County seeking a declaratory judgment cancelling Wife's lis pendens. In response, Wife filed a writ of prohibition in the COA, arguing that, once the COA acquired jurisdiction over the appeal from the Harris Court judgment, the Brazoria Court was prohibited from taking action concerning the alleged community property, including the canceling of the lis pendens.

Holding: Writ of prohibition denied.

Opinion: A writ of prohibition is available to protect the subject matter of an appeal or to prohibit unlawful interference with enforcement of an appellate court's judgment. A writ of prohibition is not appropriate relief when other remedies, like an appeal, are available and adequate.

A trial court retains authority to enforce a final judgment pending appeal so long as the judgment has not been superseded or stayed and no statute or rule of procedure removes the trial court's authority. TFC 9.007 provides that enforcement of the property division in a divorce decree is abated during the pendency of an appellate proceeding.

Here, TFC 9.007 is inapplicable because Wife's appeal is not from a judgment dividing the community estate. Even if it was, cancelling the lis pendens does not enforce a property division ruling because a lis pendens merely notifies of the existence of the dispute; its placement or removal does not quiet title. Accordingly, the Brazoria Court had jurisdiction to enter orders enforcing the judgment while the appeal was pending. Additionally, Wife has failed to demonstrate that the Brazoria Court's exercise of that jurisdiction would disturb or interfere with the COA jurisdiction over the appeal. Moreover, Wife has other adequate remedies available including, requesting alternate security in the Brazoria Court, and mandamus relief if the Brazoria Court's later orders in the declaratory judgment in fact interfere with the appeal.

WIFE CANNOT BE IMPRISONED FOR NON-PAYMENT OF A MONEY JUDGMENT TO HUSBAND SECURED BY AN OWELTY LIEN—EVEN IF WIFE HAD ACCESS TO FUNDS TO PAY THE AWARD—BECAUSE SUCH AWARD IS ONLY A DEBT.

14-3-12. *In re Kinney*, No. 05-14-00159-CV, 2014 WL 1414280 (Tex. App.—San Antonio, 2014) (orig. proceeding) (03/27/2014) (mem. op.).

Facts: Pursuant to a divorce decree, Husband was awarded $40,000.00 secured by an owelty lien on a residence in Missouri awarded to Wife in the decree. The divorce decree required Wife to pay the $40,000 to Husband within six months of the signing of the decree. Husband filed a motion to enforce the decree after Wife failed to tender payment. Following a hearing, the trial court found that Wife had access to $40,000 from an inheritance as well as property from the division of the property. Therefore, the trial court found Wife in contempt and ordered her confined until she tendered the $40,000. Wife filed a petition for writ of habeas corpus arguing the contempt order was void because it imprisoned her for failure to pay a debt.

Holding: Petition for writ of habeas corpus granted.

Opinion: The Texas Constitution provides that no person shall ever be imprisoned for debt. In accordance, Texas Family Code Section 9.012 may enforce by contempt an order requiring the delivery of specific property or an award of a right to future property—but may not enforce by contempt an award in a decree of divorce a sum of money payable in a lump sum or in future installments payments in the nature of debt, except for: (1) a sum of money in existence at the time the decree was rendered; or (2) a matured right to future payments.

Here, the divorce decree did not characterize the $40,000 award to Husband as a sum of money in existence on the date of the decree. Instead, the divorce decree characterized the $40,000.00 as a debt of Wife and secured that debt with a lien on real property awarded to her. The fact that Wife had access to $40,000.00 from money she inherited from her mother's estate and such money was in existence at the time of divorce is not dispositive. Accordingly, habeas corpus relief is granted because the trial court imprisoned Wife for the non-payment of a debt.

Editor's comment: *In short, said the court, for an order to be enforceable by contempt, "the divorce decree must indicate the funds existed at the time the decree was rendered or specify particular community funds from which the amount is to be paid." J.V.*

DIVORCE
SPOUSAL MAINTENANCE

ALTHOUGH WIFE TESTIFIED THAT SHE DID NOT CONSIDER HERSELF DISABLED, THE TRIAL COURT COULD REASONABLY INFER FROM THE REMAINDER OF THE EVIDENCE THAT HER INCAPACITY QUALIFIED HER FOR SPOUSAL MAINTENANCE; WIFE FAILED TO SUPPORT HER REQUEST FOR APPELLATE ATTORNEY'S FEES WITH EVIDENCE THAT SUCH FEES WERE REASONABLE AND NECESSARY.

14-3-13. *Galindo v. Galindo*, No. 04-13-00325-CV, 2014 WL 1390474 (Tex. App.—San Antonio 2014, no. pet. h.) (04/09/2014) (mem. op.).

Facts: Several years after Husband and Wife married, Wife was diagnosed with an intestinal tract disorder that caused Wife severe symptoms and required multiple hospitalizations. The disorder also impeded Wife's ability to work outside the home. Husband petitioned for divorce in 2011—Wife counter-petitioned and requested spousal maintenance. During the trial, Wife testified that, despite the severity of her symptoms, she did not consider herself disabled. Afterward, the trial court found Wife disabled due to her intestinal disorder and ordered Husband to pay Wife spousal maintenance. After Husband perfected his appeal, Wife filed a motion for temporary orders seeking appellate attorney's fees. The trial court granted Wife's request for appellate attorney's fees.

Holding: Affirmed in part, reversed and rendered in part.

Opinion: On appeal, Husband argued that there was insufficient evidence that Wife was disabled. Texas Family Code § 8.051(2)(A) authorizes a trial court to award spousal maintenance where the spouse seeking maintenance is unable to earn sufficient income to provide for the spouse's minimum reasonable needs because of an incapacitating physical or mental disability. There is no authority directly addressing the quantum of evidence required to prove incapacity in a spousal maintenance action. Without a statutory requirement to the contrary, a fact finder may reasonably infer an individual's incapacity from circumstantial evidence or the competent testimony of a lay witness.

Here, Wife testified that her disorder caused her severe pain that caused uncontrollable vomiting and bowel movements, and required multiple trips to the hospital. Additionally, Wife's disorder required her to take a number of medications including a nerve block injection that could impair her for several days. Although Wife provided testimony indicating that she did not consider herself disabled, when viewed in context, this testimony merely reflected her refusal to be labeled as "disabled." Based on the foregoing, the trial court could reasonably infer Wife's incapacity qualified for spousal maintenance.

Husband argued further that the trial court erred by awarding Wife spousal maintenance for an indefinite period of time. However, TFC 8.054(b) authorizes a trial court to order spousal maintenance to whom Texas Family Code § 8.051(2)(A) applies for as long as the spouse continues to satisfy the eligibility criteria. Accordingly, the trial court did not err by awarding Wife spousal maintenance indefinitely.

Husband also argued that the trial court erred by awarding Wife appellate attorney's fees because there was insufficient evidence to support the award. As long as there is a credible showing of the need for appellate attorney's fees in the amount requested and the ability of the opposing spouse to meet that need, the trial court has authority by temporary orders to require payment of such fees. However, the party seeking to recover attorney's fees has the burden of proving those fees are reasonable and necessary.

Here, Wife's motion did not request a specific amount of fees and at the hearing on the motion for temporary orders, there was neither testimony nor an affidavit to support the reasonableness of the fees awarded. Consequently, there is insufficient evidence to support the award of appellate attorney's fees. Therefore, the portion of the trial court's temporary order awarding appellate attorney's fees is reversed.

Editor's comment: *In order to prove up appellate attorney's fees, you need to prove up estimated fees as reasonable and necessary. The best way to do this is to show the estimated hours at each stage of an appeal multiplied by the appellate hourly rate (lodestar method). M.M.O.*

SAPCR
STANDING AND PROCEDURE

EVIDENCE OF A GRANDPARENT'S STANDING UNDER TEXAS FAMILY CODE 102.004(a)(1) MUST CONSTITUTE "SATISFACTORY PROOF TO THE COURT"—MEANING THAT THE COURT DOES NOT ACT AS A FACTFINDER, BUT ONLY DETERMINES WHETHER THE EVIDENCE RAISES A GENUINE FACT ISSUE ON THE REQUIRED ELEMENTS OF STANDING.

14-3-14. ***In re K.D.H.***, __SW3d__, No. 14-13-00006-CV, 2014 WL 1328130 (Tex. App.—Houston [14th Dist.] 2014, no. pet. h.) (04/03/2014).

Facts: Mother tested positive for marijuana while pregnant with the Child. Thereafter, without suing Mother or Father, TDFPS placed the Child with Grandmother. Grandmother cared for the Child for the first three months of its life and then returned the Child to Mother. Afterward, Grandmother filed an original SAPCR requesting the trial court to appoint her as the Child's sole managing conservator. Grandmother invoked Texas Family Code § 102.004(a)(1) as her basis for standing and requested a jury trial on the conservatorship issue.

To support her standing, Grandmother filed an affidavit in which she attested to Mother's previous DWI and child endangerment convictions, that Father was incarcerated, and that both parents had previously neglected and abused the Child. Mother filed a plea to the jurisdiction challenging Grandmother's standing, but did not submit any evidence in support of her plea. At a hearing on Mother's plea to the jurisdiction, Grandmother testified to her standing whereas Mother and Father made arguments but did not testify or offer any evidence. Afterward, the trial court sustained the Mother's plea to the jurisdiction and dismissed the Grandmother's suit based on lack of standing. Grandmother appealed.

Holding: Reversed and remanded.

Opinion: Under Texas Family Code §102.004(a)(1), a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original SAPCR requesting managing conservatorship if there is "**satisfactory proof to the court"** that the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. At issue is what is necessary for there to be "satisfactory proof to the court" in the context of Texas Family Code § 102.004(a).

The dissent suggests that "satisfactory proof to the court" means that standing under Texas Family Code § 102.004(a) requires the petitioner to prove standing at an evidentiary hearing in which the trial court acts as factfinder. Under this construction, if the trial court were to find the facts against the standing proposition and dismiss the case, the petitioner could then appeal and challenge the legal or factual sufficiency of the trial court's factfindings on standing. This construction conflicts with the fundamental principle that appellate courts review a trial court's rulings on standing de novo.

Moreover, for Grandmother to succeed on the merits of her suit—to be appointed as the Child's sole managing conservator—Grandmother must prove that appointment of Mother or Father as a managing conservator would not be in the Child's best interest because such an appointment would significantly impair the Child's physical health or emotional development. Therefore, Mother's challenge to Grandmother's standing under Texas Family Code §102.004(a) implicates not only Grandmother's standing, but also the merits of the Grandmother's suit. Thus, because Grandmother has invoked her right to a jury trial, construing Texas Family Code § 102.004(a)(1) in a manner that casts the trial court as the factfinder on standing deprives Grandmother of her right to have the jury, rather than the trial court, be the factfinder on the managing conservatorship issue. Accordingly, the Dissent's construction of Texas Family Code § 102.004(a) is unreasonable.

By contrast, the Texas Supreme Court has held that in this situation (when a jurisdictional challenge implicates the merits of the petitioner's case), the trial court must review the relevant evidence to determine if a fact issue exists. If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder (in this case, the jury). But, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court is to rule on the plea to the jurisdiction as a matter of law.

Based on the above principles, "satisfactory proof to the court" means that, to decide whether a petitioner has standing under Texas Family Code § 102.004(a)(1), the trial court must determine whether there is a genuine fact issue as to the proposition in question—*i.e.* whether the evidence submitted regarding the standing issue, considered in the light most favorable to the petitioner, would enable reasonable and fair-minded people to find that the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. Appellate courts will then be able to review the trial court's determination de novo. This construction also respects the trial court's gatekeeper function over standing issues, and a petitioner's right to a jury trial on issues regarding appointment of the petitioner as sole managing conservator.

