SECTION REPORT
FAMILY LAW

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IN THIS MONTH'S REPORT

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Section Wear and Publications

MESSAGE FROM THE CHAIR

I hope that you all had an enjoyable and relaxing summer. The kids are back in school, the fall season is upon us and soon football will be in full swing.

Advanced Family Law

I enjoyed seeing everyone in San Antonio for the 42nd Annual Advanced Family Law Course. Course Directors, Chris Nickelson and Jimmy Vaught, as well as the planning committee and the amazing team of the State Bar staff, put together a fantastic program.

Honors and Awards

Awards were presented at the Advanced Course to family lawyers who have made a significant contribution to the practice of family law. **Gary Nickelson** was inducted into the Family Law Hall of Legends. **Charlie Hodges** was awarded the Dan Price Award; **Susan Fischer** received the Ken Fuller Pro Bono Award; **Hon. Emily Miskel** and **Ken Raggio** received the Joseph W. McKnight Best Family Law CLE Article for their article "Electronic Evidence from A to Z"; and **Jennifer Tull** received the Gay G. Cox Collaborative Law Award. Additionally, the Texas Academy of Family Law Specialists awarded its prestigious Sam Emison Award to **Diana Friedman**. Congratulations to all of our award winners!

Publications

The Family Law Section continues to produce quality publications to benefit its members. The new updated publications -- Family Law Checklists, Predicates Manual and the Texas Family Law Practice Manual, were a huge success at the Advanced Course. Additionally, the Family Lawyer's Essential Toolkit, Family Law at Your Fingertips, and the DVD's produced by Heather King also produced great profits for the Section. These are excellent publications, and if you did not get a chance to purchase them at Advanced, they are available through the Family Law Section website. The Foundation Family Code also made its debut at the Advanced Course.

Legislative Work and Texas Family Law Foundation

The Legislature will return to Austin in 2017, and the Legislative Committee, Co-Chaired by Diana Friedman and Jack Marr, is preparing for the next Legislative Session. The Family Law Section's proposed revisions to the Family Code were submitted to the State Bar, and the Foundation Bill Review Committee will begin to review all of the bills filed to help the Foundation lobbyists.

I encourage each of you to become a member of the Texas Family Law Foundation, an entity that is separate from the Section, whose mission is to improve the practice of family law in Texas. Volunteers participate in research, legislative work and other activities. If you would like to get involved in the Family Law Foundation, please go to the website at www.texasfamilylawfoundation.com. Thank you to everyone who donated their time and items for the silent auction at Advanced, as well as those of you who purchased items and attended the fashion show. The proceeds from these endeavors benefitted the Foundation and will help make our legislative efforts successful.

Pro Bono

The Pro Bono Committee is hard at work on their upcoming seminars and webinars. The price of admission to a seminar or webinar, which qualifies for CLE credit, is the commitment to handle two family law pro bono matters over a twelve-month period. These seminars have resulted in hundreds of indigent Texans having access to legal help for their family law matter. Members who are interested in speaking at or attending future Family Law Essentials seminars can contact Lisa Hoppes at lisa@hoppescutrer.com.

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Website Additions

There is now video content on the Family Law Section website, which include videos pertaining to the history of family law in Texas. These videos include the history of the Texas Family Code, the history of the Family Law Practice Manual and interviews of Section members regarding the 50-year anniversary of the Family Law Section. In addition to the history videos, videos from the 2016 awards ceremony are now online. You can click on the name of each award recipient to review his or her portion of the award's ceremony.

Continuing Legal Education

Upcoming family law CLE programs include the following:

Masters of Family Law
September 22-24, 2016 – Horseshoe Bay, Texas
Course Director: Gary Nickelson

New Frontiers
October 13-14, 2016, Louisville, KY
Course Directors: Joe Indelicato and Natalie Webb

Family Law and Technology
December 8-9, 2016 – Austin, Texas
Course Director: Heather King

Innovations – Breaking Boundaries in Child Custody Litigation
February 16-17, 2017 – New Orleans, LA
Course Director: Kathy Kinser

Collaborative Law Course
March 2-3, 2017 – Dallas, Texas
Course Director: Julie Quaid

Marriage Dissolution
April 20-21, 2017 – Austin, Texas
Course Director: Chris Nickelson
101 Course Director: Aimee Pingenot Key

Advanced Family Law
August 7-10, 2017 – San Antonio
Course Directors: Jonathan Bates and Kimberly Naylor
101 Course Director: Jeff Domen

New Frontiers
October 2017 – Las Vegas, Nevada
Course Directors: Kathy Kinser and Hon. Emily Miskel

I will look forward to seeing all of you at New Frontiers in Kentucky!

Kathryn Murphy
Chair, Family Law Section

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IN THE LAW REVIEWS AND LEGAL PUBLICATIONS

TEXAS ARTICLES

Decreasing Disproportionality Through Kinship Care, Aimee **Corbin**, 18 Scholar: St. Mary's L. Rev. & Soc. Just. 73 (2016).

NON-TEXAS ARTICLES

When a Child Rejects a Parent: Working with the Intractable Resist/Refuse Dynamic, Majorie Gans **Walters** & Steven **Friedlander**, 54 Fam. Ct. Rev. 424 (July 2016).

Domestic Violence and the Military, Steven P. **Shewmaker** & Patricia D. **Shewmaker**, 28 J. Am. Acad. Matrim. Law. 553 (2016).

The Evolution of Family Law: Changing the Rules or Changing the Game?, Carols Martinez **de Aguirre** 30 BYU J. Pub. L. 231 (2016).

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Co-Parent Court: A Problem-Solving, Community-Based Model for Serving Low-Income Unmarried Co-Parents, Ebony L. **Ruhland**, Alisha M. **Hardman**, Emily H. **Becher**, & Mark S. **Marczak**, 54 Fam. Ct. Rev. 336 (July 2016).

Assessing the History of Exaggerated Estimates of the Number of Children Being Raised by Same-Sex Parents as Reported in Both Legal and Social Science Sources, Walter R. **Schumma1**, Martin **Seayaa1,** Keondria **McClish,,** Keisha **Clark**, Abdullah **Asiri**, Nadyah **Abdullah**, & Shuyi **Huanga**, 30 BYU J. Pub. L. 277 (2016).

Forensic Experts and Family Courts: Science or Privilege-by-License?, Dana E. **Prescott**, 28 J. Am. Acad. Matrim. Law. 521 (2016).

Alimony's Job Lock, Margaret **Ryznar**, 49 Akron L. Rev. 91 (2016).

Result Inequality in Family Law, Margaret F. **Brinig**, 49 Akron. L. Rev. 471 (2016).

Judicial Tip Sheet: Kin First, 35 No. 7 Child L. Prac. 108 (July 2016).

Note, *Polymmigration: Immigration Implications and Possibilities Post* Brown v. Buhman, Greggary E. **Lines**, 58 Ariz. L. Rev. 477 (2016).

Litigants without Lawyers: Measuring Success in Family Court, Marsha M. **Mansfield**, 67 Hastings L.J. 1389 (June 2016).

Bringing a Lamb to Slaughter: How Family Law Attorneys Unknowingly Lead Clients to Financial Disaster in the Negotiation of a Divorce Stipulation, Jennifer L. **Bjurling**, 40 Vt. L. Rev. 939 (Summer 2016).

Foreign Fathers, Japanese Mothers, and the Hague Abduction Convention: Spirited Away, Barbara **Stark**, 41 N.C.J. Int'l L. 761 (Summer 2016).

The Consequences of Co-Habitation, Anna **Stepien-Sporek** & Margaret **Ryznar**, 50 U.S.F.L. Rev. 75 (2016).

Child Protection Law as an Independent Variable, Josh **Gupta-Kagan**, 54 Fam. Ct. Rev. 398 (July 2016).

Rights, Privileges, and the Future of Marriage Law, Adam J. **MacLeod**, 28 Regent U.L. Rev. 71 (2015–2016).

Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality, Serena **Mayeri**, 125 Yale L.J. 2292 (June 2016).

Relocation Issues in Child Custody Evaluations: A Survey of Professionals, Willam G. **Austin**, James N. **Bow**, Andrea **Knoll**, & Rebecca **Ellens**, 54 Fam. Ct. Rev. 477 (July 2016).

Note, *Same-Sex Parenting Among a Patchwork of Laws: An Analysis of New York Same-Sex Parents' Options for Gaining Legal Parental Status*, Alexander **Newman**, 2016 Cardozo L. Rev. de novo 77 (2016).

Justicecorps: Helping Pro Se Litigants Bridge a Divide, Evan G. **Zuckerman**, 49 Colum. J.L. & Soc. Probs 551 (Summer 2016).

Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents, Stacy **Brustin** & Lisa **Martin**, 67 Hastings L.J. 1265 (June 2016).

1-800-Skype-Me, Andrea **Himel**, Hon. Debra **Paulseth**, & Jessica **Cohen**, 54 Fam. Ct. Rev. 457 (July 2016).

Exclusive Use and Domestic Violence: The Pendente Lite Dilemma for Matrimonial Trial Judges, Hon Richard A. **Dollinger** & Collen **Moonan**, 88-Aug N.Y. St. B.J. 19 (July/August 2016).

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IN BRIEF

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

Alimony: In Massachusetts, when a couple marries, then divorces, then cohabitates, marries again and divorces again, an alimony award must be based on the entire length of the parties' relationship except for the time between the divorce and cohabitation. *Duff-Kareores v. Kareores,* 52 N.E.3d 115 (2016). A Georgia trial court erred when it awarded a wife "alimony" in the form of one-half the husband's military retirement because the retirement was part of the marital estate. *Frost v. Frost,* 787 S.E.2d 693 (Ga. June 20, 2016). The North Dakota Supreme Court upheld the denial of an ex-husband's motion to terminate spousal support based on a newly passed statute permitting termination based on cohabitation because the statute could not operate retrospectively. *Klein v. Klein,* 882 N.W.2d 296 (N.D. July 20, 2016). In Ohio, a trial court may not vacate or modify an award of spousal support unless the divorce decree contains a reservation of jurisdiction to modify. *Morris v. Morris,* ___ N.E.3d ___, 2016 WL 3922880 (Ohio July 19, 2016).

Attorney's fees: The Alaska Supreme Court allowed an obligor's attorney to assert an attorney's lien for legal fees against excess child support erroneously paid to the obligee. *Law Offices of Steven D. Smith, P.C. v. Ceccarelli,* ___ P.3d ___, 2016 WL 3369218 (Alas. June 17, 2016). The Court also held that a successful petitioner for a domestic violence protective order is entitled to seek an award of attorney's fees, but fees cannot be awarded for successfully defending against a petition for a domestic violence protective order because the statute in question permits a fee award only to "the petitioner." *Lee-Magana v. Carpenter,* 375 P.3d 60 (Alas. July 1, 2016). Hawaii's Supreme Court declined to apply the "offer of settlement" rule – awarding attorney's fees when a party fails to recover as much after trial than he was offered in settlement – to family law cases because the rule "may be unsuited to principles of equity and justice inherent in matters commonly resolved in family court proceedings" and because the rule "may improperly coerce settlements." *Cox v. Cox,* ___ P.3d ___, 2016 WL 4367248 (Haw. Aug. 16, 2016).

Best interests: A Hawaiian family court erred when it enforced a provision in a joint-custody divorce decree that if either parent moved more than 200 miles from the other, the non-moving parent would have sole custody, because the family court failed to consider the child's best interests. *Waldecker v. O'Scanlon,* 375 P.3d 239 (Haw. June 17, 2016). The Alaska Supreme Court affirmed a trial court's finding that a mother had not shown substantial changes in circumstances justifying a modification of custody, but it remanded the case for the trial court to consider whether the visitation schedule the mother had proposed would be in the child's best interests. *Collier v. Harris,* ___ P.3d ___, 2016 WL 4257175. In a very sad case, a Maine trial court did not abuse its discretion when it modified an agreed, complex possession order by picking one of the quarreling parents to establish their nine-year-old's residence because the child had suffered serious emotional injury from her parent's bickering, to the point of "not wanting her life." *Little v. Wallace,* ___ P3d ___, 2016 WL 3405564 (Me. June 21, 2016).

Bias: The North Dakota Supreme Court reminds us that adverse or erroneous rulings do not demonstrate judicial bias, *Rath v. Rath,* 879 S.W.2d 735 (N.D. June 2, 2016). Gender bias cannot be demon-

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strated in Arkansas when a witness inadvertently calls a male attorney "ma'am" and the judge comments, "That's all right. He's been called worse than that." *Taffner v. Arkansas Dep't of Human Servs.,* ___ S.W.3d ___, 2016 Ark. 231, 2016 WL 3216248 (Ark. June 2, 2016). In California, a court of appeals voided all rulings and orders by a temporary judge who had failed to disclose that she and two other lawyers had "served as private judges in each others' cases, *i.e.,* that she or her law firm had professional relationships with lawyers in the proceeding before her." *Hayward v. Superior Court,* ___ Cal.Rptr.3d ___, 2016 WL 4132462 (Cal. App. Aug. 3, 2016). Another California court explained that due process is violated by "embroilment," which means surrendering "the role of impartial factfinder/decisionmaker," and joining in "the fray," although there was no embroilment in the case because the record did not support the appellant's contentions. *Ellis v. Lyons,* ___ Cal.rptr.3d ___, 2016 WL 4249237 (Cal. App. Aug. 11, 2016).

College child support: The Indiana child support guidelines allow a court to order payment of "postsecondary" school expenses, but "postsecondary" does not include dental school. *Allen v. Allen,* 54 N.E.3d 344 (Ind. June 1, 2016). The Hawaii Supreme Court remanded a case to the family court for additional findings on "inequity" when the father agreed to pay all college expenses of the daughter, including room and board and a clothing allowance; the daughter moved to Washington State to attend college; and the mother insisted that child support payments to the mother should continue until the daughter's graduation. *Herrmann v. Herrmann,* ___ P.3d ___, 2016 WL 3541020 (Haw. June 28, 2016). Despite the parents' agreement to pay funds into a college trust fund for their children, the parents failed to set up a trust fund, let alone pay any money into it, such that the trial court acted correctly when it ordered both parents to pay interest on their tardy contributions. *In re Marriage of Healy,* No. DA 15-0504 (Mont. June 21, 2016).

Contempt: In Arkansas, a trial court must determine that a person in arrears in child support has the ability to pay before that person may be incarcerated for civil contempt. *Stehle v. Zimmerebner,* No. ___ S.W.3d, 2016 Ark. 290, 2016 WL 3640352 (June 30, 2016). In Nevada, a suspension of commitment on the condition that a person "follow the Orders of the Court" does not amount to a "purge" clause. *Lewis v. Lewis,* 373 P.3d 878 (Nev. June 30, 2016). In *Spitz v. Iowa District Court,* No. 881 N.W.2d 456 (Iowa June 24, 2016), the trial court faced a judge's nightmare – two former spouses, both pro se, each urging the court to throw the other in jail for violating suspensions of their respective commitments – so the judge obliged them both.

Division: A North Dakota trial court did not err when it ordered a disproportionate division of the marital estate to the husband when the husband received the parties' ranch, but if the court were to equalize the division, the husband would have to liquidate the ranch because it did not "cash-flow" enough for him to make sufficient payments to the wife for an equal division, even over time. *Rebel v. Rebel,* 882 N.W.2d 256 (N.D. July 20, 2016). A Maine trial court did not abuse its discretion when it ordered the husband to pay the wife the first $325,000 in proceeds from the sale of the first of the parties' six real estate properties, when the wife had a non-marital interest of $75,000 in one of them and had paid down $250,000 of marital debt with life insurance proceeds upon her mother's death, the court rejecting the ex-husband's argument that the obligation to pay should arise only when the specific property into which the ex-wife had invested her $75,000 sold. *Hutt v. Hanson,* ___ A.3d ___, 2016 WL 4240091 (Me. Aug. 11, 2016).

Retroactive Rabbi? A Connecticut court erred when it concluded that it lacked subject matter jurisdiction to dissolve a marriage performed by Jerry Heller, who was impersonating a Rabbi. "Heller had for years fraudulently performed hundreds of marriages in New York and New Jersey." So many, in fact, that the New York legislature passed a law that any marriages performed by "Rabbi" Heller were valid. Thus, the Connecticut court failed to give full faith and credit to the New York legislation. *Gershuny v. Gershuny,* 140 A.3d 196 (Conn. July 26, 2016) (per curiam).

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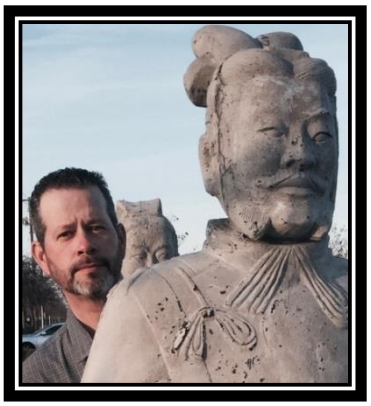
COLUMNS

OBITER DICTA
By Charles N. Geilich[1]



Isn't it great that "Hamilton," the Broadway musical that just received a record number of Tony Award nominations, has sparked an interest in the life of our first Treasury Secretary, Founding Father, and really good rapper? When I was last in New York, I conducted a scientific study of that new interest by noting two, count'em two, people walking around the streets of Manhattan with copies of Ron Chernow's "Alexander Hamilton" biography. You can read the results of my study in next month's Science magazine. (I'm pretty sure that's correct because I did send the editors an email).

Like you, however, I think it's about time that another pivotal figure in our country's history receive his due. Yes, that's right, I'm talking about George S. Boutwell. As you well know, Boutwell was also a Treasury Secretary, hip hop innovator (says the Internet), and Senator from Massachusetts, but he is best known as being the first IRS Commissioner, appointed by President Lincoln in 1862. Now, you may be surprised to learn that I have never written a musical, but I'm going to get this production of "Boutwell, well, well …!!" started.

[Curtain rises on a dramatically empty stage. A heavily-bearded, lonely figure enters stage left, looks out at the audience and raps thusly:]

"Yo, look at you lookers on, what a con, bet you wish I was already gone, my name is Boutwell, that's swell, but who am I, I'm the dude who takes your taxes, I serve at the axis of government, impoverishment, betterment, and I didn't serve at Manassas. You'll learn to love me, hate me, but you can't ignore me, you may implore me, don't take all my cash, respect my stash, but no, my man, that's not how it works, Honest Abe says I got to collect, you cannot reject, you must pay up for this government project we call … America!"

[Here, dancers dressed in green eye shades and small round glasses enter from stage right, begin snapping their fingers and circling Boutwell at center stage, singing the chorus]:

"Boutwell, Boutwell, you can never tell, with Boutwell, what you'll pay to Uncle Sam, this is where it all began, Form 1040 starts with this man, deductions, seductions, exemptions, depreciation, whatever happened to our agrarian nation? If you want protection from the wolves at the door, if you want railroads, streetcars, canals, and industry, you must report your income, don't you see! Taxes, in facts, is what we need, so get on board with Mr. George!"

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[1] 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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And so on. I think you can see that this will be a major hit, and after a long, successful run on Broadway, the show will make its way across our land and help me sell many tee shirts. Let me announce now that 5% of all my tee shirt proceeds will go to the Family Law Section.

Or maybe I'll just write a sequel to "Cats" called "Even More Cats." Either way.

WHO INTERPRETS AND APPLIES THE EVALUATION TEST RESULTS?

By John A. Zervopoulos, Ph.D., J.D., ABPP[2]

The Facts: A child custody evaluator, untrained in psychological testing, has concerns about the effects of emotional problems she recognizes in a parent and decides during the evaluation to refer the parent to a psychologist for testing—*see, e.g.,* Tex. Fam. Code § 107.1101. After administering tests, the psychologist conveys the results to the evaluator who incorporates those results into her final report. The evaluator's recommendations, supported by the test results, cut sharply against your client.

The Question: Who interprets and applies the test results?—The psychologist who is unlikely to have sufficient context of the examinee's circumstances to properly interpret the test results because he is not conducting the broader evaluation? The evaluator who is not trained to interpret test results nor to incorporate those results into her evaluation?

Psychological test results can provide useful information about examinees' emotional states or relationship styles that are key to addressing many evaluation referral questions. But properly interpreting test results and using them to develop evaluation recommendations require specialized training. Psychological tests are unlike medical x-rays from which a physician, for example, may readily identify a broken arm. Rather, knowledge of several factors contributes to proper interpretation of test results: the test's reliability and its ability to address the concerns it claims to address; the similarities of the examinee's characteristics with persons on whom the test was initially developed; the application of the results to the examinee's situation and life circumstances; personal and cultural concerns of the examinee that may affect the interpretation of the results—*see* American Psychological Assn., *Ethics Code* Std. 9.06. Test theory and the proper application of test results are core components of psychologists' training. Licensed Professional Counselors and Social Workers do not receive such training—attending continuing education workshops on testing or relying on automated computer interpretations of test results are inadequate substitutes.

Per Rule 702 of the Texas Rules of Evidence and its attendant caselaw, experts must show expertise in the methods on which they base their opinions as well as competence in the application of data from those methods to their evaluation conclusions. It follows that experts should also assure the court that data from other sources on which they base their opinions are sufficiently trustworthy.

When you encounter this test-referral situation, consider the following questions for the evaluator:

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[2]*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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• Does your licensing board allow you to administer psychological tests and to interpret test results?

• What training do you have in administering psychological testing and interpreting test results?

• Why did you refer the examinee to a psychologist for testing in this case?

• What background information about the case did you tell the psychologist when you made the referral? Did you document that conversation?

• How did the psychologist convey the test results to you? In a report? In a phone call? If so, did you take notes of that call? What did you discuss with the psychologist about the test results?

• Given your lack of expertise in psychological testing, what assurances can you give the court that the psychologist correctly administered the testing and properly interpreted the test results?

• Given your lack of expertise in psychological testing, how can you assure the court that you properly used the test results to inform your conclusions and opinions?

Who interprets and applies the evaluation's test results? Ask the question, and you may find a whole new set of questions open up to you.

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6 ESSENTIAL WORK/LIFE BALANCE TIPS FOR WOMEN IN BUSINESS

By Christy Adamcik Gammill, CDFA[1]

Women now represent 30 percent of American business owners, overseeing a total of 9.4 million companies. Black women own about 14 percent of those, around 1.3 million. And that number will likely continue to increase – black women are the **fastest growing entrepreneurial group** in the U.S., rising 332 percent since 1997.

Lack of flexible work hours is often given as a motivation for women making the transition from employee to entrepreneur, but there's more to this meteoric rise. According to entrepreneur Kike Odusanya of **My Business is Me**, it has to do with a lack of opportunity.

"Black women are one of the most educated groups in North America but often times aren't offered the same opportunities to progress in their career as their non-black counterparts, so setting up in business becomes a viable option".

For all women, launching, running, and growing a company demands a lot of time and energy. Balancing that with demands at home can be very tough. International business coach Lisa Larter observes the challenges to achieving this balance on a daily basis, "Women have been trained their entire lives to take care of other people. There is a sense of obligation around taking care of the family home and inherent guilt in asking for help."

To improve your balance between work, life, and family, consider the following strategies:

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[1] This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC, member FINRA, SIPC. 12377 Merit Drive, Suite 1500, Dallas, TX 75251, offers investment advisory products and services through AXA Advisors, LLC, an investment advisor registered with the SEC and offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC. CBG Wealth Management is not a registered investment advisor and is not owned or operated by AXA Advisors or AXA Network. Contact information: 972-455-9021 or Christy@CBGWealth.com. GE-99357(11/14)(exp.11/16)

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Limit Time-Wasting Activities

Keep a time journal. Everyone has the same number of hours available to them; how you choose to spend your time will affect what you achieve. Over the course of a week, write down everything you do and identify unnecessary activities. If mindless surfing on Facebook or constant checking of e-mails is sucking up your time, try a **program such as Freedom** to block out distractions for specific periods.

Outsource

Outsourcing the parts of your life that you don't enjoy doing will allow you to refocus and prioritize. This could mean hiring at work and delegating tasks to shorten your day, or even hiring someone to help out with household chores or errands. "This will create more open space in your life to decompress away from the office, allowing you to enjoy that time and be present with friends and family," Larter says.

Overcome Your Mindset

A report in the Harvard Business Review suggest that women are **socialized to be less confident**, compared to men. As they age, self-confidence grows, but help may be needed to overcome a negative mindset. "Most women could use a healthy dose to increased self-confidence," agrees Larter. "A coach or mentor helps to eliminate the voice of the inner critic most women face on a daily basis."

Practice Meditation

In her book, "Thrive," Arianna Huffington promotes mindfulness and meditation as key components of redefining success and creating a better sense of well-being and work/life balance. Used as a part of an overall "self-care practice," together with exercise and reading, it enables you to "show up better for other priorities," comments Larter.

Learn Fiscal Responsibility

A lack of basic financial awareness affects your ability to manage your life and work effectively. "Too many women work too hard and earn too little because they don't have a strong grasp of income, expenditure, and cash flow," observes Larter. She recommends that women learn the basics about money, so they understand how to create and invest their own wealth. This could take the form of succession planning or creating an investment portfolio, for example. Overcoming what Larter refers to as a "negative money mindset" is essential to maintaining a healthy work/life balance.

For black women, financial issues can present the biggest challenge to business growth. Research suggests they **struggle more in securing access to loans** compared to white males. Kike Odusanya agrees, adding that it's more of an issue in industries where there are fewer women, such as tech. "Oftentimes, we are turned away for resources, but what challenges us also propels us. I call it the 'muscle of resilience' that black women have developed through necessity. It fuels every part of our lives."

Make Sure It Works For You

Odusanya looks at work/life balance from a slightly different angle. "Prioritize and schedule time for the things that are important to you to achieve a sense of balance," she suggests. For Odusanya, that means blocking off time to pick up her daughter after school every day. Unlike most jobs-where you leave after eight or nine hours.—an entrepreneur's work never ends, so it's important to set boundaries, she says, and schedule "shelter time"—time off from work for non-negotiable things, such as time with your family.

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When you're juggling a business and a family, there are going to be some trade-offs. The key is to prioritize the tasks and experience you aren't willing to give up.

ARTICLES

When Your Good Deed Goes Bad – How Child Support for an Adult Child with a Disability Can Reduce SSI Benefits (and How to Fix It)

By Karen L. Marvel
Brandon J. Wong
Carmen R. Rojo
Diann M. Hanson Schooler[1]

The Texas Family Code provides that child support can be payable if a child is incapable of self-support resulting from a physical or mental disability known to exist before the termination of the child support obligation.[2] This child support paid by a parent supplements a vast web of state and federal aid, some with 10 year waiting lists for acceptance, that are intended to help disabled individuals and their families.[3] This article will address the most common benefits awarded to a disabled adult child– Supplemental Security Income (SSI) and Medicaid – and how a continuing child support payment through a court order can actually eliminate the adult child's eligibility for Medicaid. However, a properly crafted order and the use of other mechanisms including special needs trusts preserve the child's eligibility and allows payments to maintain the standard of living and meet the child's needs.[4]

Fact Pattern

Melissa and Fabian divorced in 2010 and have one child, Crystal, born in 1998. Crystal has cerebral palsy along with some intellectual disabilities and is now, as of last year, crutch dependent.. Crystal functions at a 13-year old level with no expected change. Crystal turned 18 and graduated from high school in June, 2016. Melissa

[1] Ms. Marvel is Board Certified in Family Law and practices with Mr. Wong at Marvel & Wong, PLLC, in San Antonio, TX. They can be reached at info@mwfamilylaw.com. Ms. Rojo is also board certified in Family Law and is a sole practitioner in San Antonio. Her email address is carmenrojolawoffice@gmail.com. Ms. Hanson Schooler is a Texas attorney and special education teacher in San Antonio.
[2] Tex. Fam. Code §154.302(a).
[3] For example, as of 06/30/2016, over 56,000 disabled Texans (children and adults) remain on a waiting list for CLASS benefits, which provides funds for respite care, case management, adaptive aids and minor home modifications. These benefits supplement Medicaid and/or SSI and are part of state funded services. https://www.dads.state.tx.us/services/interestlist/index.html (last accessed 08/28/2016)
[4] The authors thank Pi-Yi Mayo, Baytown and Keith D. Maples, Dallas, for their previous work and articles in this area of law. Wesley Wright's article cited below was also a great resource on Special Needs Trusts.

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earns $60,000 a year and Fabian earns $180,000. Let's assume Crystal was not eligible for SSI or Medicaid as a minor based on her parents' income. The day she turned 18, Crystal qualified for SSI and Medicaid. Melissa had applied for both early so the benefits began August, 2016 per SSI regulations. In January of 2016 Melissa and Fabian modified the child support order (by agreement, without using lawyers) to continue at $1,710 monthly so long as Crystal lived. Melissa and Fabian also agreed to name Melissa as guardian of Crystal's person and estate, which was granted shortly after Crystal's 18th birthday. Crystal enrolled in her school district's post high school program for disabled students, where she works on life skills.

When Melissa submitted her court orders to the Social Security Administration (SSA) as required, SSA informed Melissa the child support she received from Fabian counted as income to Crystal and the offset from Crystal's "income" reduced Crystal's SSI payment to zero. Crystal is a "head of household" adult for purposes of SSI even though she lives with Melissa. Under SSA regulations and federal preemption, Crystal is the recipient of the child support despite the language of the court order, the statutory construction of the Texas Family Code and the guardianship. This finding also made Crystal ineligible for Medicaid.[5]

When Melissa walks into your office, distraught and angry, she needs lots of solutions in a short amount of time. She has already been told by her neighborhood Attorney General office they cannot fix her problem. She believes Fabian will agree to work out something. She is hoping for a miracle. Do you have one?

1. How SSI and Medicaid Work

Supplemental Security Income (SSI) is a program funded through the Social Security Administration (SSA) for individuals who do not qualify for social security disability insurance benefits, or are blind or disabled.[6] Several variables determine whether the child will be awarded SSI before the age of 18. Those typically include parents' income level and the severity of the child's disability. When the child turns 18, the SSA considers the child's income only and looks at the child's disability to determine eligibility. The criteria for eligibility is a medically determinable physical or mental impairment (including an emotional or learning problem) which:

- results in the inability to do any substantial gainful activity; and
- can be expected to result in death; or
- has lasted or can be expected to last for a continuous period of not less than 12 months.[7]

In Texas, if the adult child qualifies for SSI, the child also qualifies for Medicaid coverage, which provides many advantages to the child, depending on the level of disability.[8] One of the advantages of Medicaid is almost all medical care is provided at no cost to the recipient. The disadvantage is that fewer doctors accept Medicaid, especially in rural areas. That means treatment options, especially in mental health, are limited or scarce. Medicaid is a state adminis-

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[5] Program Operations Manual for Social Security Administration SI 00830.420. Link at https://secure.ssa.gov/poms.nsf/lnx/0500830420 last viewed 08/28/2016.

[6] A great deal of confusion abounds from the two programs in Social Security for the disabled. SSI is a subsistence program that pays a minimal amount for individuals who never worked or minimally worked. 42 U.S.C. §1381. Social Security Disability Insurance Program (SSDI) pays benefits to a worker [and sometimes dependents] who become disabled after working and earning quarters in the system. https://secure.ssa.gov/apps10/poms.nsf/lnx/0400115001. Last viewed 08/31/2016. SSDI is scaled based on a person's earnings. SSI is the same for all – presently $733.00/month.

[7] 42 U.S.C. §1382c(a)(3).

[8] https://secure.ssa.gov/apps10/poms.nsf/lnx/0501730009DAL (Texas agreement with SSA for Medicaid) last viewed 08/31/2016.

tered program with funding from both the federal and state government.[9] But in this day and age of high deductibles and vanishing policies, Medicaid is a godsend to many parents – particularly those who have children requiring medical treatment for chronic conditions.

2. Using a Special Needs Trust to Protect Medicaid Benefits and Keep Child Support

A Special Needs Trust (SNT) generally provides the protection Melissa needs to shelter Crystal's child support and maintain Crystal's eligibility for SSI, but, more importantly, the protection and benefit of Medicaid. In Crystal's case, her physical condition continues to deteriorate. Special needs trusts can provide the additional necessities and extras for a disabled individual as government benefits, by design, only provide for basic food, shelter and health care.[10]

There are three types of special needs trusts that could benefit Melissa and Crystal. A *self-settled special needs trust* creates the corpus of the trust from the beneficiary's assets. This includes money received by the beneficiary from parents, grandparents or legal guardians. One of the requirements of a self-settled trust is that Texas Medicaid receives any remaining funds in the trust upon the beneficiary's death – not to exceed the amount paid out by Medicaid on behalf of the trust beneficiary. In the unlikely event money remains, it reverts to the beneficiary's estate.[11]

Why would people use a trust that gives money to the government? Self-settled trusts are generally used to avoid a period of ineligibility for Medicaid benefits when a party has a large amount of personal resources from a tort recovery or an inheritance. While that trust may be available here, it is most likely not the best vehicle for the particular facts of this case.

The second option is a *pooled special needs trust*. The pooled trust is managed by a third party organization. The most popular is the ARC of Texas, which has online forms and staff members who can assist with the creation of this trust.[12] A pooled trust can be self-settled or set up by a third party (see below). The pooled trust allows for lower management fees and asset aggregation, especially with modest trust assets. When the beneficiary dies, if self-settled, it works like a self-settled trust and monies owed to Medicaid are recouped before any refund is given to the family. But there is some dispute on disposition of the remainder upon death if the trust is third party funded which is beyond the scope of this article. [13]

A third option is a *third party special needs trust*. This trust can be funded by someone other than the beneficiary or can be self-settled. It can also be funded through estate planning by parents or grandparents to supplement the beneficiary's lifestyle and preserve the public benefits. A third party special needs trust can be managed by a family member or by a financial institution. To maintain the beneficiary's eligibility for SSI and, therefore, Medicaid,[14] the beneficiary should not be given the legal authority to revoke the trust or direct the use of the trust for his or her own support.

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[9] Maples, Keith D. & Mayo, Pi-Yi, *Child Support for Children with Disabilities,* 36th Annual Advanced Family Law Course, State Bar of Texas 2010, Ch. 44, p. 3

[10] Wright, Wesley E. *The ABCs of SNT's: Introducing Special Needs Trusts*, 2015 State Bar College Summer School, State Bar of Texas, Ch. 25, p. 1 (hereafter Wright).

[11] Wright, W. p. 2.

[12] https://www.thearcoftexas.org/trust/ (last accessed 8/28/2016.

[13] Wright, W. p. 3.

[14] Wright, W., p. 4, 23.

3. So How Does this Work Exactly?

Although the funding mechanisms differ, the operation of the trusts work the same. The trustee can pay funds directly to vendors for the benefit of the beneficiary for certain items such as housing or a vehicle. The trust CANNOT pay funds directly to Melissa (see exception below) or to Crystal without losing SSI eligibility.

a. What the Trust Can Do[15]

1. Trustee can buy or lease a property and charge rent (or not) for the beneficiary to live in the property. Trustee pays the mortgage company or lessor directly from the trust without the money coming into Melissa's or Crystal's hands.
2. Purchase a vehicle for Melissa to use in transporting Crystal. Trustee pays the finance company directly. It can also pay for gasoline, oil, insurance and maintenance.
3. Additional medical and supportive services not covered by Medicaid or state programs (such as CLASS, HBA or MDCP).[16]
4. Pay Melissa or a third party for attendant care under a contract for a reasonable wage.
5. Pay for dental work not covered by Medicaid.
6. Fund educational or vocational services for Crystal.
7. Purchase a computer, internet services, telephone and utility.
8. Pay for recreation and short term vacations.
9. Buy fitness equipment or gym membership.
10. Pay vendors for personal services for Crystal like lawn mowing, haircuts, grocery shopping.
11. Buy pets and pet supplies.

b. What the Trust Cannot Do:[17]

1. Pay the mortgage for an existing property in Melissa's name.
2. Buy food.
3. Pay real estate taxes.
4. Pay rent.
5. Pay gas, electricity, water and sewer monthly payments.
6. Buy PMI insurance required by mortgage company.