Here, the record contained Grandmother's extensive testimony regarding, among other things, Mother's and Father's drug and alcohol abuse, Mother's DWI and child endangerment convictions, and that Mother tested positive for marijuana while pregnant with the Child. Although Mother and Father made legal arguments at the hearing on Mother's plea to the jurisdiction, neither parent presented any evidence. Under a de novo review, considering the evidence in the light most favorable to Grandmother, the evidence would enable reasonable and fair-minded people to find that Grandmother's request to be named as the Child's sole managing conservator is necessary because the Child's circumstances on the date Grandmother filed suit would significantly impair the Child's physical health or emotional development. Thus, the trial court erred by sustaining Mother's plea to the jurisdiction and dismissing the case.

Dissent: "Satisfactory proof to the court" does not comport with any evidentiary standard elsewhere in the Family Code or other Texas statutes. Until the Legislature or the Texas Supreme Court clarifies whether Texas Family Code § 102.004(a)(1) creates a new evidentiary standard, this COA should follow its sister courts' constructions of the statute. These courts have held that "satisfactory proof to the court" requires the petitioner to prove standing under Texas Family Code § 102.004(a) by a preponderance of the evidence. Moreover, the phrase "satisfactory proof to the court" indicates that on appeal, appellate courts should defer to the trial court's assessment of whether a grandparents proof was satisfactory, considering the evidence in a light favorable to the trial court's ruling and implying findings to support the judgment.

Here, it is undisputed that when Grandmother filed suit, the Child was living with Mother and Father away from Grandmother's residence. Additionally, the trial noted that Grandmother presented evidence only of the Child's circumstances occurring prior to Grandmother's suit rather than evidence that the Child's then-

present circumstances significantly impaired her health or emotional development. Moreover, the trial court noted that although TDFPS was involved in placing the Child temporarily with Grandmother, it had never filed suit against Mother or Father. In fact TDFPS issued a report to the trial court recommending continued placement with Mother. Accordingly, implying the findings necessary to support the trial court's determination, the COA should have concluded that a reasonable fact-finder could have found that Grandmother failed to present by a preponderance of the evidence "proof satisfactory to the court" that the Child's present circumstances on the date Grandmother filed suit would significantly impair the Child's physical health or emotional development.

Editor's comment: *Satisfactory proof does not mean whatever the trial judge thinks it means (subjective) or proof by a preponderance of the evidence (rejected as arbitrary, subjective and random and would deprive grandmother of trial by jury). Satisfactory proof means enough to raise a genuine fact issue. Is this the same as raising a genuine issue of material fact to defeat a summary judgment? Another thought: Be sure to ask for a jury trial if you think the judge isn't inclined toward finding standing. J.V.*

Editor's comment: *This case confirms that the threshold for standing is "genuine fact issue", a gatekeeper function. Then, the party is entitled to final trial, even a jury trial if demanded, on the merits of the standing question. This is a good case to read when looking at the logistics of a standing question. M.M.O.*

FATHER'S AFFIDAVIT SUPPORTING HIS PETITION SEEKING TO MODIFY THE DESIGNATION OF THE PERSON HAVING THE EXCLUSIVE RIGHT TO DESIGNATE CHILD'S PRIMARY RESIDENCE—THAT FATHER FILED LESS THAN ONE YEAR AFTER THE PRIOR ORDER—WAS SUFFICIENT FOR THE TRIAL COURT TO JUSTIFY A HEARING ON FATHER'S PETITION.

14-3-15. ***In re A.D.***, __ SW3d __, 14-12-00914-CV, 2014, 2014 WL 1800082 (Tex. App.—Houston [14th Dist.] 2014, no. pet. h.) (05/06/2014).

Facts: In a July 2010 divorce decree, the trial court appointed Mother and Father as JMCs, gave Mother the exclusive right to designate the Child's primary residence, and awarded Father standard possession. Later that year, Mother reported to authorities a suspicion that Father had sexually abused the Child during his visitation. Mother also retained a personal-injury attorney, who took Father's deposition, in which he denied the allegation. Mother then persisted for more than a year in accusing Father of sexually abusing the Child although authorities and professionals continued to determine the allegations were unfounded.

Meanwhile, in February 2011, (less that one year after the trial court signed the divorce decree) Father filed a petition to modify the decree requesting the right to designate the Child's primary residence. Several months later, Father filed a supporting affidavit, alleging Mother was endangering the Child by perpetuating the false accusations. Mother filed a motion to dismiss Father's petition, which the trial court denied. Following a jury trial, the trial court signed an order retaining both parents as joint managing conservators but giving Father the exclusive right to designate the Child's primary residence and ordering Mother's possession to be supervised. Mother appealed, arguing that trial court erred by refusing to dismiss Father's petition to modify because Father's supporting affidavit failed to state a proper allegation pursuant to Texas Family Code Section 156.102(b)(1).

Holding: Affirmed

Opinion: Texas Family Code Section 156.102(b)(1) provides that a party seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child less than one year after the date of the rendition of the order shall execute and attach to the petition an affidavit containing supporting facts and must allege that "the child's present environment may endanger the child's physical health or significantly impair the child's emotional development." Texas Family Code Section 156.102(c) provides that the trial court "shall deny the relief sought and refuse to schedule a hearing for modification under this section

unless the court determines, on the basis of the affidavit, that facts adequate to support [the] allegation…are stated in the affidavit."

Here, in his affidavit, Father detailed Mother's continued allegations of sexual abuse, reports to authorities, and the resulting investigations and sexual assault examinations of the Child. Father also averred:

> I feel that this continued harassment against me is causing stress and trauma to [the Child].
>
> [Mother's] actions present a clear and present danger to the [C]hild's safety and welfare.

According to Mother, Father's averment that Mother reported her suspicions of abuse failed to allege that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development. However, the crux of Father's affidavit was not just that Mother reported her suspicions but that she continued to make false accusations that Father sexually abused the Child. The trial court could have found that Father sufficiently alleged Mother's behavior may significantly impair the Child's emotional development because (1) the two-year-old may be subjected to more sexual-assault examinations, and (2) there is a general harm inherent in the child being the subject of the false accusations and used as a weapon in a custody dispute. Accordingly, the trial court did not err by deciding that Father's affidavit was sufficient to justify a hearing on his petition for permanent modification.

Editor's comment: *Appellate decisions regarding what constitutes sufficient pleadings in a SAPCR are all over the map. Here the 14th COA allows a party's pleadings "as a whole" (not just the petition but later filed affidavits and other motions) coupled with court orders to serve as sufficient notice to a party of the issues at trial, when admittedly the H's live pleading did not seek the relief ultimately granted. S.S.S.*

TRIAL COURT LACKED JURISDICTION TO RENDER AN AGREED DECREE ON CONSERVATORSHIP BECAUSE PETITIONER FILED THE SAPCR PETITION AFTER FATHER SIGNED A WAIVER OF CITATION.

14-3-16. *In re J.G.H.*, No. 04-13-00027-CV, 2014 WL 2002846 (Tex. App.—San Antonio, 2014, no. pet. h.) (mem. op.) (05/14/2014).

Facts: After Mother gave birth to the Child, the Child left the hospital in the care of Mother's Aunt ("Aunt") who agreed to take care of the Child until Mother and Father were able to financially provide for the Child. Afterward, Aunt contacted an attorney about adopting the Child. Because Aunt could not afford the cost associated with an adoption, the attorney suggested the parties pursue a conservatorship by having the Child reside with Aunt for six months. On May 3, 2011, the attorney had Mother and Father sign a "Waiver of Citation and Consent to Appointment of Sole Managing Conservators" that recited among other things:

> I hereby enter my appearance in this cause for all purposes and waive the issuance, service, and return of citation on me. I agree that the petition may be amended and that the cause may be taken up and considered by the Court without further notice to me.

The attorney also prepared an agreed decree that Mother and Father signed. Although the waivers stated that Mother and Father were given a copy of the filed petition, Aunt did not actually file the petition or the waivers until November 15, 2011, six months after the Mother and Father signed the waivers. On that same day, the trial court rendered judgment appointing Aunt as the Child's sole managing conservator and Mother and Father as joint possessory conservators.

Ten months later, Father filed a petition for bill of review alleging that Aunt never served him with a filed copy of her original SAPCR petition. After an evidentiary hearing, the trial court denied Father's bill of review. Father appealed arguing that the trial court erred in denying the bill of review because Aunt obtained the waiver of citation prior to the filing the SAPCR petition.

Holding: Reversed and remanded

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Opinion: A bill of review plaintiff need not satisfy the formal requirements for a bill of review when the record reveals that the trial court lacked jurisdiction to render the judgment at issue. Texas Rule Civil Procedure 119 provides in relevant part that a defendant may:

> waive the issuance or service thereof by a written memorandum signed by him, or by his duly authorized agent or attorney, after suit is brought, sworn to before a proper officer other than an attorney in the case, and filed among the papers of the cause, and such waiver or acceptance shall have the same force and effect as if the citation had been issued and served as provided by law.

Thus, the rule contemplates that waiver may not be effected until after suit has been filed. A waiver of issuance and service of citation executed prior to the filing of an action is void.

Here, Father signed the waiver of citation on May 3, 2011. Aunt did not file the petition or Father's waiver until November 15, 2011. Accordingly, because Aunt filed the petition after Father executed the waiver, the wavier was void, and the SAPCR decree was rendered in violation of Rule 119. Similarly, because there was no action pending at the time Father signed the agreed decree, it cannot constitute a general appearance such that citation and service on Father was not required. Consequently, the trial court lacked jurisdiction to render the SAPCR decree.

SAPCR
PARENTAGE

TRIAL COURT DID NOT ERR BY VACATING A GENETIC TESTING ORDER AND APPLYING PATERNITY BY ESTOPPEL EVEN THOUGH THE TEST WAS ALREADY PERFORMED AND VERIFIED PATERNITY BECAUSE THE TEST RESULTS WERE NOT ADMITTED BEFORE THE TRIAL COURT VACATED THE TESTING ORDER.

14-3-17. *In re C.M.H.G.*, No. 02-12-00074-CV, 2014 WL 1096011 (Tex. App.—Fort Worth, 2014, no. pet. h.) (per curiam) (mem. op.) (03/20/2014).

Facts: Mother gave birth to child in 2008 and executed an acknowledgment of paternity identifying Father as the child's father. Mother died in a car accident shortly thereafter. Afterward, Father had primary responsibility for the care and custody of the child for the first eighteen months of the child's life. In 2009, the child's maternal grandmother ("Grandmother") took possession of the child, threatened Father with a gun, and demanded that Father pay her $10,000.00 for the return of the child. In 2010, the trial court issued a child support review order finding Father to be the child's father with the duty to support the child. Thereafter, Father filed a petition to enforce the order and an emergency request to take physical custody of the child. In response, Grandmother denied that Father was the child's father and asked for genetic testing to determine parentage. Initially, the trial court granted Grandmother's request for genetic testing. However, the trial court subsequently determined under TFC 160.608 that Grandmother's conduct estopped her from denying Father's paternity and entered a final order vacating the prior genetic testing order and adjudicating Father as the child's father. Although the court's opinion does not say so directly, it appears that that genetic testing was performed and that the test excluded Father as the child's biological father. Grandmother appealed arguing, among other things, that TFC 160.008 does not estop a party's denial of paternity when genetic testing has already established paternity.

Holding: Affirmed.

Opinion: TFC 160.608 codifies paternity by estoppel and allows a court to deny a motion for genetic testing if the conduct of the mother [or in this case Grandmother] estops her from denying parentage.

Here, because the order for genetic testing was an interlocutory order, the trial court retained authority to vacate the order at any time before rendering a final judgment. And although Grandmother argued that TFC

160.608 does not apply when genetic testing has already established paternity, the test results were not admitted into evidence before the trial court vacated the testing order. Therefore, the trial court did not abuse its discretion by vacating the genetic testing order.

TEXAS FAMILY CODE § 160.201(a)(1)'S RULE THAT A MOTHER-CHILD RELATIONSHIP IS ESTABLISHED BY A WOMAN GIVING BIRTH TO THE CHILD IS NOT REBUTTABLE BY GENETIC TESTING RESULTS.