If the trust should pay for these items, the results to Crystal would be a 1/3 reduction in SSI benefits for the month when these items were paid.

4. The Decision

Special needs trusts can be expensive to create and maintain. In this case, Melissa and Crystal may be best served by joining the ARC pooled special needs trust and directing that the child support pay for items for Crystal. The trust could lease a house and car for Crystal's benefit in the name of the trust.[18] Some people feel that using the ARC removes their control of money that rightfully belongs to the person or their child. Each family must carefully evaluate and weigh the cost and time involved with establishing and managing a trust. Wright recommends

[15] Wright, W. p. 42.
[16] The state programs available in Texas can be found at http://www.dads.state.tx.us/services/listofservices.html#physical (last accessed 8/28/2016).
[17] https://secure.ssa.gov/poms.nsf/lnx/0500835300
[18] https://www.thearcoftexas.org/trust/

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someone other than a family member be named as trustee, adding additional cost and paper-work to the third party trust.[19]

5. Another Option – Payment of Child Support as In-Kind Support and Maintenance

As suggested by Maples and Mayo, a child support payment made in the form of food or shelter qualifies as in-kind support and maintenance (ISM).[20] SSI benefits are reduced by 1/3 each month when ISM payments are received. If Fabian paid Melissa's mortgage payment of $1,400 as child support, Crystal's SSI benefit would be reduced to $491.11.[21] But Melissa would still receive the benefit of her $1,710 child support payment. Crystal's net support amount would be $2,201.11. This amount is less than what Crystal would receive with a special needs trust but perhaps the overall cost/benefit of creating, funding and managing the trust is outweighed by Crystal's immediate needs. This advantage also preserves 100% of Crystal's Medicaid benefit, which is the main goal of Melissa and Fabian in order to enhance Crystal's quality of life. In short, ISM reduces the SSI benefit but preserves the Medicaid benefit. For a child with multiple physical issues where the assets do not justify a special needs trust, this route may provide the best solution to protect the adult child's benefits.

The modification order will require very specific language that, as child support, a portion of the child support shall be paid directly to the mortgage company. Also, because the balance will continue to be paid to Melissa, be sure the Attorney General's office approves the language so that Fabian's obligation credits properly.

Conclusion

You have a grateful and happy client. The mechanics of adult child support involve awareness of protection of the governmental benefits to maximize the adult child's financial gain. As the cash outlay from SSI is subsistence only, protecting Medicaid eligibility becomes the paramount obligation for most disabled adult children.

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[19] Wright, p. 36.
[20] Maples & Mayo, p. 5.
[21] $733.00 *.33 reduction = $491.11 monthly benefit remaining.

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The Influence of Spanish Law on Texas Marital Property Rights

By Marie-Clare A Pfang[1]

Note on typography: Given the scope of this article, much of the literature used has been translated by the author from either Spanish or Latin to English. For the benefit of those readers who might be interested in reading the sources in their original language, the author has included the original text in footnotes where she has deemed it fit to do so.

I. INTRODUCTION

> *Few lawyers, and even fewer nonlawyers, realize that [the] ideas [of the community property system] came from Spain, arriving in the United States by way of Spanish conquest of the New World, via Texas… [T]he concept of equality in a marriage that exists within the community property system… seems very American. It is a very democratic notion that all people, even married women, should be able to control their own assets. It is a very republican notion that all people should profit from their exertions and that they should be free to own the results of their labor, even if they are married women. Equality, fairness, and freedom are the ideals that Americans hold dear, even if they are exemplified by laws that originated in Spain.*[2]

My interest in the relationship between the Spanish and Texan matrimonial property systems was sparked when my mother remarked that, in Texas, it did not really matter if she were not named on a house deed, since my Father would not be able to sell the house without her permission. This protection of the "weaker sex", she added, was due to Spanish influence, which had come to Texas through the Spanish *conquistadore*s who had brought their law to the New World. As a citizen of England (a common law country), this legal reality was alien to me and I decided to investigate further. As a student of civil law at a Spanish university, I was in an ideal position to do so. This article is the result of my research.

From the beginning of its existence as a Spanish province,[3] Texas has been strongly – albeit indirectly – influenced by Spain[4] through its 'colonization vehicle', Mexico. While one could argue that not all these influences have been positive, this is not true when it comes to Texas' legal conception of women's matrimonial property rights. Yet, while Texas' Colonial-era matrimonial property law has been reviewed alongside its Spanish counterpart, property law from the Post Civil War era has generally been left alone. In an attempt to fill the gap, the author seeks to compare and contrast the statutory evolution[5] of this area of law (primarily from a woman's viewpoint) with Spain's own evolution in the same. The article has two parts. The first is the historical evolution of Spanish matrimonial property law. The second describes and analyzes the side-by-side development of Texas matrimonial property versus Spanish law between 1840 and 1981. Surprisingly, research shows that Texan law evolved first. The delay in the development of matrimonial property law in Spain was due to Franco's iron grasp over Spain during his dictatorship regime from 1936-1975.

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[1] Ms. Pfang wrote this paper while attending an exchange program at the University of Texas School of Law in Fall 2015 and is scheduled to graduate from the Universidad Carlos III de Madrid with an L.L.B. in June 2017. She can be reached at mcpfang@utexas.edu.

[2] Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 172-173.

[3] Texas was one of the last Spanish provinces founded in North America. See Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 63.

[4] McKnight states that "although unmentioned, the Hispanic tradition was very much stronger in Texas… [than in other Southern states]. Until 1980 the Texas Constitution, specifically defined the wife separate property only and directed the legislature to deal with 'common property'." See McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 84.

[5] For the purposes of this paper, the Texas and Spanish legal systems shall be deemed to have evolved when the matrimonial property rights of both male and female are equal.

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This paper will focus on the major legislative steps that have taken place in both Texan and Spanish legal systems regarding women's matrimonial property rights. The paper will not include all the numerous property rights and/or elements that exist within a marriage, but will be limited to the following three: ownership, administration, and division of property. Last, since the Spanish legal system is a civil law jurisdiction, this paper will not be contrasting the civil law idea of matrimonial property rights with that of the common law system unless absolutely necessary, since this is outside the scope of this topic. Furthermore, where possible, this article shall ignore the presence of the 'direct link' already mentioned – i.e., the Mexican legal system and its influence on Texas matrimonial property rights. Finally, the analysis used in this paper does not focus on the legal reality (such as the legal precedent found in case law) but on the legal fiction (the statutes) with regards to parties' matrimonial property rights. This means that the article will analyze the evolution of matrimonial property law focusing solely on the written provisions of the law, even though the woman might in fact have been prevented from exercising certain property rights by judicial consensus.

This paper shall be divided into two main parts: the first shall occupy itself with an overview of Spanish matrimonial property law from its Roman roots until 1840; the second shall cover the statutory evolution of Spanish and Texas matrimonial property law from 1840 until present day. This particular year was chosen because it is when the Texas legal system started to function as its own independent system in terms of matrimonial property law, with the Act of January 20, 1840. In turn, the second part of this paper shall be divided into three sections, each covering a separate time period: the first shall cover from 1840 until 1913; the second, from 1913 until 1967; and the last, 1967 until 1981. These periods have been chosen because they correspond to the three major 'blocks' of legislative change in terms of women's matrimonial property rights.[6] The first period begins with 1840, because this date corresponds to the birth of Texas' matrimonial property system; the second, the intermediary period, marks the time between the birth of the system in 1840 and its true evolution; and the last, because 1967 marked the culmination of the evolution of Texas matrimonial property rights. The period ends at 1981 because it was at this point Spanish law considered men and women to have equal property rights within marriage.

II. FIRST CAME LOVE, THEN CAME MARRIAGE, THEN CAME THE BABY IN A BABY CARRIAGE: THE THREE EVOLUTIONARY PERIODS OF THE MATRIMONIAL PROPERTY RIGHTS SYSTEM

In order to understand any aspect of the Spanish legal system, whether it be civil, criminal, or commercial, it is essential to understand the legal ingredients that were proffered by two of the ancient nations that once ruled Spain and helped to create the finished product. In this case, their contributions shall be examined in the matrimonial property law context.

A. First Came Love: The Roman Contribution to Spanish Matrimonial Property Law - the Idea of the Dowry and the Husband as Administrator.

For the better part of the duration of the Roman Empire, the Roman conception of 'family' was predominantly a commercial and legal one. While today, the most basic way of determining a 'family' is through its member's consanguinity, in the Roman era, the default was the legal relationship shared by the members. This criterion facilitated various scenarios in which blood relatives found themselves belonging to a family that included legal 'relatives' – such as slaves or bondsmen – or whereby they were no longer considered to form part of the family, since the legal bond had been extinguished, either by marriage or by death of the *paterfamilias*.

[6] McKnight also divides the periods also into 3: 1840 to 1913; 1913 to 1967; and 1967 to 1993 (which, at the time of his article, was then the 'present time'). While McKnight extended the scope of his last period to the end, the author has chosen to 1981 as the ending period, because the thesis of this article has a narrower scope than that of McKnight's. See McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98.

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Every Roman family was headed by a *paterfamilias* – the 'father of the family'. The *paterfamilias* was the patriarch, the person who wielded almost absolute power over those who formed part of his family.[7] In order to understand the concept of a *paterfamilias*, it is important to show that Roman law conferred two types of legal status on its citizens: *sui iuris* and *alieni iuris*.[8] Those of the first category had full legal capacity[9] and were subject to no man, while those of the second were deemed to have a limited legal capacity,[10] thus preventing them from functioning fully in the legal ambit. Necessarily then, the *paterfamilias* was *sui iuris*, while everyone who formed part of his family in whichever position (as a descendant, wife or slave etc.) was considered *alieni iuris*.[11] Ulpian, the great Roman jurist[12], describes the idea of the Roman family as follows:

> The designation of households relates also to any kind of body which is covered by a legal status peculiar to its members or common to an entire related group. We talk of several persons as a household under a peculiar legal status if they are naturally or legally subjected to the power of a single person as in the case of a head of a household […]. Someone is called the head of a household if he holds sway in a house, and he is rightly called by this name even if he does not have a son; for we do not only mean his person but also a legal status; indeed, we can even call a *pupillus* a head of a household.[13]

Nonetheless, despite their limited legal capacity, each member of a family had a wide variety of rights that could range in a greater or lesser degree, according to the *paterfamilias*' discretion. One of the most important rights was that of inheritance, which both the male and female members of the Roman family possessed. It was due to this right that the Romans devised the idea of the dowry (the *dos*) to compensate a woman who lost her inheritance rights, by leaving her initial family and joining that of another, as was the case of those who married *cum manu*.[14] The *manu*[15,16] was a legal and patrimonial bond that the wife's husband (assuming he was *sui iuris*[17]) exercised over his bride. Given the nature of the marriage *cum manu*, the woman would no longer be considered part of her initial family, since the legal bond that determined her mem-

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[7] The rights of the *paterfamilias* with regards to the members of his family included the right to kill his children (*ius vitae et necis*), the right to emancipate his children, and the right to sell his children.

[8] Gaius, I, 1.48: "There is another division with reference to the law of persons, for some persons are their own masters, and some are subject to the authority of others."

[9] Notwithstanding, although women could potentially be *sui iuris*, they were subjected to various limitations – much like the situation of the women within marriage with respect to their property. In the Roman times, a woman who was *sui iuris* could not be a tutor nor alienate her goods without the ratification of another. For a definition of "Capacity" see footnote 10.

[10] Capacity: "The power to create or enter into a legal relation under the same circumstances in which a normal person would have the power to create or enter into such a relation; specif., the satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one's ability to sue or be sued, to enter into a binding contract, and the like." Black's Law Dictionary (10th ed. 2014)

[11] Institutes of Gaius, Book 1, 49: "Again, of those persons who are subject to the authority of another, some are in his power, others are in his hand, and others are considered his property."

[12] Ulpian was "[a] highly productive jurist, who was born into a prominent provincial family in Phoenicia in the city of Tyre. He held various Imperial offices during his lifetime (*Praefectus Praetorio* from 222 AD) and was assassinated in 223 AD. Ulpian was a prolific writer who wrote many treatises and monographs on a variety of topics, including commentaries on the praetorian edict in 83 books, on the *ius civile* in 51 books as well as a monograph on the duties of the Proconsul. He was one of the most influential jurists of the classical period and was listed in the Law of Citations as one of the 'important five' jurists of the classical period." See Du Plessis: Borkowski's Textbook on Roman Law, 4th ed., Oxford University Press.

[13] Digest, Book 50, 16, 195. Ulpian, Edict, Book 46.

[14] Translated literally, the term "*cum manu*" means "with [the] hand."

[15] Again, translated literally, the word "*manu*" means "hand."

[16] Institutes of Gaius, Book 1, 109: "Both males and females may be *in potestate*, but it is only females that can be *in manu*."

[17] If the husband was *alieni iuris*, his own *paterfamilias* would exercise the bond. Assuming that the *paterfamilias* was the father-in-law to the respective wife.

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bership had been dissolved. Originally, then, the dowry was only present in the marriages *cum manu* since those who married *sine manu*[18] did not leave their original families.

Initially, both the ownership and the administration of the dowry corresponded to the husband while the marriage lasted, assuming he had full legal capacity.[19] Fortunately, the woman's ownership of her dowry was established by the reforms of the Emperor Justinian, in which the husband was no longer considered to be the owner but something similar to a usufructary.[20,21] Although the woman regained her right of ownership, there was a shift in the legal perception of the dowry from 'personal' – i.e. that it existed to compensate the women for the loss of her inheritance rights – to 'economical' – that it was a necessary contribution that the woman made to the marriage to help bear the subsequent costs of the union (*onera matrimonii*).[22, 23] This subtle shift altered the 'real' ownership in favour of the husband, despite the fact that the woman had 'legal' ownership of the goods, a trend that shall be seen throughout the evolution of Spanish (and Texan) matrimonial property law, until the late 1900s.

In a sense, the need for a separate classification of matrimonial goods could be attributed to the dowry. Although it formed part of the community property during the marriage and was thus subject to the husband's administration, the dowry retained its original characteristics and, upon the dissolution of the marriage, had to be accounted for in its totality. The husband or his heirs were responsible for returning the same quantity of goods or of the same quality or price upon the dissolution of the marriage.[24] Gaius[25] says the following on the subject:

> Where property which can be weighed, counted, or measured, is given by way of dowry, this is done at the risk of the husband, because it is given to enable him to sell it at his pleasure; and when the marriage is dissolved, he must return articles of the same kind and quality, or his heir must do so.[26]

And while the husband was responsible for the administration of the goods of the marriage, including the dowry,[27] he was also subject to limitations. According to Paulus,[28] the husband was "responsible for fraud as well as negligence, because he received the dowry for his own benefit"; as a result of this, the husband was required to "exercise the same diligence which he manifest[ed] in his own affairs."[29] Further limitations were enacted by the *lex Iulia de fundo do-*

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[18] Translated literally, the term "*sine manu*" means "without [the] hand."

[19] Palacio, citing Schulz and Kunkel. See Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 7.

[20] Usufructary: "*n.* (17c) *Roman & civil law.* One having the right to a usufruct; specif., a person who has the right to the benefits of another's property; a life-renter." Black's Law Dictionary (10th ed. 2014)

[21] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 8.

[22] Palacio, citing Kaser, ob cit., pp.270 and Kunkel, ob. Cit. pp.403. See *Ibid.* Pp. 6, Footnote 11.

[23] Palacio, citing Miquel, Joan, ob. Cit. pp.120. See *Ibid.* Pp. 7, Footnote 12.

[24] Digest, Book 24, 3.2. Ulpian, On Sabinus, Book XXXV: "Where the marriage is dissolved, the dowry should be given to the woman. The husband need not promise it by stipulation to someone else at the start, unless this cannot adversely affect him."

[25] Gaius was "[b]orn in the early 40s BC, deceased by 22 AD… He wrote influential treatises on pontifical and public law as well as a collection of miscellanies (*Coniectanea*). He is rarely cited (in fact only once) by other jurists of the classical period." See Du Plessis: Borkowski's Textbook on Roman Law, 4th ed., Oxford University Press.

[26] Digest, Book 23, 42. Gaius, On the Provincial Edict, Book XI

[27] Digest, Book 23, 56.1. The Same, On Plautius, Book VI: "The dowry should be under the control of him who sustains the burdens of marriage." Digest, Book 23, 56.1. The Same, On Plautius, Book VI.

[28] Paulus was "[a] prolific jurist about whom very little is known, except that he was a contemporary of Ulpian and a student of Q. Cervidius Scaevola… He produced 320 books which included 16 on the *ius civile* and 78 (perhaps 80) on the praetorian edict. His works were widely read by later jurists and their authority was confirmed in the Law of Citations where he is listed as one of the 'important five' jurists of the classical period." See Du Plessis: Borkowski's Textbook on Roman Law, 4th ed., Oxford University Press.

[29] Digest, Book 23, 17. Paulus, On Sabinus, Book VII: "In matters relating to the dowry, the husband is responsible for fraud as well as negligence, because he received the dowry for his own benefit; he must, also, exercise the same diligence which he manifests in his own affairs."

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tali, which prohibited the husband from selling any realty pertaining to the dowry without the consent of his wife.[30] The Roman view of the husband's administrative power over separate property and the limitations to that power would trickle down through the centuries to Spanish law and, in a more limited way, to Texas law.

B. Then Came Marriage: The Visigoth Contribution to Spanish Matrimonial Property Law -Community Property.

The Visigoths established their rule in Spain in 554 AD against the backdrop of a crumbling Roman Empire.[31] In the Visigoth society, the idea of equality between the sexes – both within and without marriage – was somewhat more advanced; for example, single women were allowed to own property equally with men and both sexes inherited equally.[32, 33] This equality was aided by the Visigothic perception of the family as a 'team', a perception that greatly differed from that of the Romans, who perceived the family as patrilineal, patriarchal and hierarchical. Furthermore, while the Visigoth *paterfamilias* was important, his power was much more limited than his Roman counterpart: for example, he was prohibited from alienating the communal realty without the consent of both his wife and children, since it was considered to belong to the family as a whole.[34,35]

The Visigothic treatment of matrimonial property rights is found in the *Liber Iudiciorum*, known in Spanish as the *Fueros Juzgos*, the compilation of ancient Visigothic law. The default property system chosen by the *Fueros* was one of community property, except when the parties had entered into a 'prenuptial agreement' which was the standard occurrence.[36] While the origins of community property are disputed among legal scholars,[37] the *Fueros* is considered one of the first European bodies of law to sanction this type of property system.[38] The *Fueros Juzgos* defined two types of property, in keeping with the community property system: community property and separate property. According to the *Fueros*, community property comprised of everything that the couple acquired during their marriage – whether through their own endeavors, trade or their estate etc. Conversely, separate property was formed of two groups of goods:

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[30] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 7.

[31] Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 1.

[32] Libro IV, Título II, Ley I: "Que muerto el padre ab intestato le sucedan sus hijos legítimos igualmente."

[33] Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 2.

[34] "El rasgo diferencial entre la potestad del jefe de familia germánico y la del romano consistía en que, mientras esta última abarcaba la personalidad de los individuos sujetos á ella en todas sus relaciones, aun las meramente patrimoniales, en términos que el *pater familia* disponía á su antojo de cuanto poseían, entre los Germanos no era dueño absoluto de los bienes familiares, sino mero administrador de los inmuebles, los cuales no podía enajenar sin consentimiento de la mujer y de los hijos, por estimarse como patrimonio común de la familia." Hinojosa, E. "Cuál ha sido, cuál es y cuál debiera ser la condición de la mujer casada en la esfera del Derecho Civil", *Discurso de recepción en la Real Academia de Ciencias Morales y Políticas*, Madrid, 1907. Pp. 524.

[35] This is a stark contrast to limits imposed on the Roman husband which were confined to the real property of his wife.

[36] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 16.

[37] According to Palacio, certain authors such as Prieto Bancés, De los Mozos and E. Levi, believe that the origins of community property stem from the early Christian idea of making the spouses' personal goods "communal" in order to bear the expenses of the marriage (this is reflected in the law of Valentinian III, *De fructibus inter maritum et uxorem*, which states that the husband and wife should not have to be accountable to each other for spending any gains from their respective property during their married life). *Ibid.* Pp. 14.

[38] Palacio, citing Sánchez Román ("El Forum Iudicum y una ley, que parece ser de Recesvinto, aunque sus orígenes consuetudinarios, por lo menos como tendencia, más que como régimen perfecto y acabado, proceden indudablemente de las costumbres germanas, y que es de las primeras que reglamentaron esta institución, estableciéndola en uno de los más antiguos Cuerpos legales de Europa que la sancionaron") and Martínez Marina. See *Ibid.* Pp. 13, Footnote 39.

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the first was the dowry (which could comprise of the *morgengrave* (the gift that the husband gave to his bride) and the goods that the bride's parents gave to her upon her marriage); the second was a rather general aggrupation of items: anything that the wife acquired by donation, inheritance, by means of a patron, the king etc.[39] This consideration was the same for the husband's separate property. With regards to the ownership, under the *Fueros*, both the husband and wife were owners of the community property and each owners of their separate property.[40]

In the same way that the Roman male was the administrator of both the community and separate property under Roman law, so too was the Visigoth male. Nonetheless, unlike his Roman counterpart whose powers of administration were practically unlimited,[41] the Visigoth husband was subject to more restrictions that varied according to the property type. With regards to community property, he had power to do whatever he wished, so long as he did not sell the community realty without the consent of his wife and children. The husband's administrative power was further limited when it came to the separate property: while able to alienate his wife's personalty without her consent, he was required to gain her consent when it came to her realty.[42] While this distinction may not seem very significant under modern reasoning, it is important to remember that in the Middle Ages (and prior to them), wealth was not measured by material possessions or fungible items such as money; instead, it was measured by realty, such as land. From this viewpoint, the limitation to the husband's administrative powers was, in fact, quite substantial.

Matrimonial property rights are especially important in determining how the community property is to be divided – either in the event of the death of one of the spouses or of divorce. The *Fueros* opted for a pro-rata division,[43] unless the parties had stipulated to the contrary, thus honoring the principle of freedom of contract. The rationale behind this division was based on the ownership of the property – i.e. each party had owned the property prior to its constitution as community property and therefore each should be entitled to regain the said property.[44,45]

C. Then Came the Baby in the Baby Carriage. 'Castilian Law'.

Although 'Castilian law' was built upon the bases of Roman and Visigoth law, it underwent its own evolution, incorporating other elements that had nothing to do with either of the former. The result was a unique product that would ultimately arrive in New Spain.[46] Since it is important to understand the evolution of Castilian law, this section examines two periods starting from the 1200s until 1840.

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[39] Palacio, citing Cárdenas, ob. cit., pp. 74. See *Ibid*. Pp. 17, Footnote 56.

[40] As we shall see further on, the *Fueros*' position on the roles of the parties with regards to the administration of their goods was finally reclaimed in the Texas and Spanish constructions of 1967 and 1975/1981.

[41] As mentioned above, the general limits to the husband's administrative powers over the separate property of his wife were good faith, diligence etc., although with Justinian's reform, this did change to some extent.

[42] "Como consecuencia natural de la absoluta sujeción de la mujer á la potestad del marido, éste concentraba en su mano todos los bienes de aquélla, así mueble como inmuebles, los cuales administraba y usufructuaba, pudiendo disponer por sí solo de los primeros, mas no de los segundos sin el consentimiento de la mujer." Hinojosa, E. "Cuál ha sido, cuál es y cuál debiera ser la condición de la mujer casada en la esfera del Derecho Civil", *Discurso de recepción en la Real Academia de Ciencias Morales y Políticas*, Madrid, 1907. p. 523.

[43] Fueros Juzgos, Libro IV, Título II, Ley XVII[16]: "Que las ganancias hechas durante el matrimonio entre marido y muger, se partan conform á la cantidad que cada uno trajo al matrimonio." Translation by Dr. Alonso de Villadiego, Madrid, 1841.

[44] Palacio, citing Cárdenas, ob. cit., pp. 74. See Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 17, Footnote 57.

[45] This, in a sense, contradicted the idea of 'community' in the true sense of the word, since the woman (unable to work outside the home) was unable to contribute to the 'society' in the same way as her husband although she was given equal legal ownership of the property with him. Society is understood to be "[a]n association or company of persons (usu. unincorporated) united by mutual consent, to deliberate, determine, and act jointly for a common purpose." Black's Law Dictionary (10th ed. 2014)

[46] Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 45.

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i. The Initial Period. The *Fuero Real* and *Las Siete Partidas*.

Until its unification in 1492 by Queen Isabella of Castile and her husband, King Ferdinand of Aragon, Spain had been divided into separate kingdoms, including the Kingdoms of Navarre, Aragon, Leon and, most importantly, Castile, which eventually became the most powerful of them all.[47] Against the backdrop of multiple invasions[48] and territorial division, it is understandable that the Spanish legal system was extraordinarily patchy, reflecting the multiple and diverse traditions and legal customs (*mores maiorum*) that prevailed throughout each kingdom.

In 1256, King Alfonso X '*el sabio*' (the wise) attempted to codify the laws of Castile on two levels: the municipal level (through means of the *Fuero Real*, or the Royal Decree, which was essentially an improved version of the *Fueros Juzgos*) and the territorial level (through *Las Siete Partidas*, or Seven Divisions of Law).[49,50] These two bodies of law are important inasmuch as they regulated matrimonial property rights in slightly different ways than previously mentioned.

Given that the *Fuero Real* was essentially an improved version of the *Fueros Juzgos*, the better part of the regulation of matrimonial property rights was left untouched: the community property system remained the default system, both spouses had ownership of the community property, the definitions of separate and community property were maintained, and the husband was given administrative power over all property. There were, however, a few notable changes. Firstly, the property was to be divided equally, in keeping with the true idea of 'community'.[51] This idea was further strengthened by the *Fuero Real*'s clear statement that the ownership of the community property was not based on who contributed more – be it the husband or the wife.[52] Secondly, the definition of community property was expanded to include the income from the spouses' separate property. Thirdly, the husband's administrative powers over the community property increased,[53] although he was still obliged to act in accordance with the duty of care or diligence and in good faith, two limits inherited from Roman law.[54]

Las Siete Partidas resulted from Alfonso's desire that "a work encompassing the whole of law be compiled"[55] and are based on a wide number of legal sources, including Roman law (on which the *Partidas* draw heavily) and Visigoth law.[56] The *Partidas* were unusual in that they did not specify a default property system; they did, however, recognize the community property system as a possibility and even offered legal solutions to the problems that could have potentially been derived from it.[57] In addition, the *Partidas* innovated the idea of separate property, which they understood as the wife's dowry and paraphernal property – "all [the wife's] property not in-

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[47] The dominance of Castile is important to note because it was the Spanish Kingdom that eventually ruled all the rest of them; this dominance was catalyzed by the dynastic marriage of Queen Isabella and King Ferdinand. Furthermore, for our purposes, the laws of Castile were those which also ruled Spain – thus 'Castilian law'.

[48] These invasions include those carried out by the Romans, the Visigoths and the Moors – whose impact on Spanish culture we have chosen to ignore for the purpose of this paper.

[49] Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 15-16.

[50] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 19.

[51] Under the title of "De las ganancias del marido e de la mujer", the first law states: "Toda cosa que el marido e la muger ganaren o compraren de consouno, háyanlo amos por medio."

[52] The pertinent section of the *Fuero Real* states: "Mager que el marido haya mas que la muger, ó la muger mas que el marido, quier en heredad, quier en mueble, los frutos sean comunales de ambos á dos: é la hereda, é las otras cosas donde viene los frutos hayalos el marido, ó sus herederos."

[53] No reference seems to be made to the initial limitations to which the husband was subjected under the *Fueros Juzgos*.

[54] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 21.

[55] Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 16

[56] *Ibid.* Pp. 16

[57] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 23.

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cluded in [her] dowry."[58] The dowry, defined in *Partida IV, Title II, Law I* ("that which the wife brought into the marriage" [59,60]), remained the wife's, although its income formed part of the community property[61] as did that generated by the paraphernalia.[62,63] Perhaps the most important innovation, however, was in the administrative powers of the parties. For example, the wife could agree to her husband administering her paraphernalia (in which case he would have unlimited power over it) or choose to retain the administration for herself; if the wife chose the latter option, the paraphernalia would no longer be called 'paraphernal property' but 'personal property'.[64] Furthermore, despite the fact that the husband "publicly… controlled all the property owned by both… the wife could, if necessary, legally enjoin him not to waste her portion, and she had to officially consent to all sales of her own [separate or paraphernal property] or commonly owned property [by both the husband and the wife]."[65]

The *Partidas* are important because by the 15th century, when the Kingdoms of Aragon and Castile were united by the dynastic marriage of King Ferdinand and Queen Isabella, they had been accepted as "the customary law by the people of Castile."[66] Furthermore, for the purpose of this article, the *Partidas* are extremely relevant in the fact that they formed the basis of the law that finally reached the New World and Texas.[67]

ii. The Final Period: The *Leyes de Estilo*, the *Leyes de Toro* and the *Recopilaciones*.

The *Leyes de Estilo* (enacted sometime after the *Fuero Real*) and the *Leyes de Toro* (enacted in 1505), were important for two separate reasons. The *Leyes de Estilo*, which have been described as a sort of collection of jurisprudence garnered from exemplary court cases[68], created a community property presumption with regards to the property that was owned by either husband or wife.[69] The *Leyes de Toro* were important because they notoriously created the idea of the *licencia marital* (marital license[70]), which would plague Spanish women until the enactment of the Law 14/1975 at the end of the Franco Regime. Texan women were slightly more fortunate, since this legal impediment only lasted until 1967. The marital license essentially constricted the legal capacity of married women in an unprecedented and paternalistic way.[71] For

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[58] Partida IV, Title XI, Law XVII defines paraphernal property. See Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 26

[59] Partida IV, Title II, Law I: "El algo que da la mujer al marido por razón de casamiento es llamado dote; y es como manera de donación hecha con entendimiento de mantenerse y ayudar el matrimonio con ella."

[60] Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 26.

[61] The community property was considered to be the rest of the goods owned by the husband and the wife and those derived from their work.

[62] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 23.

[63] Sponsler, L.A. 1982, "The Status of Married Women Under the Legal System of Spain", *Louisiana Law Review,* vol. 42. Pp. 7.

[64] Palacio, citing Gómez LaPlaza, ob. cit., pp. 272. See Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 23, Footnote 83.

[65] Stuntz also mentions that the wife, in consenting, had to do so following a specific form of contract. See Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 26.

[66] *Ibid.* Pp. 45.

[67] *Ibid.* Pp. 45.

[68] Palacio, citing Tomas y Valiente: "[P]odemos decir que son una colección de "casos ejemplares de jurisprudence del tribunal de la corte", como dijo López Ortiz en 1945." See Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 23, Footnote 84.

[69] *Ibid.* Pp. 24.

[70] Ley 54 de Toro reads the following: "La mujer durante el matrimonio no pueda sin licencia de su marido repudiar ninguna herencia que le venga extestamento ni abintestato; pero primitimos que pueda aceptar sin la dicha licencia cualquier herencua extestamento e abintestaato con beneficio de invtario y no de otra manera." See *Ibid.* Pp. 24, Footnote 87.

[71] Palacio considers that "para Valverde, a las Leyes de Toro corresponde reintegrar la familia castellana a la organización de los códigos genuinamente españoles y regular la capacidad de la mujer casada, con minuciosidad y alteza de miras." See *Ibid.* Pp. 24, Footnote 87.

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example, in the *Leyes de Toro*, "one finds a provision that during marriage a woman could not make any contract without her husband's permission (Law XV), although if he refused, she could seek permission from a judge (Law XVII)."[72] During Franco's regime, the marital license was extended to restrict such actions as opening bank accounts. While Texas did not strictly have a marital license in the Spanish sense, the Texan equivalent was the privy examination married women were required to undergo before they could alienate their separate property.

The *Nueva Recopilación* (enacted in 1567) and the *Novísima Recopilación* (enacted in 1805) were recompilations of *Leyes de Estilo*, the *Fuero Real* and *Leyes de Toro*,[73] which means that it will not be necessary to analyze them in great detail. One of the more noteworthy changes was the removal of the legal barriers that had previously required the husband to obtain the wife's consent before alienating certain types of property. The only limit that carried over from the previous laws was that of good faith.[74] This rather 'chauvinistic' stance was taken because, while the law recognized the communality of the property, it emphasized that as far as possible the husband's right to administer should not be constricted.[75] Legal scholars of the time talked about the different variations of ownership: 'active' ownership (*in actu*) and 'potential' ownership (*in potencia* or *in habitu*).[76, 77] The husband possessed the first type and the wife the second, which meant that her ownership over the goods was essentially dormant until the husband died or was unable to exercise his ownership.

To summarize the legal situation of the woman's matrimonial property rights in Spain prior to 1840: with exception of Roman law, she remained the owner of her own separate property (which included her paraphernalia and dowry) and was considered co-owner of the 'community property' that she shared with her husband. However, on a practical level (i.e. the administrative power that the women could obtain over the property), the law steadily decreased any power that the woman could possibly exercise over property in general. Under the Visigoth system, the husband had to request permission of his wife before selling the realty that formed part of her dowry and of both his wife and children when alienating that which pertained to the community property, while in the later systems, the wife no longer exercised any power. In contrast, the restrictions to the husband's administrative powers were gradually lessened. Under the *Fueros* and the *Partidas*, he was obliged to act in good faith and in accordance with the duty of care and of good administration, whereas under the *Recopilaciones*, not only was he freed of all restrictions but that of good faith, but was granted extra power over his wife, through the marital license.

III. SECOND TO THE RIGHT AND STRAIGHT ON TILL MORNING

Following the overview of the evolution of Spanish matrimonial property rights from its Roman and Visigoth roots until 1840, this article will now analyze and compare the subsequent legal evolution that Texas and Spain have undergone in terms of woman's matrimonial property rights.

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[72] Sponsler, L.A. 1982, "The Status of Married Women Under the Legal System of Spain", Louisiana Law Review, vol. 42. Pp. 6.

[73] Alarcon Palacio, Y. 2005, "Regimen patrimonial del matrimonio desde roma hasta la novisima recopilacion", *Revista de Derecho,* no. 24, pp. 2-31. Pp. 25-26.

[74] *Ibid.* Pg. 26

[75] Palacio, citing Gutiérrez states: "La ley 205 de Estilo prueba que siempre se había entendido así la del Fuero que no por hacer comunicables las ganacias debía privarse al marido del derecho de disponer de ellas." See *Ibid.* Pp. 26, Footnote 93.

[76] Palacio, citing Gutiérrez who continues: "Su dominio [the husband's] que está en ejercicio, in actu, difiere del de la mujer, en términos de escuela llama los autores in habitu o in potencia." See *Ibid.* Pp. 26, Footnote 93.