14-3-18. ***In re M.M.M.***, __SW3d__, No. 14-12-01145-CV, 2014 WL 1396388 (Tex. App.—Houston [14th Dist.] 2014, no. pet. h.) (04/10/2014).

Facts: Mother, an unmarried woman, conceived twin Children via assisted reproductive technology using Father's sperm and an unknown donor's eggs. Consequently, Mother was not the Children's genetic mother. Mother and Father did not enter into a written agreement regarding their intentions regarding the assisted reproduction. After Mother gave birth to the Children, Father filed suit seeking a declaratory judgment that he was the Children's father and that Mother had no parental relationship with, or standing to pursue rights to, the Children because she was solely a gestational carrier. Both parties moved for summary judgment. Afterward, the trial court signed an order finding that Mother was the mother of the Children as a matter of law. Additionally, the trial court denied the portion of Father's summary judgment motion as to Mother's relationship to the Children, but granted the portion declaring Father to be the Children's father. Father appealed, arguing that Texas Family Code Section 160.201(a)(1), the applicable statute establishing a mother-child relationship by a woman giving birth to the child, is not conclusive but merely creates a presumption of maternity that may be rebutted with genetic evidence.

Holding: Affirmed

Opinion: Texas Family Code Section 160.201 provides the methods by which the parent-child relationship can be established between the woman and a child (Texas Family Code § 160.201(a)), and a man and a child (Texas Family Code § 160.201(b)). Texas Family Code § 160.201(a)(1) provides that the mother-child relationship is established between a woman and a child by the woman giving birth to the child. The crux of Father's argument is that because certain situations establishing paternity are rebuttable by genetic testing, the rule that maternity is established by giving birth is also rebuttable by genetic testing.

Specifically, Texas Family Code § 160.201(b)(1) provides that the father-child relationship is established between a man and a child by an unrebutted presumption of the man's paternity of the child under Texas Family Code § 160.204. Texas Family Code § 160.204, in turn, defines five situations in which a man is presumed to be a child's father. Texas Family Code § 160.204 also provides that a presumption of paternity under these defined situations may be rebutted by (1) an adjudication of parentage; or (2) the filing of a valid denial of paternity by a presumed father in conjunction with the filing by another person of a valid acknowledgment of paternity.

In contrast, nothing in the plain language of Texas Family Code § 160.201(a)(1) refers to a rebuttable presumption of maternity when a woman gives birth to a child. If the Legislature had intended that giving birth creates merely a rebuttable presumption, it could have included such language in the statute, as it did relative to the provisions for establishing paternity.

There is only one exception when a woman who gives birth to a child conceived via assisted reproduction is considered only a "gestational mother" lacking parental rights. Texas Family Code Chapter 160, subchapter I provides that woman and "the intended parents" may enter into a written agreement whereby the woman will give birth to a child conceived via assisted reproduction, using the egg of the intended mother or another donor, and the woman relinquishes all parental rights. To be enforceable, the gestational agreement must satisfy certain requirements and be validated by a court. Here, there was no agreement satisfying those requirements. Texas Family Code Chapter 160, subchapter I demonstrates that when the Legislature chose to

override Texas Family Code § 160.201(a)(1) and define a situation in which a woman who gives birth to a child is not the mother, it expressly did so. Accordingly, Texas Family Code § 160.201(a)(1)'s rule that the mother-child relationship is established by a woman giving birth is not rebuttable by genetic testing results.

ALTHOUGH FATHER FILED HIS SUIT TO ESTABLISH PATERNITY MORE THAN FOUR YEARS AFTER THE CHILD'S BIRTH, MOTHER AND PRESUMED FATHER ARE EQUITABLY ESTOPPED FROM RELYING ON TFC 160.607(a)'s STATUTE OF LIMITATIONS DEFENSE.

14-3-19. ***Quiroz v. Gray***, __SW3d__, No. 08-12-00163-CV, 2014 WL 1672045 (Tex. App.— El Paso, 2014, no. pet. h.) (04/25/2014).

Facts: In October 2002, Mother began dating and engaging in sexual relations with Father. Unbeknownst, to Father, Mother was married to Vernier. After Mother became pregnant, she informed Father that he was the Child's father. Following the Child's birth on September 15, 2003, Mother, Father, and the Child lived together for three years during which time Father provided financial support for the Child. Afterward, Mother and Father separated, and Father lost contact with the Child.

In March 2007, the OAG filed a petition seeking to establish Father's paternity. Father requested genetic testing, which the trial court ordered and which conclusively proved Father's paternity. Mother subsequently filed a petition to establish Father as the Child's father. During the proceedings, the trial court granted Father access to the Child permitting Father and the Child to reestablish a parent-child relationship. Father also began supporting the Child financially. Thereafter, Mother filed a petition to terminate Father's parental rights. In November 2010, Father responded by filing a petition to adjudicate his parentage of the Child. In February 2011, Mother moved to dismiss Father's petition, alleging for the first time, that Father was not the Child's father and that Vernier was the Child's presumed father. Vernier then filed a petition to intervene and a plea to the jurisdiction arguing that he was the Child's presumed father and therefore Father lacked standing to pursue his paternity suit under TFC 160.607. The trial court denied Vernier's intervention and adjudicated Father as the Child's Father. Mother and Vernier appealed arguing that the trial court erred in denying Vernier's plea to the jurisdiction because Father filed his petition to adjudicate parentage more than four years after the Child's fourth birthday.

Holding: Affirmed

Opinion: Under TFC 160.607(a), a proceeding to establish parentage on behalf of a child with a presumed father must be commenced no later than the child's fourth birthday. However, a party in a paternity action may be equitably estopped from relying on an otherwise applicable statutory bar to recovery. The application of estoppel in paternity actions is aimed at achieving fairness as between the parents by holding both the mother and father to their prior conduct regarding the paternity of the child.

Here, the record established, among other things, that:

- Mother represented to Father that he was the Child's father while concealing the material fact that she was married to Vernier and engaging in sexual intercourse with him;
- during the time frame in which Mother became pregnant, she never raised the question of Father's paternity;
- Father attended prenatal care, and was present at the Child's birth;
- Father always believed he was the Child's father;
- Father and child maintained a recognized and operative parent-child relationship;
- Father bonded with the Child, and provided financial support for the Child;
- Father did not know that Mother had engaged in relations with another man;
- Mother encouraged Father to participate in the Child's life as his father; and
- from the Child's birth on September 15, 2003 until February 2011, Mother never disputed Father's paternity and in fact consistently identified Father to be the Child's father in her pleadings.

Under these facts, and given the conclusive results of the 2007 paternity test, Father had no reason to seek adjudication of his parentage in a timely manner. Consequently, the trial court did not err in denying Vernier's

plea to the jurisdiction because the doctrine of equitable estoppel precluded Mother and Vernier from relying on limitations as a defense.

SAPCR
CONSERVATORSHIP

TRIAL COURT HAD SUFFICIENT EVIDENCE TO FIND THAT IT WAS IN THE CHILDREN'S BEST INTEREST TO SPLIT CUSTODY.

14-3-20. *In re K.B.K.*, No. 11-12-00155-CV, 2014 WL 1285784 (Tex. App.—Eastland, 2014, no. pet. h.) (mem. op.) (03/27/2014).

Facts: In 2010, the trial court signed a decree of divorce appointing Mother and Father as JMCs of the parties 3 children (2 older daughters and a younger son) and ordered that Mother would decide the children's primary residence. Mother and the children initially remained in Texas, but moved to Colorado after Mother developed a relationship with and eventually married another man. Father filed a petition to modify the custody arrangement to have the Children returned to Texas. Following a trial, the trial court ordered that the 2 older daughters would reside with Father in Texas, but that the younger son would continue to reside with Mother in Colorado. Father appealed, arguing that the trial court erred because there was no evidence supporting split custody.

Holding: Affirmed.

Opinion: Texas's policy favoring keeping children together during periods of possession is simply a factor the trial court considers in deciding what is in the child's best interest. Here, during the proceeding, the trial court interviewed the two older daughters in chambers, and the daughters expressed their desire to live with Father in Texas in order to maintain strong ties with family and friends in Texas. The trial court also heard evidence that, among other things, the younger son had adjusted well to his new home and school in Colorado, had bonded with his step father, and was very attached to his new puppy. Accordingly, the trial court had sufficient evidence to find that in was in the Children's best interest to split custody.

SAPCR
CHILD SUPPORT ENFORCEMENT

TRIAL COURT ABUSED ITS DISCRETION BY ELIMINATING FATHER'S CHILD SUPPORT ARREARAGE BASED ON MOTHER AND FATHER'S PRIOR ACCORD AND SATISFACTION AGREEMENT INCLUDING VOLUNTARY RELINQUISHMENT OF FATHER'S PARENTAL RIGHTS WHEN THE PARTIES FAILED TO OBTAIN AN ORDER ON THE AGREEMENT.

14-3-21. *In re R.K.S.*, No. 10-11-00403-CV, 2014 WL 1681891 (Tex. App.—Waco, 2014, no pet. h.) (mem. op.) (04/24/2014).

Facts: In 1995, the trial court ordered Father to pay child support to Mother for the support of the couple's two Children. By January 2001, Father had accrued a $37,529.70 child-support arrearage. On January 29, 2001, Mother and Father entered into an agreement wherein Father agreed to make a $10,000 lump-sum pay-

ment to Mother and sign a relinquishment of his parental rights in exchange for not paying past child support or future child support. After Father paid Mother the $10,000 and signed an affidavit of relinquishment of his parental rights, Mother and her husband filed a termination and adoption petition. However, Mother and her husband decided not to proceed with the termination/adoption and the trial court ultimately dismissed the case for want of prosecution. Father received no notice of the dismissal and paid no further child support.

In January 2010, the OAG filed a motion to enforce child support alleging Father had a $114,747.82 child-support arrearage. Father answered and affirmatively pleaded accord and satisfaction based on the parties' agreement. At a hearing, Mother admitted to the agreement and Father's $10,000 payment. Following the hearing, the trial court found that the parties had entered into a valid agreement and concluded that such agreement was in the nature of an accord and satisfaction. Consequently, the trial court confirmed Father's child support arrearage at $0 entered a judgment for that amount. The OAG appealed.

Holding: Reversed and remanded

Opinion: In *OAG v. Scholer*, 403 S.W.3d 859 (Tex.2013), the Texas Supreme Court recently held that, except for a very narrow exception not applicable here, the obligor parent may not rely on the obligee parent's actions to extinguish his child support duty. The Family Code characterizes child support as a duty rather than a debt. A parent who owes that duty must diligently satisfy it. If he is unable to pay, he may seek a modification of the support order. If he believes his rights and his support obligations have been terminated, he should ensure a court order reflects that. But the parents' actions, either collectively or alone, cannot affect the support duty, except as provided by statute.

Here, the equities weigh in Father's favor—Mother agreed to zero out Father's child-support arrearage as of January 29, 2001 in exchange Father's $10,000 lump-sum payment, which Father made and relinquishment of his parental rights. However, under *Scholer*, Father's duty to support his children is not extinguished by the parties' agreement, especially considering that the parties did not seek court approval of the agreement until approximately ten years later. Therefore, the parties' agreement did not eliminate Father's child support obligation accruing after January 29, 2001. The trial court abused its discretion by eliminating Father's child-support obligation accruing after that date.

Editor's comment: *Child support is not a debt – which could be the subject of an agreement to forgive – but is a duty. Only a court may relieve a person of his duty to pay child support. Plus a person who agrees to be terminated better make sure he actually is terminated. J.V.*

TRIAL COURT DID NOT ERR BY DETERMINING FATHER'S CHILD SUPPORT OBLIGATION EXTENDED THROUGH HIS EIGHTEEN-YEAR-OLD CHILD'S ACADEMIC SCHOOL YEAR EVEN THOUGH CHILD HAD THIRTY-SIX ABSENCES FROM SCHOOL DURING THE YEAR.

14-3-22. *Roberts v. Swain*, No. 01-13-00801-CV, 2014 WL 1912678 (Tex. App.—Houston [1st Dist.], 2014, no. pet. h.) (mem. op.) (05/13/2014).