[77] Palacio, citing Viso, who writes: "Empezando por los que tiene el marido, diremos como consecuencia de este dominio, la facultad de administrarlos, permutarlos y enajenarlos á su arbitirio, siempre que no lo haga con ánimo ó intención de defrauder ó perjudicar á su mujer, como expresa la ley 5ª, tit. IV, lib.X, Novís. Recop." See *Ibid.* Pp. 26, Footnote 93.

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A. 1840 to 1900

i. Spain: The Project of 1851 and the Civil Code of 1889

Despite various endeavors to codify Spanish law, it would not be until 1888 that the Spanish Parliament would promulgate its first national Civil Code. Prior to the Civil Code of 1888, there had been many drafts or projects, including that of Florencio García Goyena[78] (the Project of 1851) which is heavily incorporated into the Code.[79] Since the Civil Code of 1888 relied on much of the Project of García Goyena – although, at the same time, it rejected certain legal ideologies that the Project contained and endorsed – it would be easier to begin by explaining García Goyena's work and subsequently highlighting the differences between the two.

Under the Project of 1851, women's matrimonial property rights declined rapidly. The Project, following the patterns of its predecessors, opted for the community property system as the default system, which was defined in Article 1309;[80] however, since it honored the parties' contractual freedom – in keeping with historical precedent[81] – these were free to choose for themselves. The growing trend towards legal inequality between the husband and wife was clearly demonstrated by the disappearance of the 'separate property category' and the heralding of the husband as the supreme administrator of all the goods.[82] Instead of defining two types of property, the Project chose to establish the idea of 'matrimonial property' in its Article 1233[83], which was comprised of those goods formerly considered to be community property and separate property.[84] Since the concept of the dowry (which included any donations, inheritance or legacy received by the wife from her parents, relatives or 'strangers' according to Article 1272[85]) had been subsumed into 'separate property', the husband (with respect to the wife) was truly the sole administrator, as evidenced by Articles 58[86], 60[87] and 1333[88], and could have reasonably been considered the sole owner.[89] The husband's legal rights are further increased through Ar-

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[78] Florencio García Goyena was a famous Spanish jurist who, amongst other things, was the President of the General Commission for Codification, created by the Royal Decree of the 19th of August, 1843, for the purpose of codifying the first Spanish civil code. See Rodríguez, L.E. 2006, "Florencio García Goyena y la codificación iberoamericana", *Anuario de la historia del derecho español,* vol. 76.

[79] Alarcon Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", *Revista de Derecho*, no. 25, pp. 80-124.Pp. 82, 84.

[80] Article 1309: "Entre marido y mujer hay sociedad legal, cuyo efecto es hacer communes de ambos por mitad las ganacias o beneficios obtenidos durante el matrimonio."

[81] Recall that the Visigoths were great believers in freedom of contract, although it was limited to the choice of the property system.

[82] Palacio explains that García Goyena was very much aware of the absolute power that the husband had been granted by Roman law over the dower property and the 'liberal' evolution that had occurred during the time of the *Partidas*, in which the wife was given power of her paraphernal goods. Despite this positive trend, he was determined to "consecrate male supremacy", and thus excluded the wife from any possibility of administration. See Alarcon Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", *Revista de Derecho*, no. 25, pp. 80-124. Pp. 86.

[83] Article 1233: "Los bienes del matrimonio se gobiernan por las reglas de la sociedad legal, a falta de pacto expreso en contrario. Los bienes del matrimonio se componen de los propios de cada cónyuge, y de los comunes cuando los haya."

[84] Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", *Revista de Derecho*, no. 25, pp. 80-124. Pp. 85.

[85] *Ibid.* Pp. 86

[86] Article 58; the husband is considered to be the head of the household. García Goyena calls the husband the "lord and head of the wife." See Goyena, F.G. 1852, *Concordancias, motivos y comentarios del Código Civil Español, tomo III*, Imprenta de la Sociedad Tipográfica, Madrid. Pp. 72.

[87] Article 60; the husband is considered to be the legitimate administrator of all the matrimonial goods, as a consequence of Article 58. Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", *Revista de Derecho*, no. 25, pp. 80-124. Pp. 85.

[88] Article 1333: "El marido administra exclusivamente la sociedad legal."

[89] Palacio, citing García Goyena: "Sin embargo, funda la diferencia entre marido y mujer en 'que el primero, mientras dure la sociedad, es su administrador independiente con facultad de enajenar los gananciales; la mujer, por el contrario, no puede mezclarse en la administración, ni obligar en manera alguna los bienes, ni en realidad hay para ella

ticle 1334, which empowers the husband to alienate, onerously contract with third parties,[90] and dispose freely of the matrimonial property (which now included all property), without the consent of his wife. Notwithstanding its disparaging treatment, the Project was more 'magnanimous' in that it recognized the equal partition of the matrimonial property.[91]

While the Civil Code of 1888 retained certain ideas set out in the Project of 1851, it was much less radical than its predecessor. The Civil Code followed the Project regarding the freedom of contract. The agreement of the parties had primacy over the then default system of community property, which was only applied in the event that the parties did not stipulate anything. The community property was defined as all the goods that were acquired during the marriage by the husband and wife. The separate property was formed of the dowry (which did not have to exist and, if it did, could be either *estimada* or *inestimada*[92]) and the paraphernalia. It was administered in the same way as the community property (i.e. the husband was empowered to administer it) although the extent of his power differed. In terms of the dowry, the husband administered as if it were *estimada*. In terms of the paraphernalia, the woman could retain administrative power of it (a step forward in woman's property rights) unless she delegated it to her husband, which required an act of notary. Notwithstanding the woman's retention of the administrative power, she was still required to gain her husband's authorization in order to dispose of the goods pertaining to the separate property.

The parties were free to decide on whom could administer the property, thanks to Article 1315, which consecrated the ability of the wife to wield this power, a landmark change in the history of positive law.[93] And while Article 59 of the Civil Code did impose limits, these were not to be construed to prohibit the parties' agreement of the administration of the community property by the wife. This is in stark contrast to the Project of 1851, whereby the parties were explicitly prohibited from agreeing to any limitation on the husband's right to administer the community property indirectly or directly.[94]

ii. Texas: the Act of January 20, 1840; the Constitution of Texas, 1845; and the Property Laws of 1846

Through the Act of January 20, 1840, the Republic of Texas intended to repeal "certain Mexican Laws, and to regulate the Marital Rights of parties"[95] while simultaneously adopting the Common Law of England (so far as it was consistent with the Texas Constitution and the Acts of

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gananciales hasta haberse disuelto la sociedad'." See Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", Revista de Derecho, no. 25, pp. 80-124. Pp. 91, Footnote 11.

[90] Onerous Contract: "[A] contract in which each party is obligated to perform in exchange for the other's promise of performance. La. Civ. Code art. 1909. Cf. *gratuitous contract*." Black's Law Dictionary (10th ed. 2014)

[91] Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", *Revista de Derecho*, no. 25, pp. 80-124. Pp. 89.

[92] According to Sponsler, provisions for dowries date back to the days of the *Partidas* and, until the 1980s, parents were required to give dowries, which could be of two different types: the *estimada* and *inestimada*. Since the dowries have not been the focus of this article, the author has not given much time explaining them in detail. However, in order to understand the changes made by the Civil Code of 1888, a brief explanation is necessary. The *estimada* portion of the dowry was "handled just like the medieval dowries, for this was the part of the dowry transferred to the husband's control with the obligation that he restore its value to his wife in the case of poor management or upon dissolution of the community. During the marriage he had the right to sell or mortgage this portion of the dowry, and he was no obligation to restore to his wife any increments in its value." The *inestimada* portion was defined as "that to which the wife retained ownership, although her husband administered this property and had the usufruct of it, normally insuring the property by bond." Sponsler, L.A. 1982, "The Status of Married Women Under the Legal System of Spain", *Louisiana Law Review,* vol. 42. Pp. 7.

[93] Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", *Revista de Derecho*, no. 25, pp. 80-124. Pp. 106-107.

[94] Palacio, Y. 2006, "Regimen economico del matrimonio espanol desde la codificacion hasta la reforma de 1981", *Revista de Derecho*, no. 25, pp. 80-124. Pp. 85.

[95] The wording of the statutes is taken from *The Laws of Texas 1822-1897*, *compiled and arranged by H.P.N. Gammel, with an introduction by C.W. Raines*. Accessed 12/14/2015: https://goo.gl/ZDfMiE

Congress then in force) to be "the rule of decision in this Republic."[96] Interestingly, the adoption of the Common Law did not extend to matrimonial property rights, which, with few exceptions,[97] continued to be regulated under the inherited Spanish 'civil law' regime.

The Act regulated many things, including applicable matrimonial property law to foreigners (Section 13), the statute of limitations for recovery of property (Section 11) and the husband's obligation to support his wife (Section 10). Most importantly, however, is the Act's definition of the types of property (separate property and community property) and, consequently, its choice of the community property system. Section 3 of the Act defines separate property as

> the lands [or] slaves which the wife may own, or to which she may have any right, title or claim at the time of her marriage… the lands nor slaves to which she may acquire, during the coverture, any right, title or claim, by gift, devise or descent… the increase of such slaves in each case, [and] the paraphernalia as defined at Common Law, which the wife may have at the time of the marriage, or which she may acquire during the coverture as aforesaid.

The community property was defined by Section 4 to include "all property which the husband or wife may bring into the marriage… and all the property acquired during the marriage… as may be acquired by either party, by gift, devise or descent… shall be the common property of the husband and wife." Notwithstanding this rather broad definition of community property, Section 4 did exclude the land and slaves owned by the husband and wife at the time of the marriage, their increase, and the wife's paraphernalia.

There was also a possibility of freedom of contract, set out in Section 5, which allowed the parties to "enter into what stipulations they please" as long as they met a long list of restrictions covering the alteration of inheritance rights and legal orders of descent. Most importantly, however, the parties were banned from entering into any agreement that "impair[ed] the legal rights of the husband over the person of the wife."[98] This effectively rendered void any stipulations concerning the management of the community property that gave the wife 'expanded' administrative powers – just as in the case of Spanish matrimonial property law. Furthermore, the parties were prohibited from altering the matrimonial agreement (which had to be made before a notary public and two witnesses[99]) after the celebration of marriage.[100]

The husband had full administrative power over both community and separate property, subject to his wife's joinder[101] in conveyances of the latter type.[102] According to Section 4, the community property "may be sold or otherwise disposed of by the husband only." Section 3 pro-

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[96] Section 1 of the Act of January 20, 1840

[97] One of these exceptions was the administration of the wife's separate estate. According to McKnight, "[i]n 1848, statutes were enacted that defined the separate estate of each spouse along the lines of the constitutional definition of the wife's separate estate… The husband was given control of the common estate, and (in a lapse into English legal ideology) the separate estate of the wife was put under the husband's management as well." See McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 76.

[98] Section 5 states: "Be it further enacted, [t]hat parties intending to. enter into the marriage state, may enter into what stipulations they please, provided they be not contrary to good morals, or to some rule of law, and in no case shall they enter into any agreement, or make any renunciation, the object of which would be to alter the legal orders of descent either with respect to themselves in what concerns the inheritance of their children or posterity which either may have by any other person, or in respect to their common children — nor shall they make any valid agreement to impair the legal rights of the husband over the person of the wife, or the persons of their common children."

[99] Section 6 of the Act of January 20, 1840

[100] Section 7 of the Act of January 20, 1840

[101] Joinder: "*n.* (17c) The uniting of parties or claims in a single lawsuit. Cf. consolidation (3). — **join,** *vb.*" Black's Law Dictionary (10th ed. 2014)

[102] McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 70.

tects the wife's ownership of her separate property but orders that "during the continuance of the marriage, the husband shall have sole management of such lands and slaves."

The Texan definition of property was enshrined in the Texas Constitution of 1845 in Section 19 of Article 7 ("General Provisions") as follows:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property." It then continues, referencing the laws that the legislature should enact to define "more clearly… the rights of the wife, in relation as well to her separate property, as that held in common with her husband.

The 1845 Constitution also enjoined upon the legislature the duty of creating a procedure for wives to register their separate property.

This preoccupation with women's matrimonial property rights and the definition of property in Texas law makes sense. When Texas became a republic, it shed itself of the domination of Mexico while largely retaining Mexico's heritage of Spanish legal tradition. Those who settled in Texas – both Mexican and American – were used to being ruled by laws that were more civil than common, amongst them being the regulation of property rights. While as a general rule, Texas chose to adopt the Common Law of England, it was evident that it could not abandon the matrimonial property regulation, which was more favorable to both sexes, for fear of public outcry. The relative 'equality' that women experienced under Civil Law was firmly rooted in Texas tradition.[103]

The definition of a woman's property in the Texas Constitution is very different from the Spanish one, where it is not mentioned at all. Section 33.1 of the Spanish Constitution of 1978 states that "[t]he right to private property and inheritance is recognized" and Section 33.3 adds that "[n]o one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law." Perhaps this is due to that fact, unlike Texas, Spain never underwent a drastic change in its form of government (from a province to a republic). When abrupt changes happen, things must be clearly defined in order not to be lost.

The laws to which the Texas Constitution makes reference soon came to fruition with the Act of April 29, 1846 and the Act of April 30, 1846. The first act was titled "To provide for the registration of the separate Property of Married Women." The registration referred to "all property, real and personal, owned or claimed by married women, or which may be owned or claimed at the time of marriage, by any woman, or which they may acquire by gift, devise or descent, shall be registered as hereinafter directed." The second act was titled "Defining the mode of conveying Property in which the wife has an interest" and codified the way by which the wife could convey her property. According to Section 1, the wife was required to "appear before [a] judge of the supreme or district court, or notary public" and be "privily examined by such officer, apart from her husband" and "declare that she did freely and willingly sign and seal the said writing." The writing then had to be explained to her, by the officer (who was usually a notary public), so that she could understand what it meant exactly before deciding to retract it or not.[104] In the event that the wife had not been privily examined, the transaction was "rendered… a nullity and afford[ed] married women a substantial instrument of fraud."[105] The rationale behind the 'examination requirement' was to "protect women from unscrupulous husbands, preventing the

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[103] Stuntz refers to many examples of legal actions brought about by Texan women through attorneys which "would have been impossible or illegal under English law, but the laws of the Republic allowed." See Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 141.

[104] "The wife had to be taken apart from her husband and declare to an uninterested party, usually a notary public, that she was making the sale of her own free will, that she realized what she was doing, and that her husband had not pressured her in making the sale." See *Ibid.* Pp. 157.

[105] McKnight, *Texas Family Code Symposium – Title 1. Husband and Wife*, 13 Tex. Tech. L. Rev. 611 (1982). Pp. 751.

husband from selling the wife's property without her knowledge or consent, as he was entitled to do under English common law."[106] The requirements set out by the Act also applied to the homestead, which could not be alienated by the husband "unless by the consent of the wife, in such manner as the Legislature may hereafter point out"[107] and to "property owned or claimed by the wife before marriage, and that acquired afterwards by purchase, gift, devise, or descent."[108] The need for the wife's consent was derived directly from Spanish law, as Stuntz remarks:

> As in the Spanish and Mexican systems, when a husband sold community real property, the wife had to be questioned separately to determine that it was truly her wish to sell the land. For more than a century, all deeds recording sales of community property land included a separate averment by the wife, made to a notary public out of the presence of her husband, stating she agreed to the sale.[109]

The special homestead provisions echo the Visigoth limitations on the husband's powers of administering and alienating the communal property – recall that he was prohibited from alienating the communal realty without the consent of both his wife and children.

B. 1900 to 1967

i. Spain: the Law of 1958

In Spain, the modifications made by the Law of April 24, 1958, were considered to be the most extensive up until that point in time. The preamble of the law states that the legal capacity of the woman in general, which should be inspired by the principle of equality, is derived from both the natural and social order. This principle translates to the fact that gender, in itself, should not be allowed to justify a differential treatment of the female in terms of legal capacity. Nonetheless, despite a promising start, the preamble then goes on to suggest that, although inequality is not allowed, there are (and should be) certain 'structural differences' derived from the characteristics of those who make up the union of matrimony. According to the drafters of the Law, these differences justify (in a certain sense) the discrepant treatment of the man and woman in terms of their legal rights.[110] In this manner, the continuance of a wife's 'disabilities of coverture'[111] (such as the privation of the right to administer her own separate property) is condoned.

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[106] See Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 156.

[107] Section 22, Article 7, Constitution of Texas of 1845 sets out the "requirement of joinder." Accessed 12/14/2015: http://goo.gl/qhyQcC.

[108] Section 3 of the Act of April 30, 1846

[109] See Stuntz, J.A. 2005, *Hers, His, & Theirs: Community Property Law in Spain and Early Texas,* Texas Tech University Press. Pp. 139.

[110] Preamble of the Law of April 24, 1958: "Por lo que se refiere a la capacidad jurídica de la mujer en general, la presente Ley se inspire en el principio de que, tanto en un orden natural como en el orden social, el sexo por sí solo no puede determinar en el campo del Derecho civil una diferencia de trato que se traduzca, en algún modo, en la limitación de la capacidad de la mujer a los efectos de su intervención en las relaciones jurídicas…. Si bien es cierto que el sexo por sí no debe dar lugar a diferencias y menos a desigualdades de trato jurídico civil, ha parecido igualmente claro hasta el punto de estimarlo también como principio fundamental que la familia, por ser la más íntima y esencial de las comunidades, no puede originar desigualdades, pero sí ciertas diferencias orgánicas derivadas de los cometidos que en ella incumben a sus componentes, para el mejor logro de los fines morales y sociales que conforme al Derecho natural, está llamada a cumplir. Se contempla, por tanto, la posición peculiar de la mujer casada en la sociedad conyugal, en la que, por exigencias de la unidad matrimonial, existe una potestad de dirección, que la naturaleza, la Religión y la Historia atribuyen al marido, dentro de un régimen en el que se recoge fielmente el sentido de la tradición católica que ha inspirado siempre y debe inspirar en lo sucesivo las relaciones entre los cónyuges." Boletín Oficial del Estado, núm. 99, de 25 de abril de 1958, páginas 730 a 738.

[111] [Disabilities of] Coverture: "[are] by law applied to the state and condition of a married woman, who is *sub potestati viri*, (under the power of her husband) and therefore unable to contract with any to the damage of herself or husband, without his consent and privity, or his allowance and confirmation thereof. When a woman is married she is called a

A positive change was made, however, by the amendment of Article 1413 of the Civil Code, which limited the husband's power to alienate or bind realty and businesses without the wife's consent or, in the event of the wife's denial, with judicial authorization. Although the husband was still permitted to alienate or oblige the personal property of the wife and the community property, at least his previously unlimited power was somewhat weakened.[112]

ii. Texas: the Legislative Session of '11, the Married Woman's Act of 1913 and the Legislative Amendments of '17, '63 and '65.

In Texas, the disabilities of coverture to which the woman was subject were somewhat modified by the House Bill No. 74, Chapter 52 (Legislative Session of 1911) which provided for the "removal of disabilities of coverture for mercantile and trading purposes." According to that act, with the consent of her husband, any married woman could petition the district court to grant her the status of a *feme sole*[113] for mercantile and trading purposes. This type of statute, known as "sole trader statutes" was not uncommon at this time[114] which perhaps explains why the legislature felt that there was an urgent need to enact one, as is evident in Section 5: "The fact that there is now no law on the statutes removing a married woman's disabilities and declaring her feme sole for mercantile and trading purposes, creates an emergency and an imperative public necessity." In accordance with this "imperative public necessity", the legislature suspended the Constitutional decree regarding the reading of the bills on three separate days and commanded that the Act "take effect and be in force from and after its passage."[115] If the petitioner was successful and the court granted her request, she was granted a 'fictional' legal status, likened to that which a male would have had. She could, in her own name, "contract and be contracted with, sue and be sued" and subject her non-exempt separate property to debts and liabilities. Notwithstanding this act, the statute prohibited her from conveying or encumbering "her separate real property except as now provided by law."[116]

In 1913, the Texas legislature adopted the Married Woman's Act, which was created to bring about the modernization and innovation that the matrimonial property system desperately needed.[117] Change in this regard had been championed by various people and organizations, including one of the first woman lawyers in Texas, Hortense Sparks Ward, the Texas Bar Association, the Texas Federation of Women's Clubs and the Texas Congress of Mothers.[118] The

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Femme couvert, and whatever is done concerning her during marriage is said to be done during coverture." Black's Law Dictionary (10th ed. 2014)

[112] Article 1413: "El marido, además de las facultades que tiene como administrador, podrá enajenar y obligar, a título oneroso, los bienes de la sociedad de gananciales; pero necesitará el consentimiento de la mujer o, en su defecto, autorización judicial a solicitud fundada del marido y del modo previsto en el párrafo siguiente, para actos de disposición sobre inmuebles o establecimientos mercantiles. Cuando el marido venga efectuando actos dispositivos sobre bienes no comprendidos en el párrafo anterior que entrañen grave riesgo para la sociedad de gananciales, podrá el Juez de Primera Instancia, a solicitud fundada de la mujer, oyendo a su consorte y previa información sumaria, adoptar aquellas medidas de aseguramiento que estime procedentes. En todo caso, no podrán perjudicar a la mujer, ni a sus herederos, los actos de disposición que el marido realice en contravención de este Código o en fraude de la mujer, sea cual fuere la condición de los bienes afectados." Boletín Oficial del Estado, núm. 99, de 25 de abril de 1958, páginas 730 a 738.

[113] Feme/Femme Sole: "[Law French] (17c) *Archaic*. **1.** An unmarried woman. **2.** A married woman handling the affairs of her separate estate. — Also termed (in sense 2) *feme sole trader*; *feme sole merchant.*" Black's Law Dictionary (10th ed. 2014)

[114] McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 82.

[115] Section 5, Act of March 13, 1911. Accessed 12/14/2015: http://goo.gl/Zr7lWn.

[116] Section 4, Act of March 13, 1911. Accessed 12/14/2015: http://goo.gl/Zr7lWn.

[117] According to McKnight: "Prior to 1913, "the husband was the manager of the wife's separate property as well as his own, but with respect to control of his wife's separate property, the wife's participation was required for conveyances of realty and her assent was necessary to rebut any imputation of fraud upon her interests." See McKnight, *Texas Family Code Symposium – Title 1. Husband and Wife*, 13 Tex. Tech. L. Rev. 611 (1982). Pp. 750.

[118] Ariens, M. 2011, *Lone Star Law: a Legal History of Texas,* Texas Tech University Press, Lubbock. Pp. 170-171.

drafters of the act ambitiously sought to equalize the legal position of a married woman to that of a *feme sole*, stating in the preamble that it would confer upon her

> the power to make contracts, authorizing suits on such contracts,… control over her separate property,… giving her control over the rents from her separate real estate, interest on bonds and notes, and dividends on stock owned by her, and over her personal earnings, exempting the same from debts contracted by the husband, providing that the joinder of the husband shall be necessary to a conveyance or encumbrance of the wife's lands, bonds and stocks, except that upon the order of the district court she may convey the same without the joinder of her husband.[119]

Notwithstanding this lofty ideal, the difference between the act's provisions and its stated purpose was abysmal, given the lack of legislative energy to enact the act accordingly and, in part, Governor Colquitt's objection to the extent of its scope. Instead, it was "much more limited than indicated by its caption" and, consequently, "a married woman was not equivalent to a *feme sole*."[120] She was, however, permitted to manage "the income from her separate property and her earnings."[121]

The legislative amendment of 1917 in question amended "Article 4621, Chapter 32, of the General Laws… concerning the marital rights of parties" and gave the wife the power to "make contracts, authoriz[e] suits on such contracts" and "control… her separate property" while, at the same time, "placing limitations upon such control." Separate property was now defined to mean "both real and personal [property], owned or claimed by [the wife] before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom." The wife's administrative powers were expanded over her own separate property, with the amended Article 4621 stating that the wife "shall have the sole management, control and disposition of her separate property, both real and personal." This expansion was limited, as could be expected. The wife required the "consent" (or joinder) of her husband to convey her real property and the "signature of the husband… [was] necessary to a transfer of stocks and bonds" that belonged to or were controlled by her. As usual, there was always the option of judicial oversight if the husband denied his wife's request, so long as the court held that the transaction would be "advantageous to the interest of the wife."[122]

During the period before1967, the "legislature continued to adopt piecemeal laws regarding control of separate property by married women"[123] and thus "avoided making any substantial changes to community property law for nearly thirty years."[124] This lack of desire to equalize the matrimonial property rights of the parties would continue until the enactment of the Community Property Code in 1967. A few years prior, the legislature did, however, enact two somewhat important amendments: the legislative amendment of 1963 and that of 1965. The first amendment "removed the disabilities of coverture by making [the] wife the 'sole' manager of her separate property [and] also gave a married woman 'the same powers and capacity as if she were a feme sole' to contract and sue and be sued regarding her separate property."[125] Married women finally gained "full contractual capacity… and… substantially unfettered control of their separate

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[119] HB 22, 33rd Regular Session, Relating to marital rights of parties, defining separate and community property of husband and wife. Accessed 12/14/2015: http://goo.gl/Jn0MWb.
[120] Ariens, M. 2011, *Lone Star Law: a Legal History of Texas,* Texas Tech University Press, Lubbock. Pp. 171.
[121] McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 82.
[122] HB 222, Chapter 194: Authorizing Conveyance or Incumbrance by Wife of her Separate Real Estate, Etc., Under Certain Conditions. Accessed 12/14/2015: http://goo.gl/Tpq1Z6.
[123] Ariens, M. 2011, *Lone Star Law: a Legal History of Texas,* Texas Tech University Press, Lubbock. Pp. 171-172.
[124] *Ibid.* Pp. 173.
[125] *Ibid.* Pp. 173.

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property."[126] The second amendment gave the wife the authority to sue to recover her separate property without having to resort to her husband. Notwithstanding these advances, the equality of the sexes would not be achieved – at least on paper – until the enactment of the Community Property Code of 1967.

B. 1967 to 1981

i. Spain: The Laws of 1975 and 1981

During Franco's regime, women were given unfair and unequal treatment by the law in terms of their legal rights (such as the aforementioned marital license). Despite positive amendments to the Civil Code, such as those contained in the Law of April 24, 1958, these were mostly ornamental and, in reality, did nothing to improve the legal status of women. In fact, they were generally viewed as somewhat socially inferior to men. Their place was considered to be in the home, and their focus on raising their children competently and attending to the needs of their menfolk. To illustrate the Francoist mentality towards women, consider a text written by Carmen Werner Bolín[127] for the Sección Feminina, the female branch of the Falange[128]:

> Nothing is more pleasing to male psychology than women's submission, and nothing is more pleasing to female psychology than submissive surrender to male authority [. . .] Let us conceal or diminish our presence at work. Let us be little ants, graceful and kind [. . .] Men have been very competent at work and have already formed an opinion about things [. . .] Why try to impress them with our improvised achievements, if we know we are offending their judgement and their tradition of superiority?[129]

Given the social standing of women during Franco's regime, as evidenced by the words of Carmen Werner, it is not surprising that Spaniards had to wait until their country's transition to democracy in 1975 before any meaningful legislation was in terms of equalizing women's rights. Furthermore, the process was long and drawn-out: while the first piece of legislation passed in 1975 did further women's matrimonial property rights, it would not be until 1981 that Spanish women were finally accorded the same legal standing as Texan women.

In 1975, with the arrival of democracy, the equality of women greatly improved, as was reflected in the Law 14/1975 of May 2, 1975. This was the Spanish equivalent of the Texan Community Property Act of 1967, whereby a formal equality in terms of the matrimonial property rights was finally reached – although it would require the subsequent enactment of the Law 11/1981 to reach a complete equality. As such, the law was much more radical in its amendments than those that had been made previously. Its preamble is very much different from that of 1958, whereby the arrival of equality was heralded but never given effect. The preamble states that the limits imposed on women by society and the law in terms of their legal personality have lost their reason for existing.[130] While the husband had previously been considered to represent the affairs of his wife, the preamble clearly sets out that none of the parties shall be

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[126] McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 86.

[127] During the Spanish Civil War, Werner was the first provincial head of the Sección Feminina in Malaga. See Bowden, W.H. 2000, *Spaniards and Nazi Germany: Collaboration in the New Order*, University of Missouri Press.

[128] According to Oxford Dictionaries, the Falange was "[t]he Spanish Fascist movement that merged with traditional right-wing elements in 1937 to form the ruling party, the Falange Española Tradicionalista, under General Franco. It was formally abolished in 1977." Accessed 12/14/2015: http://goo.gl/BcWmXk.

[129] For the original text of Carmen Werner's writing, please see http://goo.gl/0nRpF7. Accessed 12/14/2015.

[130] Preamble from Ley 14/1975: "Una de las corrientes de opinión fuertemente sentidas en nuestros días en el ámbito del derecho privado, reflejo de auténticas necesidades de carácter apremiante, es la que incide sobre la situación jurídica de la mujer casada. Sufre ésta señaladas limitaciones en su capacidad de obrar que, si en otros tiempos pudieron tener alguna explicación, en la actualidad la han perdido." Boletín Oficial del Estado, núm. 107, de 5 de mayo de 1975, páginas 9413 a 9419.

presumed to represent the other, unless it is the will of the party to do so (Article 63).[131] More importantly, the concept of the marital license is finally abolished.[132] With regards to the paraphernalia, the woman is now permitted to administer them herself (thus freely being able to alienate and bind them); she is also allowed to appear in court to litigate them and, furthermore, the husband is considered the 'agent' of his wife with respect to the paraphernalia (Articles 1383, 1387, 1388).[133] Although the 'male administrator presumption' is still in effect, Article 59 is modified to exclude the restrictive wording "against the interests of the law etc.", thus providing the parties with the possibility of co-administrating the community property.[134] The freedom of contract is now fully effective, both in theory and in practice. Article 62 states that marriage does not restrict the legal personality of either spouse.

In addition, the community property presumption can be destroyed, if the parties stipulate accordingly (Article 1315[135]), following the legal procedure set forth in Article 1433. Notwithstanding, these must not be contrary to the Laws, good customs or the "purpose of marriage" (Article 1316[136]). Interestingly, McKnight acknowledges the theoretical recognition of freedom of contract in Spanish law, which Texas law inherited, although he does so in a roundabout way, reflecting on the Texan idea of the Spanish legal tradition. He writes:

> Although old Spanish authority supported prenuptial and spousal contractual alteration of the community marital regime, that Hispanic tradition had not been as consistently maintained as some commentators have suggested."[137] As a result, "[l]ate nineteenth and early twentieth-century Texas authorities severely condemned spousal agreements to alter community property, and it was generally understood by the Texas legal progression that these decisions reflected Spanish law of the early nineteenth-century."[138]

As previously mentioned in Part I, the freedom of contract was prevalent in early Spanish law (thanks to early Visigothic influences) but only in terms of the choice of property system; notwithstanding its legally recognized presence, the freedom did not apply to the administration of the property, since any agreement between the husband and wife that altered the husband's right of administration was deemed to be invalid.

The Spanish legal landscape remained unchanged until 1981, when the Law 11/1981 of May 13 was promulgated. This law furthered the quest for equality between the parties and represents the apex of the evolution of women's matrimonial property rights. The validity of the parties' stipulations about their property system no longer depends on their 'compliance' with the

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[131] Preamble from Ley 14/1975: "En consecuencia, ninguno de ellos ostenta una representación legal del otro, siendo posible únicamente la representación derivada de la voluntad." *Ibid.*

[132] Preamble from Ley 14/1975: "Ha sido eliminada igualmente la licencia marital que el artículo ochocientos noventa y tres exigía para que la mujer casada fuera albacea." *Ibid.*

[133] Preamble from Ley 14/1975: "Por lo que se refiere al régimen de los bienes parafernales, en contraste con las anteriores limitaciones, se ha establecido que la mujer puede disponer por sí sola de tales bienes, que puede comparecer en juicio con el fin de litigar respecto de ellos y que el marido sólo puedo ejercitar acciones en orden a dichos bienes como apoderado de su mujer." *Ibid.*

[134] Article 59: "El marido es el administrador de los bienes de la sociedad conyugal, salvo estipulación en contrario." *Ibid.*

[135] Article 1315: "Los que se unan en matrimonio podrán otorgar sus capitulaciones antes o después de celebrarlo, estipulando las condiciones de la sociedad conyugal relativamente a los bienes presentes y futuros, sin otras limitaciones que las señaladas en este Código. A falta de contrato sobre los bienes, se entenderá el matrimonio contraído bajo el régimen de la sociedad legal de gananciales." *Ibid.*

[136] Article 1316: "En los contratos a que se refiere el artículo anterior no podrán los otorgantes estipular nada que fuere contrario a las Leyes o a las buenas costumbres ni a los fines del matrimonio. Toda estipulación que no se ajuste a lo preceptuado en este artículo se tendrá por nula." *Ibid.*

[137] McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 90.

[138] *Ibid.* Pp. 90.

"purpose of marriage."[139] Both spouses' consent is now required to dispose of the community property; in the event that one of the parties declines to consent, judicial intervention is possible (Article 1377). Any stipulation that limits the equality of either spouse is considered null and void (Article 1328[140]) which is a big change from the one-sided articles that had previously protected the 'primacy' of the husband. Furthermore, the default 'administration rule' is that both parties are responsible for administering the community property, unless there is an express agreement that states otherwise (Article 1375[141]).

The purpose behind the community property system is explained in Article 1344: it is a system through which any gains or profits obtained by either spouse are made common to the spouses, "and shall be allocated by halves upon dissolution thereof."[142] Article 1347 defines community property to include "property obtained pursuant to the work or industry of either spouse", "fruits, income or interest generated by exclusive and common property", and "property…acquired for valuable consideration charged to the assets held in common, irrespective of whether the acquisition is made to the community or for only one of the spouses."[143] The separate property of each spouse is defined in Article 1346.[144]

The Law 11/1981 also creates a community property presumption about the goods in the marriage that the spouses could destroy upon proving that the goods in question were in fact their separate property (Article 1316).[145] This presumption, referred to as the "strongest protective devise"[146] of the community property system, worked in the following way: "[i]f it [was] established that an asset was acquired during marriage or was possessed by a spouse on dissolution of the marriage, a spouse or a spouse's heir claiming a separate interest [had to] prove it."[147]

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[139] Article 1316 now reads: "A falta de capitulaciones o cuando éstas sean ineficaces, el régimen será el de la sociedad de gananciales." Boletín Oficial del Estado, núm. 119, de 19 de mayo de 1981, páginas 10725 a 10735

[140] Article 1328: "Será nula cualquier estipulación contraria a las Leyes o a las buenas costumbres o limitativa de la igualdad de derechos que corresponda a cada cónyuge." *Ibid.*

[141] Article 1375: "En defecto de pacto en capitulaciones, la gestión y disposiciones de los bienes gananciales corresponde conjuntamente a los cónyuges, sin perjuicio de lo que se determina en los artículos siguientes." *Ibid.*

[142] Ministerio de Justicia, Spanish Civil Code, 2013.

[143] Article 1347: "Son bienes gananciales: 1.° Los obtenidos por el trabajo o la industria de cualquiera de los cónyuges. 2.° Los frutos, rentas o intereses que produzcan tanto los bienes privativos como los gananciales. 3.° Los adquiridos a título oneroso a costa del caudal común, bien se haga la adquisición para la comunidad, bien para uno solo de los esposos. 4.° Los adquiridos por derecho de retracto de carácter ganancial, aun cuando lo fueran con fondos privativos, en cuyo caso la sociedad será deudora del cónyuge por el valor satisfecho. 5.° Las Empresas y establecimientos fundados durante la vigencia de la sociedad por uno cualquiera de los cónyuges a expensas de los bienes comunes. Si a la formación de la Empresa o establecimiento concurren capital privativo y capital común, se aplicará lo dispuesto en el artículo 1.354." *Ibid.*

[144] Article 1346: "Son privativos de cada uno de los cónyuges: 1.° Los bienes y derechos que le pertenecieran al comenzar la sociedad. 2.° Los que adquiera después por título gratuito. 3.° Los adquiridos a costa o en sustitución de bienes privativos. 4.° Los adquiridos por derecho de retracto perteneciente a uno solo de los cónyuges. 5.° Los bienes y derechos patrimoniales inherentes a la persona y los no transmisibles ínter vivos. 6.° El resarcimiento por daños inferidos a la persona de uno de los cónyuges o a sus bienes privativos. 7.° Las ropas y objetos de uso personal que no sean de extraordinario valor. 8.° Los instrumentos necesarios para el ejercicio de la profesión u oficio, salvo cuando éstos sean parte integrante o pertenencias de un establecimiento o explotación de carácter común. Los bienes mencionados en los apartados 4.° y 8.° no perderán su carácter de privativos por el hecho de que su adquisición se haya realizado con fondos comunes; pero, en este caso, la sociedad será acreedora del cónyuge propietario por el valor satisfecho." *Ibid.*

[145] Article 1361: "Se presumen gananciales los bienes existentes en el matrimonio mientras no se pruebe que pertenecen privativamente al marido o a la mujer." *Ibid.*

[146] McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 74.

[147] *Ibid.* Pp. 74.

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ii. Texas: The Community Property Code of 1967[148]

With the Community Property Code of 1967 Amendment, Texas "was the first community property jurisdiction in the United States to eliminate gender discrimination from the laws of community management."[149] The Community Property Code heralded a new era of the matrimonial property rights of women, providing a statutory framework of equality which could be complemented and developed by the judiciary. The Act of 1967 was codified in the 1969 Texas Family Code.

Similar to the Spanish laws concerning matrimonial property, the Community Property Code of 1967 has a provision that allows the parties to choose the property system, thus honoring the principle of contractual freedom. Section 5.41 states to this effect that "[b]efore marriage, persons intending to marry may enter into a marital property agreement concerning their property then existing or to be acquired, as they may desire." The section eliminates any inheritance requirements that were set out in Section 5 of the Act of January 20, 1840 as well as any constraints on the contents of the marital property agreements by "good morals, or to some rule of law."[150] The wording of the section differs from that of the Law 14/1975, which allows the parties to change the marital property system during the marriage; notwithstanding, it differs in that it does not restrict the contents – while the law does, as well as its successor, Law 11/1981, which removes constraints imposed by the "purpose of the marriage" but retains those imposed by "good morals and the law." The Code did allow the spouses to partition or exchange their community property, voluntarily converting it to separate property, under Section 5.42 which contains the important statutory language "at any time." In keeping with the Constitution of 1845, the specific homestead regulation was retained in the Code in Section 5.81, rendering the difference between separate and community property – at least with regards to the homestead – null. The Section reads as follows: "Whether the homestead is the separate property or community property, neither spouse may sell, convey, or encumber it without the joinder of the other spouse except as provided in Section 5.82, 5.83, 5.84, or 5.85 of this code or by other rules of law."

The Code divided the property into two types, in accordance with the Texas Constitution of 1845: separate property and community property. Since a woman's separate property had been defined in this Constitution, "all subsequent constitutional formulations… were derived from that provision."[151] The definition of separate property set out in Section 5.01 included any property "owned or claimed by the spouse before marriage" or "acquired by the spouse during marriage by gift, devise, or descent", while community property was the "property, other than separate property, acquired by either spouse during the marriage." The property was presumed to be community property according to Section 5.02[152] unless it was "overcome by a claimant's proof that property [was] separate as defined in [S]ection 5.01."[153] This is in keeping with the Spanish matrimonial property legislation, specifically Article 1316 of the Law 11/1981. Nonetheless, in order to protect innocent third parties, the presumption was tempered by a 'separate property presumption' in Section 5.24, which holds that property is presumed to be solely administered by one spouse if it is held in his or her name (and evidence corroborates the presumption) or if it is in his or her possession.

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[148] The sections of the Community Property Code of 1967 that have been used in this article reflect the state of the Code in 1982, since the author has taken the sections from the Texas Tech Law Review of that same year.

[149] McKnight, J.W. 1993, "Texas Community Property Law: Conservative Attitudes, Reluctant Change", *Law and Contemporary Problems,* vol. 56, no. 2, pp. 71-98. Pp. 73.

[150] McKnight, *Texas Family Code Symposium – Title 1. Husband and Wife*, 13 Tex. Tech. L. Rev. 611 (1982). Pp. 776.

[151] *Ibid.* Pp. 736.

[152] Section 5.02: "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."

[153] McKnight, *Texas Family Code Symposium – Title 1. Husband and Wife*, 13 Tex. Tech. L. Rev. 611 (1982). Pp. 747.

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Section 5.21 sets out the abilities of the spouses to manage and administer their separate property: "Each spouse has the sole management, control, and disposition of his or her separate property." Since this section applies to both spouses, it could be read as the wife having the "sole management, control, and disposition of… her separate property" – a big improvement from the initial legislation on this matter. The wife, therefore, was no longer subject to the privy examination for purposes of conveyance – a requirement which dated back to 1840, was attempted to be removed in 1963, and finally repealed in 1967.[154] While the administration of the separate property corresponds to each respective spouse, Section 5.22 (setting out the general community property regulations), holds that, unless otherwise provided, "the community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney in writing or other agreement." These provisions reflect the idea contained in Article 1375 of the Law 11/1981, which also establishes a joint administration default. Section 5.22 once again reinforces the idea of Section 5.21, stating that each spouse is able to administer independently the property "that he or she would have owned if single"; importantly, this includes any personal earnings such as those produced "by the spouse's labor or separate property."

IV. CONCLUSION

From the sample of Spanish[155] and Texan legislation that has been covered in this article, spanning over 15 centuries worth of legislative history, two things are evident. The first is that Spanish law has had a significant influence on Texan women's matrimonial property rights, although this influence is not widely recognized. Second, the Texas legal system granted women legal equality before the Spanish legal system, despite Spain having a head-start of a few centuries to vindicate the rights of women. To illustrate the first point, the author has selected certain examples of law, both with positive implications (such as the creation of the community property system; the emphasis on women's separate property; the possibility of judicial intervention to protect women's property interests; and limits – albeit feeble ones – on the husband's administrative power) and negative ones (such as the marital license; and the legal deference given to the husband). In terms of the second point, the author has demonstrated that Texas evolved before Spain in its treatment of women's matrimonial property rights because of the stagnant period that was Franco's dictatorship. During this regime, most of the progression that had been made in this area was lost. Conversely, as a result of the positive pressure exerted by society in general, married women were finally accorded an equitable standing by Texan law.

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[154] McKnight, *Texas Family Code Symposium – Title 1. Husband and Wife*, 13 Tex. Tech. L. Rev. 611 (1982). Pp. 751.

[155] This reference also includes the Roman and Visigothic roots of Spanish law.

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INTERPRETING THE HAGUE CONVENTION ON SERVICE OF PROCESS FOR MEXICAN PARENTS

By Ha-Vi Nguyen[1]

I. INTRODUCTION

Child welfare systems make decisions that have a profound impact on children and their families, which require courts to take care in determining the best interests of the child and respecting the rights and interests of parents.[2] The Due Process Clause of the U.S. Constitution provides both substantial and procedural protection to the parent-child relationship that requires "notice and an opportunity for a hearing when a state intervenes in a parent-child relationship, and [the parents'] interest are protected by a heightened standard of proof in cases involving a termination of parental rights."[3] In Texas, a trial court may have temporary emergency jurisdiction if the child is present in the state and has been abandoned by both parents.[4] The state also has personal jurisdiction in custody cases if the child and at least one parent have a significant connection with the state, and there is evidence that the child's care and upbringing was significantly inside the state.[5]

Recently, state courts have also found that a state can terminate the parental rights of a parent who is outside of the country as long as the state has personal jurisdiction over the child and has followed due process.[6] Providing adequate notice to parents outside the United States in order to give them an opportunity to participate in a court's proceeding in a case against them, especially when it involves their parental rights, is an important procedural requirement that courts must carefully scrutinize and determine.[7] This is because a court can render a judgment against parties even if they live outside of the United States as long as they have been properly served.[8] Determining what is considered "adequate notice" to a parent who resides outside of the United States, particularly a parent in Mexico, is the main focus of this article. Service of process to a parent in Mexico is of particular concern because there have been many disputes on what consists actual proper service of process.[9]

This article seeks to explain why service by international mail to a parent in Mexico is improper. Part I of the article explains how the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 14 ["The Hague Service Convention"] has rules on service of process including the dispute of the language in

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[2] Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law,* OKLA. L. R. 691, 691 (2011).

[3] *Id*. at 692.

[4] Tex. Fam. Code Ann. § 152.204 (West)

[5] *See* Tex. Fam. Code Ann. § 152.201 (West) ("Except as otherwise provided in Section 152.204, a court of this state has jurisdiction to make an initial child custody determination only if…(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationship.").

[6] In re R.W., 39 A.3d 682, 693 (2011) ("[S]tatus jurisdiction applies to cases involving termination of parental rights….[A]sserting jurisdiction over termination proceedings based on status does not offend the Due Process Clause.").

[7] *See* Estin, *supra* note 1, at 697 ("[C]onstitutional due process norms are adequately addressed when nonresident parents are given notice and an opportunity to participate in the court's proceedings.").

[8] W. Mark C. Weidemaier, *International Service of Process Under the Hague Convention,* Administration of Justice, Number 2004-07 1, 2.

[9] *See id.*, at Tbl. A (listing Mexico as one of the countries that have acceded to the Hague Convention and allows service of process by international mail); *but see* Charles B. Campbell, *No Sirve: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention*, MINN. J. OF INT'L L. 107, 122 (2010) (describing the mistranslation of Mexico declaring that it does not allow service of process by international mail).

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Article 10(a) that provides a state can "***send*** judicial documents, by postal channels, directly to persons abroad."[10] This section includes the Fifth Circuit interpretation of the provision that binds district courts and agencies in Texas and why it is important in effecting a judgment against a parent in Mexico.[11] Part II analyzes the line of reasoning for the circuit splits on the interpretation of the word "send" in Article 10(a) of The Hague Service Convention and why the Fifth Circuit's analysis of the provision may be incorrect. Part III argues that even if the Fifth Circuit interpretation of Article 10(a) is correct, Mexico has properly opted out of service by international mail. Mexico's decision to not allow service by international mail to a citizen residing in Mexico still adheres to The Hague Service Convention rules making service through international mail by any Texas agency improper. Part IV advances some proposals that may help to clearly define the rules on how to properly serve a parent in Mexico and concludes that the current proper way to serve a parent in Mexico is to go through the Central Authority of the Mexican government.

II. THE HAGUE CONVENTION ON SERVICE OF PROCESS

A. General Applicability of The Hague Service Convention

The Hague Conference on Private International Law met in 1893 to provide a forum to discuss methods to unify private law among countries.[12] During the tenth session of this conference, the delegates promulgated the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 14, hereafter referred to as The Hague Service Convention.[13] This multilateral treaty was created in order to provide a simpler way to process service abroad.[14] The Hague Service Convention has three goals: (1) devise a system that gave actual notice to the recipient in sufficient time to allow him to defend himself; (2) simplify and improve the methods of service; (3) facilitate proof that service had been accomplished.[15]

In 1967, the United States participated in the final drafting and became one of the first nations to sign The Hague Service Convention.[16] The United States ratified the Convention in 1969[17] while Mexico acceded to the treaty in 1999.[18] When a state ratifies a treaty, it consents to be bound by the treaty.[19] When a state accedes to a treaty, it is accepting "the offer or the opportunity to become a party to a treaty already negotiated and signed by other states."[20] A country usually accedes to a treaty after it has entered into force, but the legal ramifications between

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[10] Permanent Bureau of the Hague Conference on Private Int'l Law, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 10(a) *available at* https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf (last visited Nov. 7, 2015) (emphasis added) [hereinafter The Hague Service Convention].

[11] *See Tax Research: Understanding Sources of Tax Law (Why My IRC Beats Your Rev Proc!)*, Wolters Kluwer, 2 *available at https://www.cchgroup.com/media/wk/taa/pdfs/accounting-firms/tax/understanding-judicial-system-fact-sheet.pdf* (explaining how the Fifth Circuit has authority over district courts in Texas).

[12] Franklin B. Mann, Jr., *Foreign Service of Process by Direct Mail Under The Hague Convention and the Article 10(a) Controversy: Send v. Service*, 21 CUMB. L. REV. 647, 649 (1991).

[13] The Hague Service Convention, *supra* note 10.

[14] Volkwagenwerk Aktiengesellschaft v.Schlunk, 486 U.S. 698 (1988).

[15] Mann, *supra* note 12, at 650.

[16] *Id*.

[17] Jennifer Scullion, Adam T. Berkowitz, & Charles Sanders McNew, *International Litigation*: *Serving Process Outside the US*, Practical Law Company 1,2 (2011) *available at http://www.proskauer.com/files/News/5b04a3dd-34ab-40f4-a64f-3bc52468277a/Presentation/NewsAttachment/db2a546c-d01c-4ce3-815a-43df368f05c8/Proskauer_122011_Practical%20Law%20Company_Scullion_Berkowitz_McNew_International%20Litigation_Serving.pdf*

[18] Charles B. Campbell, *No Sirve: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention*, 19 MINN. J. INT'L L. 107, 120 (2010).

[19] United Nations Treaty Collection, Glossary of terms relating to Treaty actions, *available at* https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml

[20] *Id.*

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ratification and accession are the same.[21] Once a country has ratified or acceded to The Hague Service Convention, it agrees to follow the rules provided in the Convention and these rules "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[22]

Under the Federal Rules of Civil Procedure, an individual in a foreign country is properly served "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[.]"[23] Since both Mexico and the United States are contracting states to The Hague Service Convention, a U.S. Court must follow the rules under the Convention to provide adequate notice to an individual residing in Mexico.[24]

The supremacy clause of the U.S. Constitution provides that state laws are to be held subordinate to treaties of the United States, and "courts have been compelled to recognize the supremacy of the Convention's provisions."[25] It has been held that if "[T]he Hague [Service] Convention is applicable, its provisions preempt inconsistent methods of service prescribed by state law."[26] If a state fails to follow the requirements of The Hague Service Convention, then the service of process is considered void even if the defendant has actual notice of a pending lawsuit.[27] There are exceptions to The Hague Service Convention such as the rules becoming inapplicable where service is made upon the agent of a foreign entity in the United States or where the address of a foreign defendant is unknown, making service by publication permissible.[28] However, these other forms of service of process are outside the scope of this article; and it will be assumed that the state knows the formal address of the parent in Mexico in which it seeks to provide adequate notice.

B. The Dispute of Article 10(a)

Service of process is the formal delivery of documents that are legally sufficient to give notice of a pending action filed in the United States against a parent located in Mexico.[29] As described above, the most formal way to serve a party under The Hague Service Convention includes forwarding documents to a Central Authority of the country in which the person to be served resides.[30] The Central Authority is then required to give the documents to the correct agency within the country, and that agency is to deliver the document to the individual being served.[31] Once the individual has been served, the Central Authority provides a certificate, which states that the document has been served to the individual, formalizing the entire process of providing notice to an individual in a foreign country.[32]

In this case, Mexico has "designated the Directorate-General of Legal Affairs of its Ministry of Foreign Affairs as its Central Authority to receive and forward requests for service of judicial and extrajudicial documents from other contracting States[.]"[33] Even though service is usually guaranteed using this method, it can be quite expensive because of the imposition of service

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[21] *Id*.
[22] Hague Service Convention, *supra* note 10, at art. 1.
[23] Fed. R. Civ. P. 4(f)(1).
[24] *See* Weidemaier, *supra* note 8, at 2 ("When service is to be made in a country that has ratified or acceded to the Hague Convention (a 'Contracting State'), the serving party must use the Convention's procedures.").
[25] Gary A. Magnarini, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 660 (1988).
[26] Bayoil Supply & Trading of Bahamas v. Jorgen Jahre Shipping AS, 54 F. Supp. 2d 691, 693 (S.D. Tex. 1999)
[27] Balcom v. Hiller, 46 Cal. App. 4th 1758, 1763 (1996).
[28] 18 A.L.R. Fed. 2d 185 (Originally published in 2007)
[29] *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988).
[30] *See generally* Hague Service Convention, *supra* note 10. For specific provisions on who the Central Authority of a country can consist of and what the Central Authority does in terms of providing service to a defendant in its nation, see *id*., at art. 2-7.
[31] *Id*. at art. 5.
[32] *Id*. at art. 6.
[33] Campbell, *supra* note 18, at 108.

fees by a Central Authority and extremely time consuming.[34] The cost of service of process through the U.S. Central Authority in Washington D.C. to any other Central Authority in the world is $450, a costly fee for a state agency for each potential child custody case that may develop.[35] Also, a commentator notes that "utilizing the Central Authority can often be extremely time consuming, often taking more than three months and occasionally resulting in no service at all."[36]

On the other hand, The Hague Service Convention provides another method of service to an individual –service by international mail.[37] This method is much cheaper and quicker for any Texas agency to send to a defendant in Mexico, with the cost of registered mail being only $13.95 per piece.[38] However, the validity of this method is widely disputed by U.S. courts.[39] This is because Article 10 of The Hague Service Convention states that:

> ***Provided the State of destination does not object***, the present Convention shall not interfere with –
> *a)* the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad,
> *b)* the freedom of judicial officers, officials or other competent persons of the State of origin to effect ***service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
> *c)* the freedom of any person interested in a judicial proceeding to effect ***service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.[40]

The word "send" in Article 10(a) is a strong point of contention among courts in the United States as to how to interpret the particular provision.[41] This is because in all of the other provisions of The Hague Service Convention, the word "service" is used to indicate service of process instead.[42] The Fifth Circuit is one of many authoritative courts that have interpreted Article 10(a) to not only service by international mail.[43]

C. The Fifth Circuit Interpretation

The leading case on Fifth Circuit interpretation of Article 10(a) of The Hague Service Convention is *Nuovo Pignone v. Storman Asia M/V*.[44] In this case, Fagioli, S.A., an Italian company, agreed to furnish a ship, a vessel named M/V Storman Asia, to transport an EO reactor that belonged to Nuovo Pignone, SpA.[45] Nuovo Pignone, SpA signed a contract stipulating that it would

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[34] Emily Fishbein Johnson, *Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?*, 37 GEO. WASH. INT'L L. REV. 769, 784 (2005).
[35] *Process Forwarding International*, ABC LEGAL SERVICES, INC. (last visited Nov. 27, 2015). http://www.pfiserves.com/
[36] *Id*.
[37] Hague Service Convention, *supra* note 9, at art. 10.
[38] United States Postal Service, *Price List Notice 123* USPS (May 31, 2015) http://pe.usps.com/text/dmm300/Notice123.htm#2084579
[39] *Compare* Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989) ("We conclude that sending a copy of a summons and complaint by registered mail to a defendant in a foreign country is not a method of service of process permitted by the Hague Convention.") *with* Ackermann v. Levine, 788 F.2d 830, 834 (2d Cir. 1986) ("We hold that service of process by registered mail satisfied the Hague Convention and constitutional due process…").
[40] Hague Service Convention, *supra* note 30, at art. 10 (emphasis added).
[41] *See Bankston*, 889 F.2d, at 173 ("In recent years, two distinct lines of Article 10(a) interpretation have arisen.").
[42] *Id*.
[43] *See* 1 Litigation of International Disputes in U.S. Courts § 2:6 ("There are two leading circuit court opinions that hold that the Hague Convention does not allow service by mail, the *Nuovo* decision of the Fifth Circuit and the *Bankston* decision of the Eighth").
[44] *Id*.
[45] *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 377 (5th Cir. 2002). An EO reactor is strong and heavy machinery that combines ethylene and oxygen to produce EO, which can then be separated and produce high purity EO or fiber-grade monoethylene glycol (MEG). These products can be used in many important processes that produce industrial and consumer goods such as polyester fibers or antifreeze. Scientific Design Company, Inc.,

provide a vessel that was safe and seaworthy.[46] The EO reactor was transported across the Atlantic Ocean on the ship without incident until it reached the Port of New Orleans.[47] In New Orleans, a cable of a shipping crane onboard the vessel broke causing the reactor to fall, and Nuovo Pignone, SpA sued Fagioli, S.A. for breach of contract.[48]

Nuovo Pignone, SpA attempted to effect service of process by using Federal Express mail to send a complaint to the president of Fagioli, S.A. in Milan, Italy.[49] The Fifth Circuit Court of Appeals concluded that service by international mail was not appropriate under The Hague Service Convention.[50] The court notes that the word "service" is used throughout the treaty to mean "service of process" so if the drafters "purposely elected to use forms of the word 'service' throughout The [Service] Hague Convention, while confining use of the word 'send' to article 10(a), [the court] will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service'".[51] The court explains that it relies "on the canons of statutory interpretation" rather than merely presuming that the use of the word "send" was an oversight.[52]

D. Why the Dispute of Article 10(a) Needs to be Settled

Even though determining the word "send" in Article 10(a) seems like a miniscule area of the law, it makes a significant difference to how U.S. courts can enforce judgments against parents in Mexico. Furthermore, these judgments will be considered valid and binding on an international basis leaving the parent almost no room to appeal within their own country or through an international court. This is because Article 15 of The Hague Service Convention provides that:

> Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled -
>
> *a)* ***the document was transmitted by one of the methods provided for in this Convention***,
>
> *b)* a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
>
> *c)* no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.
>
> Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.[53]

This allows a court to enter a default judgment if a party fails to appear after appropriate service according to the rules of The Hague Service Convention, even if there is no certificate of service by a Central Authority.[54] Thus, if service by international mail is interpreted to be allowed by article 10(a), parties in the United States including federal and state agencies can speedily provide service to parents in Mexico. This will allow obtaining judgment that is cheaper and faster than going through the red tape of a Central Authority. However, if a state improperly

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Ethylene oxide/Ethylene Glycols, http://www.scidesign.com/technologies/ethylene-oxide-and-derivatives/ethylene-oxide-ethylene-glycols.

[46] *Nuovo Pignone, SpA,* 310 F.3d, at 377.

[47] *Id*.

[48] *Id*.

[49] *Id*. at 383.

[50] *Id*. at 384.

[51] *Nuovo Pignone, SpA,* 310 F.3d, at 384.

[52] *Id*.

[53] Hague Service Convention, *supra* note 10, at art. 15.

[54] *Id*.

serves a foreign parent abroad, it can be viewed as an affront to that country's sovereignty and the country will unlikely enforce any resulting judgment that U.S. courts determine.[55]

There is a constitutional right that exists between parents and their children.[56] The parental right is one that is considered even more precious than property rights.[57] That is why there are higher standards of evidence before a court will step in and disturb the parental right, especially when it comes to termination of the parental right itself.[58] In the case of parents who reside in Mexico, lack of notice of a trial regarding their children not only violates due process[59], but also the parental right that is regarded as fundamental to all individuals. This is why even though a parent of a child in the United States resides in another country, agencies in the United States must make a solid effort to provide adequate notice of any pending trial or action that disturbs the parental rights of the parent.

II. THE CIRCUIT SPLITS ON "SEND" VS. "SERVICE"

Article 10(a) of The Hague Service Convention has created much litigation since its inception.[60] The word "send" in Article 10(a) is not defined and courts are left without much guidance on the intention of the drafters.[61] That is why there have been two distinct lines of interpretation concerning Article 10(a) that have been argued and remain unsettled among appellate courts.[62] The analyses of courts on the interpretation will be described in detail below.

A. Why Other U.S. Courts and Authority Agree with the Fifth Circuit

The most notable Circuit to agree with the interpretations of the Fifth Circuit is the Eighth Circuit in *Bankston v. Toyota Motor Corp*..[63] In *Bankston*, two plaintiffs filed suit in a district court of Arkansas against Toyota Motor Corporation, a company based in Japan, seeking damages that resulted from an accident involving a truck made by Toyota.[64] The appellants tried to serve process upon Toyota Motor Corporation by sending a summons and complaint through registered mail to the headquarters in Tokyo, Japan.[65] The court notes that in subsections 10(b) and 10(c), the drafters use the word "service."[66] The court explains that "If the drafters of the Convention had meant for subparagraph (a) to provide an additional manner of service of judicial documents, they would have used the word 'service.'"[67] This goes along with the line of cases that maintain that Article 10(a) only provides a method to send subsequent documents after service of process has been obtained.[68]

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[55] Samuel R. Feldman, *Not-So-Great Weight: Treaty Deference and the Article 10(a) Controversy*, 51 B.C. L. REV. 797, 799 (2010)
[56] Holick v. Smith, 685 S.W.2d 18, 20 (Tex. 1985)
[57] *Id*.
[58] *Id*.; *see also* Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 977 (1988) ("Consequently, there seems to exist today a clearly articulated precept declaring that parental interests in the custody, care, and control of their children are constitutionally protected from unwarranted state interference to a high degree.").
[59] In re J.F.C., 96 S.W.3d 256, 263 (Tex. 2002)
[60] *See* Mann, *supra* note 12, at 653 ("No single aspect of The Hague Service Convention has spawned more litigation than article 10(a).").
[61] *Id*.
[62] Wasden v. Yamaha Motor Co., 131 F.R.D. 206, 208 (M.D. Fla. 1990).
[63] *See* EOI Corp. v. Med. Mktg. Ltd., 172 F.R.D. 133, 139 (D.N.J. 1997) ("Conversely, the second line of authority, advocated by the Eighth Circuit Court of Appeals and a number of district courts ascribes…that Article 10(a) does not sanction service of process by means of postal channels.").
[64] *Bankston*, 889 F.2d, at 172.
[65] *Id*.
[66] *Id*. at 173.
[67] *Id*. at 173-74.
[68] *See*, *e.g.*, Mommsen v. Toro Co., 108 F.R.D. 444, 446 (S.D. Iowa 1985) ("The provision at issue here, subparagraph (a) of Article 10, does not expressly allow "service" of judicial process by postal channels in signatory nations; it merely permits one to "send" judicial documents by mail to persons abroad.").

If there is no clearly expressed legislative intent in a statute, then the language of the statute itself must be considered conclusive.[69] If the drafters of The Hague Service Convention included "service" in subsections 10(b) and (c), then it could be presumed that the omission in Article 10(a) was on purpose.[70] Thus, some courts have reasoned that in interpreting the article, only the ordinary meaning of the word "send" should be considered.[71] However, there is contrary authority that suggests that only looking at the language of a treaty may be inappropriate.[72] An international treaty is equivalent to a contract between nations where the written words must be considered with the context of the treaty as a whole.[73] This leads to the next line of cases and authority that find "send" to also mean "service" in Article 10(a).

B. Why Other U.S. Courts and Authority Disagree with the Fifth Circuit

The Second Circuit provides a leading case to describe other lines of thought in regards to the interpretation of Article 10(a) of The Hague Service Convention.[74] In *Ackermann v. Levine*, a German law firm sought to recover disputed legal fees from an American citizen involved in real estate business in New York.[75] The plaintiff used a German court to send a summons and complaint to the German Consulate in New York, which mailed them to the defendant's address.[76] The defendant acknowledged receipt of the service and actual knowledge of the lawsuit.[77] The court held that The Hague Service Convention allowed for the service of process by registered mail and so the summons and complaint were valid to provide notice to the defendant.[78]

The court in *Ackermann* explains that the United States itself holds service of process by registered mail as an appropriate method to serve a defendant in the country under The Hague Service Convention.[79] It agrees with the line of reasoning of prior court decisions that Article 10(a) "would be superfluous unless it was related to the sending of such documents for the purpose of service."[80] This argument is further strengthened by the placement of Article 10(a) within the Convention.[81]

Even though the Central Authority is considered the main method of effecting service of process under The Hague Service Convention, it is not the only method provided in the set of rules.[82] Article 8 of the Convention provides that a state can use its own diplomatic or consular agents to directly serve a foreign defendant.[83] Article 9 allows for the use of consular or diplomatic channels to forward documents to the authorities within a contract state, which then serves the document to the parent in Mexico. Article 11 even allows the United States and Mexico to agree to any other method of service not specifically mentioned in the preceding articles of the Convention if their authorities can agree on it.[84]

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[69] Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).
[70] *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate exclusion or inclusion.").
[71] Ormandy v. Lynn, N.Y.S.2d 274, 275 (1984).
[72] Mann, *supra* note 12, at 655.
[73] Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 533-34 (1987).
[74] 112 A.L.R. Fed. 241 (Originally published in 1993)
[75] Ackermann v. Levine, 788 F.2d 830, 834-37 (2d Cir. 1986).
[76] *Id*. at 837.
[77] *Id*.
[78] *Id*. at 838.
[79] *Id*. at 839.
[80] Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 821 (1973).
[81] *See id*. ("Moreover, the reference appears in the context of other alternatives to the use of the 'Central Authority' created by the treaty.").
[82] Mann, *supra* note 12, at 653.
[83] The Hague Service Convention, *supra* note 10, at art. 8.
[84] *Id*. at art. 11.

Several courts have noted that Article 10 is found in the midst of alternative service provisions.[85] Considering the consistency of Articles 8-11 as other methods of effecting service of process, it would be highly unlikely that the drafters would include an unrelated provision in the midst of the list of alternative methods.[86] If Article 10(a)'s use of the word "send" does not include any method for service of process, logically it would be located somewhere else in The Hague Service Convention (likely under Clause III), instead of being embedded with other subsections that provide alternative methods for service of process.[87]

The Ninth Circuit in *Brockmeyer v. May* agreed with the Second Circuit's line of reasoning.[88] It also looked to the commentaries on the history of the negotiations that led to The Hague Service Convention to further explain why Article 10(a) allows service by mail.[89] According to the official Rapporteur's report, the first paragraph of Article 10(a) of the draft Convention was identical to the final Convention, which intended to permit service by mail.[90] The Permanent Bureau of the Hague Convention published a handbook that summarized that Article 10(a) does permit service by mail.[91] Moreover, the United States delegate to The Hague Service Convention told Congress that Article 10(a) permitted service by mail.[92]

Also, this line of analysis corresponds with the original intent of The Hague Service Convention.[93] Recall that the drafters had three objectives in creating The Hague Service Convention: (1) devising a system that gave actual notice to the recipient in sufficient time to allow him to defend himself; (2) simplifying and improving the methods of service; (3) facilitating proof that service had been accomplished.[94] This means that the countries that adopted the Convention did not intend to be restricted to only formal methods of service, and are looking for simpler ways to provide service of process to foreign defendants.[95]

International mail is considerably less expensive and complicated than other ways to provide service of process, including going through the Central Authority or sending judicial documents through consular channels.[96] It is also arguable that the process of sending a judicial document through international mail fulfills all of the analogous objectives of sending a judicial document through the Central Authority that would make it a viable alternative method. Serving a parent in Mexico through registered mail requires the state to have the correct address where the parent resides.[97] The process requires that there be a receipt that the foreign parent has received the service of process returned back to the state that sent it, which is equated to the certificate provided by the Central Authority.[98] In short, sending a judicial document through regis-

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[85] *See*, *e.g.*, Nicholson v. Yamaha Motor Co., 80 Md. App. 695, 706 (1989).
[86] Mann, *supra* note 12, at 658.
[87] *Id*.
[88] *See* Brockmeyer v. May, 383 F.3d 798 ("We agree with the Second Circuit that this holding is consistent with the purpose of the Convention to facilitate international service of judicial documents.").
[89] *Id*. at 802.
[90] Bruno A. Ristau, *Michael Abbell, International Judicial Assistance: Civil and Commercial* INTERNATIONAL LAW INSTITUTE (2000) (translating the Service Convention Negotiating Document from French to English).
[91] *Brockmeyer,* 383 F.3d at 802-803.
[92] *Id*. at 803.
[93] Magnarini, *supra* note 25, at 677.
[94] *See supra* Part I.
[95] Magnarini, *supra* note 25, at 677.
[96] *See supra* Part II.B. *See also* Scullion, *supra* note 17 ("As a practical matter, US litigants rarely serve process under Articles 8 and 9, because officers of the US Foreign Service are normally prohibited from serving process or legal papers or appointing others to do so.")
[97] Irene A. Blake, *Definitions of Certified and Registered Mail*, HEARST NEWSPAPERS, LLC http://smallbusiness.chron.com/definitions-certified-mail-registered-mail-40208.html
[98] *See id*. ("The recipient must sign to receive your mail, and if you need proof of delivery, you can purchase Return Receipt service or Return Receipt After Mailing.").

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tered mail provides the same notice as going through the Central Authority except it is cheaper and more efficient.[99]

C. Other Authority That Disagrees with the Fifth Circuit

The U.S. Department of State has interpreted Article 10(a) as a viable alternative service of process method. After the decision by the Eighth Circuit in *Bankston*, the U.S. Department of State issued an opinion that the decision was wrong and service by mail was permitted by Article 10(a).[100] Courts that agree with the executive branch's interpretation simply defer to it, whereas courts that do not agree with it simply do not defer.[101] Notwithstanding the judicial conflict, there is perhaps a compelling argument to give deference to the interpretations of the executive branch because it is responsible for negotiating and implementing the treaty itself.[102] On the other hand, state agencies located in the Fifth Circuit, which includes Texas, probably are best advised not to follow this course until further notice from higher authority.

The Supreme Court has given great weight in how the executive branch interprets a treaty.[103] In *Kolovrat v. Oregon*, the Supreme Court reviewed an Oregon inheritance law that disagreed with the 1881 Treaty of Friendship between the United States and Serbia.[104] The Court held that Oregon's state law violated the treaty and the same inheritance rights must be given to Yugoslavian citizens living in the United States.[105] The Court relied on diplomatic notes and correspondence from the State Department to make its judgment.[106] The Court held that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."[107]

It is also worthy to note how other countries that have ratified or acceded to The Hague Service Convention have interpreted what Article 10(a) means because they are part of the nations with which the United States have contracted with under the Convention. Courts in Europe have held that Article 10(a) allows service through a country's postal channels.[108] In Canada, a high court has stated that "Article 10(a) of the Hague Convention provides that if the state of destination does not object, judicial documents may be served by postal channels."[109] A court of appeals in Greece has held that "the possibility of serving judicial documents in civil and commercial cases through postal channels…is envisaged in Article 10(a) of the Hague Convention."[110] The overall purpose of the Hague Conference and the conventions that came out of it was to propose methods to unify and harmonize private law.[111] This also advances the idea that the United States should keep its rulings consistent with other countries that have adopted The Hague Service Convention in order to create a more unified international body of law.