Facts: The OAG filed suit seeking to modify Father's child support obligation and a motion to confirm Father's child support arrearage for his two children. The trial court conducted a hearing on the OAG's motion to confirm child support arrearage and to determine whether the child support obligation had been fulfilled. At the hearing, Father contended that his oldest Child had turned eighteen years old in October 2012 and had failed to comply with minimum high school attendance requirements entitling her to continued child support. To support his argument, Father tendered two of the Child's report cards for the 2012-2013 school year reflecting that the Child had a total of thirty-six absences for the entire school year. At the conclusion of the hearing, the trial court determined that (1) the evidence did not demonstrate that the Child had failed to comply with minimum attendance requirements and (2) Father's child support obligation had therefore terminated at the end of the school year on May 31, 2013. Father appealed, arguing that the trial court disregarded Texas Family Code Section 154.002(a)(2) and Texas Educational Code Section 25.085(e).

Holding: Affirmed

Opinion: Texas Family Code Section 154.002(a)(1)-(2) provides, in pertinent part, that a trial court may modify an existing order, providing child support past the 18th birthday of the child if the child is enrolled in an accredited high school and complies with the minimum attendance requirements under the Education Code. Texas Educational Code Section 28.085 in turn provides that "[a] person who voluntarily enrolls in school or voluntarily attends school after the person's 18th birthday shall attend school each school day for the entire period the program of instruction is offered. A school district may revoke for the remainder of the school year the enrollment of a person who has more than five absences in a semester that are not excused…"

Here, relying on the Child's 2012-2013 report cards reflecting the child had thirty-six absences for the entire school year, Father argued that number exceeded the five unexcused absences permitted under section Texas Educational Code Section 25.085(e). However, the report cards are not evidence that the Child did not meet the minimum attendance requirements. The report cards show only the number of the Child's absences during the school year but do not indicate which, if any, were unexcused. Further, the report cards reflect that the Child received credit and grades in each grading period of the 2012-13 school year, undermining Father's contention that the Child did not meet minimum attendance requirements. Accordingly, the trial court's determination that Father's child support obligation terminated on May 31, 2013 does not conflict with Texas Family Code Section 154.002(a)(2) or Texas Educational Code Section 25.085.

ALTHOUGH THE TRIAL ORDERED FATHER CONFINED FOR FAILURE TO MAKE A CHILD SUPPORT PAYMENT THAT FATHER IN FACT MADE, THE ENTIRE COMMITMENT ORDER WAS NOT VOID BECAUSE THE ERRONEOUS PROVISION WAS SEVERABLE FROM THE REMAINDER OF THE CONTEMPT/COMMITMENT ORDER; THE REPEAL OF TFC'S "PURGING PROVISION" DURING THE CONTEMPT PROCEEDINGS DID NOTOPERATE AS AN EX POST FACTO LAW AS TO FATHER BECAUSE HE HAD SIX WEEKS TO BECOME CURRENT ON HIS CHILD SUPPORT OBLIGATION BEFORE THE REPEAL BUT HE FAILED TO DO SO.

14-3-23. ***In re Hall***, __SW3d__, No. 14-14-00062-CV, 2014 WL 2420972 (Tex. App.—Houston [14th Dist.], orig. proceeding) (05/28/2014).

Facts: In July 2012, the trial court ordered Father to pay child support to Mother. On April 19, 2013, Mother filed a motion to enforce by contempt asserting that Father had failed to make seven payments due between August 1, 2012 and April 1, 2013, but not including the September 1, 2012 payment. The motion was originally set for June 10, 2013, however, it was reset to November 18, 2013 by which time Father made sufficient payments to become current on his child support obligation. Following the hearing, the trial court found Father guilty of five separate counts of criminal contempt by failing to make child support payments on August 1, 2012, September 1, 2012, October 1, 2012, November 1, 2012, and December 1, 2012. As punishment for the criminal contempt, the trial court ordered Father confined for 180 days for each of the five counts of contempt, sentences to run concurrently. Father filed a petition for habeas corpus.

Holding: Petition for writ of habeas corpus granted in part, and denied

Opinion: Father argued that the trial court's entire commitment order was void because the trial court ordered Father confined for failing to make a full payment on September 1, 2012, when Father had in fact paid his child support obligation on that date. If one punishment is assessed for more than one act of contempt, and one act is not punishable by contempt, the entire judgment is void. However, where the trial court lists each failure separately and assesses a separate punishment for each failure, only the invalid portion is void; the invalid portion may be severed, and the valid portion retained.

Here, in its order, the trial court listed five separate violations for not paying child support: including September 1, 2012. Additionally, the order directs that Father is to be confined for a period of 180 days for each count, the sentences to run concurrently. Therefore, because a separate punishment has been assessed for each of the listed violations, only the punishment for the September 1, 2012 violation is void, and it may be severed from the remainder of the contempt order. Consequently, the COA struck the trial court's commitment order holding Father in contempt and confining him for 180 days for failing to make the September 1, 2012 support payment but left the remainder of the commitment order intact.

Father argued further that the trial court's commitment order violated his procedural due process rights because the Legislature's repeal of Texas Family Code Section 157.162(d) during the pendency of the proceedings allowed the trial court to sentence him to six months in jail even though he was current on his child support payments at the time of the November 18, 2013 contempt hearing. The COA analyzed Father's complaint as an unconstitutional ex post facto law as to Father.

Former Texas Family Code Section 157.162(d), was known as a "purging provision" because it allowed a child support obligor to escape a valid finding of contempt if the obligor demonstrated at the enforcement hearing that he or she was current in the payment of child support as ordered by the court as of the date of the enforcement hearing. However, the Legislature repealed Texas Family Code Section 157.162(d) effective June 14, 2013, and such repeal expressly applies to a hearing to enforce that commences on or after that date. Here, Although Mother filed her enforcement motion on April 26, 2013, the hearing was not held until November 18, 2013. Therefore, Father was not able to take advantage of the section 157.162(d) purging provision at the November 18, 2013 hearing. Thus, the issue is whether the repeal of Texas Family Code Section 157.162(d) is an ex post facto law when Father's violations of the July 2012 order arose during the time period in which section 157.162(d) was effective, but was no longer available to Father at the November 18, 2013 hearing.

Family law contempt proceedings are considered quasi-criminal in nature, and their proceedings should conform as nearly as practicable to those in criminal cases. The Texas Constitution prohibits ex post facto laws. Generally, an ex post facto law is any law that retroactively inflicts or increases criminal punishment. Although remedial or procedural laws are not usually within the ex post facto prohibition, if a procedural change is retroactive and results in a deprivation of a substantive protection, it is unconstitutional.

Here, the repeal of Texas Family Code Section 157.162(d) did not amend substantive law regarding what acts constitute contempt or provide the available penalties for contempt; therefore, it is procedural in nature. However, the statute provided substantive protection to a party charged with contempt. Although a party could still have been guilty of contempt (failing to obey a court order), the court could not make a finding of contempt. The repeal of Texas Family Code Section 157.162(d) also applied retroactively as to Father because at the time he committed the acts of contempt (failing to pay the child support timely), he had the "affirmative defense" of payment. The repeal took away that defense as of June 14, 2013. Thus, the repeal of Texas Family Code Section 157.162(d) is an ex post facto law as to Father.

Nevertheless, the repeal did not violate Father's substantive protections in this case because he had the ability to take advantage of that affirmative defense before its repeal. Mother served Father with the motion for enforcement on April 30, 2013. Father had until June 13, 2013—about six weeks—to become completely current on his child support obligations under the July 2012 support order. If Father had done so, he could not have been held in contempt. Accordingly, the repeal of section 157.162(d) did not violate Father's substantive protections.

TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING FATHER WAS NOT IN CHILD SUPPORT ARREARS EVEN THOUGH MOTHER AND FATHER INFORMALLY AGREED THAT FATHER WOULD PAY FOR CHILD'S DAY CARE AND TUITION IN EXCESS OF FATHER'S CHILD SUPPORT OBLIGATION.

14-3-24. ***Ochsner v. Ochsner***, __SW3d__, No. 14-13-00301-CV, 2014 WL 2420951 (Tex. App.—Houston [14th Dist.], no pet. h.) (05/29/2014).

Facts: A 2001 divorce decree ordered Father to pay $240 per month in child support to Mother until the Child no longer attended Enron's Kid's Center day care and that Father's child support obligation would increase to

$800 per month thereafter. The Child stopped attending Enron's Kid's Center in September 2002. Afterward, Mother and Father orally agreed that instead of paying increased monthly child support, Father would continue to pay $240 per month in child support as well as the Child's daycare and tuition. Pursuant to the parties' informal agreement, Father paid $240 per month in child support, but also paid for the Child to attend various day cares and private schools through January 1, 2011. That same month, Mother filed a motion to enforce Child support order alleging Father failed to pay $800 per month in child support that was due beginning October 1, 2002 and ending January 1, 2011, for a total arrearage of $55,569.40.

Following a hearing, the trial court denied Mother's motion for enforcement concluding that the divorce decree did not contain language ordering Father to make periodic child support payments after the Child stopped attending Enron's Kid's Center. Mother appealed. The COA determined that the trial court's conclusion was erroneous and remanded the case back to the trial court. On remand, the trial court concluded that Father was not in arrears because Father paid daycare and private school tuition in excess of what he owed in child support and again denied Mother's motion for enforcement.

Holding: Reversed and remanded

Opinion: A trial court may not reduce or modify the amount of child support arrearages except as specifically provided in the Family Code. The trial court's child support calculations must be based on the payment evidence presented, not the trial court's assessment of what is fair or reasonable. Nevertheless, under Texas Family Code Sections 157.008(d) and TFC 157.009, a counterclaim or offset may be given for an obligor's provision of actual support to a child during periods when a child support obligee voluntarily relinquished to the obligor actual possession and control of a child, and for and lump-sum monies received by the obligee from an obligor's disability payments. The TFC's child support arrearage scheme reflects important public policy goals—child support is not a debt; rather, it is a duty owed to the child that cannot be affected by the "quarrels, iniquities, or mutual agreements" of the parents. Private agreements that alter child support obligations violate public policy and are unenforceable. Instead, parents must obtain court approval, conditioned on the best interest of the child, before they can agree to modify child support.

Here, neither party asked the trial court to modify the child support obligations found in the original divorce decree to allow Father's payments to a daycare and private schools to constitute child support. Thus, even if the trial court found that the parties agreed that Father's payment to a daycare and private school constituted child support, such an agreement is unenforceable and is not a proper basis for reducing child support arrearages. Moreover, Father's daycare and tuition payments do not constitute a counterclaim or offset because this case does not involve voluntary relinquishment of actual possession and control of the child; nor does it involve disability payments. Therefore, Texas Family Code Sections 157.008(d) and 157.009 are not implicated. Accordingly, the trial court abused its discretion in concluding that Father was not in arrears

Dissent: The divorce decree ordered Father to pay $240 a month to Mother and it also ordered him to pay $563 a month to Enron Kid's day care. After the Child stopped going to Enron Kid's day care, Father continued to pay $240 a month to Mother and initially paid for another day care and then private schools with after school day care. Thus, the evidence at trial supports an implied finding by the trial court that Mother was financially responsible for the day care and school payments and that Father paid the day care and schools instead of paying Mother. Although parents must get court approval to modify child support obligations, the COA should have concluded that this is not a reduction or a modification of Father's child support obligations but instead is merely a finding by the trial court that Father complied with his child support obligations.

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SAPCR
MODIFICATION

TRIAL COURT ABUSED ITS DISCRETION BY DENYING FATHER'S MOTION TO TRANSFER SAPCR WITHOUT HOLDING A HEARING ON THE MOTION OR MOTHER'S CONTROVERTING AFFIDAVIT.

14-3-25. *In re Claiborne*, No. 10-14-00076-CV, 2014 WL 1886052 (Tex. App.—Waco, 2014, orig. proceeding) (mem. op.) (05/08/2014).

Facts: In 2008, the Johnson County trial court entered a final divorce decree between Mother and Father. In 2013, Father filed a motion to modify and a motion to transfer venue pursuant to Texas Family Code Section 155.201 in which Father alleged the Child had resided in Tarrant County during the six-month period preceding the commencement of the suit. Mother filed a controverting affidavit contesting Father's motion to transfer venue stating that her residence was on the border of Tarrant and Johnson counties. The trial court denied Father's motion to transfer venue without conducting a hearing. Father then petitioned the appellate court for mandamus relief.

Holding: Writ of mandamus conditionally granted

Opinion: Texas Family Code Section 155.201(b) provides that if a party modification or enforcement suit, in the court having continuing, exclusive jurisdiction over the SAPCR, "on the timely motion of a party the court shall…transfer the proceeding to another county in this state if the child has resided in the other county for six months or longer." Under Texas Family Code Section 155.204(e), if an opposing party files a controverting affidavit contesting the motion to transfer, the trial court is required to hold hearing on the motion.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIFTING DIVORCE DECREE'S GEOGRAPHIC RESTRICTION BECAUSE SUCH MODIFICATION WAS IN THE CHILD'S BEST INTEREST AND DID NOT VIOLATE TEXAS'S PUBLIC POLICY ENCOURAGING DIVORCED PARENTS TO SHARE IN THE RIGHTS AND DUTIES OF RAISING A CHILD.

14-3-26. *In re C.M.*, No. 04-12-00395-CV, 2014 WL 2002843 (Tex. App.—San Antonio, 2014, no. pet. h.) (mem. op.) (05/14/2014).

Facts: A 2005 divorce decree appointed Mother and Father as joint managing conservators with Mother having the exclusive right to establish the primary residence of the Child subject to a geographic restriction within Bexar County. In 2011, Mother remarried, and began making arrangements to move to Georgia with the Child where she and the Child could be with Mother's new husband and where Mother had extended family including the Child's maternal grandparents. Afterward, Father filed a petition to modify the parent-child relationship seeking to be appointed as the parent with the exclusive right to designate the Child's the primary residence, or alternatively that the terms and conditions of his access to the Child be modified to an expanded standard possession order and for Mother to be enjoined from removing the Child from Bexar County. Mother filed a counter-petition seeking to have the geographic restriction lifted in order to allow her to move with the Child to Georgia. Following a hearing, the trial court ordered the geographic restriction lifted finding among other things that lifting the restriction would positively affect the Child and enhance the Child's emotional and mental well-being. Father appealed.

Holding: Affirmed

Opinion: Among the Texas Supreme Court's "*Lenz*" factors relevant to the determination of whether a geographic restriction is in the best interest of the child, a trial court may consider the degree of economic, emotional, and educational enhancement for the custodial parent and child. Relying on 2002 case law, Father argued that Mother failed to prove that lifting the geographic restriction would have a *positive impact* on the child educationally, emotionally, or financially. However, the Legislature amended TFC 156.101 in 2001—the current version no longer includes the requirement of a "positive improvement." Rather, TFC 156.101 now provides in pertinent part that a trial court may "modify an order ... that provides for the possession of or access to a child if modification would be in the *best interest of the child*." Thus, a proper *Lenz* application is conducted under a best interest analysis.

Here, the trial court heard testimony from both parents and the psychologist assigned to perform a social study. In her social study, the psychologist concluded that the Child's best interest would be served by Mother remaining the parent with the exclusive right to designate the child's residence and the geographic restriction being modified to include the Augusta, Georgia area. At a hearing, the psychologist testified and:

- described Father as controlling and manipulative;
- expressed concern regarding Father's behavior toward Mother in the presence of the Child, Father's failure to consistently exercise his visitation, and the communication between Father and Mother, which on at least one occasion resulted in the Child being left at school when Father did not pick her up for visitation;
- opined that a strong bond could be maintained between the Child and Father based on the Child's verbal capability and her belief that the Child could communicate well via Skype or other video-conferencing methods;
- confirmed that Mother was from Georgia, her family lived there, and her new spouse and his extended family lived there;
- opined that the move would be more stable for Mother and, thus, a better situation for the Child; and
- recommended that a "co-parenting facilitator" would be beneficial for the parents.

On this record, trial court did not abuse its discretion in determining the *Lenz* factors weighed in favor of lifting the geographic restriction.

Father argued further that Texas public policy dictated against allowing Mother to move the Child one-thousand miles away. In Texas, public policy highly recommends encouraging separated and divorced parents to share in both the rights and duties of raising a child. TFC 153.001(a) provides factors for the court to use in evaluating whether lifting the geographic restriction violates Texas public policy by requiring the court to:

> (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child;
> (2) provide a safe, stable, and nonviolent environment for the child; and
> (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

Here, the record detailed above supported the trial court's conclusion that in the absence of a geographic restriction, the Child could maintain frequent contact with Father, Mother would be able to provide the Child a stable environment in Georgia, and both parents could continue to exercise their rights and duties in the Child. Therefore, the trial court did not abuse its discretion in determining that public policy supported lifting the geographic restriction.

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SAPCR
TERMINATION OF PARENTAL RIGHTS

IN A TERMINATION PROCEEDING, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING FATHER'S TESTIMONY REGARDING THE SUITABILITY OF PLACING CHILD IN A FAMILY MEMBER'S CARE.

14-3-27. ***T.W. v. Texas Dept. of Family & Protective Services***, __SW3d__, No. 08-13-00286-CV, 2014 WL 1060712 (Tex. App.—El Paso, 2014, no. pet. h.) (03/19/2014).

Facts: TDFPS removed the child from the care of her paternal aunt and placed the child in foster care due to allegations of drug abuse and neglectful supervision. At that time, the child had never resided with her Father. During a termination proceeding, the trial court heard extensive evidence including that Father's parental rights were previously terminated to the child's biological sister, Father had an extensive criminal history and incarceration record, Father left the child exclusively in paternal aunt's care since the child's birth, and that paternal aunt tested positive for drugs and also had an extensive criminal history. The evidence also showed that paternal aunt had engaged conduct that endangered the child. Following the trial, the trial court terminated Father's parental rights. Father appealed arguing the trial court abused its discretion by preventing him from testifying that it was in the child's best interest to be returned to paternal aunt's care.

Holding: Affirmed.

Opinion: While it is presumed that it is in the child's best interest to preserve the parent-child relationship, the requirement to show that termination is in the child's best interest subsumes reunification issues and guarantees the constitutionality of termination proceedings. A separate consideration of alternatives to termination is not required. Moreover, while the determination of where a child will be placed is a factor in determining the child's best interest, the fact that the placement will be with non-relatives is not a bar to termination.

Here, because a best interest determination focuses on the child, and not the parent, and the trial court was not required to consider alternatives to termination, the trial court did not abuse its discretion by excluding Father's testimony.

FATHER'S TESTIMONY THAT HE ENDANGERED THE CHILD'S EMOTIONAL WELL BEING BY DISCONTINUING VISITATION WITH THE CHILD DID NOT CONCLUSIVELY PROVE THAT FATHER'S PARENTAL RIGHTS SHOULD BE TERMINATED.

14-3-28. ***Burns v. Burns***, __SW3d__, No. 01-13-00797-CV, 2014 WL 1394936 (Tex. App.—Houston [1st Dist.] 2014, no. pet. h.) (04/10/2014).

Facts: A 2004 agreed final decree of divorce named Mother and Father as the Child's joint managing conservators and designated Mother as the primary conservator. Due to Father's bipolar disorder diagnosis, the decree provided a 4-phase visitation schedule in which Father's initial visitations would be supervised but would progress to a full standard possession order based on Father's compliance with the decree's requirements. Father substantially complied with the agreed possession order for several months. Eventually, however, Father's visits became more sporadic and then ceased altogether in 2008.

Subsequently, Mother petitioned the trial court to terminate Father's parental rights under Texas Family Code Section 161.001(1)(E), which provides that a parent's rights can be terminated when he has "engaged in conduct . . . which endangers the physical or emotional well-being of the child." During the trial, Father testified that he made the decision to discontinue his visitation with the Child because of the acrimony between Mother and Father and that he believed the acrimony was detrimental to the child. Father also admitted that,

by discontinuing visitation with the Child, he had "engaged in conduct that endanger[ed] the emotional well-being of [the Child]" but that he did so to avoid endangering the Child further.

The trial court denied Mother's request to terminate Father's parental rights. Mother appealed, arguing that the trial court erred because Father judicially admitted that he endangered the Child's emotional wellbeing and that such admission conclusively proved that Father's engaged in the conduct proscribed by Texas Family Code Section 161.001(1)(E).

Holding: Affirmed

Opinion: A judicial admission is an assertion of fact, usually found in pleadings or stipulations of the parties, that acts as a formal waiver of proof. A party's testimonial declarations which are contrary to his position generally are admissions, but they are not always outcome-determinative judicial admissions. Instead, a fact-finder may consider their evidentiary weight in light of other evidence.

Here, Father agreed that he endangered the Child's emotional wellbeing by discontinuing visitation. But he also explained that he considered both his difficulties with Mother and his decision to be absent from the Child's life, and that he considered the decision to be absent to be the lesser harm. Read in context, Father's acknowledgment that his absence from the Child's life endangered the Child's emotional wellbeing is a testimonial admission, but it is not the kind of unequivocal statement that amounts to a judicial admission.

★★★TEXAS SUPREME COURT ★★★

A COA CONDUCTING A FACTUAL SUFFICIENCY REVIEW IN A PARENTAL TERMINATION CASE MUST UNDERTAKE AN EXACTING REVIEW OF THE ENTIRE RECORD—BUT IT NEED NOT DETAIL ALL OF THE EVIDENCE IN ITS OPINION IF IT *AFFIRMS* A JURY'S VERDICT FINDING SUFFICIENT GROUNDS FOR TERMINATION.

14-3-29. ***In re A.B.***, __SW3d__, No. 13-0749, 2014 WL 1998440 (Tex. 2014) (05/16/2014).

Facts: Mother and Father married in 2005 and had a Daughter that same year. Mother gave birth to a Son in 2006. Mother and Father separated in 2007 with the Children remaining in Mother's care. In September 2007, Daughter was admitted to the hospital for seizures resulting from severe malnourishment and physical neglect. After the Daughter was released from the hospital, TDFPS placed her temporarily with maternal relatives, and eventually to Father's care.

One month later, a caseworker visited the children at Father's home and discovered Son with injuries to his face and head. TDFPS removed the Children from Father's care, placed them with a foster family and filed suit to terminate both parents' rights the following day. Mother subsequently voluntarily relinquished her parental rights. After a bench trial in 2009, the trial court terminated Father's parental rights finding that Father had knowingly endangered the Children pursuant to Texas Family Code Section 161.001(1)(D)-(E).

Father appealed the trial court's 2009 decision, challenging the legal and factual sufficiency of the evidence to support the court's endangerment findings. The COA reversed and remanded, holding the evidence was legally sufficient, but factually insufficient to support the finding of endangerment. The case was retried before a jury which made the same findings as the trial court had in 2009, including the endangerment findings under Texas Family Code Section 161.001(1)(D)-(E) and that termination was in the Children's best interest. The trial court entered a decree of termination pursuant to the jury's findings in June 2011. Father appealed the termination order, once again arguing the State failed to present legally and factually sufficient evidence to support the jury verdict. The COA once again held there was factually insufficient evidence of endangerment. On en banc reconsideration, the en banc COA reversed course and affirmed the termination of Father's parental rights finding that the evidence of endangerment was factually sufficient to support termination. Father then petitioned the Texas Supreme Court, arguing the en banc COA improperly disregarded relevant, probative evidence in performing its factual sufficiency review, and erred when it "failed to detail the

conflicting evidence."

Holding: Affirmed

Opinion: Because the termination of parental rights implicates fundamental interests, a higher standard of proof—clear and convincing evidence—is required at trial. Consequently, a heightened standard of appellate review in parental termination cases is similarly warranted. Specifically, a proper factual sufficiency review requires the COA to determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations. If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. And in making this determination, the reviewing court must undertake an exacting review of the entire record with a healthy regard for the constitutional interests at stake.