III. MEXICO HAS PROPERLY OPTED OUT OF SERVICE BY MAIL

It is immaterial whether the interpretations of Article 10 by the Fifth Circuit is correct or incorrect because Mexico is one of the countries that has opted out of allowing service of process

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[99] *See supra*, Part II.B.
[100] U.S. Dep't of State op. Regarding the *Bankston* Case, 30 I.L.M. 260, 263 (1991) (citing Letter from Alan J. Kreczko, Deputy Legal Advisor, U.S. Dep't of State, to the Admin. Office of the U.S. Courts (Mar. 14, 1991).
[101] Feldman, *supra* note 55, at 800.
[102] *Id*. at 807.
[103] Kolovrat v. Oregon, 366 U.S. 187, 194
[104] *Id*. at 190.
[105] *Id*.
[106] *Id*. at 194-195.
[107] *Id*. at 194.
[108] *See, e.g.*, Case C–412/97, E.D. Srl. v. Italo Fenocchio, 1999 E.C.R. I–3845, [2000] C.M.L.R. 855 (Court of Justice of the European Communities).
[109] Integral Energy & Envtl. Eng'g Ltd. v. Schenker of Canada Ltd., (2001) 295 A.R. 233, 2001 WL 454163 (Alberta Queens Bench) *rev'd on other grounds,* (2001).
[110] R. v. Re Recognition of an Italian Judgment, [2002] I.L.Pr. 15, 2000 WL 33541696 (Thessaloniki Court of Appeal, Greece) (2002).
[111] Mann, *supra* note 12, at 649.

through postal channels. The Hague Service Convention specifically provides that any nation subject to the treaty has the opportunity to object to any or all of the of the alternative service provisions in Articles (8) through (10).[112] It also authorizes a country to provide a declaration if it does not want to allow courts of other nations to have the ability to enforce judgments against its citizens.[113] These special rules can be found in Article (21) of The Hague Service Convention as follows:

> Each Contracting State shall similarly inform the Ministry, where appropriate, of -
> a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,
> b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
> c) all modifications of the above designations, oppositions and declarations.[114]

A. Declarations to Opt Out are Valid

There are twenty-nine states that have formally objected to having its citizens served through postal channels including Germany, Japan, and Switzerland.[115] Courts have generally recognized that if a country has opted out of any alternative method of service, it will be recognized before declaring judgment.[116] Courts have looked at countries' objections to Article 10(a) before making the decision on whether a foreign individual has been properly served.[117] Also the ability of a country to specifically opt out of service through postal channels in Article 10(a) does strengthen the argument that it is meant to be another method for service of process.[118]

On the official website of The Hague Service Convention, the Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3) provides that Mexico has opposed all provisions of Article 10.[119] Compared to Australia, who has a "qualified opposition" to Article 10(a),[120] Mexico is listed as having only an "opposition" to Article 10(a) indicating that it does not have any qualifications to its opposition.[121] If it is clearly stated that Mexico does oppose to Article 10 and this opposition is to be recognized for all contracting states under The Hague Service Convention, why is there a dispute that Mexico would allow the citizens of its state to be served through international mail?

B. The Mistranslation of Mexico's Declaration

When Mexico acceded to The Hague Service Convention in 1999, the Mexican government published its decree of accession with declarations.[122] Declarations are official oppositions to any appropriate article in the Convention allowed by Article 21.[123] On June 2, 1999, the Mexican government deposited the instrument of accession along with its declarations in the depositary

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[112] *See* Rivers v. Stihl, Inc., 434 So. 2d 766, 769 (Ala. 1983) ("The convention also prescribes several alternative methods of service, including service by postal channels directly to the recipient, but allows signatory countries to object to the alternative methods.").
[113] Hague Service Convention, *supra* note 10, at art. 21.
[114] *Id*.
[115] U.S. Department of State Foreign Affairs Manual Volume 7 Consular Affairs, *available at* http://www.state.gov/documents/organization/86743.pdf.
[116] *See, e.g.*, Lyman Steel Corp. v. Ferrostaal Metals Corp., 747 F. Supp. 389, 399-400 (N.D. Ohio 1990).
[117] Tataragasi v. Tataragasi, 477 S.E.2d, at 243.
[118] Weidemaier, *supra* note 8, at 8.
[119] TABLE REFLECTING APPLICABILITY OF ARTICLES 8(2), 10(a)(b) AND (c), 15(2) AND 16(3) OF THE HAGUE SERVICE CONVENTION *available at* http://www.hcch.net/upload/applicability14e.pdf.
[120] *See* http://www.hcch.net/index_en.php?act=status.comment&csid=1062&disp=resdn *(*"Australia does not object to service by postal channels, where it is permitted in the jurisdiction in which the process is to be served. Documents forwarded via postal channels must be sent via registered mail to enable acknowledgement of receipt.").
[121] TABLE, *supra* note 119, at 6.
[122] Campbell, *supra* note 18, at 120.
[123] *Id*. *See also* The Hague Service Convention, *supra* note 10, at art. 21 (describing how each Contracting State should declare their opposition to Articles 8 and 10 during the time they ratify or accede to the treaty).

of the Ministry of Foreign Affairs of Netherlands in accordance of Article 28 of the Convention.[124] The depositary then provided "notification that included a copy of Mexico's original Spanish declarations, an English 'courtesy translation' of the declarations, and a French *traduction* (translation) of the declarations."

In the English courtesy translation of Mexico's objection to Article 10 of The Hague Service Convention, it added that Mexico's opposition to Article 10 occurred only when attempted "through diplomatic or consular agents."[125] However, the original Spanish declaration did not have such qualification and opposed to Article 10 as a whole.[126] The Spanish text of Mexico's declaration to oppose Article 10 states can be found in Paragraph V of Mexico's Accession (with declarations)[127]:

> V. En relación con el artículo 10, los Estados Unidos Mexicanos no reconocen la facultad de remitir directamente los documentos judiciales []**[128]** a las personas que se encuentren en su territorio conforme a los procedimientos previstos en los incisos a), b) y c); salvo que la Autoridad Judicial conceda, excepcionalmente, la simplificación de formalidades distintas a las nacionales, y que ello no resulte lesivo al orden público o a las garantías individuales. La petición deberá contener la descripción de las formalidades cuya aplicación se solicita para diligenciar la notificación o traslado del documento.[129]

The English translation in the same set of documents provided by the depositary of the Ministry of Foreign Affairs of Netherlands provides that:

> In relation to Article 10, the United Mexican States are opposed to the direct service of documents ***through diplomatic or consular agents*** to persons in Mexican territory according to the procedures described in sub-paragraphs a), b) and c), unless the Judicial Authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document.[130]

If the Spanish translation wanted to qualify that the opposition was only for service of documents through diplomatic or consular agents, it would add the phrase, "por medio de agentes diplomáticos o consulares" where brackets [] lay.[131] This phrase currently appears in the Paragraph IV of the official Spanish translation of Mexico's Accession (with declarations) that relates to the opposition of Article 8 of The Hague Service Convention:[132]

> IV. En relacion con el articulo 8, los Estados Parte no podran realizar nolificaciones o traslados de documentos judiciales directamente, ***por medio de sus agentes diplomaticos o consulares***, en territorio mexicano, salvo que el documento en cuestion deba ser notificado o trasladado a un nacional del Estado de origen, siempre que tal procedimiento no sea contrario a normas de orden publico o garantias individuales.[133]

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[124] Campbell, *supra* note 18, at 120; The Hague Service Convention, *supra* note 10, at art. 28.
[125] Campbell, *supra* note 18, at 108.
[126] *Id*.
[127] Accession (with Declarations) of Mexico to the Hague Service Convention, 2117 U.N.T.S. 318, 319 (2000) [hereinafter Accession (with Declarations)](Spanish text of declarations, followed by English and French translations) *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%202117/v2117.pdf.
[128] [] where "por medio de agentes diplomaticos o consulares" should be included if Mexico had meant for the opposition to be limited.
[129] Accession (with Declarations), *supra* note 127.
[130] *Id*. at 321 (emphasis added).
[131] Campbell, *supra* note 18, at 124.
[132] Accession (with Declarations), *supra* note 127, at 319.
[133] *Id*. (emphasis added).

The phrase is correctly translated in Paragraph IV of the English translation of Mexico's Accession (with declarations).[134] There is no reason that the language of Paragraph IV should be added to the English translation of Paragraph V of Mexico's declarations.[135] This is because Paragraph IV is a direct opposition to Article 8 of The Hague Service Convention, which lists the method to effect service of judicial documents upon individuals living in another country *through that country's diplomatic or consular agents*.[136] The phrase in Paragraph IV does not lend itself to correctly be in Paragraph V.

From a legal perspective, the authentic and original texts of Mexico's Accession and declarations are controlling and stand over any "official translation" of the texts.[137] It is arguable that official translations, "whether prepared by the contracting parties themselves, by an international body, or by a single contracting or non-contracting State, have in principle no value at the international level and in case of divergence between authentic or official texts[,]" and the official text must prevail.[138]

> This fact is further emphasized in Article 33 of the Vienna Convention:
> Article 33. INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[139]

The Vienna Convention on this matter because the principle of treaty interpretation also applies to declarations and reservations.[140] The English translation does not have the same authenticated status as the original Spanish text and therefore must not prevail in determining the meaning of Mexico's declaration.[141] This complies with how U.S. courts construe treaties as well.[142] Courts have held that interpretations of treaties that waive sovereign rights of a government or the people of a State should be carefully scrutinized.[143] Multiple translations may lead to ambiguous interpretations of Mexico's declaration, but U.S. courts must accept the interpreta-

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[134] *See id*. at 321 ("In relation to Article 8, the contracting States shall not be able to effect service of judicial documents directly through its diplomatic or consular agencies in Mexican territory, unless the document is to be served upon a national of the State in which the documents originate and provided that such a procedure does not contravene public law or violate individual guarantees.").
[135] Campbell, *supra* note 18, at 124.
[136] The Hague Service Convention, *supra* note 10, at art. 8 (emphasis added).
[137] Campbell, *supra* note 18, at 124.
[138] Jean Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 BRIT. Y.B. INT'L L. 72, 136 (1961).
[139] Vienna Convention on the Law of Treaties, done May 23, 1969, 1155 U.N.T.S 331, 340 https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf
[140] Campbell, *supra* note 18, at 126; 1 OPPENHEIM'S INTERNATIONAL LAW § 614, at 1242 ("A treaty and any reservations to it have to be interpreted together, and reservations themselves are therefore subject to interpretation in accordance with international law.").
[141] *Id*. at 124-25.
[142] *See, e.g.,* Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534, (1991); *Schlunk*, 486 U.S. at 699.
[143] Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638-39 (5th Cir. 1994)

tion that derogates "minimally from the sovereign power of the State, which is the quintessential and most legitimate entity in international law."[144] Therefore, because Mexico did not limit its opting out provision to only documents served "through diplomatic or consular agents," U.S. courts absolutely should not look to the defective English translation and misinterpret the country's declaration in that way.

V. POLICY PROPOSAL AND CONCLUSION

A. The Use of the Central Authority of Mexico

A Texas state agency should not attempt to provide notice to a parent residing in Mexico through international mail. This is because it is not considered adequate notice due to the Fifth Circuit interpretation of Article 10(a),[145] and Mexico has properly opposed to service by international mail.[146] However, this does not mean that state agencies do not have other methods to provide adequate notice of a trial against parents residing in other countries. Articles 2-6 is the most formal way to serve a party under The Hague Service Convention, which consists of forwarding documents to a Central Authority that in turn delivers them to the defendant within the country.[147] This is a costly and cumbersome method[148] for a Texas state agency to serve a parent in Mexico, but it is the most effective way to provide notice. After proper service using this method, a court provides judgments and enforces them abroad more easily than if another method provided by the Convention was used.[149]

In order to take advantage of the safeguards inherent in this method, a Texas state agency has to follow the correct procedures.[150] After preliminary documents are prepared, the clerk of the court must issue a summons.[151] The summons should be delivered to the Division of Services, which forwards the documents along with a form that is reprinted at the end of the Convention.[152] Along with the fees associated with using this process, the other arduous task is translating all of the documents into the official language of the country where the process will be served.[153] Even though this process is tedious, it ensures the parental rights of an individual of another country are preserved. It also closes the door on any litigation made by the defendant on not understanding the documents and not receiving adequate notice due to a language barrier.[154]

Article 11 of The Hague Service Convention allows for two states that have adopted the treaty to make agreements on their own on what service of process methods to use between them.[155] The provision states that the Convention allows for any form of service of process, even if it is not stated in the Convention itself, as long as two countries exclusively agree upon it.[156] This means that the U.S. government can sign a side agreement with Mexico that allows for service by international mail exclusively between the two nations. However, this requires the executive branch to negotiate a treaty with Mexico that allows service by international mail between the two countries and the Senate to approve the treaty, which can be an arduous pro-

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[144] *Id*. at 639.
[145] *See supra*, Part II.A
[146] *See supra,* Part III.B.
[147] *See supra*, Part II.A.
[148] *See supra*, Part II.B.
[149] Michael L. Silhol, *Service of Process Upon Foreign Defendants Under the Hague Convention*, TENN. B.J.,1992, at 16, 19.
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] Weidemaier, *supra* note 8, at 14.
[155] The Hague Service Convention, *supra* note 10, at art. 11.
[156] *Id*.

cess.[157] Also, the United States does not appear to have made such side agreements in terms of service of process with any other country so far.[158]

B. Conclusion

Parental rights are so fundamental that courts should and do hesitate to disturb the relationships between parents and their children. That is why every procedural step in a case involving changing or even terminating parental rights must be carefully scrutinized. This means that providing adequate notice to parents of a case against them by a state is of utmost importance so as not to violate due process. The Hague Service Convention provides a standardized set of rules to unify laws on how to properly serve individuals (and corporations) from different countries. However, the Convention does not clearly define whether service by international mail is an appropriate method leading to two different interpretations by U.S. courts.

After the analysis in this article, the Fifth Circuit is incorrect in declaring that The Hague Service Convention does not allow for service by international mail *at all*. In regards to serving a parent in Mexico, service by international mail is correctly prohibited. This is because Mexico has officially and rightfully declared an opposition to Article 10 of The Hague Service Convention. This leaves a Texas state agency to use the method of serving documents through the Central Authority of Mexico described in Articles 2-6 of the Convention to properly serve a parent in Mexico and give adequate notice of a case regarding their child in the United States. This method should be used until the U.S. government has signed an exclusive agreement with Mexico that allows for service by international mail.

[157] Michael d. Ramsey Treaty Clause, *The Heritage Guide to the Constitution,* THE HERITAGE FOUNDATION http://www.heritage.org/constitution/#!/articles/2/essays/90/treaty-clause.
[158] Weidemaier, *supra* note 8, at 7.

Guest Editors this month includes Jimmy Verner (*J.V.),* Michelle May O'Neil (*M.M.O.)*, and Jessica H. Janicek (*J.H.J.*)

DIVORCE
VALIDITY OF MARRIAGE

PARTIES COULD NOT HAVE ENTERED COMMON-LAW MARRIAGE IN FLORIDA BECAUSE FLORIDA DOES NOT RECOGNIZE COMMON-LAW MARRIAGES.

¶16-4-01. *Cutler v. Cutler*, No. 04-15-00693-CV, 2016 WL 4444418 (Tex. App.—San Antonio 2016, no pet. h.) (mem. op.) (08-24-16).

Facts: Wife purchased a house in Florida before her 2002 wedding ceremony to marry Husband. Subsequently, she learned Husband's divorce to his former Wife was not finalized before the wedding. Husband and Wife eventually reconciled and lived in Wife's house for a few years before moving to Japan and then to Texas. Wife kept the Florida house as a rental property after they left and used the rental proceeds to pay for the house's upkeep and mortgage.

Wife filed for divorce in Texas. Husband filed a counter-petition and alleged that the community estate was entitled to reimbursement from Wife's separate estate. Wife filed an amended petition asking the court to declare the marriage void. The trial court found that the marriage became valid a few months after the ceremonial wedding, when Husband's prior divorce was finalized. The court also granted Husband's request for reimbursement for the reduction of Wife's mortgage on her separate property Florida home. Wife appealed.

Holding: Reversed and Remanded

Opinion: Florida abolished common-law marriages in 1968, so the parties could not have entered a common law marriage while living there. Further, under Florida law, Husband and Wife's ceremonial marriage was void because Father was still married to his previous Wife. Such a void ceremonial marriage may become a valid common-law marriage under Florida law, but only if the impediment ceased to exist prior to January 1, 1968, which is when Florida quit recognizing common-law marriages.

While there was some evidence to support a common-law marriage after the parties moved to Texas, the trial court did not address that issue due to its erroneous ruling that the parties were married in Florida. Even if the parties did enter a common-law marriage after moving to Texas, the trial court's just and right division had to be remanded because it was based on an incorrect date of marriage.

Editor's Comment: *This case is a great example as to why pleading and arguing alternative methods of relief is many times a good choice, but further how difficult that can make the case. Here, even though Florida did not recognize common-law marriage, Wife could still have established, as an alternative, the beginning of a common law marriage in Texas. However, that would not have come without its own difficulties as there would be a new start date for the inception of community property, separate property, etc. You would almost essentially have to do two different methods of calculation, one based on a marriage beginning on a date in Florida and one based on a marriage beginning on a date in Texas. And, you almost have to bring the claims this way so there isn't a statute of limitations or a waiver problem. Tricky! J.H.J.*

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Editor's Comment: *As people increasingly move to Texas from other states, we must be mindful of the differences in law of the other states versus Texas. Only a few states currently recognize common law (or informal) marriage along with Texas: Alabama, Colorado, D.C., Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, and Utah. (New Hampshire only recognizes common law marriage as it relates to inheritance rights; Kentucky recognizes only for workers comp benefits.) Another handful of states recognize common law marriage up to the date it was outlawed in those states. When there is interplay between states for mobile couples, there must be a careful consideration of the laws of each state they lived in. Sometimes that may mean consulting with or hiring a lawyer from that state to advise. M.M.O.*

Editor's Comment: *Few states recognize common law marriage. According to the National Conference of State Legislatures, they are Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas and Utah. http://www.ncsl.org/research/human-services/common-law-marriage.aspx (accessed September 6, 2016). J.V.*

DIVORCE
INFORMAL MARRIAGE

NO COMMON LAW MARRIAGE EXISTED BECAUSE EX-WIFE FAILED TO SHOW THAT EX-HUSBAND EVER AGREED TO BE REMARRIED.

¶16-4-02. *Estate of Sinatra v. Sinatra*, No. 13-14-00565-CV, 2016 WL 4040290 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (07-28-16).

Facts: Ex-Husband and Ex-Wife divorced but remained close. They travelled together. Ex-Husband visited Ex-Wife and her Children. Ex-Husband continued to support Ex-Wife and her Children because he felt it was appropriate. Over ten years later, Ex-Wife filed a petition for divorce, alleging a common-law marriage existed after the prior divorce. Ex-Husband argued that he never agreed to be married. The trial court found a marriage existed and divided the community property. Ex-Husband appealed.

Holding: Reversed and Rendered

Opinion: An agreement to create a common law marriage must be specific and mutual. Here, there was no evidence that Ex-Husband ever intended to be married to Wife after their divorce or that he actually agreed to be married. Further, when it came to legal matters, neither party claimed to be married. When they purchased property together, they identified themselves as single tenants-in-common. Ex-Husband filed his tax returns and single, and Ex-Wife filed hers as head of household (which cannot be done by a married person). Additionally, Ex-Husband filed gift-tax returns for money given to Ex-Wife after the divorce, when gifts between spouses are tax exempt.

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DIVORCE
STANDING AND JURISDICTION

INDIAN CHILD WELFARE ACT INAPPLICABLE TO DIVORCE WITH CHILDREN.

¶16-4-03. *Villareal v. Villareal*, No. 04-15-00551-CV, 2016 WL 4124067 (Tex. App.—San Antonio 2016, no pet. h.) (mem. op.) (08-03-16).

Facts: Mother filed a petition for divorce in a Texas trial court. The trial court notified her that a failure to pay court costs within 20 days would result in a dismissal. Mother did not pay the costs, but no order dismissing the case was entered. A few months later, Mother filed a petition for divorce in the San Carlos Apache Tribal Court and obtained a default judgment. After the petition was filed in the tribal court but before the default judgment was signed, Father filed an answer and counter-petition in the Texas trial court. The Texas trial court determined it did not have jurisdiction to hear the divorce and dismissed the case. The Texas trial court reasoned that it had concurrent jurisdiction with the tribal court pursuant to the Indian Child Welfare Act ("ICWA"), and the tribal court had accepted jurisdiction. Father appealed.

Holding: Reversed and Remanded

Opinion: The ICWA applies to child custody proceedings but expressly does not apply to divorce proceedings in which custody is to be granted to one of the parents. The ICWA is intended to apply in situations involving attempts to remove children from their Native-American families. Here, the tribe was treated as though it were a state of the United States. When Mother filed her original petition, Texas had jurisdiction, as it was the Children's home state under the UCCJEA, and that proceeding had not been terminated or stayed. Thus, the tribal court could not exercise jurisdiction over the case, and its final order was void.

Editor's Comment: *As a quick note, it is very important to make sure that the original filings on a case are done in the proper court, especially if there is already a court of continuing, exclusive jurisdiction. Subject matter jurisdiction over an issue can never be waived, and can even be brought up for the first time on appeal. I see so many people file cases in completely different states, get final orders and rulings, and then have to do it all over again because the court of continuing jurisdiction did not properly give up or have the ability to give up it's exclusive authority over a case--essentially making the modification ruling void. J.H.J.*

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DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

FORMAL REFERRAL TO MEDIATION NOT PREREQUISITE TO OBTAIN ENFORCEABLE MSA PURSUANT TO TEX. FAM. CODE § 6.602.

¶16-4-04. *Cojocar v. Cojocar*, No. 03-14-00422-CV, 2016 WL 3390893 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (06-16-16).

Facts: During their divorce proceedings, Husband and Wife signed a mediated settlement agreement ("MSA"). Subsequently, Wife filed a motion to enter a final decree consistent with the MSA, and Husband filed a motion to revoke the MSA. The trial court denied Husband's motion, granted Wife's motion, and signed a final decree. Husband appealed, arguing in part that the trial court erred in failing to set aside the MSA because, while the MSA met the formal requirements in Tex. Fam. Code § 6.602(b), it did not meet the prerequisites of subsection (a), which provides:

> On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of marriage to mediation.

Husband argued that because the parties informally attended mediation without an order or written agreement, the MSA was not enforceable.

Holding: Affirmed

Opinion: The plain language of Tex. Fam. Code § 6.602(a) permits a court to refer a divorce suit to mediation; it does not require the court to do so. Thus, a court referral to mediation is not a prerequisite to an enforceable MSA pursuant to Tex. Fam. Code § 6.602.

DIVORCE
PROPERTY AGREEMENTS

¶16-4-05. *In re Marriage of Ard and Ard-Phillips*, No. 14-14-00808-CV, 2016 WL 3901902 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (mem. op.) (07-14-16).

Facts: Shortly after Husband and Wife married, they entered into a post-nuptial agreement premised on Husband's admission that he had made false statements about not having any sexual diseases or problems. Wife was a licensed attorney. Husband had a bachelor's degree in computer science and worked in IT. Wife had been divorced three time, and Husband had been divorced once and had no experience with post-nuptial agreements. Wife pressured Husband into signing the agreement with a threat that she would disclose to "everybody" his secret sexual proclivities and problems. Further, Wife indicated that because a statute of limitations was approaching, Husband had no time to have an attorney review the agreement. Husband signed it believing he had no choice.

An attorney's fees provision in the agreement provided that in the event that Wife had to enforce the agreement in court, Husband would pay her attorney's fees, whether or not she hired an attorney. Husband and Wife spent the next 10 years attempting to reconcile, but eventually, Husband filed for divorce. A jury determined that portions of the agreement were enforceable, but other portions were unconscionable and unenforceable. The trial court divided the remaining property not divided by the enforceable provisions of the agreement.

Subsequently, Wife's attorney withdrew and filed a petition in intervention seeking attorney's fees. Wife moved to strike the intervention and filed for Chapter 7 bankruptcy. Five years later, the trial continued and a final decree of divorce was signed. Wife filed a pro se appeal.

Holding: Affirmed

Opinion: Contrary to Wife's contention, the attorney's fees provision was severable from the rest of the agreement because they were not mutually dependent promises. Excising the attorney's fees provision would not defeat or undermine the essential purpose of the conscionable portions of the agreement.

Editor's Comment: *So if you are an attorney who is getting divorced, and your post-marital agreement says your spouse has to pay your attorney's fees to enforce it even if you represent yourself, that provision is unconscionable if you do represent yourself. What if you have a PC and hire it to represent you? What if your law firm represents you but you do most of the work? Questions for another day. J.V.*

DIVORCE
DIVISION OF PROPERTY

TRIAL COURT DID NOT ERR IN USING DATE IT RENDERED PROPERTY DIVISION—RATHER THAN DATE DIVORCE ORALLY RENDERED—FOR DIVIDING PARTIES' ASSETS.

¶16-4-06. *In re Marriage of Hammett*, No. 05-14-00613-CV, 2016 WL 3086126 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (06-01-16).

Facts: At the conclusion of trial in the divorce proceeding, the court orally granted the parties' a divorce but took all other matters under advisement. Almost three months later, the court sent the parties an email stating that it was dividing the community estate disproportionately in Wife's favor. Subsequently, the trial court signed a final decree that included a division of Husband's pension benefits based on the benefits accumulated as of the date of the court's email. Husband appealed, arguing that the date of division should have been based on the date when the divorce was pronounced, three months earlier.

Holding: Reversed and Rendered in Part; Affirmed in Part; Affirmed as Modified in Part

Opinion: The trial court's oral pronouncement was only an interlocutory judgment that did not become final until the court signed the final decree of divorce. "Furthermore, trial courts exercise broad discretion over the division of property in a divorce and when, as in this case, the date of divorce and the date on which the property is divided are different, the decision of which date to use should be left to the trial court's discretion."

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Editor's Comment: *I know this is an on-going issue, but I think the Court got it wrong. Texas Family Code 6.801(a) provides: "Except as otherwise provided by this subchapter, neither party to a divorce may marry a third party before the 31st day after the date the divorce is decreed." Notably, the statute does not say "the date the divorce is finally decreed." Therefore, if parties are free to remarry 31 days after a court decrees them divorced, whether that decree is interlocutory or final, then under this opinion, if a party remarries prior to the final decree of divorce, that party could be accumulating community property in two different marriages. G.L.S.*

Editor's Comment: *I absolutely agree that the court here got this wrong. In essence, parties can be divorced and free to remarry, yet wait for months and months for their divorce decree to be entered. Is this ruling really trying to stand for the proposition that all of that properly accumulated in that timeframe is still divisible? The court stated that the trial court has a wide discussion in dividing property. However, the court can only divide community property, so how can the court divide property that accumulates after the parties are declared divorced? I think the only reasonable answer is that, it simply cannot. J.H.J.*

Editor's Comment: *This is a terrible result. I hope this case is going up to SCOTX and they fix it. The date the divorce is granted is the date of divorce. That is the date upon which community property ceases to exist. Property acquired after divorce is not marital property and is not subject to division by the divorce court. This is a jurisdictional issue. The court has no jurisdiction over the property of either party after the date of divorce. There should be zero discretion to address property of the parties' post-divorce. There are many constitutional problems with this opinion! M.M.O.*

Editor's Comment: *Wait a minute: "At the conclusion of trial, on May 4, 2012, the trial court announced it was orally granting the parties a divorce but taking all other matters, including the division of property, under advisement." But property division cannot be severed from a divorce. Accordingly, as the opinion recognizes, the grant of the divorce was interlocutory. Thus, dividing property as of a later date was within the trial court's discretion. J.V.*

MOTHER'S UNPLEADED CLAIM FOR DAMGAGES FOR CONVERSION OF PROPERTY TRIED BY CONSENT.

¶16-4-07. *Espronceda v. Espronceda*, No. 13-15-00081-CV, 2016 WL 3225860 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (06-09-16).

Facts: During their marriage, Mother and Father had one child. In her divorce pleading, Mother sought child support, a disproportionate share of the marital estate, and reimbursement from the community estate to her separate estate, from Father's separate estate to the community estate, and from Father's separate estate to her separate estate. During the final hearing, Mother complained that while she was in prison for two years, Father removed $300,000 worth of her separate property. At the time, Mother's sister called the police, and Father told them that he had put the items into storage. In her requested relief in the divorce proceeding, Mother asked for an order compelling Father to return the items or an order for Father to pay her $300,000 in reimbursement for the loss of the items. The trial court granted the divorce, divided the community, and ordered to Father to pay ongoing child support, retroactive child support, and a $300,000 judgment to Mother. Father appealed, arguing that Mother failed to plead for either retroactive child support or the "reimbursement" award and that Mother's testimony alone as to value was insufficient to support the judgment.

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Holding: Reversed and Rendered in part; Affirmed in part

Opinion: Mother's pleadings asked for child support "in the manner specified by the Court," which was not specific enough to give Father fair notice that Mother was seeking retroactive child support. Further, because the issue was not addressed during trial, it was not tried by consent.

Despite the lack of a pleading regarding items removed from the marital estate, the issue of conversion was tried by consent. Mother testified about items removed from the home while she was in prison and that Father claimed to have put the items in storage. Mother repeatedly asked the court to reimburse her for the items. Father was cross-examined without objection on the value of the items. Finally, Mother explicitly stated at the end of the hearing that she sought an order compelling the return of the items or a money judgment to compensate her for her loss.

Finally, a party's uncontroverted testimony regarding the value of her own property is sufficient to sustain a finding as to value.

Editor's Comment: *Object, object, object! The damage here was done when the testimony was allowed in and the cross-examination occurred without any kind of objection or ruling on the record. Remember that if you do not object and obtain a ruling on your objection on the record, many times, in fact most times, your objection has been waived. As a trial tip, I would suggest that if you even think this might become an issue, I would stand up and make an objection and obtain a ruling on the record. That way you have at least preserved the record on appeal rather than waived your client's objection. J.H.J.*

AFTER NEW TRIAL ESTABLISHED DIFFERENT DATE OF MARRIAGE, TRIAL COURT COULD NOT USE SAME PROPERTY DIVISION FROM PREVIOUS TRIAL.

¶16-4-08. *In re J.J.F.R., Jr.*, No. 04-15-00751-CV, 2016 WL 3944823 (Tex. App.—San Antonio 2016, no pet. h.) (mem. op.) (07-20-16).

Facts: After signing a decree dissolving an informal marriage, the court granted Husband a new trial "as to the issue of whether the parties were common-law married." After a new trial, the trial court again found the parties were informally married but as of a different date. The new final order incorporated the prior property division without change. Husband appealed, argued that the discrepancy in the date of marriage meant that Wife was awarded some of Husband's separate property.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The final order from the prior trial found that parties were married in 2000. After the new trial, the trial court found that the parties were married in 2004. Thus, the property division may have divested the parties of separate property, which may have materially affected the just and right division of the community estate.

There was no dispute appellant and appellee lived together from at least early 2000 to 2009; however, because appellant was still married to Nora during a portion of this time, any "marriage" between appellant and appellee was void until appellant's marriage to Nora was terminated. *See* TEX. FAM. CODE ANN. § 6.202(a) (A "marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse."). The Family Code provides that the "later marriage that is void under this section becomes valid when the prior marriage is dissolved if, after the date of the dissolution, the parties have lived together as husband and wife and represented

themselves to others as being married." *Id.* at § 6.202(b). Therefore, the informal marriage between appellant and appellee—if proved—became valid when appellant's marriage to Nora was dissolved "if, after the date of the dissolution," appellant and appellee "lived together as husband and wife and represented themselves to others as being married." *Id.* Therefore, the first issue to address is the question of when the marriage to Nora was dissolved.

TRIAL COURT ABUSED ITS DISCRETION WHEN IT IN EFFECT AWARDED PARTNERSHIP PROPERTY AS PART OF THE COMMUNITY ESTATE.

¶16-4-09. ***Gonzales v. Maggio,*** ___ S.W.3d ___, No. 03-14-00117-CV, 2016 WL 4429930 (Tex. App.—Austin 2016, no pet. h.) (08/18/16).

Facts: Gonzales and Maggio are each Texas-licensed attorneys who were formerly partners in both marriage and law practice. They divorced both maritally and professionally. The district court rendered its decree consistent with the jury's findings, naming Gonzales and Maggio joint managing conservators and granting Maggio the exclusive right to determine the children's primary residence within the State of Texas.

During their marriage, Gonzales and Maggio had formed a general partnership known as "Gonzales & Gonzales" (the Partnership) through which they had both practiced law. Although there was no written partnership agreement, it was undisputed that the couple had agreed to share 50-50 in the Partnership's capital, profits, and losses. The Partnership's chief business was plaintiffs' personal-injury work, principally auto-collision claims that tended to settle prior to suit or trial. The Partnership's standard contracts with clients provided for a "contingent-fee" arrangement—if and when the Partnership obtained a recovery on the claim, it was entitled to reimbursement of any expenses it had advanced plus a percentage of the net recovery. When and to the extent the Partnership enjoyed a net profit on a claim, the proceeds would be split evenly between Gonzales and Maggio, and the two partners would likewise participate equally in any losses.

In a Rule 11 agreement dated May 30, 2012, Gonzales and Maggio agreed that "Marissa is no longer a partner at Gonzales & Gonzales and the partnership is dissolved." They further agreed in the Rule 11 that "[t]he liabilities of [the Partnership] and other issues pertaining to winding up the firm will be handled at a later time, most likely a final hearing." This provision, as the parties acknowledge, referenced principles of Texas law governing dissolution and termination of general partnerships, which have been codified at relevant times in the Texas Business Organizations Code. Under these requirements, the Rule 11 agreement "dissolved" the Partnership but did not immediately or automatically conclude the Partnership's legal existence or operations. Instead, it triggered requirements under the Code that the partners "wind up" the Partnership's business and affairs—basically discharge its existing obligations and liquidate or distribute any remaining Partnership property among the partners—"as soon as reasonably practicable." During this process, a partnership's business operations continued to the limited extent necessary to wind up, and the partners continued to owe duties to the Partnership and each other to act with loyalty, with care, and in good faith. Only upon completion of this winding-up process does a partnership's legal existence terminate.

The Partnership's matters to be wound up included its rights and duties under its contingent-fee contracts in a number of cases that had not yet been resolved by the date of dissolution. Within a few weeks after dissolution, and as contemplated by another term of the Rule 11 agreement, Gonzales and Maggio transmitted a joint letter on Partnership letterhead advising each of the Partnership's clients that Maggio had left the Gonzales & Gonzales firm "to practice as a solo practitioner"; that Gonzales was continuing to practice law under the name of "Gonzales & Gonzales, Attorneys at Law"; and that the client had the right either to have Maggio "con-

tinue in her new capacity to represent you in this matter," have "the firm known as Gonzales & Gonzales, Attorneys at Law to continue to represent you," or retain "an entirely new attorney." The letter also included a form in which the client could indicate his or her choice, along with a self-addressed stamped envelope in which to return the form. The vast majority of Partnership clients opted to have the new Gonzales & Gonzales entity "continue to represent" them.

Thereafter, while their divorce litigation remained pending, both Gonzales and Maggio settled a number of cases that had originated with the Partnership and received expense reimbursements and attorney's-fee payments. Disputes arose concerning the respective entitlements of Gonzales and Maggio to these monies or similar payments that either side would receive from Partnership-originated cases in the future. Ultimately, the parties' dispute focused on what were termed two "buckets" of Partnership-originated cases. "Bucket 2" consisted of thirty Partnership-originated cases that had been settled between the date of the Partnership's dissolution and the date of divorce, twenty-five of which had been handled and payment received by Gonzales post-dissolution and five of which had been handled by Maggio. "Bucket 3," on the other hand, consisted of approximately forty cases that had still been pending on the date of divorce, in thirty-three of which Gonzales was counsel or co-counsel of record, six in which Maggio was counsel or co-counsel, and the remainder having previously been referred by the Partnership to another lawyer.