However, while parental rights are of a constitutional magnitude, they are not absolute. Consequently, despite the heightened standard of review, the COA must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter of the credibility and demeanor of witnesses. For this reason, if a COA is *reversing* the jury's finding based on insufficient evidence, the reviewing court must *detail the evidence* relevant to the issue of parental termination and clearly state why the evidence is insufficient to support a termination finding by clear and convincing evidence.

In contrast, the Texas Supreme Court has never similarly required COAs to detail the evidence in this manner when the court *affirms* the judgment of termination. The purpose of requiring reviewing courts too detail the evidence when *reversing* a jury verdict is to discourage the reviewing court from merely substituting its judgment for that of the jury. But when the reviewing court *affirms* the jury verdict, the risk that the court has usurped the role of the jury disappears.

There is only one exception to the general rule that appellate courts need not "detail the evidence" when *affirming* a jury finding: exemplary damages. This is because juries have broad discretion in imposing exemplary damages and because the purpose of exemplary damages is to punish and deter, similar to that for criminal punishment. Due to concerns that jury awards for exemplary damages can be unpredictable with little basis in fact, both the Legislature and the Texas Supreme Court have imposed various procedural safeguards, including requiring a COA on a sufficiency review to "detail the evidence" whether it affirms or reverses the award.

The purpose of terminating parental rights, in contrast, is not to punish parents or deter "bad" conduct, but rather to protect the interests of the child. Additionally, the TFC provides a detailed statutory framework to guide the jury in making its termination findings. Moreover, whereas an award of exemplary damages implicates a single fundamental right—the defendant's due process rights to her property—parental termination cases involve a balance between the parent's fundamental interest in the custody/control of the child and the State's fundamental interest in protecting the welfare of the child. And again, the Texas Supreme Court has further safeguarded the parent's interest by requiring COAs to conduct an exacting review of the evidence. Due to the differences between exemplary damages cases and parental termination cases, and in light of the extensive procedural safeguards in termination cases, there is no need for a COA to detail the evidence when *affirming* a jury verdict.

Here, the en banc COA cited the correct standard—that is, whether "on the entire record, a factfinder could reasonably form a firm conviction or belief that the parent violated [TFC 161.001(1)(D)-(E)]" and "[i]f, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction in the truth of its finding." The en banc COA then devoted six pages of its opinion to articulating the evidence presented at trial. Although the en banc COA did not specifically detail all evidence favorable to Father in its majority opinion, it did in fact comply with the correct factual sufficiency review. And because the court ultimately affirmed the jury's termination findings, it was not required to detail all of the evidence.

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MISCELLANEOUS

DIVORCE DECREE'S INJUNCTION PERMANENTLY ENJOINING HUSBAND FROM ACCESS TO HIS ONE-HALF SEPARATE PROPERTY INTEREST IN MARITAL RESIDENCE IMPERMISSIBLY DIVESTED HUSBAND OF HIS SEPARATE PROPERTY.

14-3-30. *Heard v. Heard*, No. 02-12-00406-CV, 2014 WL 1257262 (Tex. App.—Fort Worth, 2014, no. pet. h.) (mem. op.) (03/27/2014).

Facts: Husband and Wife purchased their residence before marriage with each party taking a one-half undivided separate property interest in the property. The trial court rendered a divorce decree that, among other things, confirmed Husband's and Wife's one-half interest in the residence. The decree made Wife's interest a present possessory interest in the entire property including Husband's separate property interest until the children were emancipated, the children's disabilities were otherwise removed, or Wife ceased to use the residence as her primary residence. Additionally, the decree enjoined Husband from entering the property without Wife's knowledge or consent. Husband appealed arguing that the trial court divested him of his separate-property interest in the residence.

Holding: Reversed and rendered.

Opinion: Unlike Wife's possessory interest, which ceases upon the occurrence of one of three conditions, Husband's injunction does not terminate upon the occurrence of anything, including when Wife's possessory interest ceases. Therefore, the injunction effectively divested Husband of his separate property interest in the residence. The injunction is reformed so that it terminates when Wife's possessory interest terminates.

IF A DEBTOR SPOUSE INCURS A DEBT, EVEN BEFORE HE MARRIES, THE CREDITOR MAY FILE AN ABSTRACT OF JUDGMENT AND REACH THE DEBTOR SPOUSE'S MARITAL PROPERTY IN SATISFACTION OF THE DEBT, EVEN IF THAT PROPERTY IS JOINTLY MANAGED BY HIS NON-DEBTOR WIFE.

14-3-31. ***Drake Interiors, L.L.C. v. Thomas***, __SW3d__, No. 14-13-00349-CV, 2014 WL 1328011 (Tex. App.—Houston [14th Dist.], 2014, no pet. h.) (04/03/2014).

Facts: In February 2000, Drake Interiors "Creditor" sold building materials to a partnership solely managed and controlled by Husband. In June 2002, Creditor filed a lawsuit against Husband and several of Husband's business entities (collectively "Husband") alleging that Husband had breached a promissory note covering the building materials.

In October 2002, during the pendency of the lawsuit, Husband married Wife. In 2003, Husband and Wife acquired a townhome ("Asbury Property"), which they held as their joint management community property. In 2004, Creditor obtained a $44,856.95 judgment against Husband, which was made subject to a settlement agreement for a lessor amount and for installment payments, but permitted Creditor to collect the full judgment if Husband defaulted. Husband defaulted under the settlement agreement shortly thereafter.

In 2006, Wife purchased and held as her sole management community property a second property ("Queenswood Property") where Husband and Wife intended to build a new home. On January 18, 2008, Creditor abstracted and recorded the judgment from its suit against Husband in Harris County, where both the Asbury and the Queenswood properties were located. The abstract did not name Wife because she did not participate in the underlying suit against Husband. Shortly thereafter, Husband and Wife separated. Husband

and Wife completely vacated the Asbury Property by August 1, 2008 and rented the property to a third party. The December 2008 divorce decree awarded Wife the Queenswood Property, which she designated as her homestead on January 1, 2009. The divorce decree also awarded Wife the Asbury Property.

In April 2009, Creditor filed a declaratory action against Husband and Wife seeking a declaration that it was entitled to execute against the Asbury Property. Wife filed a counter-claim for declaratory relief. By May 2011, the time of her live pleading, Wife returned to the Asbury Property and claimed it as her homestead. Subsequently, Wife filed a motion for partial summary judgment arguing that the Asbury Property was not liable for Husband's premarital debt. Creditor filed a cross-motion for summary judgment. The trial court granted Wife's motion for partial summary judgment and issued an order declaring that Creditor had no lien or claim to the Asbury Property. Creditor appealed.

Holding: Reversed and remanded

Opinion: In her summary judgment motion, Wife argued that the Creditor's judgment lien was invalid because there was no "community debt" for which the Asbury Property might be liable. The COA rejected this argument, observing that Texas Family Code Section 3.202(c) provides that "[t]he community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage." This language is clear and unambiguous. Thus, if a husband incurs a debt before he marries, the creditor may reach his marital property in satisfaction of the debt, even if that property is jointly managed by his non-debtor wife.

Here, there is no dispute that the Asbury Property was Husband and Wife's joint management community property. Accordingly, if Creditor's judgment lien attached during marriage, then Creditor can reach any nonexempt community interest in the Asbury Property. Wife cannot invalidate the lien simply because the debt was not hers.

Wife argued further that the judgment lien was invalid because she was not named in Creditor's lawsuit against Husband or the final judgment. However, in construing Texas Family Code Section 3.202(c)'s predecessor statute, the Texas Supreme Court has held that for a creditor to reach joint management community property, there is no requirement for the joinder of both spouses in the lawsuit. Therefore, Wife did not need to be named in the earlier lawsuit or the judgment for Creditor to reach community assets jointly managed by Husband and Wife. Section 3.202(c) makes the entirety of the joint management community property subject to the liabilities of a debtor spouse.

Nevertheless, Wife relied on the Texas Supreme Court's analysis of the doctrine of virtual representation in *Cooper v. Texas Gulf Industries*, 513 S.W.2d 200 (Tex. 1974). Under that former doctrine, a husband was said to have the sole power to manage the marital community, meaning that a suit naming only the husband was nonetheless binding on his wife. But in recognizing the abolishment of virtual representation, the supreme court held that "[t]he rights of the wife, like the rights of the husband and the rights of any other joint owner, may be affected only by a suit in which the wife is called to answer."

Cooper's analysis does not apply here. When Creditor first sued Husband, the suit directly concerned Husband's premarital debt, not his community property. Husband was still unmarried and had yet to acquire any interest in the Asbury Property. Even if Husband and Wife had been married at the time of the suit, Wife did not need to be joined as a party. If the suit concerns only a debt, the creditor does not have to join both spouses in order to later reach assets jointly held in community. In sum, Wife failed to carry her summary judgment burden.

In his summary judgment motion, Husband sought two declarations, one declaring that the abstract of judgment created a valid judgment lien on the Asbury Property, and the other declaring that he was entitled to execute against the Asbury Property. Generally, a lien may not attach to property that is held as the debtor's homestead, which is protected from all debts except those delineated by the Texas Constitution. If the property is exempt because it is the debtor's homestead, the lien will attach only when the property has lost its homestead character. Property that has been designated as a homestead will only lose its homestead character through abandonment, death, or alienation. Proof of abandonment must be undeniably clear and beyond almost the shadow of a doubt, at least all reasonable ground of dispute, that there has been a total abandonment with an intention not to return and claim the exemption. The burden of proving abandonment rests on the party asserting it.

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Creditor argued that its judgment lien attached to the Asbury property on January 18, 2008—the time it recorded the abstract—because although Husband and Wife were still living at the Asbury Property, construction on the Queenswood Property was underway, and Husband and Wife intended to move into that property when construction was completed. In the alternative, Creditor argued the Asbury Property became nonexempt no later than August 1, 2008, and Wife had filed for divorce by this time, and neither she nor Husband were still living at the Asbury Property.

Husband failed to prove abandonment. Abandonment cannot be shown on January 18, 2008, because Husband and Wife continued to occupy the Asbury Property—evidence conclusively showing the opposite of discontinued use. And although Creditor conclusively proved that Husband and Wife had vacated the Asbury Property by August 1, 2008, there was no clear proof of an intent to never return. The evidence showed that the Asbury Property was leased to a third party, but the temporary renting of a homestead does not constitute an abandonment so long as the claimant has not designated another homestead. Accordingly, Husband also failed to carry his summary judgment burden. The trial court's judgment is reversed and remanded because neither party established its entitlement to declaratory relief as a matter of law.

TRIAL COURT ABUSED ITS DISCRETION BY ORDERING TRUSTEE OF A SPENDTHRIFT TRUST TO WITHHOLD MANDATORY AND DISCRETIONARY DISTRIBUTIONS AND TO PAY MANDATORY DISTRIBUTIONS TO WIFE AS TEMPORARY SPOUSAL SUPPORT.

14-3-32. *In re BancorpSouth Bank*, No. 05-14-00294-CV, 2014 WL 1477746 (Tex. App.—Dallas, 2014, orig. proceeding) (mem. op.) (04/14/2014).

Facts: Relator ("Trustee Bank") is the trustee of a spendthrift trust in which Husband is the beneficiary. In a divorce proceeding, the trial court ordered Trustee Bank to withhold mandatory and discretionary distributions that would otherwise be payable to Husband and to pay the mandatory distributions to Wife as spousal support according to the trial court's temporary support order and to pay the discretionary distributions to the trial court's registry. Trustee Bank then petitioned the appellate court for mandamus relief.

Holding: Writ of mandamus conditionally granted

Opinion: Spendthrift trusts are trusts with language prohibiting the voluntary or involuntary alienation of the beneficial interest. A spendthrift trust protects the beneficiary from his creditors by expressly forbidding alienation of the beneficiary's interest in the trust.

Wife analogized the trial court's order to an income withholding order directed to an employer for child support or court-ordered spousal support under Texas Family Code Sections 154.007 and 8.101. However, Texas Family Code Sections 154.007 and 8.101 are creatures of specific statutes that create an exception to the general limitation on garnishment of current wages. There is no similar statute permitting a trial court to redirect payments from a spendthrift trust to a spouse or former spouse.

Wife also analogized the trial court's order to an order under Texas Family Code Section 154.005, which provides that a trial court "may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments." However, there is no similar statutory provision exempting spousal support from the spendthrift provisions of a trust. Accordingly, trial court abused its discretion by entering a withholding order attempting to circumvent the spendthrift provisions of the trust.

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AFTER THE JURY RENDERED A VERDICT FINDING THAT FATHER SHOULD NOT BE CHILD'S CONSERVATOR, TRIAL COURT ABUSED ITS DISCRETION BY GRANTING FATHER'S MOTION FOR A NEW TRIAL UNDER A THEORY THAT THE JURY VERDICT AMOUNTED TO A DE FACTO TERMINATION OF HIS PARENTAL RIGHTS.

14-3-33. *In re Stearns*, No. 02-14-00079-CV, 2014 WL 1510059 (Tex. App.—Fort Worth, 2014, orig. proceeding) (mem. op.) (04/17/2014).

Facts: Mother sued Father for divorce and sought sole custody of the parties' Child. The jury found that Mother should be the sole-managing conservator and that Father should not be a possessory conservator because such appointment was not in Child's best interest and possession or access by Father would endanger the Child's physical or emotional welfare. The trial court signed a judgment in accordance with the verdict. Afterward, Father filed a motion for new trial arguing that his due process rights were violated when the jury did not appoint him as a possessory conservator thereby creating a de facto termination under a preponderance of the evidence standard, rather than a clear and convincing standard for conservatorship determinations. The trial court granted Father a new trial as well as access to the Child. Mother petitioned for mandamus relief.

Holding: Writ of mandamus conditionally granted

Opinion: The trial court's order granting a new trial based on Father's "de facto" termination argument violates TFC 105.002(c)(1)(C), which provides that a trial court may not "contravene a jury verdict" on the issue of the appointment of a possessory conservator. The trial court's order also overlooks the Family Code's provisions (TFC 102.003(a)(1), 156.001–.002, 156.101) allowing a parent, even a nonconservator like Father, to seek modification of a conservatorship order and that gives a trial court discretion to grant modification if it is in the child's best interest and the parent's or child's circumstances have materially and substantially changed since the order was rendered. It is this law that differentiates Father from parents whose relationships with their children have been permanently severed, and it is this law that provides Father and other similarly situated parents due process. Accordingly, the trial court abused its discretion by contravening the jury's verdict. The trial court is ordered to vacate its order granting Father's motion for new trial.

Although Mother could appeal the granting of Father's motion for new trial after the trial court enters a final judgment, whether that appeal would be an adequate remedy depends on a careful analysis of the costs and benefits of interlocutory review. Here, the jury determined that Father should not be a conservator of his two-year-old Child. With the trial court's granting of Father's motion for new trial, Father retained court-ordered visitation despite a jury's decision that possession or access by Father would endanger the child's physical or emotional welfare. Under these circumstances, mandamus relief is appropriate.

TRIAL COURT ERRED BY CONFIRMING AN ARBITRATION AWARD THAT THE ARBITRATOR RENDERED AFTER THE DEADLINE SET IN THE ARBITRATION AGREEMENT.

14-3-34. *Sims v. Building Tomorrow's Talent*, No. 07-12-00170-CV, 2014 WL 1800839 (Tex. App.—Amarillo, 2014, no pet. h.) (mem. op.) (04/30/2014).

Facts: Sims and Gay entered into a partnership related to human resources consultation with each owning a 50% interest. Thereafter, Gay sued Sims on various claims related to the partnership after which the parties entered into a mediated settlement agreement containing an arbitration clause for resolving future issues. Afterward, the parties invoked the arbitration provisions to resolve a dispute regarding ownership of copyrighted materials.

Sims and Gay selected an arbitrator and executed proposed arbitration guidelines requiring the arbitrator to issue a written ruling within fourteen days of both parties' written submissions. Gay submitted his final brief on December 22, 2008. Therefore, under the arbitration terms, the arbitrator's ruling was due no later than January 6, 2009. By January 6, 2009, the arbitrator had not filed his written ruling. On April 3, 2009, Sims's sent a letter to Gay and the arbitrator objecting to the arbitrator's failure to render an award. The arbi-

trator did not respond. Thereafter, the parties engaged in a protracted battle over whether and when the arbitrator was to submit a written ruling.

On June 18, 2010, the trial court entered a written order directing the arbitrator to render a written award within sixty days. Sims objected to the written order on the basis the court was replacing agreements and deadlines entered into by the parties in the proposed arbitration guidelines. On August 10, 2010, approximately nineteen months after the initial, agreed-to deadline, the arbitrator issued his award in favor of Gay and against Sims. But not until August 25, 2011, did the arbitrator issue a final judgment awarding Gay $195,000 in damages and $92,135.32 in attorney's fees. The trial court confirmed the arbitrator's award on October 26, 2011. Sims appealed, arguing that the trial court erred in confirming the arbitrator's award after the deadline set by the parties had passed.

Holding: Reversed and remanded

Opinion: Arbitration is a contractual proceeding by which the parties to an agree to submit their controversy or dispute to arbitrations in order to obtain a speedy and inexpensive final disposition. Texas Civil Practices and Remedies Code 171.053(c)(1), (2) clearly and unambiguously provides that an arbitrator *shall* make an award within the time established by the agreement to arbitrate, or if a deadline is not established by agreement, within the time ordered by the court. Section 171.053(e) provides that complaints concerning the tardiness of an arbitration award are waived "unless the party notifies the arbitrators of the objection before the delivery of the award to that party."

Here, the parties executed proposed arbitration guidelines requiring the arbitrator to issue a written ruling within fourteen days of both parties' written submissions—January 6, 2009. Regardless, on June 18, 2010, the trial court set new deadlines for discovery, testimony and briefing and sixty days to render a written award. Even assuming the parties abandoned the original deadline as argued by Gay, the arbitrator's award was still outside the later deadline set by the trial court. The arbitrator's conduct defeated the intent of arbitration—a contractual arrangement by parties to obtain a speedy and inexpensive final disposition. Accordingly, the trial court erred by confirming the arbitrator's award.

TRIAL COURT VIOLATED HUSBAND'S DUE PROCESS RIGHTS BY INCARCERATING HUSBAND FOR DIRECT CONTEMPT WITHOUT SIGNING A WRITTEN COMMITMENT ORDER—THE TRIAL COURT'S DOCKET SHEET NOTATION FAILED TO SATISFY DUE PROCESS.

14-3-35. ***In re Griffith***, __SW3d__, No. 01-14-00087-CV, 2014 WL 1745897 (Tex. App.—Houston [1st Dist.], 2014, orig. proceeding) (05/01/14).

Facts: During a divorce trial, the trial court admonished Husband for proffering nonresponsive answers while being questioned by Wife's attorney. The trial court warned Husband that if he failed to answer subsequent questions, the trial court would hold Husband in direct contempt and jail Husband for each occasion. Following additional testimony, the trial court held Husband in direct contempt for failing to answer the questions asked by his own counsel and ordered Husband immediately jailed for 30 days. The trial court made a docket entry reflecting the contempt finding, but the court did not sign a written contempt or commitment order.

Holding: Writ of habeas corpus granted

Opinion: It is well settled in Texas that a person may not be imprisoned for contempt without a written order of commitment. This is true in cases of both direct contempt and constructive contempt. In cases of direct contempt, the trial court may cause the contemnor to be detained for a short and reasonable time while the trial court prepares and signs the judgment of contempt and order of commitment. Thereafter, if no written order is signed, the contemnor must be released in compliance with due process. A docket sheet notation is not sufficient to satisfy due process requirements; a written order of commitment is required.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REOPENING THE EVIDENCE EVEN THOUGH WIFE FAILED TO EXERCISE DUE DILIGENCE IN OBTAINING ADDITIONAL EVIDENCE.

14-3-36. *Brazell v. Brazell*, No. 04-13-00491-CV, 2014 WL 1871361 (Tex. App.—San Antonio, 2014, no. pet. h.) (mem. op.) (05/08/2014).

Facts: Husband and Wife divorced in 2001. The divorce decree awarded Wife a 42% interest in Husband's Civil Service retirement plan with a $17,500 offset. Husband retired in 2010 and began receiving his monthly annuity payments. After Husband failed to make payments to Wife, Wife brought suit to compel payment for past due and future payments owed to her.

The trial court held a hearing in which Husband argued his retirement plan was a defined benefit plan whereas Wife argued the plan was a defined contribution plan. Husband introduced a letter, from the U.S. Office of Personnel Management ("OPM") stating that for Husband to be eligible for the benefits under the plan, he would have to reach a minimum age of fifty-five with thirty years of service. As of the 2001 divorce, Bruce had not yet reached the age of fifty-five. Therefore, OPM concluded that, at the time of divorce, Husband would only have been able to make an application for a refund of the contributions made—then totaling $89,594.61. Based on the length of the marriage, OPM calculated Wife's share of the contributions as of the date of the divorce at $21,914.84. But the parties disputed whether Wife was entitled simply to a one-time payment of $21,914.84 representing her portion of a defined contribution plan, or whether Wife was entitled to a continuous share of Husband's monthly annuity payment as her share of a defined benefit plan totaling $21,914.84 annually.

At the conclusion of the hearing, the trial court informed the parties it would review the law and contact them once it made a ruling. Several days later, the trial court recalled the parties and requested the parties contact OPM to calculate what Husband's monthly annuity payment would have been as of the date of the divorce, assuming Husband was eligible to receive his retirement benefits at that time. Subsequently, Husband submitted a second letter from OPM stating that had Husband been eligible to receive his retirement benefits as of the date of the divorce, his monthly annuity payment would have been $3,884 per month. Based on OPM's new calculation, the trial court awarded Wife a $1,631.28 monthly annuity payment, calculated by multiplying Wife's 42% interest awarded in the divorce decree by the $3,884 monthly annuity payment. Husband appealed arguing the trial court erred by reopening the evidence because Wife failed to exercise due diligence in obtaining the evidence contained in OPM's second letter.

Holding: Affirmed

Opinion: Texas Rule of Civil Procedure 270 provides that "[w]hen it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time…" In determining whether to permit additional evidence, a court should consider whether (1) the moving party showed due diligence in obtaining evidence; (2) the proffered evidence is decisive; (3) reception of such evidence will cause undue delay; and (4) granting the motion will cause injustice.

Here, the record is devoid of any evidence that Wife exercised due diligence in obtaining the additional evidence. However, the lack of due diligence is but one factor appellate courts consider in determining whether the trial court abused its discretion. By requesting OPM to calculate the value of Husband's annuity payment assuming he would have been eligible to retire as of the date of the divorce, the trial court agreed with Wife's assertion that Husband's retirement plan should be classified as a defined benefit plan rather than a defined contribution plan. The additional evidence was decisive and did not cause injustice because without it, the trial court could not have correctly calculated Wife's interest in Husband's monthly annuity payment. Accordingly, the trial court did not abuse its discretion by reopening the evidence.

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ALTHOUGH MOTHER ALLEGEDLY COULD NOT READ/WRITE/UNDERSTAND ENGLISH, THE TRIAL COURT DID NOT ERR BY REQUIRING MOTHER TO PROVE UP THE TRADITIONAL ELEMENTS FOR A BILL OF REVIEW BECAUSE MOTHER FAILED TO ESTABLISH A DUE PROCESS VIOLATION AND OTHERWISE NEGLIGENTLY SIGNED AN AGREED ORDER WITHOUT MAKING THE OTHER PARTIES OR THE COURT AWARE THAT SHE REQUIRED TRANSLATION SERVICES.