The court awarded Gonzales and Maggio, as his or her separate property, 50% of the fees that had been earned on the Bucket 2 cases, to "be calculated after the party who advanced the out-of-pocket case expenses is reimbursed." In the event the out-of-pocket expenses to be reimbursed had been advanced by the Partnership, the court ordered that the reimbursement payment would be split 50-50 between Gonzales and Maggio. In addition to stating these awards in terms of equations or formulas, the district court awarded Maggio a lump sum of $44,815.39 to be paid her by Gonzales "for her equal share of the net proceeds" in the Bucket 2 cases. This figure corresponded to 50% of $89,630.78, a calculation presented in evidence as the difference between the total expense reimbursements and net fees Gonzales had received on Bucket 2 cases over the total amount Maggio had received.

As for the Bucket 3 cases, the district court awarded Gonzales and Maggio, as his or her separate property, percentages of any net fees ultimately earned on those cases that varied according to the level of that attorney's involvement post-Partnership dissolution. The percentages varied as follows: 60% if the attorney had retained the case following the Partnership's dissolution; 40% if the other attorney had retained the case; and 50% if the case had been referred to a third-party attorney for handling. As with the Bucket 2 cases, the shares were to be calculated only after reimbursing the party who had advanced the out-of-pocket expenses, with Gonzales and Maggio each entitled to half of reimbursements of any expenses that had been advanced by the Partnership.

Gonzales appealed complaining of both aspects of the disunion that were addressed by the final decree. Gonzales challenged a decree provision allowing Maggio, as JMC with exclusive right to determine the primary residence of two children of the marriage, to locate that residence anywhere within the State of Texas. Gonzales's remaining issues complain of the decree's award of interests in cases that had been originated by the Gonzales-Maggio law partnership. As to the interests of Gonzales and Maggio in the Partnership *entity*, Gonzales argued that the parties' interests did not extend to rights in particular *assets* owned by the Partnership, as opposed to entitling them as partners to receive equal shares of profits and surplus. Emphasizing these principles, Gonzales characterized the district court's decree as having purported to divide Partnership property as if part of the community estate, a clear abuse of discretion.

Holding: Affirmed as to the geographic restrictions, reverse and remand, in part, as to the award of interests in cases.

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Opinion: The Rule 11 agreement in evidence explicitly contemplated that the Partnership would be wound up "most likely at a final hearing," and the parties' conduct thereafter was consistent with that expectation. The district court's ensuing award of lump sums from the Bucket 2 settlements is consistent with a winding up of this portion of the Partnership's work in progress. These respective distributions, in turn, would have become part of the community estate and subject to the district court's "just and right" division. However, the court's disposition of the Bucket 3 cases—which, again, was in the form of percentages of future net fees under contingent-fee contracts rather than lump sums—was inconsistent with a winding up. This is so because "a partner ... is not entitled to demand or receive from a partnership a distribution in any form other than cash" unless the partnership provides otherwise, and there was no evidence of such an agreement provision here. Consequently, the decree's disposition of the interests in Bucket 3 cases had the effect of awarding Partnership property as if part of the community estate, an abuse of discretion.

Editor's Comment: *Like most states, Texas follows the entity theory of partnership codified in the Uniform Partnership Act, not the aggregate theory, which regards a partnership as an aggregate of individuals without itself being an entity apart from them. J.V.*

SAPCR
PROCEDURE AND JURISDICTION

FLORIDA TRIAL COURT'S FAILURE TO COMMUNICATE OR RULE ON FATHER'S PENDING MOTION CONSTITUTED ITS IMPLICIT DECLINATION TO EXERCISE HOME-STATE JURISDICTION.

¶16-4-10. ***In re T.B.***, ___ S.W.3d ___, No. 02-16-00006-CV, 2016 WL 3889293 (Tex. App.—Fort Worth 2016, no pet. h.) (07-14-16).

Facts: Mother and Father never married but lived together and had two Children in Florida. When the couple broke up, Mother and the Children moved to Texas. Father filed a paternity suit in Florida. The Florida court signed an order approving a settlement agreement between the parties that declared Father the Children's father, set a visitation schedule, and did not require Father to pay child support. After Mother and the Children had lived in Texas for six months, Mother filed a motion to modify, seeking child support. Father filed a plea to the jurisdiction arguing that Florida retained jurisdiction under both the UCCJEA and UIFSA. After failed attempts to communicate with the Florida court, the Texas trial court signed an order granting Mother's requested relief. Father appealed.

Holding: Affirmed

Opinion: Under the UCCJEA, a home-state court may decline to exercise jurisdiction based on an inconvenient forum analysis. Here, Father and the Texas trial court each made multiple attempts to contact the Florida court, but no response was received. The Florida trial court's failure to communicate with Father or the Texas trial court or rule on Father's pending motion for over six months constituted an implicit determination by that court to decline to exercise its home-state jurisdiction. Accordingly, because the Child had lived in Texas for over six months, the Texas trial court properly exercised its jurisdiction under the UCCJEA.

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Further, because the Florida trial court only approved the parties' settlement agreement, it did not consider the issue of child support. Additionally, the only monetary obligation in the agreement was a requirement that Father pay his own travel expenses for himself and the Children for transport between Florida and Texas, which did not meet the definition of a "child support order." Thus, Florida never acquired jurisdiction under UIFSA, and the Texas trial court had jurisdiction to enter an order for child support.

Editor's Comment: *This is one of the more interesting cases that I have seen. Basically, according to this court, if the litigant in the court attempts reasonably to confer or set up a conference with the court having continuing, exclusive jurisdiction, and that court just simply doesn't respond, it has implicitly given up jurisdiction. The question to me then would become, what's a reasonable amount of time? Is it six months like in this case, or if the issues are more pressing, would it be less time? Does it matter if a party just contacts the court coordinator, or does it have to be written letter or email directly to the judge? I assume this is going to be on a case-by-case basis, but it's quite interesting none the less. J.H.J.*

COLORADO ORDER SPLITTING EXPENSES FOR THE CHILD QUALIFIED AS A "SUPPORT ORDER" UNDER UIFSA, WHICH DEPRIVED TEXAS OF JURISDICTION OVER MOTHER'S REQUEST FOR CHILD SUPPORT.

¶16-4-11. *In re Sanders*, No. 05-16-00617-CV, 2016 WL 3947093 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.) (07-18-16).

Facts: Mother and Father divorced in Colorado. A few years later Mother and the Child moved to Texas. A few years after that, the parents entered into a stipulated order in Colorado addressing custody and certain expenses related to the Child.

Subsequently, Mother filed a SAPCR in Texas, seeking an order for child support. Father contested Texas's jurisdiction under UIFSA. Mother contended that because the Colorado order provided that neither party would pay monthly child support, UIFSA did not apply. The trial court overruled Father's objection and orally ordered Father to pay monthly child support and medical support. Father petitioned for writ of mandamus. The appellate court denied his petition because no written conflicting order existed. However, the appellate court noted in a footnote UIFSA's definition of a support order.

Shortly thereafter, the trial court entered a written order requiring Father to pay temporary child support and medical support. Father filed a second petition for writ of mandamus and a stay of the temporary support order.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The Colorado order included provisions requiring the parties to split expenses for the child, including medical, health insurance, and extracurricular activities. Thus, despite a lack of a provision for monthly child support, the order met the definition of a "support order" under UIFSA. Further, because Father—a person affected by the order—continued to reside in Colorado, Texas lacked jurisdiction to enter orders regarding child support. Accordingly, the appellate court ordered the trial court to vacate the child support order and dismiss Mother's SAPCR for lack of jurisdiction.

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GRANDPARENTS FAILED TO ESTABLISH STANDING TO SEEK CONSERVATORSHIP BECAUSE PARENTS HAD NOT ABDICATED THEIR PARENTAL DUTIES.

¶16-4-12. *In re H.S.*, No. 02-15-00303-CV, 2016 WL 4040497 (Tex. App.—Fort Worth 2016, no pet. h.) (mem. op.) (07-28-16).

Facts: Mother and Father never married, but they co-parented the Child from birth. The parents were named joint managing conservators, and Mother had the exclusive right to designate the Child's primary residence. Mother lived with the Child's maternal Grandparents until the Child was about a year old. At that time, Grandparents, Mother, and Father agreed that Mother needed to seek treatment for alcohol abuse. Mother and Father agreed to let the Child live with Grandparents while Mother lived at Sober Living. Six months and one week after Mother entered rehab, Grandparents filed a petition to modify conservatorship, alleging that Mother voluntarily relinquished actual care, custody, and control of the Child and sought to be appointed the conservator with the exclusive right to designate the Child's primary residence. Father filed a plea to the jurisdiction, asserting Grandparents lacked standing to bring their suit. The trial court agreed with Father and dismissed Grandparents' suit. They appealed.

Holding: Affirmed

Opinion: Following its own and Beaumont's precedent, the Fort Worth Court held that the word "control" means "something more than the control implicit in having care and possession of the child." It "refers to the power or authority to guide and manage and includes the authority to make decisions of legal significance for the child." Thus, to have actual care and control, a nonparent must show that the parents are inadequately caring for the child or have abdicated their parental duties. The court opined that to allow a nonparent to gain standing when a fit parent has not abdicated his parental rights is contrary to *Troxel*.

Here, there was no evidence that either Mother or Father was an unfit parent. Mother continued to visit the Child while in Grandparents' care, cared for, bathed, read to the Child, and put the Child to bed. Mother continued to make doctor's appointments for the Child. Grandparents had to receive medical authorization from Mother and Father to attend to the Child's acute care needs. Father saw the Child at least every other weekend and testified that he had never gone more than four days without seeing the Child.

Editor's Comment: *These nonparent standing cases are all over the place. SCOTX needs to find one on point to clarify the standard for "actual care, control, and possession" (especially the "control" element) once and for all! In this case, the child was living with grandparents and the parents were visiting. I don't see how that isn't an abdication of parental control? Note, this case was decided after final trial on the merits. Standing is ultimately a final trial issue. Troxel and the parental presumption will also apply at final trial. GPs will have to show that both/either parent is unfit to gain custody. While the Mother clearly had issues, that doesn't preclude Father from invoking Troxel and the parental presumption for conservatorship. M.M.O.*

Editor's Comment: *The Court has conflated the issue of standing with the issue of a parent's rights under Troxel. There is no "abdication" requirement in Troxel. How can it be that the mere issue of standing "implicitly raises the issue of whether the parents are adequately caring for the child or have abdicated their parental duties of care for and control of the child?" The Court should have held that the grandparents had standing, then presumed the parents' fitness and placed the burden on the grandparents to prove that the parents were unfit. In short, standing gets you to the courthouse where you must then prove your case. J.V.*

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"ACTUAL CONTROL" DOES NOT REQUIRE A PARENT OR CONSERVATOR TO RELINQUISH THEIR RIGHT OVER A CHILD OR THE PERSON ASSERTING STANDING TO HAVE ULTIMATE LEGAL CONTROL OVER A CHILD.

¶16-4-13. ***In re Lankford*****,** ___ S.W.3d ___, No. 12-15-00149-CV, 2016 WL 4447697 (Tex. App.—Tyler 2016, orig. proceeding) (08-24-16).

Facts: T.D.L. is 14 year old biological child of F and M, who were divorced in 2003. T.D.L. started living with F when she was 3 months old after F and M separated. From 2003 until sometime in 2007, F "outside of the States." During that time, Paternal Grandmother ("PGM"), lived in F's house with T.D.L.

F and Smith married in 2008, but had been together since sometime in 2007. T.D.L. was approximately 5 years old when the relationship began. From 2007 to 2012, F worked out of town, and was away from home between 50% and 80% of the time. Smith and T.D.L. remained in the family home. In July 2012, F began working in Afghanistan. According to F, this was "a decision by [him] that [he and Smith] discussed and agreed upon." F elected expatriate status, which prohibits him from being in the U.S. more than 35 days a year. Smith and T.D.L. again remained in the family home.

In November 2014, Smith filed for divorce at F's request. Her petition included a motion to modify the existing conservatorship order to appoint Smith and F as JMCs of T.D.L. Smith also requested that she be designated as the conservator having the exclusive right to designate T.D.L.'s primary residence. She alleged that she has standing under Texas Family Code Section 102.003(a)(9) to seek modification of the order.

Through various errors and misunderstandings that occurred in prior proceedings, the existing conservatorship order, which was rendered in 2004, made PGM managing conservator and F and M possessory conservators. However, F believed the 3 were JMCs. He also believed that he had the right to designate T.D.L.'s residence.

In December 2014, F and PGM filed a motion to modify the 2004 order to make them joint managing conservators. Additionally, they asserted that Smith's motion to modify must be filed in the pre-existing SAPCR. Smith moved to sever the conservatorship issue and consolidate it with the SAPCR. The trial court granted the motion. F filed a plea to the jurisdiction and motion to dismiss alleging Smith lacked standing. PGM raised the issue in her answer. After a hearing, the trial court concluded that Smith has standing under section 102.003(a)(9) and, by written order, overruled the pleas to the jurisdiction and the motion to dismiss. The trial court also rendered temporary orders designating Smith as a JMC of T.D.L.

Holding: Mandamus denied.

Opinion: F and PGM insisted that to have standing under subsection (a)(9), Smith must establish that she has had "legal control" over T.D.L. However, had the legislature intended "control" to mean "legal control" instead of "control" in its ordinary sense, it could easily have defined it as such. Or it could have defined "actual control" to mean "legal control." But it did neither. Therefore, the Tyler Court of Appeals joins the courts that hold limiting standing under subsection (a)(9) to those having the ultimate legal right to control a child would require reading words into the text "that are not there" and render the word "actual" either superfluous or meaningless. *See Jasek v. Tex. Dep't of Family & Protective Servs.*, 348 S.W.3d 523 (Tex. App.–Austin 2011, no pet.); *see also, See In the Interest of K.G.*, No. 05–14–01171–CV, 2016 WL 3265215, at *6 (Tex. App.–Dallas June 13, 2016, no pet.) (mem. op.); *In the Interest of K.S.*, No. 14–15–00008–CV, 2016 WL 1660366, at *4 (Tex. App.–Houston [14th Dist.] Apr. 26, 2016, pet. denied) (op.); *Interest of B.A.G.*, No. 11–11–00354-CV, 2013 WL 364240, at *10 (Tex. App.–Eastland

Jan. 13, 2013, no pet.) (mem. op.); *In the Interest of K.K.T.*, No. 07–11–00306–CV, 2012 WL 3553006, at *4 (Tex. App.–Amarillo Aug. 17, 2012, no pet.) (mem. op.).

Editor's Comment: *Just a quick note, this case continues to join a line of cases that disagree that you must have somehow had legal control of a child to have standing. When filing a case under the actual care and control statute, make sure and look at the caselaw in your specific jurisdiction. There is a major split of authority that continues on these issues. J.H.J.*

Editor's Comment: *In this case, the trial court overruled a pretrial motion challenging standing. The court of appeals denied mandamus. This means that standing becomes an issue for final trial. It is not a conclusive determination on standing until after final trial. However, the Troxel standard does not apply in this case because the PGM was already a party – parental presumption was out the window when PGM was part of the prior final order. M.M.O.*

Editor's Comment: *Compare this case with H.S., supra, where the Fort Worth Court required a showing of parental "abdication" for grandparent standing. Here, the Tyler Court correctly observes that the purpose of subsection (a)(9) (standing when a person has "actual care, control, and possession of the child") "is to create standing for those who have developed and maintained a relationship with a child over time." Thus, the Tyler Court held, there is no requirement that persons demonstrate "legal" control over a child to have standing. J.V.*

IF THE EVIDENCE CREATES A FACT QUESTION REGARDING THE JURISDICTIONAL ISSUE, THEN THE TRIAL COURT CANNOT GRANT A PLEA TO THE JURISDICTION.

¶16-4-14. ***In re R.E.R.*****,** ___ S.W.3d ___, No. 13-14-00489-CV, 2016 WL ###### (Tex. App.—Corpus Christi 2016, no pet. h.) (08-25-16).

Facts: A.R. and N.G., were in a same-sex relationship, and they decided that N.G. would have a child. A donor provided the sperm. A.R. and N.G. signed a donor agreement that stated, among other things, that N.G. "shall have absolute authority and power to appoint her life partner [(A.R.)] as guardian for CHILD, and that the mother and guardian may act with sole discretion as to all legal financial, medical and emotional needs of CHILD without any involvement with or demands of authority from DONOR and DONOR's WIFE." The agreement further stated that A.R. and N.G. "intended to go through the process known as second parent adopting" for R.E.R. N.G. gave birth to R.E.R., on July 21, 2009. According to A.R., both she and N.G. parented R.E.R. and resided together for approximately the next four years of R.E.R.'s life.

In June 2013, A.R. and N.G. separated. On July 5, 2013, N.G. drafted and signed a notarized document (the "July 2013 document") stating:

> I [N.G.] temporarily give temporary rights of [R.E.R.] to [A.R.].
> [A.R.] will have the rights and say so to any decision needed to be made for [R.E.R.].
> I [N.G.] will be able to see [R.E.R.] and keep her when able to. Also I [N.G.] will still be able to voice opinion for [R.E.R.'s] well-being.

In July of 2013, R.E.R. resided exclusively with A.R., and A.R. and N.G. agreed that they would implement a possession schedule. Subsequently, R.E.R. resided with N.G. and R.E.R. spent some weekends with A.R. In October of 2013, N.G. stopped allowing R.E.R to spend weekends with A.R. In November and December of 2013, A.R. continued visitation with R.E.R. two to three days per week at school and on weekends when N.G. allowed her visitation. According to A.R., throughout this time period, she "raised the issue [with N.G.] for the necessity for court orders for R.E.R.—however[,] [N.G.] informed her throughout this time that she considered [A.R.] to be R.E.R.'s mother, and that there was no need for the court to get involved."

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In 2014, A.R. filed her original SAPCR petition. N.G. filed her original answer claiming that A.R. lacked standing because "she did not have care, control, and possession" of R.E.R. A.R. amended her petition, along with a supporting brief, asserting that she had standing pursuant to Family Code Section 102.003(a)(9). N.G. filed a response arguing, among other things, that although she signed the July 2013 document, she later revoked that document by signing a notarized document, which is included in the record, that she claimed nullified the July 2013 document. N.G. also filed a plea to the jurisdiction on arguing that A.R. is not R.E.R.'s biological mother and had "not had care, control and possession of the child[]."

On May 14, 2014, the trial court issued temporary orders finding that it was not in R.E.R's best interest to sever her relationship with A.R. and that R.E.R. "has a special and important relationship with" A.R. The trial court appointed N.G. as temporary sole parent managing conservator and A.R. as temporary non-parent possessory conservator of R.E.R. N.G. then filed a motion to dismiss for lack of standing. The trial court issued its order granting N.G.'s motion to dismiss for lack of standing and plea to the jurisdiction and dismissing A.R.'s suit without prejudice. A.R. appealed.

Holding: Reversed and remanded.

Opinion: 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. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.

In support of her pleadings, A.R. stated that (1) N.G. and she had agreed that N.G. would have a baby, (2) the couple would co-parent the baby once it was born, (3) a donor provided the sperm, (4) the parties signed a donor agreement documenting the couple's intent that A.R. adopt the baby, (5) N.G. agreed that A.R. would adopt R.E.R., (6) A.R. resided with the child for the first four years of R.E.R's life, (7) N.G. gave the child, A.R.'s last name, (8) R.E.R. called A.R. "mommy," (9) N.G. signed the July 2013 document giving A.R. temporary custody of R.E.R., (10) A.R. had actual care, control, and possession of R.E.R. for at least six months, and (11) A.R. had filed her petition within ninety days of that period. Construing the pleadings liberally, A.R. gave fair notice of her basis to bring suit, and she sufficiently pleaded that she had actual care, control, and possession of R.E.R. Therefore, there is some evidence to support standing.

Editor's Comment: *Another nonparent standing case. This one was decided on a pre-trial motion to dismiss. The court of appeals pointed to "actual care, control, and possession" facts alleged by the nonparent that should have been sufficient to get this case to a final trial on the merits. The court of appeals reversed and remanded for final trial. This case does not preclude the parents from raising standing again at final trial. All it does is say that the nonparent had enough facts to get past a pretrial motion to dismiss and have a final trial on the issue of "actual care, control, and possession." All of that being said, I'm just not sure how the nonparent overcomes the Troxel parental presumption of fitness. If the nonparent cannot show the parent unfit to care for the child, the nonparent is out anyway and cannot be granted rights. To me, this is the bigger issue for the nonparent – if the parent is a fit parent, then you may win the standing "battle" but lose the custody "war." M.M.O.*

Editor's Comment: *Per Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004), extensively quoted in this opinion, a trial court has discretion to determine whether it has jurisdiction at a preliminary hearing or "await a fuller development of the case." Here, the trial court erred by dismissing the case for lack of standing because there was "some evidence" to support standing. The Petitioner might yet suffer a dismissal because the Court remanded the case "for*

proceedings consistent with this opinion" which could include standing findings adverse to the Petitioner. J.V.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

TEXAS FAMILY CODE SECTION 153.0071(e) DOES NOT APPLY TO SUITS TO TERMINATE THE PARENT-CHILD RELATIONSHIP.

¶16-4-15. ***In re Morris*****,** ___ S.W.3d ___, No. 14-16-00227-CV, 2016 WL 3457953 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (06-22-16).

Facts: Mother and Father were named joint managing conservators of their Child. Ten years later, Mother signed a voluntary relinquishment of her parental right to the Child, which waived her right to service and stated that termination was in the Child's best interest. However, the affidavit provided no facts to support that conclusion. Father filed a petition to terminate Mother's parental rights, and the parties signed an MSA that stated, "the terms of settlement are to enter the order of termination as attached." Subsequently, Father filed the MSA and appeared to prove up its terms. Father presented no evidence beyond the parties' agreement that the termination was in the Child's best interest. The trial court refused to enter the judgement pursuant to the MSA because there was no evidence that termination would be in the Child's best interest. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: Tex. Fam. Code § 161.001 permits a trial court to terminate a parent-child relationship if clear and convincing evidence establishes one of the enumerated acts in Subsection (1) and that termination is in the Child's best interest. A voluntary affidavit of relinquishment satisfies the first requirement but does not conclusively establish the second.

Here, Father introduced no evidence to support a best interest finding, and Mother's affidavit merely stated that termination was in the Child's best interest without providing any relevant facts. Further, although Father argued that the parties agreed to render an order, contracting parties cannot agree to "render" an order, as that is the office of the court. Contracting parties can agree to submit a proposed order to a court and request the court to sign the proposed order

Additionally, pursuant to the plain language of Tex. Fam. Code § 153.0071, any suit affecting the parent-child relationship—including a termination suit—can be referred to mediation. However, Section 153.0071(e) (providing that a party meeting certain prerequisites is entitled to a judgment on an MSA) only applies to suits under Chapter 153, or suits for conservatorship, possession, and access. By not including any SAPCR in Section 153.0071(e), the legislature likely considered the finality and irrevocability of terminations as opposed to suits for conservatorship, possession, and access, which can be modified. Another concern is that a termination impacts the fundamental liberty interests of the child, who is typically not a party to the parents' mediated settlement agreement.

Editor's Comment: *This case is a must read. It very specifically states that you cannot get around a best interest test by signing a MSA in a termination proceeding. It is still required that you prove up the termination factor and the best interest factor. The case has lots of good lan-*

guage about what a party must show to obtain the termination, and as a practice note, I think it's a good idea not only to make findings in your order that the termination satisfies all of those elements and requirements in the case, but also make sure to put on evidence of this at the prove up hearing. J.H.J.

MEDIATOR PROPER AUTHORITY TO RESOLVE DISPUTES REGARDING AN AMBIGUOUS MEDIATED SETTLEMENT AGREEMENT.

¶16-4-16. ***In re L.T.H.***, ___ S.W.3d ___, No. 14-15-00366-CV, 2016 WL 4480892 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (08-25-16).

Facts: Father filed a petition to modify the parent-child relationship seeking to revise and expand his possessory rights under an earlier agreed order. The trial court signed temporary orders providing that father would have possession of and access to the child pursuant to a modified standard possession order, which expanded father's periods of possession until the child reached the age of three. After the child reached the age of three, the temporary orders provided that father would have possession and access pursuant to a standard possession order.

Subsequently, father amended his petition to seek possession and access pursuant to a "fully expanded Standard Possession Order." The trial court referred the parties to mediation, and mother and father reached a settlement and executed a mediated settlement agreement (MSA). The MSA recited in boldfaced, capitalized, and underlined letters that it was not subject to revocation, and it was signed by the parties and their attorneys. The terms of the parties' agreement were contained in an attached Exhibit A incorporated into the MSA, which provided in relevant part:

POSSESSION AND ACCESS: Dad's periods of possession are to begin at 3 pm pickup from daycare or mom's residence. If the child is not at either location then Mom is to notify Dad so that he cannot pickup from the child's location

Dad"s periods of possession: Per Temporary Orders: Expanded SPO

If Dad does not take the child to daycare on his Friday possession period he must notify mom the location of the child where.

Kimberly Levi to draft Final Order: Order will include the Temp Order and the above additions to the Temp Orders.

Ms. Levi is father's attorney. The MSA also provided that the parties "shall" submit to binding arbitration with the mediator "regarding all (a) drafting disputes, (b) issues regarding interpretation of this [MSA] and (c) issues regarding the intent of the parties as reflected in this [MSA]."

Subsequently, the trial court held a hearing to address a dispute that had arisen concerning the language of the proposed order on the MSA as drafted by father's attorney. At the hearing, mother took the position that the parties had agreed to an order incorporating the temporary orders as modified in Exhibit A to the MSA, and that—as in the temporary orders—the standard possession order would apply once the child reached the age of three. Mother complained that, contrary to the parties' agreement, the proposed order extended father's periods of possession after the child turned three beyond what was contemplated in the temporary orders. The trial court disagreed, concluding that "the MSA is clear."

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Ultimately, the trial court signed an agreed order based on the MSA. This final order made several modifications to father's periods of possession, including granting father certain possessory rights after the child reached the age of three that differed from that portion of the temporary orders providing for a standard possession order after the child reached the age of three. Mother appealed.

Holding: Affirmed in Part, Reversed and Remanded in Part.

Opinion: Although mother and father provided conflicting interpretations of the meaning of "Per Temporary Orders: Expanded SPO," neither expressly argues that the terms of the MSA are ambiguous. The parties' failure to raise the issue of ambiguity is not determinative, however, because whether a contract is ambiguous is a question of law. On the record presented the court was unable to discern from the terms of the MSA or any other record evidence whether—as father argues—father's periods of possession under the modified standard possession order continue to apply after the child reaches the age of three, or—as mother argues—father's periods of possession return to a standard possession order after the child reaches the age of three as provided in the temporary orders.

Although conflicting interpretations alone do not establish ambiguity, the meaning of the phrase "Per Temporary Orders: Expanded SPO," is ambiguous because it is susceptible to more than one reasonable interpretation, creating a fact issue on the parties' intent. Because the MSA provides that in the event of in the event of drafting disputes, issues regarding the interpretation of the MSA, or issues regarding the parties' intent as reflected in the MSA, the parties must submit to binding arbitration. Because a fact issue exists regarding the interpretation of the MSA and the parties' intent concerning father's periods of possession, the trial court erred by resolving the dispute and determining the periods of possession to be awarded to father.

Editor's Comment: *Trial courts… READ THIS CASE! You cannot hear disputes about the wording of a final order stemming from an MSA in an entry hearing. If the MSA says the parties agree to "binding arbitration" to resolve disputes regarding the MSA, then that is what it means – arbitration. The trial court lacks jurisdiction to resolve the dispute. M.M.O,*

SAPCR
TEMPORARY ORDERS

TEX. FAM. CODE RESTRICTION AGAINST TEMPORARY ORDERS THAT CHANGE PERSON WITH RIGHT TO DESIGNATE CHILD'S RESIDENCE DID NOT APPLY BECAUSE NO FINAL ORDER PREVIOUSLY GRANTED THAT RIGHT.

¶16-4-17. ***In re G.P.***, ___ S.W.3d ___, No. 02-16-00236-CV, 2016 WL 4379450 (Tex. App.—Fort Worth 2016, orig. proceeding) (08-17-16).

Facts: An order adjudicating parentage appointed Mother and Father joint managing conservators of the Child. The order did not grant either parent the exclusive right to designate the Child's primary residence, but it did restrict the Child's residence to Denton County and contiguous counties. A few years later, the paternal Grandparents filed suit asking to be named joint managing conservators with Mother. Grandparents asked for Father's access to the Child be limited based on Father's history of family violence. The trial court signed temporary orders continuing Mother and Father as joint managing conservators, awarding Mother the exclusive right

to designate the Child's primary residence, and delineating periods of possession for Mother, Father, and Grandparents. Subsequently, Grandparents filed a motion to modify the temporary orders and again asked to be granted the exclusive right to designate the Child's primary residence. The trial court declined to set a hearing, stating that it was prohibited from entering temporary orders changing the person with the exclusive right to designate the Child's primary residence. Grandparents amended their petition asserting that the requested change was necessary because the Child's present circumstances would significantly impair the Child's physical health or emotional development. Grandparents attached supporting affidavits to the amended petition. The trial court responded by email stating that its position had not changed and that no hearing would be set. Grandparents filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Tex. Fam. Code 156.006 only prohibits temporary orders changing the person with the exclusive right to designate the child's primary residence under a previous *final order*. Here, the only prior final order did not award that right to either conservator. Moreover, even if the statue did apply in this case, Grandparents' petition satisfied exception by alleging that the requested change was necessary because the Child's present circumstances would significantly impair the Child's physical health or emotional development.

Editor's Comments: *This case is interesting because it clarifies the temporary orders on modification standards. Where a prior order is silent as to one parent or the other having exclusive right to designate primary residence, then no proof of significant impairment is required to meet the threshold of entitlement to a temporary hearing. The silence amounts to no order on primary which allows the trial court to modify on temp orders. M.M.O.*

SAPCR
FAMILY VIOLENCE

FATHER'S ANGRY OUTBURSTS SUFFICIENT TO SUPPORT PROTECTIVE ORDER EVEN THOUGH NO EVIDENCE THAT HE EVER PHYSICALLY HURT ANYONE.

¶16-4-18. ***Burt v. Francis*****,** ___ S.W.3d ___, No. 11-14-00244-CV, 2016 WL 4574286 (Tex. App.—Eastland 2016, no pet. h.) (08-25-16).

Facts: Mother and Father signed an agreed divorce decree providing that Father's visitations with the Children were to take place at his mother's house. Subsequently, Father would appear at Mother's and her mother's house to yell at them and the Children and would continue yelling after the front door was shut on him. Once, Father shot a gun at Mother's house, apparently to show the Children his new gun. When he would get angry, he would loom over Mother and the Children, flex his muscles, slam his fists, and yell foul language while standing very close to whomever he was yelling at. Mother testified that the Children were angry and stressed out "pretty much all the time" due to Father's conduct. Mother sought a protective order. In addition to Mother's testimony, Father's mother testified as to the negative effects Father's actions were having on the Children. Father testified that he was an emotional, passionate person and that he did not feel like he was yelling when talking to people. The trial court granted the protective order. Father appealed, arguing that there was no evidence that he ever tried to physically hurt Mother or the Children.

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Holding: Affirmed

Opinion: Even where no express threats are conveyed, a factfinder may conclude that an individual was reasonably placed in fear by another's actions. Here, Mother testified that she and the Children were fearful of Father because of his intimidating posture when yelling. One Child reacted to Father by trembling and crying. The trial court could have reasonably concluded Mother and the Children reasonably feared imminent physical harm.

SAPCR
CONSERVATORSHIP

EVIDENCE SUPPORTED GRANTING FATHER LIMITED SUPERVISED POSSESSION AND AWARDING NO PARENTAL RIGHTS.

¶16-4-19. *In re T.N.R.*, No. 05-16-00261-CV, 2016 WL 3660331 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (07-07-16).

Facts: Mother and Father only dated a few months. The Child was born while Father was in prison. When Father was released, he found the Child and began communicating with him via Facebook. Subsequently, Father reported Mother to TDFPS for neglecting the Child, which led the TDFPS seeking to terminate both parents' parental rights. Father filed a counter-petition for sole managing conservatorship. At trial, evidence focused on two-decades of Father's aggressive behavior, including an arrest during the pendency of the termination proceeding for threatening to kill an Arby's manager for failing to provide service quickly enough. Father denied and discounted credible evidence of violence against many ex-girlfriends and other individuals. Ultimately, the trial court did not terminate Father's parental rights, appointed him possessory conservator without any parental rights listed in Texas Family Code and granted limited supervised visitation with the Child. Father appealed.

Holding: Affirmed

Opinion: Extensive evidence established Father's history of aggressive, violent behavior. His refusal to accept responsibility in those incidents caused concern among the professionals involved in the case. Additionally, contrary to Father's argument that the denial of his rights should only be allowed in "extreme" circumstances, Father was not denied complete access to Child.

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SAPCR
POSSESSION

NO EVIDENCE TO SUPPORT ORDER GIVING GRANDMOTHER FIRST RIGHT OF REFUSAL AT TIMES MOTHER COULD NOT EXERCISE POSSESSION.

¶16-4-20. *In re K.G.*, No. 05-14-01171-CV, 2016 WL 3265215 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (06-13-16).

Facts: A divorce order appointed the Mother and Father joint managing conservators of the Child, and Father was ordered to pay child support. About 10 years later, the OAG filed a petition to increase Father's child support obligation. Father contested the petition, arguing that the Child actually lived with paternal Grandmother. Subsequently, Grandmother petitioned to have her, Mother, and Father named joint managing conservators; to grant her the exclusive right to designate the Child's primary residence; and to order Mother and Father to pay child support. After a bench trial, the court granted Grandmother's requested relief. Mother appealed, raising a number of issues, including a challenge to the trial court's award to Grandmother of a first right of refusal if Mother could not exercise her possession for more than three hours.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Tex. Fam. Code § 153.193 provides that an order that imposes limitations on a parent's right to possession may not exceed those that are required to protect the best interest of the child. Even if the concern was whether the Child was left unsupervised (a question expressly not addressed by the court), there was no evidence that the child's best interest required that Mother consult with Grandmother about supervision rather than making some other suitable arrangement.

SAPCR
CHILD SUPPORT

MOTHER LACKED STANDING TO SUE FATHER FOR ADULT DISABLED CHILD SUPPORT BECAUSE MOTHER DID NOT HAVE PHYSICAL CUSTODY OF OR GUARDIANSHIP OVER CHILD.

¶16-4-21. ***In re C.J.N.-S.***, ___ S.W.3d ___, No. 13-14-00729-CV, 2016 WL 3962705 (Tex. App.—Corpus Christi 2016, no pet. h.) (07-21-16).

Facts: When Mother and Father divorced, they had two minor children, one of whom had medical problems before turning 18-years old. The Child was able to live on her own at age 20 and was able to hold down a job for some time; however, she lost the job after being diagnosed with gastroparesis. Mother paid for the Child's multiple medical procedures and visited the Child several times a week to help with household chores. When the Child was 21, Mother filed suit seeking an order requiring Father to pay to Mother child support and medical support for the Child. Father argued that Mother lacked standing to bring the suit under Tex. Fam. Code §

154.303. Holding that the language of the statute was unclear, the trial court granted Mother her requested relief. Father appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 154.303 grants standing to bring suit for support of a disabled child to:

(1) A parent of the child or another person having physical custody or guardianship of the child under a court order; or
(2) the child if …

The court held that the plain meaning of the words in the statute grant standing to a parent or other person with physical custody of or guardianship over an adult child. The statute requires more than parentage alone. Allowing a parent to sue for support of an adult child without having to show any sort of continuing obligation to the Child's care could lead to unjust enrichment.

SAPCR
MODIFICATION

MOTHER OBTAINING PERMANENT RESIDENCY STATUS DID NOT CONSTITUTE MATERIAL AND SUBSTANTIAL CHANGE TO SUPPORT LIFTING RESTRICTION ON INTERNATIONAL TRAVEL.

¶16-4-22. *Wiese v. AlBakry*, No. 03-14-00799-CV, 2016 WL 3136874 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (06-01-16).

Facts: Mother (a citizen of Oman) and Father met at the University of Texas. They married, had two Children, and divorced when the Children were still toddlers. The agreed final decree provided that the parents could only travel internationally with the written consent of the other parent. About ten years later, Mother filed a petition to modify the decree to lift the international travel restriction because she asserted Father had never consented to allow her to travel with the Children, even to Mother's siblings' weddings in Oman. Mother testified that Oman was a relatively peaceful area, that the Children would benefit from being exposed to other cultures, and that travel to Europe, Asia, and Africa would be easier while visiting her family in Oman. Mother additionally explained that she had obtained her permanent residency status and that she had no plans to move from the U.S, where she had lived for the previous 19 years. Mother argued that even if Father's fear of abduction at the time of divorce was reasonable, the Children were old enough to contact Father by phone or email if necessary. Father presented an expert witness who testified that the parents' marriage would be considered void in Oman because Father was a non-Muslim. Thus, the Children would be considered illegitimate by the Oman courts, and Mother would easily be able to obtain custody of the Children in an Oman court—which was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague"). The trial court modified the decree to allow international travel under certain conditions. Father appealed.

Holding: Reversed and Rendered

Opinion: In its findings, the trial court stated that the material and substantial changes warranting lifting the restriction included the increased ages of the Children and Mother's permanent

residency status obtained after the divorce. Additionally, the appellate court liberally construed the findings to find that the trial court additionally based its determination on a finding that the Children would benefit more from international travel as a 10- and 12-year-old than they would have as toddlers. The appellate court held that anticipated changes, such as children aging, could not constitute a material and substantial change. Further, the Hague expressly provides that a parent's residency status is immaterial to an evaluation of a potential abduction.

Editor's Comment: *One point about this case… the court of appeals found that an anticipatory change in the future is not sufficient to establish current material and substantial change of circumstances. So here, anticipating that as the children got older, they would benefit from international travel was insufficient to justify modification of the current order to allow for international travel. M.M.O.*

CIRCUMSTANCES WARRANTED ORDER IN MODIFICATION SUIT FOR MOTHER'S CONTINUED SUPERVISED VISITATION DESPITE APPOINTMENT AS JOINT MANAGING CONSERVATOR.

¶16-4-23. ***In re P.A.C.,*** ___ S.W.3d ___, No. 14-14-00799-CV, 2016 WL 3213299 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (06-09-16).

Facts: In their divorce decree, Mother and Father were appointed joint managing conservators of their two Children, and the trial court ordered that Mother's access to the Children be supervised until a set date or until she completed a psychological evaluation, whichever occurred later. Subsequently, Father filed a motion to modify, arguing good cause existed to continue Mother's supervised possession and asked to be appointed sole managing conservator. Mother filed a petition seeking standard possession and the exclusive right to designate the Children's primary residence.

During trial, Mother admitted she had violated the court's orders with respect to her communications with Father and expressed the sentiment that she need not follow the orders if she disagreed with them. Mother had sent emails and text messages to Father accusing him of worshiping Satan and of persecuting God, her, and the Children. She asserted that Father would "get [his] day with the President of the U.S." When asked to explain that statement, she responded "[a]nything is possible." Mother claimed to be engaged to a man whom she had dated for 18 months, but the Children had never heard of him, Mother could not provide any contact information for him, and she stated that he could not be contacted by telephone because he was out of the country for several months.

A jury found that the parties should continue to be joint managing conservators and that Father should retain the exclusive right to designate the Children's primary residence. The trial court signed a final order incorporating the jury's findings and additionally ordered that Mother's periods of possession continue to be supervised and awarded Father the additional exclusive rights to consent to the Children's marriages and to represent them in legal actions. The order also provided for a "step up" possession schedule for Mother if she complied with court-ordered psychological counseling and did not violate the court's order. Mother appealed, arguing that the order did not conform to Father's pleadings and that the evidence was insufficient to support the judgment.

Holding: Affirmed

Opinion: Although Father did not explicitly request the additional exclusive rights awarded him, Father implicitly did so by asking to be appointed the sole managing conservator. Thus, his request encompassed requests for the two additional rights.

Mother had shown disregard for and violated the trial court's prior orders and admitted that her behavior at times was not in the Children's best interest, her mental health was questionable, and she tended to disparage Father when she was with the Children. Although supervised visitation is rare in a joint managing conservatorship, it may be appropriate when dictated by the circumstances.

Editor's Comment: *A request in pleadings for sole managing conservatorship necessarily encompases a request for any relief regarding conservatorship – JMC, allocation of rights/duties, etc. M.M.O.*

MOTHER'S ABUSE OF JUDICIAL PROCESS IN MODIFICATION SUIT WARRANTED AWARD TO FATHER FOR ATTORNEY'S FEES.

¶16-4-24. ***In re E.R.C.***, ___ S.W.3d ___, No. 06-15-00085-CV, 2016 WL 3355846 (Tex. App.—Texarkana 2016, no pet. h.) (06-14-16).

Facts: Mother, a licensed attorney with a history of autism, represented herself at trial and on appeal.

Father filed a motion to modify the parent-child relationship. After much litigation, the parents were appointed joint managing conservators of their Child with a 50-50 possession schedule. Father was granted exclusive rights regarding the Child's residence, education, medical, and psychological treatment. Mother was ordered to pay monthly child support and Father's attorney's fees. Mother appealed, arguing:

- error in the denial of her motion to recuse the trial court judge because his support of LGBT rights indicated a bias against Christians;
- that the local rule allowing for the random assignment of trial courts was unconstitutional;
- that a temporary order appointing a guardian ad litem violated her due process rights under the United States Constitution; and
- that the cumulative effect of errors—regarding, inter alia, discovery orders, conservatorship, visitation, child support violated, and attorney's fees—violated her due process rights under the United States Constitution.

Holding: Affirmed

Opinion: The majority of Mother's issues were not preserved for appeal, inadequately briefed, or moot. Additionally, the cumulative error doctrine—which "has found little favor with appellate courts"—only applies if errors exist.

While discovery generally must be concluded 30 days before trial, a trial court has discretion to allow additional discovery if new information is discovered after the deadline and the party seeking the information would be unfairly prejudiced if the discovery were not obtained. Here, Mother failed to disclose the existence of her psychiatric evaluation until two weeks before trial and asserted that she would not disclose it without a court order.

Mother failed to rebut the presumption that appointing the parents as joint managing conservators would be in the Child's best interest. Additionally, Mother had more than twice the net monthly resources than Father, which supported an order for her to pay Child support (at less

than 8% of her net monthly resources) even though the parents were given a 50-50 possession order.

Finally, Mother did not challenge the trial court's findings that she abused the judicial process by filing numerous and unnecessary pleadings and by filing numerous motions, complaints, and lawsuits against various professionals involved in the case. Thus, the unchallenged finding supported an award for Father's attorney's fees.

Editor's Comment: *The autism issue pertained to court-ordered evaluations of both parties by a forensic psychologist who discovered that the appellant had a history of autism, then advised the parties that she had no expertise in autism and recommended another expert to conduct testing. The appellant failed to preserve error by inadequately objecting to admission of the forensic psychologist's report. J.V.*

TRIAL COURT LACKED DISCRETION TO DENY TRANSFER WHEN CHILDREN HAD UNQUESTIONABLY LIVED IN ANOTHER COUNTY FOR OVER SIX MONTHS.

¶16-4-25. *In re Burling*, No. 05-16-00529-CV, 2016 WL 3438075 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.) (06-21-16).

Facts: When Mother and Father divorced in Collin County, Mother was granted the exclusive right to designate their two Children's primary residence without geographical restrictions. Subsequently, the parties privately agreed that one Child would live with Mother in Harris County, and the other Child would live with Father in Collin County. A few years later, the parents agreed that both Children would live with Mother. However, the parties disagreed as to whether the new living arrangement was intended to be permanent or only for one year. A year after the second Child had moved in with Mother, Mother filed in Collin County a motion to modify child support and a motion to transfer the case to Harris County. Father filed a controverting affidavit, asserting that although the second Child had been in Harris County for over six months, the arrangement was only temporary. After a hearing, the trial court denied Mother's motion to transfer, and she filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: When a controverting affidavit fails to deny that grounds for transfer exist the allegations in the motion to transfer are effectively uncontroverted. Here, Father acknowledged in his affidavit that both Children had lived in Harris County for over six months. Thus, transfer was mandatory.

Editor's Comment: *One thing I find interesting is when a party files an affidavit that doesn't actually controvert the mandatory transfer facts, but says something totally and completely different. In my opinion, that's automatically an uncontroverted affidavit and the transfer is mandatory. I don't think you can just file an affidavit that says something irrelevant and then claim it's controverting. This case seems to support that. J.H.J.*

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COURT COULD NOT RENDER TEMPORARY ORDER CHANGING CONSERVATOR WITH EXCLUSIVE RIGHT TO DESIGNATE CHILD'S PRIMARY RESIDENCE ABSENT EVIDENCE THAT THE CHILD'S PRESENT CIRCUMSTANCES WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

¶16-4-26. *In re Montemayor*, No. 04-16-00222-CV, 2016 WL 3440130 (Tex. App.—San Antonio 2016, orig. proceeding) (mem. op.) (06-22-16).

Facts: Mother and Father were appointed joint managing conservators, and Mother was given the exclusive right to designate the Child's primary residence. When Mother accepted a job that would require her and the Child to move, Father filed a SAPCR, seeking a temporary order appointing him as the conservator with the exclusive right to designate the Child's primary residence. At the subsequent hearing on Father's motion, no evidence was introduced about whether Mother's move would significantly impair the Child's physical health or emotional development. Father and the ad litem each testified generally that it would be in the Child's best interest not to move. Mother testified about the improved life the Child would have as a result of the move. Ultimately, the trial court issued a temporary order granting Father the exclusive right to designate the Child's primary residence, referencing the "best interest of the child" as the applicable standard. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: No evidence supported any of the exceptions to Tex. Fam. Code § 156.006(b), which prohibits a court from rendering a temporary order that has the effect of changing the designation of the person with the exclusive right to designate the child's primary residence. Father, the trial court, and the attorney ad litem only addressed whether the temporary order would be in the Child's best interest, which is not an exception under the statute.

Additionally, although Mother did not file her petition for writ of mandamus until about eight months after the temporary order was issued, she did not waive her right to seek mandamus relief because the delay was not unreasonable. Wife's attorney withdrew shortly after the temporary order was issued, and her new attorney's first act was to file a motion to vacate the temporary order. The petition for writ of mandamus was filed the day after the trial court denied that motion.

Editor's Comment: *The laches doctrine did not prevent mother from filing mandamus of temporary orders where she showed that she continued to challenge the trial court's temporary order for 8 months following the initial order. Bottom line… don't rest on your laurels when planning to seek mandamus relief. M.M.O.*

FATHER FAILED TO SHOW MATERIAL AND SUBSTANTIAL CHANGE TO SUPPORT TERMINATION OF ADULT DISABLED CHILD SUPPORT.

¶16-4-27. *In re D.C.*, No. 13-15-00486-CV, 2016 WL 3962713 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (07-21-16).

Facts: The final divorce decree ordered Father to pay child support for his two Children and ordered Father to continue paying ongoing child support for one Child due to that Child's mental or physical disability. When the Child was in his mid-twenties, Father filed a petition to terminate his child support obligation.

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The Child was autistic but was able to graduate high school with the aid of his Mother, sister, and friends. When the Child went to college, Mother paid a friend of the Child to take care of the Child, and she drove to the college frequently to check on the Child. When the Child began working on a master's degree, his sister moved in with him. Although the Child was capable of doing some things for himself, he would not bathe himself unless directed to do so by his sister. He could not cook for himself or cross the street by himself. The trial court denied Father's motion, and Father appealed.

Holding: Affirmed

Opinion: Contrary to Father's assertion, the Tex. Fam. Code does not require a court to make § 154.130 findings regarding a deviation from guideline child support when the court denies a request to terminate previously order child support.

Father bore the burden to establish a material and substantial change in circumstances before the trial court could enter an order modifying child support. Although the decree did not specify the nature of the Child's disability, it did include a finding that the Child was disabled and required ongoing support, and the evidence supported a finding that the Child continued to require substantial care and personal supervision because of a mental or physical disability and was not capable of self-support.

MOTHER FAILED TO SHOW REMOVING GEOGRAPHIC RESTRICTION WAS IN CHILD'S BEST INTEREST.

¶16-4-28. *Romero v. Arguello*, No. 03-14-00674-CV, 2016 WL 3974762 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (07-21-16).

Facts: Mother had the exclusive right to designate the Child's primary residence with a geographic restriction. Mother's new husband joined the Air Force and was assigned to a base in North Dakota. Mother sought to have the geographical restriction removed so that she and the Child (and her two younger children) could move to North Dakota with her new husband. If the geographic restriction were not removed, Mother explained that they would have to maintain two households and that she and the children would not see her husband very often. Mother offered to increase Father's summer visitation and allow him daily video-chats with the Child. Father opposed the move, arguing that it would remove the Child from her extended family and the only home she had ever known. The trial court denied Mother's request, and she appealed.

Holding: Affirmed

Opinion: The evidence established that the Child's opportunities would be approximately the same whether she moved or not. While Mother and her new husband's financial situation would be improved by removing the geographic restriction, it would also negatively impact the Child's relationship with Father and her extended family.

MOTHER FAILED TO PLEAD OR PROVE MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

¶16-4-29. *Warren v. Ulatoski*, No. 03-15-00380-CV, 2016 WL 4269999 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (08-11-16).

Facts: A final divorce decree granted Father the exclusive right to designate the Child's primary residence. Three years later, the court signed an order that modified the decree's provisions regarding travel arrangements for the Child. A few years later, Mother filed a petition seeking sole managing conservatorship because she learned that Father was being investigated regarding allegations of sexual abuse against his former girlfriend's 12-year-old daughter. Two weeks after Mother filed her petition, TDFPS and the police both determined that the allegations were without merit and that the former girlfriend had made those types of allegations before. The case was being closed. After a hearing, the trial court granted Mother the exclusive right to designate the Child's primary residence. Father appealed, arguing that the evidence was legally and factually insufficient to support a finding that circumstances had materially and substantially changed.

Holding: Reversed and Rendered

Opinion: The only change alleged by Mother was the TDFPS investigation which was subsequently determined to be without merit. Mother never amended her petition to allege any other changes since the prior order.

Mother asserted that the court should look to the parties' circumstances in 2008, when the divorce decree was signed, because the 2011 modification order primarily dealt with travel arrangements for the Child's visitation with Mother. However, the 2011 order modified the decree's provisions related to the Child and was in response to Mother's previous motion to modify. Therefore, the Court compared the parties' circumstances in 2011 to their circumstances at the time of the March 2014 hearing.

TRANSFER MANDATORY BECAUSE FATHER FAILED TO TIMELY FILE A CONTROVERTING AFFIDAVIT.

¶16-4-30. *In re Alvarez*, No. 05-16-00753-CV, 2016 WL 4275032 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.) (08-15-16).

Facts: The trial court signed a final order in a modification proceeding. Five days later, Father filed a motion to set aside, modify, correct, or reform that order. Mother immediately filed a motion to transfer venue based on the Children's residence. Father filed no controverting affidavit. Instead, he filed a non-verified answer complaining that Mother's motion to transfer was untimely because it was not filed five years earlier, when Mother first sought modification. The trial court denied Mother's motion to transfer, and she filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A motion to transfer filed by a "petitioner or movant" is timely if it is made at the time the initial pleadings are filed. Tex. Fam. Code Ann. § 155.204. "Initial pleading" does not mean the first pleading in the case and does not require transfer motions be filed at the time the original petition is filed. On the contrary, a motion to modify a SAPCR is considered a new suit and, therefore, a motion to modify can be considered an "initial pleading" under section 155.204.

Here, the motion to modify and amended motion were filed the same day as the motion to transfer and amended motion to transfer.

A trial court has a ministerial duty to grant a motion to transfer when the motion is timely filed and not timely controverted. Here, Father failed to file a controverting affidavit, his response to Mother's motion was not verified, he attached no affidavit to his response, and he did not discuss the Children's current residence in his response.

SAPCR
CHILD SUPPORT ENFORCEMENT

OBLIGATION TO PAY CHILD SUPPORT NOT ENFORCEABLE BY CONTEMPT UNTIL DATE JUDGMENT IS SIGNED.

¶16-4-31. *Ex parte Huitrado-Soto*, No. 05-16-00545-CV, 2016 WL 3185357 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.) (06-08-16).

Facts: When Mother and Father divorced, the divorce decree ordered Father to pay monthly child support beginning two months after the decree was signed and to pay medical support beginning four months before the decree was signed. About four months later, Mother filed a motion to enforce the child support order. The trial court found Father in arrears for the period beginning four months before the decree was signed. The trial court held Father in civil and criminal contempt, ordered Father to pay arrearages and attorney's fees, assessed a $500 fine and sentenced him to 180 days' confinement. Father filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: A party cannot be held in constructive contempt of court for conduct that occurred before the court's order was reduced to writing. Therefore, Father could not be in arrears for failure to pay child support before the order was signed. Further, because the trial court imposed only one punishment for multiple acts of contempt, the order could not be reformed by the appellate court.

Editor's Comment: *This case seems basic, but I get surprised occasionally when someone tries this. Orders are enforceable by contempt from the date they are entered. Conduct that occurs prior to entry of the order may be enforceable by other remedies, like entry of judgment, but not by contempt. Remember enforcement remedies are a larger subset, of which contempt is only one. M.M.O.*

Editor's Comment: *To make your contempt stick, be sure to have the judge impose a separate punishment for each act of contempt. Otherwise, citing Ex parte Linder, 783 S.W.2d 754, 758 (Tex. App.-Dallas 1990, orig. proceeding), "entire contempt judgment is void if any one of acts that form basis of contempt finding is not properly punishable by contempt." J.V.*

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★★★TEXAS SUPREME COURT ★★★

FATHER'S DIRECT PAYMENTS FOR CHILD'S TUITION CONSTITUTED SUPPORT PAYMENTS; MOTHER NOT ENTITLED TO JUDGMENT FOR PAYMENTS NOT MADE THROUGH REGISTRY. DECISION CONFINED TO FACTS PRESENTED.

¶16-4-32. ***Ochsner v. Ochsner*****,** ___ S.W.3d ___, No. 14-0638, 2016 WL 3537255 (Tex. 2016) (06-24-16).

Facts: In their divorce decree, Father was ordered to pay monthly payments of $240 directly to Mother plus tuition payments directly to the Child's then-current daycare. In the event that the Child changed schools, Father was ordered to pay $400 monthly either directly to Mother or through the Child Support Office. When the Child changed schools, although Mother was then obligated to pay the Child's tuition, Father continued to pay Mother $240 a month plus tuition payments directly to various private schools rather than the $400 monthly to Mother through the registry. Over time, Father paid more than $20,000 above the amount contemplated.

Ten years after the Child left her original daycare, Mother filed an enforcement action, arguing that Father was in arrears for failing to make any payments through the state registry as ordered in the final decree. The trial court found in favor of Father. The appellate court reversed, and the trial court again found in favor of Father applying a different legal analysis. The appellate court again reversed, holding that the trial court had impermissibly enforced a private agreement to modify a child-support order. Father appealed to the Texas Supreme Court.

Holding: Appellate Judgment Reversed and Rendered, Trial Court affirmed

Majority Opinion: (J. Willett, C.J. Hecht, J. Green, J. Guzman, J. Lehrman, J. Devine, J. Brown). The interpretive focus of this case was on Tex. Fam. Code § 157.263, which provides that a trial court shall confirm the amount of arrearages and render a cumulative money judgment, which includes the unpaid child support, any balance previously owed, and interest. In confirming the "amount" of arrearages, a trial court must determine the quantity of the child support obligation that the obligor failed to meet.

Under Chapter 154 (Child Support), a trial court has considerable discretion to dictate the manner of payment in a child-support order. While an order for income withholding requires payment through a disbursement unit, nothing in the statute requires that *voluntary* payments be made through a state registry. The quantity of unmet child-support is a factual finding that the trial courts are capable of determining. Thus, upon review of Chapter 157 (Enforcement), the trial court may consider the various payments made by the obligor, regardless of the precise manner specified in the child-support order.

The Texas Supreme Court's precedent forbids private arrangements that allow obligors to shirk their obligations, but that was not the case here. This case involved *made* payments, not *missed* payments. Here, Father paid over $20,000 more than the divorce decree required, all of which contributed directly to the Child's education. Father did not attempt to abdicate his parental responsibility.

Further, the divorce decree required Father to make payments to the Child's original day care, and the method of payment was only to change after the Child no longer attended that day care. After that time, Mother would have been obligated to pay for the Child's education. Thus, Father's payments for the Child's tuition directly satisfied a debt owed by Mother. Accordingly, judgment against Father was not warranted because there were no "arrearages."

The Court noted that the decision in this case should be confined to the facts presented. It should not be read to encourage obligors to make direct payments, bypassing the registry, and,

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at a minimum, complicating enforcement proceedings. Under the specific facts of this case, Father paid more than, and was not attempting to reduce, the amount he owed.

Concurring Opinion: (J. Guzman, J. Lehrman). Chapter 157 allows a court to consider direct payments in determining whether an arrearage exists. Thus, logically, the trial court had discretion to consider the payments made by Father to the Child's school. Crediting evidence that payments were made directly to the obligee, rather than through a registry is not a modification of the amount of child support owed.

Dissenting Opinion: (J. Johnson, J. Boyd). The majority failed to follow basic principles of construction in enforcing an unambiguous divorce decree. While some provisions of the decree in this case allowed the parties to modify terms by written agreement, the method for making child support payments was not among them. Further, the payments to the Child's original day care were not categorized as child support in the decree. The majority improperly condoned Father's failure to comply with a court order. Additionally, the majority's opinion introduces uncertainty into enforcement actions by stating that a trial court need not, but may, enforce final judgments as they are written.

Dissenting Opinion: (J. Boyd, J. Johnson). Chapter 157 permits motions to enforce *provisions of a child-support order* and never mentions "discretion" or "best interests." The existing order had already been determined to be in the Child's best interest and was controlling to protect the Child's best interest, not the interests of either parent. Substantive provisions—including those concerning the method of payment—may only be changed by way of a proper modification order.

Here, Father failed to make payments in the manner specified by the child-support order. The majority acknowledged that no statutory counterclaims or offsets applied in this case. The trial court was asked to enforce the order, not what the court believed the order should have been. Further, the facts were not in dispute; rather, the question before the trial court was a legal question. A trial court abuses its discretion as to legal matters when it acts without reference to guiding rules. Father could have attempted to controvert the Child Support Office's payment record, but the Family Code did not permit him to controvert the child-support order itself.

The majority has announced a new rule permitting enforcement courts to consider payments not made in the manner specified by the order, which will likely lead to obligors seeking offsets for any payment made for the benefit of the child, ensuring that they never have to pay a penny more than the amount ordered. Whether for good or bad, that is not a rule in the Texas Family Code nor in the Texas Supreme Court's precedent.

Editor's Comment: *Regardless of what this case says that it just applies to these specific facts, I think this opens the door for spouses to start nickel and diming every little thing that they pay for their kids. How many clients do we have that pay child support, but also pay significant expenses on behalf of a child because they have the financial ability to do so? I can see someone voluntarily paying for select sports, and then trying to say that their child support is paid up or overpaid because instead of monthly child support payments, they were paying for sports. I can also see this now being a new affirmative defense we can plead to fight in child support enforcement cases. J.H.J.*

Editor's Comment: *My main comment about this case is the opinion's limitation to "the facts presented". Aren't all cases limited to the facts presented? But, shouldn't we lawyers and Texas jurisprudence in general be able to rely on SCOTX opinions as law applicable to other cases that come along. By putting this language in the opinion, are we allowed to rely on it as authoritative or not? If so, why put that language in there. If not, why issue an opinion at all? M.M.O.*

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Editor's Comment: *The Court did the equitable thing, but in doing so, it opened a huge can of worms. Per Justice Boyd's dissent, "The majority has announced a new rule permitting enforcement courts to consider payments not made in the manner specified by the order, which will likely lead to obligors seeking offsets for any payment made for the benefit of the child . . . ." J.V.*

FATHER'S ARREARAGES INCLUDED UNPAID CHILD SUPPORT OBLIGATIONS FOR TWO INDEPENDENT CHILD SUPPORT ORDERS RENDERED UNDER THE LAW PRIOR TO UIFSA.

¶16-4-33. ***In re J.R.G.***, ___ S.W.3d ___, No. 08-14-00313-CV, 2016 WL 4014089 (Tex. App.—El Paso 2016, no pet. h.) (07-27-16).

Facts: Mother and Father divorced in Alaska, and the decree included an obligation for Father to pay monthly child support. Subsequently, Father moved to Texas, and the Alaska OAG filed a petition in Texas seeking payment of child support arrearages. In early 1993, the Texas trial court rendered judgment against Father, ordered payment of the arrearages, and ordered Father to pay reduced monthly child support. However, the Texas order did not include language modifying the Alaska order or stating that it was the controlling order.

Many years later, the Texas OAG twice filed a motion to confirm arrearages; however, both motions were dismissed without prejudice. Subsequently, Father filed a petition for declaratory judgment, seeking a declaration that Texas had exclusive jurisdiction over the child support issues, that the Texas order was the only controlling order, and that any arrearages had been paid in full. After a trial, the trial court signed a judgment declaring that the Texas order had been entered pursuant to RURESA and that Father owed child support arrearages. The court further ordered Father to pay the arrearages pursuant to varying interest rates depending upon the dates during which the arrearages had been accrued. The OAG appealed, arguing that the judgment was not final and appealable because it failed to address all of Father's requested relief, that the trial court erred in failing to include the Alaska order's obligation when calculating arrearages, and that the trial court erred in its application of interest on Father's arrearages.

Holding: Reversed and Remanded

Opinion: Under the *Aldridge* presumption, any judgment following a conventional trial on the merits is presumed to be final for purposes of appeal. *See NE. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex. 1966). Here, nothing in the record dispelled the presumption of finality. Father, the petitioner, presented a proposed judgment, which was signed by the trial court with only one minor modification.

In September 1993, UIFSA replaced RURESA (Revised Uniform Reciprocal Enforcement of Support Act). Under RURESA, two independently valid support orders could exist simultaneously. Here, because the 1993 Texas support order—which was governed by RURESA—did not provide that it was modifying, replacing, or controlling the prior Alaska support order, both orders were enforceable.

Finally, the trial court abused its discretion by failing to apply the appropriate statutory interest rates effective at the time the arrearages were accrued.

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COMMITMENT ORDER VOID BECAUSE IT FAILED TO INCLUDE ANY FINDINGS REQUIRED BY TEX. FAM. CODE AND VIOLATED FATHER'S DUE PROCESS.

¶16-4-34. *In re Grimm*, No. 01-16-00062-CV, 2016 WL 4535986 (Tex. App.—Houston [1st. Dist.] 2016, orig. proceeding) (mem. op.) (08-30-16).

Facts: Mother filed a motion to enforce the divorce decree, alleging Father failed to pay five months each of child support and medical support. After a hearing, the trial court stated on the record that Father failed to comply with the divorce decree by failing to make payments in June 2013, December 2014, August 2015, September 2015, and November 2015. The court sentenced Father to confinement for 60 days and until he paid the arrears and Mother's attorney's fees. The court did not sign a written order for contempt. However, it did sign a written order for Father's commitment, which stated only that Father was to be confined for 60 days and confined until he paid arrearages. Father filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: The commitment order failed to identify the order for which enforcement was requested, the provisions with which Father failed to comply, or the manner of Father's non-compliance. Moreover, it failed to specify whether it was intended to be for civil or criminal contempt. If civil, it failed to include the specific conditions on which Father could be released from confinement. If criminal, it failed to specify a means of payment or to whom payment should be made.

Editor's comment: *Even though the trial court's order was deficient, it was still good enough to keep the Father in jail for seven days and force him to hire an attorney to file a writ of habeas corpus and post a $500 bond to be release from jail pending resolution of the writ. Hopefully, Father has learned that it is just easier to pay his child support. G.L.S.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

★★★TEXAS SUPREME COURT ★★★

DISSENT: TRIAL COURT HAD NO DISCRETION TO REFUSE TO RETURN CHILD TO FOSTER PARENTS.

¶16-4-35. ***In re C.T.***, ___ S.W.3d ___, No. 15-0098, 2016 WL 3212494 (Tex. 2016) (orig. proceeding) (06-10-16).

Facts: Mother signed an affidavit relinquishing her parental rights and designating Foster Parents as the Child's temporary managing conservators and prospective adoptive parents. At that time, Foster Parents were caring for seven children, including the Child and two of the Child's already adopted siblings. Subsequently, TDFPS removed all seven children from Foster Parents' care. TDFPS then filed suit to terminate Mother's parental rights, to assume conservatorship of the Child from Foster Parents, and to be named the Child's permanent managing conservator. After a hearing, the trial court ordered the return of most of the children, but appointed TDFPS temporary managing conservator of the Child.

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At a pre-trial hearing, the trial court orally stated that an extension was warranted because a jury trial was requested and several children were involved. However, the trial court neglected to set a new dismissal date. After the original dismissal date passed, the trial court signed a written order granting an extension and setting a new dismissal deadline. Foster Parents moved to dismiss, arguing that the extension was improper because there were no extraordinary circumstances and because the trial court failed to set a dismissal date as required by statute. The trial court denied the motion.

Holding: Writ of Mandamus Denied

Dissenting Opinion: (J. Guzman) The issues raised in this case were worthy of the Texas Supreme Court's attention. The Child was directly and immediately impacted by the legal issues presented, and the matter carried significant judicial import.

The Tex. Fam. Code allows TDFPS to obtain emergency orders to remove a child without notice or hearing. However, a full adversary hearing must be held shortly after the removal, and TDFPS bears the burden of proving it is entitled to maintain possession of the child due to a continuing danger to the child. Here, the court made none of the required statutory findings. Rather, it considered factors not relevant to the inquiry, such as the fact that Foster Parents homeschooled the Child. Moreover, the court returned the other children to Foster Parents' home but no evidence showed that the Child's circumstances were materially different from that of the other children.

Additionally, the trial court failed to set a new dismissal deadline when granting the extension, which made the extension order invalid. Further, whether the request for a jury trial constituted "extraordinary circumstances" necessitating an extension was questionable, and the Texas Supreme Court should have addressed the issue to provide guidance to the lower courts.

AN AFFIDAVID OF RELLINQUISHMENT IS NOT *IPSO FACTO* EVIDENCE THAT TERMINATION IS IN THE CHILDREN'S BEST INTEREST.

¶16-4-36. ***In re K.S.L.,*** ___ S.W.3d ___, No. 04-16-00020-CV, 2016 WL 3727952 (Tex. App.—San Antonio 2016, no pet. h.) (07/06/16).

Facts: Prior to the termination trial, both Mother and Father signed affidavits of voluntary relinquishment. The affidavits provided, in part, an acknowledgement that "[t]ermination of the parent-child relationship is in the best interest of the child(ren)." In the affidavits, the parents each designated TDFPS as managing conservator of the children and waived citation, notice, hearing, and notice of entry of any termination order. The parents also assented to their understanding that the affidavit of relinquishment, once signed, "is and shall be forever final, permanent, and irrevocable." At trial, the trial court took judicial notice of the affidavits. The only witness to testify was the Department caseworker, who answered "yes" when asked if she "believe[d] that accepting—the Court to accept the relinquishments is in the best interest of this child?" She further testified that the child was doing well in kinship placement with her paternal uncle and that the long-range permanency plan is relative adoption with the uncle. When asked if she believed "that this is best for [the child]," the caseworker replied, "yes." At the conclusion of the termination trial, the trial court terminated Mother's and Father's parental rights based *Bu*irrevocable affidavit of relinquishment of parental rights as provided by Chapter 161" of the Family Code and that termination of the parent-child relationship is in the best interest of the child. Tex. Fam. Code § 161.001(b)(1)(K), (2).

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On appeal, neither Mother nor Father contested the statutory ground for termination, but instead claimed there was insufficient evidence to support the trial court's best interest finding.

Holding: Termination reversed, affirmed as to all other aspects.

Majority Opinion (Martinez): While an affidavit of relinquishment of parental rights is "relevant to the best interest inquiry," "a relinquishment is not *ipso facto* evidence that termination is in the children's best interest. To hold otherwise would subsume the requirement of proving best interest by clear and convincing evidence into the requirement of proving an act or omission listed in section 161.001 by clear and convincing evidence." *In re A.H.,* 414 S.W.3d 802, 806 (Tex. App.—San Antonio 2013, no pet. *But see, In re J.H.,* 486 S.W.3d 190, 198 (Tex. App.—Dallas 2016, no. pet.) (section 161.211(c) "bars" an appellant's complaint that there is insufficient evidence of best interest where the appellant has also executed an affidavit of relinquishment).

Dissent (J. Pulliam): Texas Family Code Section 161.211(c) expressly applies to cases such as this involving challenges to the trial court's best interest finding when an affidavit of voluntary relinquishment forms the statutory basis for termination. The Family Code states that "[a] direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit." Tex. Fam. Code § 161.211(c). Neither Mother nor Father alleged that the execution of their affidavits was the result of fraud, duress, or coercion.

14-YEAR-OLD TWINS HAD STANDING TO ADJUDICATE PARENTAGE AND TERMINATE THE PARENT-CHILD RELATIONSHIP BETWEEN THEM AND THEIR MOTHER'S EX-HUSBAND, WHO WAS NOT THEIR BIOLOGICAL FATHER.

¶16-4-37. *In re J.A.C.*, No. 05-15-00554-CV, 2016 WL 3854215 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (07-13-16).

Facts: Mother and Father married and had two children. Additionally, Mother had Twins as a result of her secret, extramarital affair with Boyfriend. Subsequently, Mother and Father divorced in South Carolina, remarried, and divorced again in Georgia. About six years after the second divorce, the Twins, through Mother, sued Father and Boyfriend to have Boyfriend adjudicated as their father and to terminate their parent-child relationship with Father. Boyfriend filed a plea to the jurisdiction, arguing that the trial court lacked jurisdiction because Father had been twice adjudicated as the Twins' father in the two divorce decrees. Boyfriend argued that the Twins lacked standing to bring the suit. The trial court granted the plea and dismissed the suit. The Twins appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 160.637 provides that a child is not bound by a determination of parentage unless:

(1) the determination was based on an unrescinded acknowledgment of paternity and the acknowledgment is consistent with the results of genetic testing;
(2) the adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown; or

(3) the child was a party or was represented in the proceeding determining parentage by an attorney ad litem.