14-3-37. ***Castro v. Ayala***, __SW3d__, No. 08-12-00142-CV, 2014 WL 1938837 (Tex. App.—El Paso May, no pet. h.) (05/14/2014).

Facts: Mother and Father divorced in 1997. The divorce decree awarded Mother custody of the parties' three minor children and ordered Father to pay child support. In 2010, at Mother's request, the OAG filed a suit against Father for, among other things, failure to pay child support, totaling $15,685.44 in arrearages. Father answered by claiming Mother had voluntarily relinquished the actual possession and control of the children. Immediately before commencement of a hearing on the matter, in which Mother appeared pro se, Mother and Father reached an agreement to release Father from $12,079.44 of the alleged arrearage and to pay the remaining $3,606. As the hearing commenced, the trial court severed the contempt action and then heard other issues raised by the pleadings.

After the hearing, the OAG drew up an order reflecting the parties' agreement and reviewed the order with Mother, who signed the order along with the other parties and counsel, after which the trial court approved the order. Mother's communications with the OAG were conducted in English. At no point in the proceedings did Mother request an interpreter, request a translation of the written agreed order, request that the order be read to her in Spanish, or otherwise indicate that she did not understand the agreement between the parties.

Subsequently, Mother filed a petition for bill of review claiming that she did not agree to release Father from any child support arrearage and that the OAG had engaged in extrinsic fraud by taking advantage of her inability to speak or read English and denied her an opportunity to present a meritorious claim or defense. At the hearing, Mother testified that she speaks English with sixty percent proficiency, but does not understand English and cannot read or write English. The trial court denied Mother's petition, concluding that Mother understood English very well and in any event, was negligent in signing the order if she did not understand it, and failing to make the other parties or the court aware that she required translation services.

Holding: Affirmed

Opinion: Mother appealed arguing the trial court applied the wrong standard in considering whether to grant her petition for bill of review because she allegedly established a due process violation. Ordinarily, under the Texas Supreme Court's *Baker v. Goldsmith* standard, a party seeking relief under a bill of review must plead and prove: (1) a meritorious defense to the underlying cause of action, (2) which they were prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake, (3) unmixed with any fault or negligence on their part. However, under the Court's *Caldwell v. Barnes* standard, if the petitioner is claiming constitutional due process, such as non-service or notice of proceedings resulting in default judgment, then the party is relieved from showing the first two elements and need only prove there was no fault or negligence on their part.

Mother argued that the entering of the agreed order violated her right to have the order accurately interpreted in a language she understands. In support, Mother relied on: (1) criminal law precedent that a defendant's right to have trial court proceedings interpreted into a language he understands is part of his constitutional right to confrontation; and (2) the due process protections in parental rights termination proceedings including a parent's right to have the affidavit interpreted into a language he understands. However, there is no constitutional right to confrontation in a civil case and this is not a parental rights termination case.

Moreover, the trial court determined that Mother speaks and understands English very well, did not request an interpreter or that the order be read to her or translated into Spanish before she signed it. Mother also

testified at the enforcement hearing that she signed the order so she would receive the $3,606 payment quickly, and that the written order comported with the terms of the agreement she understood at the time she signed it. Thus, the trial court determined that Mother understood the terms of the order when she signed it, regardless of whether or not she could read English. Because Mother failed to establish a due process violation, the trial court did not err in applying the *Baker* standard in denying Mother's bill of review.

BECAUSE FATHER FAILED TO ESTABLISH A RECOGNIZED EXCEPTION TO THE FULL FAITH AND CREDIT CLAUSE, THE TRIAL COURT DID NOT ERR BY CONFIRMING A FOREIGN WAGE GARNISHMENT ORDER REQUIRING FATHER'S TEXAS EMPLOYER TO WITHHOLD FATHER'S EARNINGS FOR HIS FAILURE TO PAY CONTRACTUAL SPOUSAL AND CHILD SUPPORT.

14-3-38. *Daus v. Daus*, No. 05-13-00060-CV, 2014 WL 2109379 (Tex. App.—Dallas, 2014, no. pet. h.) (mem. op.) (05/14/2014).

Facts: In 2001, Father and Mother entered into a separation and property settlement agreement under North Carolina law in which Father would pay child support and spousal support to Mother, who intended to move to Nevada with the Children. The parties agreed the terms of the agreement would not be modified and that each party was subject to or would consent to the personal jurisdiction of any jurisdiction where Mother and the Children resided. Thereafter, Mother and the Children moved to Nevada, and Father moved to Texas. When Father failed to pay spousal and child support, Mother filed suit in Nevada.

Following several hearings, the Nevada court reduced Father's outstanding spousal support arrearages to judgment. Additionally, the Nevada court found that, because the 2001 agreement provided for specific enforcement, and Father had repeatedly failed to pay child and spousal support, Mother was entitled to a wage assignment order for both child and spousal support. Accordingly, the Nevada court signed a wage garnishment order requiring Father's Texas employer to send a total of $6,938.00 each month to Mother at her Nevada address. Subsequently, Father filed in Texas a petition to register and contest the Nevada order. Mother answered, asking only that Texas give full faith and credit to the Nevada order. Following trial, the trial court concluded Father failed to establish a defense to the validity or enforcement of the Nevada order and ordered it confirmed as registered. Father appealed, arguing the trial court erred by confirming the Nevada order because the Texas Constitution forbids the garnishment of wages for debts other than court-ordered child support and spousal maintenance.

Holding: Affirmed

Opinion: The Full Faith and Credit Clause requires that a valid judgment or final order from one state be enforced in other states regardless of the laws or public policy of the other states. An opposing party has the burden of collaterally attacking the judgment by establishing a recognized exception to the full faith and credit requirements. Those exceptions are when a decree is interlocutory or subject to modification under the law of the rendering state, when the rendering state lacks jurisdiction, when the judgment was procured by fraud or is penal in nature, or when limitations have expired under section Texas Civil Practice and Remedies Code Section 16.066.

Here, Father did not challenge the validity of the Nevada order and failed to raise a recognized full faith and credit exception. In fact, Father conceded that the Nevada court "conclusively adjudicated [Mother's] entitlement to spousal maintenance." His only argument is that the order cannot be enforced in Texas because the Texas Constitution prohibits the garnishment of wages except for court-ordered child support payments and spousal maintenance.

However, under Full Faith and Credit, the confirmation of foreign court order may result in the garnishment of a Texas resident's wages even though a Texas court would be limited or precluded from issuing the same substantive order against a Texas resident. Further, this is not a case wherein a party is seeking a Texas court order garnishing wages for the enforcement of a valid foreign judgment. That situation is clearly a different matter because Texas courts would then be asked to do an act that violates the Texas Constitution. Here, Mother did not request a Texas court to enforce the Nevada order; rather, she asked only that Texas

give full faith and credit to the order. Because Texas courts need do nothing to enforce the valid Nevada order, the trial court did not err by confirming it.

TRIAL COURT'S AWARD OF ATTORNEY'S FEES IN ENFORCEMENT ACTION NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE UNDER THE LOADSTAR METHOD (OR ANY OTHER METHOD) BECAUSE THERE WAS NO EVIDENCE OF THE REASONABLENESS OF THE FEES; TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING ATTORNEY'S FEES IN THE UNDERLYING FORECLOSURE ACTION IN THE ABSENCE OF EVIDENCE OF THE REASONABLENESS OF THOSE ATTORNEY'S FEES BECAUSE WIFE CLAIMED THEM AS AN ELEMENT OF DAMAGES.

14-3-39. ***IMOMO*** ***Pyrtle***, __SW3d__, 05-13-00359-CV, 2014 WL 2053972 (Tex. App.—Dallas, no pet. h.) (05/19/2014).

Facts: An April 2009 Texas divorce decree provided procedures for the sale of Husband and Wife's marital residence in Florida, a division of the sale proceeds, that Husband would retain the right to live in the residence until sale, and ordered Husband to pay the mortgage on the property until it was sold. In July 2009, Wife discovered that Husband was not making mortgage payments on the residence and that although potential buyers made purchase offers on the residence, Husband would not agree to the purchase terms. Subsequently, the mortgagee initiated a foreclosure action. Attempting to avoid foreclosure, Husband hired a Florida attorney. However, the mortgagee eventually foreclosed on the property and a Florida Court rendered a judgment of foreclosure against the parties for the entire $334,830.19 mortgage balance.

In November 2011, Wife filed in the Texas trial court a petition for enforcement of the divorce decree alleging Husband had failed to sign documents to effectuate a sale of the Florida property, failed to pay the mortgage as ordered in the divorce decree, and that Husband's actions harmed Wife by causing a loss in equity on the Florida property, damaging Wife's credit, and causing Wife to incur $1,294.00 in attorney's fees she paid to the Florida attorney. Wife requested equitable relief to "make her whole" for the damage done in Florida and for attorney's fees related to her enforcement suit.

Following a hearing, the trial court rendered judgment against Husband for, among other things, $1,294.00 in attorney's fees "for services rendered in Florida in connection with the foreclosure of the mortgage on the parties' marital residence." Additionally, the trial court awarded Wife's Texas counsel a judgment against Husband for $7,000 in attorney's fees. Husband appealed.

Holding: Reversed and remanded

Opinion: Husband argued that the evidence was legally insufficient to support the $7,000 attorney's fees awarded to Wife's counsel because although Wife's counsel testified as to the number of hours spent on the case, the record contained no testimony or evidence that the time spent was reasonable and/or necessary. Both parties relied on the Texas Supreme opinion in *El Apple*, which involved the calculation of attorney's fees using the lodestar method. Generally under the lodestar method for calculating attorney's fees, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. To establish the number of hours reasonably spent on the case, the fee application and record must include proof documenting the performance of specific tasks, the time required for those tasks, the person who performed the work, and his or her specific rate.

Here, Wife's attorney testified that (1) she had been a licensed attorney in Texas since 1982; (2) she incurred a total of $6,008.98 in fees prior to the final hearing; (3) she incurred an additional eight hours for service on the day of the hearing hearing"; (4) she was "asking the Court for a total of $8,000.00 in attorney's fees…"; and (5) her "total attorney's hours" were "twenty-four total attorney's hours" plus "ten hours of paralegal time at $100.00 an hour" and "another four hours of doing research and that type of thing." Additionally, Wife testified that she agreed to pay her attorney $250 per hour. However, the record contained no evidence

of the reasonableness of the hourly rate, the performance of specific tasks, the time required for those tasks, or the person who performed the work. Therefore, the evidence in the record was not legally sufficient to calculate a reasonable fee award using the lodestar method.

Moreover, unlike in *El Apple*, this case did not involve a statute specifically requiring attorney's fees to be calculated by the lodestar method. Other COAs addressing the sufficiency of the evidence to support attorney's fees awards since *El Apple* have concluded that *El Apple* has no bearing on non-lodestar awards of fees. Here, there was no expert testimony regarding the hourly rate of Wife's attorney or the reasonableness of those fees. Accordingly, assuming arguendo that the lodestar method did not apply, the record evidence was legally insufficient to support the trial court's award of $7,000 in attorney's fees to Wife's counsel.

Husband argued further that the trial court abused its discretion by awarding Wife a judgment for attorney's fees she paid to her Florida counsel because the record contained no supporting evidence of the time, reasonableness and/or necessity for the fees. The Texas Supreme Court has held that if a lawsuit contains an underlying suit that concerns a claim for attorney's fees as an element of damages, then those fees may properly be included in a judge or jury's compensatory damages award.

Here, Wife claimed her Florida attorney's fees as an element of her damages in the underlying foreclosure action in Florida. Therefore, Wife was not required to establish the reasonableness and necessity of the Florida attorney's fees in in order to recover them. Instead, Wife's uncontroverted testimony that she paid $1,294 to the Florida attorney due to Husband's failure to pay the mortgage on the Florida property was sufficient to support her claim for the Florida attorney's fees. Accordingly the trial court did not abuse its discretion by awarding Wife a judgment for the Florida attorney's fees.

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.

***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.