Here, there was no evidence of an acknowledgement of paternity, genetic testing, or formal adjudication of parentage. While the two divorce decrees stated that the Twins were children of the marriage, the decrees did not state that the adjudication was based on findings consistent with the results of genetic testing. Further, the four-year statute of limitations on challenging paternity only applies when there is an acknowledgement of paternity. Finally, there was no evidence that the Twins were parties to, or were represented in, the divorce proceedings.

TERMINATION PROCEEDINGS COULD NOT BE TOLLED MERELY DUE TO MOTHER'S STATUS AS MINOR.

¶16-4-38. ***In re G.A.C.***, ___ S.W.3d ___, No. 07-16-00050-CV, 2016 WL 3924020 (Tex. App.—Amarillo 2016, no pet. h.) (07-13-16).

Facts: Mother was sixteen years old when the Child was removed from the maternal grandmother's residence. After a trial, the court terminated Mother's parental rights. She appealed, asserting that termination of her parental rights should have been tolled until she was no longer a minor.

Holding: Affirmed

Opinion: The Tex. Fam. Code contemplates that a court may terminate the parental rights of a minor. The Fourteenth Amendment entitled Mother to due process and equal protection, but the Child's interests could not be sacrificed merely to preserve Mother's parental rights. Further, Mother was appointed one attorney to defend her parental rights and a second attorney to act as her guardian ad litem, which adequately secured her due process rights. Moreover, to grant an exception under this condition would constitute legislating from the bench and would undermine the legislature's intent to resolve termination proceedings expeditiously.

FATHER WAS ENTITLED TO PERSONAL SERVICE OF TERMINATION SUIT BECAUSE TDFPS KNEW FATHER'S IDENTITY AND LOCATION AND NAMED FATHER IN THE LAWSUIT, AND FATHER HAD NO KNOWLEDGE OF THE CHILD'S EXISTENCE.

¶16-4-39. ***In re P. RJ E.***, ___ S.W.3d ___, No. 01-15-01110-CV, 2016 WL 3901911 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (on reh'g) (07-14-16).

Facts: Mother and her boyfriend tested positive for drugs when the Child was born, so TDFPS placed the Child in a foster home. After Mother voluntarily relinquished her parental rights, TDFPS filed a petition to terminate the parents' parental rights. However, a DNA test revealed that the first suspected father was not the Child's father. TDFPS obtained an order to serve the Child's unknown fathers by publication and did so. After a lengthy search, TDFPS identified the Child's likely Father and amended the termination petition to seek to terminate Father's parental rights. However, Father was never served with notice. At the final trial, Father was represented by an ad litem who did not object to the lack of service on Father. Once Father learned of the termination, he appealed, arguing that the Tex. Fam. Code Sections allowing service by publication in termination suits were unconstitutional as applied in this case. TDFPS responded that it was not required to serve Father because he had not registered in the paternity registry.

Holding: Reversed and Remanded

Opinion: While the Texas Family Code allows for unknown fathers to be served via publication in a termination proceeding, the facts in this case required personal service. TDFPS was aware of Father's identity and location a month before the final hearing, it joined Father as a party, and there was no evidence Father knew of Mother's pregnancy, the Child's birth, or the termination proceeding. As applied under these circumstances, the failure to personally serve Father violated his right to due process. TDFPS could not rely on the prior service by publication on the Child's "unknown fathers." "When it is 'both possible and practicable to more adequately warn' the parent 'of the impending termination of [his or] her parental rights' notice by publication is inadequate." The court distinguished this case from *Lehr v. Robertson*, 463 U.S. 248—where the father knew of his child's existence—and *In re Baby Girl S.*, 407 S.W.3d 904—where the adoption agency had no knowledge of the identity of the child's father.

MOTHER'S APPOINTED ATTORNEY REQUIRED TO REMAIN ATTORNEY OF RECORD UNTIL EXHAUSTION OR WAIVER OF ALL APPEALS.

¶16-4-40. ***In re A.M.*****,** ___ S.W.3d ___, No. 01-16-00130-CV, 2016 WL 4055030 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (07-28-16).

Facts: The trial court terminated Mother's and Father's parental rights to the Children, and each were appointed appellate counsel. Father's counsel filed an appeal challenging the sufficiency of the evidence. Mother's counsel filed an *Anders* brief (asserting that there were no non-frivolous grounds upon which to base an appeal) and a motion to withdraw.

Holding: Appeal Affirmed; Motion to Withdraw Denied

Opinion: Mother's appointed counsel attempted to notify Mother by certified and first class mail of the brief, Mother's right to appeal pro se, and the motion to withdraw. However, the mailings were returned as undeliverable. While the appellate court agreed that Mother's appeal would have been frivolous, it noted that the appointed counsel's duty extended through the exhaustion or waiver of all appeals. Thus, if Mother wished to appeal to the Texas Supreme Court, Mother's appointed counsel could meet her obligation by filing an *Anders* brief in that court.

DISSENT: AFTER TDFPS REMOVED CHILDREN FROM MOTHER, TDFPS FAILED TO PRODUCE LEGALLY SUFFICIENT EVIDENCE TO JUSTIFY NOT RETURNING CHILDREN TO MOTHER.

¶16-4-41. ***In re B.M.*****,** ___ S.W.3d ___, No. 01-16-00229-CV & No. 01-16-00230, 2016 WL 4150743 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (J. Jennings, *dissenting*) (08-04-16).

Facts: Mother had three Children by two fathers. After receiving a referral alleging abuse, TDFPS removed the three Children from Mother's care. The youngest Child was placed in foster care, and the two older Children were placed with their father. Despite Mother's agreement to this arrangement, Mother allegedly retrieved the two older Children from their father. Subsequently, TDFPS filed a petition to modify conservatorship and to terminate Mother's parental rights. After a hearing, the trial court named TDFPS temporary sole managing conservator of

the Children. Mother filed a petition for writ of mandamus, arguing that the trial court erred in not returning the Children to their home with her.

Holding: Writ of Mandamus Denied (C.J. Radack, J. Lloyd)

Dissenting Opinion: (J. Jennings) Under certain circumstances, TDFPS may take emergency possession of a child without prior notice and a full hearing. However, once the children are removed, the trial court must hold an adversarial hearing, and TDFPS bears the burden to show:

(1) there was a danger to the physical health or safety of the child, . . . which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child;

(2) the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal; and

(3) reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.

pursuant to Tex. Fam. Code § 262.201(b). Here, there was no legally-sufficient evidence to establish any one of these three statutory requirements. Accordingly, the trial court had no choice but to order the return of the Children to their home.

ONLY ONE PREDICATE FINDING UNDER FAMILY CODE SECTION 161.001(1) IS NECESSARY TO SUPPORT A JUDGMENT OF TERMINATION WHEN THERE IS ALSO A FINDING THAT TERMINATION IS IN THE CHILD'S BEST INTEREST.

¶16-4-42. ***In re J.F.G.,*** ___ S.W.3d ___, No. 06-16-00031-CV, 2016 WL 4256921 (Tex. App.—Texarkana 2016, no pet. h.) (08/05/16).

Facts: In August 2014, while M was pregnant with J.F.G., her parental rights to her two older children were terminated based on a finding that termination of those rights was in the children's best interests and that M had engaged in acts or conduct pertaining to those children that satisfied the grounds for termination set out in Texas Family Code Section 161.001(b)(1)(D), (E), and (O) . In April 2015, when five-month-old J.F.G. and M were living with M's mother, two brothers, a sister, and her mother's boyfriend, the Department received information that J.F.G. had been admitted to Parkland Hospital with 2d degree burns to his left buttocks, left lower leg, and left ankle. M's explanation to the Department investigator was that J.F.G. had been sitting on an arm rest of the sofa when his fifteen-year-old aunt (M's sister, who was allegedly "intellectually delayed") sat down next to the child while holding a bowl of noodles. M stated that J.F.G. grabbed the bowl from his aunt's hands and that the bowl's contents spilled on J.F.G.

At trial, Dr. C. testified that J.F.G. suffered from significant burns, burns which M told him had been caused by the spilled hot water and noodles as described above. Dr. C described the burns, however, as having occurred by immersion. According to Dr. C, an immersion burn is a pattern of injury indicating contact with hot water (such as occurs when a foot is placed into some type of scalding hot water). Dr. C asserted that a burn caused by a spill exhibits a more irregular pattern. The burn pattern on J.F.G.'s left leg and foot was not, according to Dr. C, consistent with what was described as a spill. Moreover, the history that was described to Dr. Cox of J.F.G. reaching forward from a seated position would be unlikely, taking into account his age and his developmental abilities.

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J.F.G. was released from the hospital into the Department's conservatorship and was placed in a foster home, where he continued to reside at the time of trial. After an adversary hearing, the trial court issued a temporary order which reflected that there was a danger to J.F.G.'s physical health and safety and that his continued presence in the home was contrary to his welfare, that there was an urgent need for protection that required J.F.G.'s immediate removal from the home, and that although reasonable efforts were made to enable J.F.G. to return home, there was a substantial risk of continuing danger if that were done. S.J.'s parental rights to J.F.G. were terminated in accordance with Texas Family Code Section 161.001(b)(1)(D), (E), (M), (N), and (O).

M appealed claiming the evidence is legally and factually insufficient to support the jury's verdict of termination under grounds (D), (E), (N), and (O) of the Texas Family Code.

Holding: Affirmed.

Opinion: In addition to grounds (D), (E), (N), and (O), the trial court also terminated M's parental rights on ground (M), that she "had her parent-child relationship terminated with respect to another child based on a finding that the mother's conduct was in violation of § 161.001(b)(1)(D) or (E), Texas Family Code." Only one predicate finding under Section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest.

A COURT-APPOINTED ATTORNEY'S DUTY TO HIS OR HER CLIENT EXTENDS THROUGH THE EXHAUSTION OR WAIVER OF "ALL APPEALS IN RELATION TO ANY FINAL ORDER TERMINATING PARENTAL RIGHTS."

¶16-4-43. ***In re G.P.***, ___ S.W.3d ___, No. 06-16-00017-CV, 2016 WL 4490605 (Tex. App.—Texarkana 2016, no pet. h.) (08-25-16).

Facts: M's parental rights to her son were terminated after a bench trial in a suit brought by the TDFPS. M is represented on appeal by court-appointed counsel who concluded, after a thorough review of the record, that the appeal was frivolous and without merit. The appellate court agreed and affirmed the judgment of the trial court terminating M's parental rights, but denied counsel's motion to withdraw.

Counsel established that she provided M with a copy of her brief, provided her with a copy of the appellate record, and notified her of her right to file a pro se response and the deadline within which to do so. M did not timely exercised her right to file a pro se response.

Holding: Affirmed.

Opinion: An attorney's duty to his or her client extends through the exhaustion or waiver of "all appeals in relation to any final order terminating parental rights." Tex. Fam. Code § 107.016(2)B). If M wishes to pursue an appeal to the Supreme Court of Texas, "appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an Anders brief." *Anders v. California*, 386 U.S. 738 (1967).

¶16-4-44. ***In re C.J.*****,** ___ S.W.3d ___, No. 02-16-00143-CV, 2016 WL 4491231 (Tex. App.—Fort Worth 2016, no pet. h.) (08-26-16).

Facts: M's and F's parental rights to their children were terminated after a jury trial. M and F are represented on appeal by court-appointed counsel who concluded, after a thorough review of the record, that the appeal was frivolous and without merit. Both counsel also filed motions to withdraw. The appellate court agreed and affirmed the judgment of the trial court terminating M's and F's parental rights, but denied counsels' motion to withdraw. Although given an opportunity, neither M nor F filed responses.

Holding: Affirmed.

Opinion: An attorney's duty to his or her client extends through the exhaustion or waiver of "all appeals in relation to any final order terminating parental rights." Tex. Fam. Code § 107.016(2)B). Motions to withdraw filed by M's and F's counsels denied because they do not show "good cause" other than counsels' determination that an appeal would be frivolous. If M or F wishes to pursue an appeal to the Supreme Court of Texas, "appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an Anders brief." *Anders v. California*, 386 U.S. 738 (1967).

PSYCHOLOGICAL EXPERT'S TESTIMONY FOUND RELIABLE WHEN APPLYING *NENNO* FACTORS; *ROBINSON* FACTORS NOT APPLICABLE TO "SOFT" SCIENCES.

¶16-4-45. ***In re J.R.*****,** ___ S.W.3d ___, No. 10-16-00088-CV, 2016 WL ####### (Tex. App.—Waco 2016, no pet. h.) (08-31-16).

Facts: Mother appealed the termination of her parental rights, raising a number of issues, including a complaint that the expert who testified regarding her parenting and psychological assessment failed to establish the reliability of his underlying methodology.

Holding: Affirmed

Opinion: When testing the reliability of an expert's testimony regarding parenting and psychological assessments, the "soft" science factors provided in *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998) apply, i.e., whether:

(1) the field of expertise is a legitimate one;
(2) the subject matter of the expert's testimony is within the scope of that field; and
(3) the expert's testimony properly relies upon the principles involved in that field of study.

The factors laid out in *E.I. du Pont de Nemours v. Robinson* were not applicable.

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MISCELLANOUS

DUE TO BROAD LANGUAGE OF APPOINTING ORDER, RECEIVER WAS IMMUNE FROM WIFE'S POST-DIVORCE SUIT.

¶16-4-46. *Logsdon v. Owens*, No. 02-15-00254-CV, 2016 WL 3197953 (Tex. App.—Fort Worth 2016, no pet. h.) (mem. op.) (06-09-16).

Facts: When Husband admitted to having an affair, Wife began depleting the primary account of their jointly-owned business. In the subsequent divorce proceeding, a receiver was appointed to do "any and all acts necessary" with regard to the parties' property as ordered by the family court. In the final decree, the family court ordered the Receiver to sell the couple's business "under terms and conditions determined by…[the Receiver]." The receiver sold all of the company's assets at auction, rather than selling the company as a whole. The company's goodwill, name, and client list were not sold. The Receiver believed they had no value because neither party would sign a noncompetition agreement. After the auction, the net sales proceeds were distributed in accordance with the final decree. Subsequently, Husband, who had purchased a number of the company's assets at auction, used the client list to begin his own company. Wife sued Husband and the Receiver for fraud. The Receiver filed a motion for summary judgment, asserting derived judicial immunity. After the trial court granted the summary judgment and severed the action against the Receiver, Wife appealed.

Holding: Affirmed

Opinion: When entitled to derived judicial immunity, a person appointed to perform services for the court receives the same absolute immunity from liability as a judge acting in his or her official capacity. A person has derived judicial immunity if he or she is intimately associated with the judicial process. A court-appointed receiver is entitled to immunity to the extent that he was authorized to act by an order of the court.

Here, the agreed order appointing the Receiver was extremely broad, and the actions about which Wife complained all fell squarely under the authority delegated to him by the family court. Further there was no evidence that the Receiver had a relationship with Husband outside his role as receiver.

Editor's Comment: *Receiverships are being overused in Texas divorce cases. Receivers should not be immune from suit and courts should not have unfettered discretion to appoint them to resolve property disputes. M.M.O.*

TRIAL COURTS NOT REQUIRED TO ENFORCE LAWS CONTRARY TO PUBLIC POLICY OR VIOLATIVE OF DUE PROCESS RIGHTS.

¶16-4-47. **Tex. Att'y Gen. Op. No. KP-0094,** 2016 WL 3383777 (06-15-16).

Issues: Whether a trial court may refuse to enforce:

(1) a foreign judgment;
(2) an arbitration award that applied foreign law or principals of a particular faith;
(3) a foreign law;

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(4) a contract provision that applies foreign law;
(5) a contractual forum selection provision providing that a dispute will be resolved by a foreign court;
(9) an adoption order entered by a foreign court or jurisdiction

if doing so violates due process rights or is contrary to Texas's public policy.

(6) Whether a judge may exercise jurisdiction despite a more convenient foreign forum if foreign forum would apply law that violates due process rights or is contrary to Texas's public policy.
(7) Whether a trial court abuses its discretion in permitting the application of a foreign law that violates due process rights or is contrary to Texas's public policy.
(8) Whether a judge may refuse to enforce a provision of a contract that provides for a specific list of provisions, including arranged marriages and allowing a conservator to remove a child to a jurisdiction that permits female genital mutilation.
(10) Whether a judge may refuse to enforce a premarital agreement or partition agreement if the agreement is unconscionable.
(11) To what extent Tex. Civ. Prac. & Rem Code Ch. 36 applies in a family law dispute.

Opinion: With respect to issues one through five, under Texas law, a court is not required in family law disputes to enforce a foreign law if enforcement would be contrary to Texas public policy or if it would violate a party's basic right to due process. Similarly, a court must consider certain factors, including whether the parties will be deprived of all remedies or treated unfairly, when determining whether an alternative forum would be appropriate. Further, a trial court is without discretion to apply foreign law in a circumstance where doing so violates a party's right to due process or a clearly established public policy of this state. The Attorney General did not address the specific list of provisions presented by the questioner but rather, stated that to the extent any contract term violates Texas's public policy, a court may refuse to enforce it. The Attorney General noted that issue nine is specifically addressed by Tex. Fam. Code Section 162.023(a), which provides that a foreign adoption need not be enforced if "the adoption law or process of the foreign country violates the fundamental principles of human rights or the law or public policy of this state." Additionally, whether any specific agreement is unconscionable must be determined after analyzing the relevant facts. Finally, Tex. Civ. Prac. & Rem. Code Ch. 36 applies to foreign money judgments and, thus, would have limited application to family law disputes. However, to the extent it is applicable, a court need not recognize the judgment if the defendant did not receive adequate notice of the proceedings or if the cause of action is repugnant to Texas's public policy.

★★★UNITED STATES SUPREME COURT ★★★

THE FEDERAL BAN ON FIREARMS POSSESSION APPLIES TO ANY PERSON WITH A PRIOR MISDEMEANOR CONVICTION FOR THE "USE…OF PHYSICAL FORCE," INCLUDING ACTS OF FORCE UNDERTAKEN RECKLESSLY.

¶16-4-48. ***Voisine v. United States*****,** 579 U.S. ____, No. 14-10154, 2016 WL 3461559 (2016) (06-27-16).

Facts: Two petitioners found in possession of firearms were charged with violating the federal ban on firearms for those with prior convictions for misdemeanor domestic assault. Petitioners argued that they were not subject to the firearm prohibition because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct. The District Court rejected the claim, and the Circuit Court affirmed. The U.S. Supreme Court granted certiorari to

resolve a split over whether a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun under 18 U.S.C. § 922(g)(9).

Holding: Affirmed

Majority Opinion: (J. Kagan, C.J. Roberts, J. Ginsburg, J. Breyer, J. Alito) The majority's analysis focused on the word "use," which it defined as the "act of employing" something. To commit an assault recklessly is to act with conscious disregard of a substantial risk that one's conduct will cause harm. The force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. While the federal provision excludes "merely accidental" conduct, there is no exclusion for acts undertaken with awareness of the substantial risk of causing injury.

For example, if a husband with soapy hands loses his grip on a plate, which then shatters and cuts his wife, he has not "used" physical force. However, if he throws the plate in anger against the wall near where his wife is standing, that throw would be considered a qualifying "use of force" even if he did not know for certain, but only recognized a substantial risk, that a shard from the plate could injure his wife.

Similarly, if a person lets slip a door he is trying to hold for his girlfriend, he has not actively employed force, even if the result is her injury. But if he slams the door shut with his girlfriend following close behind, then he had actively employed force, regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb.

Dissenting Opinion: (J. Thomas, J. Sotomayor) Use of physical force requires intentional conduct—more than neglect or mere accidental conduct. Thus, "use of physical force" is narrower than most state assault statutes, which punish anyone who recklessly causes physical injury. The offenses for which Petitioners were convicted could be committed "intentionally, knowingly, or recklessly" as a single indivisible offense. Thus, the assault convictions did not necessarily include as an element the "use of physical force" against a family member.

The majority's definition of "use of physical force" is overbroad. Applying the majority's approach could lead to a permanent firearm ban for a father who recklessly caused a car accident—and injury to his son—by texting while driving. The "force" of the car crash and the resulting harm were reckless, but the father did not intentionally use violence against property. The "use of physical force" should be limited to persons who intentionally use force with a practical certainty that the action will cause injury.

The majority's examples of "nonvolitional" acts do not follow the traditional legal definition of the word. For the plate and door examples not to be volitional acts, they would need to be unwilled muscular movements, such as a person who drops the plate because of a seizure. The majority seeks to expand an already broad rule to any reckless physical injury or nonconsensual touch, which extends the statute into constitutionally problematic territory.

REFERRING COURT ERRED IN REFUSING TO SIGN FINAL ORDER OR CONDUCT DE NOVO REVIEW OF ASSOCIATE JUDGE'S PROPOSED ORDER.

¶16-4-49. *In re Clark*, No. 01-15-00729-CV, 2016 WL 3541704 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (mem. op.) (06-28-16). (and *Clark v. Clark*, No. 01-15-00615-CV, 2016 WL 3541704 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (mem. op.) (06-28-16)).

Facts: Father and Mother filed cross-petition to modify conservatorship. The final trial was held before an associate judge. On the record, Mother and Father waived their right to a de novo hearing before the referring court. At the trial's conclusion, the associate judge rendered an or-

der that he announced as final because the parties had waived de novo review. Father filed a motion for new trial, which the associate judge recommended denying. The referring court took no action on the motion for new trial.

Father filed a petition for writ of mandamus asking that the associate judge's order be vacated and the new trial be granted. The appellate court dismissed the petition for want of jurisdiction because no final order had been signed.

Father sent a letter to the referring court asking it to take action in light of the appellate court's dismissal. Subsequently, after the referring court still had taken no action, Father filed an appeal challenging the order and a new petition for writ of mandamus contending that the referring court abused its discretion in failing to take any action. Mother filed a response, arguing that the associate judge's order was final because the parties had waived their right to a de novo review, and thus, the referring court had no obligation to act.

Holding: Appeal dismissed for want of jurisdiction; Writ of Mandamus conditionally granted.

Opinion: Without a final order, the appellate court lacked jurisdiction to address an appeal. However, while the appellate court lacked jurisdiction to review an associate judge report that was not final, it did have mandamus jurisdiction over the referring court. Although a referring court has discretion with respect to *how* it chooses to act on an associate judge's proposed order, the referring court cannot refuse to take any action.

ERROR TO STRIKE MOTHER'S JURY DEMAND WHEN SHE FAILED TO COMPLY WITH LOCAL RULES.

¶16-4-50. *In re I.R.H.*, No. 01-15-00787-CV, 2016 WL 3571398 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (mem. op.) (06-30-16).

Facts: Father initiated a modification proceeding addressing conservatorship. During the proceedings, Mother's attorney withdrew, and Mother was provided with the withdrawal order and a list of pending settings and deadlines. Subsequently, Mother filed a response stating she did not want the prior orders for conservatorship or possession to change, except that she wanted a geographical restriction on the Children's residency placed because Father had moved almost annually with the Children over the prior five years. At the pretrial hearing, Mother requested a continuance to give her time to find an attorney. Father asked the trial court to strike Mother's jury demand because she failed to file a proposed parenting plan or proposed exhibits as required by the court's local rules. The trial court struck Mother's request for a jury trial because she was unprepared for the pretrial hearing, and the final trial began the following day. After the final order was signed, Mother appealed the denial of her jury demand.

Holding: Reversed and Remanded

Opinion: The local rules provided that failure to comply could result in Tex. R. Civ. P. 215 sanctions. However, nothing in Rule 215 provides for the striking of a jury demand. In fact, a jury demand survives even death-penalty sanctions for discovery abuse.

TEX. R. CIV. P. 91a PROVISION DIRECTING COURTS TO RULE ON MOTIONS TO DISMISS WITHIN 45-DAYS OF FILING IS DIRECTORIAL LANGUAGE, NOT MANDATORY.

¶16-4-51. ***Koenig v. Blaylock*, ___ S.W.3d ___, No. 03-15-00705-CV, 2016 WL 3610950 (Tex. App.—Austin 2016, no pet. h.)** (07-01-16).

Facts: Husband purchased a home while dating Wife before they lived together. During the marriage, they lived in the home, and Wife contributed some funds to pay towards the mortgage. During their divorce proceedings, they reached a mediated settlement agreement that awarded the home to Husband upon a cash payment by him to Wife. Subsequently, when Husband failed to make the cash payment, Wife filed a motion to enforce asking the family court to either order a forced sale of the home or award her a money judgment. The family court declined to order a forced sale but awarded her a money judgment plus interest and fees. When Wife was unable to collect on her judgment, she filed a partition suit in a district court seeking an order to sell the home and distribute the net proceeds according to the parties' respective ownership interests in the home. Husband filed a motion to dismiss under Tex. R. Civ. P. 91a. The district court was unable to schedule a hearing within the Rule's requisite 45-day period, and at the hearing on Husband's motion, the district court denied the motion on the procedural ground that it had not ruled within 45-days and awarded Wife attorney's fees as the prevailing party. After an evidentiary hearing, the district court denied Wife's requested relief without stating a reason. Wife appealed. Husband filed a cross-appeal, arguing that the district court abused its discretion in denying his motion to dismiss.

Holding: Reversed; Rendered in part; Remanded in Part

Opinion: When a statute directs, authorizes, or commands an act to be done within a certain time, the absence of a stated consequence for failure to act indicates a *directory* construction, as opposed to a *mandatory* construction. Here, the requirement to grant or deny the motion to dismiss within 45 days is intended to promote the orderly and prompt dismissal of baseless causes. The district court's construction would frustrate the legislative intent of the Rule that a defendant be made whole through an award of attorney's fees and costs incurred in successfully dismissing a baseless suit.

Further, here, because the family court granted Wife a money judgment in exchange for her interest in the property, her subsequent suit seeking "her interest" in the sale of the property was baseless and should have been dismissed.

AFTER TRIAL JUDGE RETIRES, SUCCESSOR JUDGE NOT AUTHORIZED TO MAKE FINDINGS OF FACT, SO CASE MUST BE REMANDED FOR A NEW TRIAL.

¶16-4-52. *In re J.D.H.*, No. 05-14-00504-CV, 2016 WL 3946822 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (07-18-16).

Facts: Parties filed for divorce after twenty years of marriage. After a bench trial, trial judge retired then four days later issued his ruling. Final decree signed by successor judge incorporated trial judge's ruling. Husband filed findings of fact and conclusions of law regarding child support varying from guidelines and as to disproportionate division in wife's favor. Even though husband filed notice of past due findings/conclusion, court did not file. Husband appealed

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

Opinion: Trial court's failure to file findings of fact forced husband to guess basis for elevated child support or disproportionate division.

Abatement for findings from the judge who tried the case is the preferred remedy. In this case, however, that remedy is not available because Judge Dry who tried the case retired after the trial.

The Legislature has created a statute and the supreme court has promulgated a rule, both of which speak to the continuation of a trial court's business after a judge has been replaced. Section 30.002 of the Texas Civil Practice and Remedies Code addresses the situation in which a trial judge dies before completing certain work of a trial. If the trial judge dies before filing findings of fact and conclusions of law in a case pending at his death, then the judge's successor may file them. Clearly, section 30.002 does not allow a successor judge to make findings of fact or conclusions of law based on the trial Judge Dry conducted.

Rule 18 of the Texas Rules of Civil Procedure allows a successor judge to make findings of fact and conclusions of law when the preceding judge has died, resigned, or become disabled during his term of office. None of those circumstances are presented here: Judge Dry did not die, resign, or become disabled during his term on the bench. He retired. And Texas law differentiates between a retired judge and a judge who leaves office in another fashion. The government code defines "retired judge" to mean a person who has retired under either one of the judicial retirement systems of Texas (i.e., a "retiree") or a county and district retirement system. Tex. Gov't Code Ann. § 74.041(6), (3). A "former judge," on the other hand, is a person who has served as an active judge in Texas but is *not* a retired judge. *Id.* § 74.041(5). Any retiree may elect to be a judicial officer; he is then designated a "senior judge." *Id.* § 75.001. A former appellate judge may also elect to serve as a judicial officer, but a senior appellate judge can be assigned to more courts in a broader geographic area. *Compare id.* § 75.002 (assignment of retiree) *and id.* § 75.003 (assignment of former judge). A judge's status is fixed when he leaves office. Thus, even if a former judge subsequently becomes eligible for judicial retirement, he does not thereby become a retired judge under Texas law. A judge who retires—rather than resigns—does not fall within the purview of rule 18.

If neither article 30.002 nor rule 18 applies to a case that requires findings of fact and conclusions of law, then the case must be remanded for a new trial. The successor judge was authorized to reduce Judge Dry's rulings to the proper form of the judgment and to sign that judgment. Making findings of fact, however, is not a ministerial duty: it requires hearing evidence, resolving conflicts in that evidence, and evaluating the credibility of witnesses. The appellate court may not perform those functions and, unless authorized by statute or rule, neither may a judge who has not presided over the taking of evidence.

DISTRICT COURT DID NOT LOSE PLENARY POWER OVER DE NOVO REVIEW OF ASSOCIATE JUDGE'S REPORT; DENIAL OF DE NOVO REVIEW CONSTITUTED FINAL APPEALABLE ORDER.

¶16-4-53. *Balachandarachari v. Tang*, No. 05-15-00889-CV, 2016 WL 3971323 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (07-22-16).

Facts: The Office of the Attorney General ("OAG") filed a motion for enforcement and modification of child support. The associate judge heard the motion and issued a report finding Father in arrears and modifying his support obligation. Father filed a request for a de novo hearing before the family court. Months later, the family court convened a hearing and orally pronounced that it lacked plenary power of the de novo appeal pursuant to Tex. R. Civ. P. 329b. Father filed a motion to reconsider, which the family court denied in a written order. Father appealed. The OAG

agreed that the trial court abused its discretion but argued that the appellate court lacked jurisdiction over the appeal because the family court had not issued a final appealable order.

Holding: Reversed and Remanded

Opinion: Associate judges do not have the power to render final judgments outside certain statutory exceptions not present here. However, an order of an associate judge becomes final if a de novo hearing is not requested within three days. If a de novo hearing is timely requested, the associate judge order does not become final, and the family court has the power to adopt, modify, or reject the associate judge's report, hear further evidence, or recommit the matter to the associate judge. The requirement to hold a de novo hearing within 30 days is a deadline for the court to ensure prompt resolution of the appeal; it is not a deadline placed on the parties.

Here, the trial court retained plenary power of the associate judge's report because it was not a final order. However, the trial court's rendition that it had lost plenary power disposed of all parties and claims and thus, was a final appealable order.

NO EVIDENCE SUPPORTED DISQUALIFYING WIFE'S CHOICE OF ATTORNEY.

¶16-4-54. *In re Duke*, No. 09-16-00185-CV, 2016 WL 4040128 (Tex. App.—Beaumont 2016, orig. proceeding) (mem. op.) (07-28-16).

Facts: During the divorce proceeding, Wife's New Lawyer filed a motion to substitute herself as Wife's attorney. Wife's Former Lawyer filed a motion to withdraw. Husband filed a motion opposing New Lawyer, alleging a conflict of interest.

Several weeks earlier, New Lawyer approached Husband's attorney in the courthouse hallway and asked to be hired as a mediator if the proceeding went to mediation. A few days later, New Lawyer contacted Husband's attorney by telephone and asked to be kept in mind if the parties decided to mediate. New Lawyer testified that no confidential details of the case were discussed in either of these exchanges. Husband offered no evidence to the contrary. Without any knowledge of these conversations, Wife sought out New Lawyer to represent her because she had received a recommendation for New Lawyer from someone not associated with New Lawyer's firm.

The trial court granted Wife's Former Counsel's motion to withdraw but refused to allow New Lawyer to appear. Wife filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Disqualification of an attorney that a client desires to engage is a sever remedy. Even if a lawyer violates a disciplinary rule, the party requesting disqualification must demonstrate that the opposing lawyer's conduct caused actual prejudice that requires disqualification. Here, the record contained no evidence to show that New Lawyer acquired any confidential information about the case. Further, New Lawyer informed the court that she would not seek a continuance, and because the trial court granted Former Lawyer's motion to withdraw, Wife would need to seek new counsel. Thus, Husband's argument that allowing New Lawyer to appear would cause undue delay was meritless.

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APPLICANT CITED NO LAW PROVIDING AUTHORITY TO TRIAL COURT TO GRANT REQUEST TO CHANGE APPLICANT'S GENDER DESIGNATION.

¶16-4-55. *In re Rocher*, No. 14-15-00462-CV, 2016 WL 4131626 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (mem. op.) (08-02-16).

Facts: Applicant filed a petition for a name change pursuant to Tex. Fam. Code § 45.102 and also requested that the court change the Applicant's gender designation from female to male. During the hearing, Applicant referenced two Texas cases and Tex. Fam. Code § 2.005(b)(8) in support of the request. The trial court granted the name change but denied the gender change. Applicant appealed, arguing that the trial court violated the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution.

Holding: Affirmed

Opinion: Tex. Fam. Code § 45.102 gives a trial court the authority to change a person's name, not his or her gender. Further, Tex. Fam. Code § 2.005(b)(8)—which allows an order relating to a sex change to prove one's identity for purposes of application for a marriage license—does not grant a trial court authority to issue an order relating to a sex change. Additionally, the two cases cited by Applicant did not reach the issue of whether a trial court has authority to issue an order changing one's gender. Finally, Applicant presented no evidence to support a proposition that the Applicant's current gender designation was inaccurate. A mere request, even if verified, is not evidence to support such a change.

BECAUSE PROTECTIVE ORDER ISSUED BASED ON SEXUAL ASSAULT, ONLY THE VICTIM HAD STANDING TO MOVE TO RESCIND PROTECTIVE ORDER.

¶16-4-56. ***R.M. v. Swearingen*, ___ S.W.3d ___, No. 08-15-00359-CV, 2016 WL 4153596 (Tex. App.—El Paso 2016, no pet. h.)** (08-05-16).

Facts: R.M. filed an application for a protective order against Swearingen alleging sexual assault. The trial court issued a 10-year protective order finding that R.M. and Swearingen were intimate partners, that there were reasonable grounds to believe Swearingen sexually assaulted R.M., that Swearingen committed family violence, and that further family violence was likely to continue. One year later, Swearingen moved to terminate the protective order, alleging that he wanted to apply for a transfer at work but that it was common knowledge at his office that employees subject to pending administrative investigations could not transfer. He believed that lifting the protective order would allow him to convince his employer to end the investigation trembling on the witness stand. At the hearing's conclusion, the trial court remarked that if Swearingen left town, it would take pressure off R.M. However, the trial court further noted that if anything happened to make R.M. feel unsafe, she should get something filed ASAP, and the trial court would hear it. Once the protective order was lifted, R.M. promptly appealed.

Holding: Reversed and Rendered

Opinion: The Texas Code of Criminal Procedure allows a victim of a sexual assault (among certain other listed crimes) to seek a protective order. No prior relationship between the assailant and the victim is required. If there are reasonable grounds to believe the applicant is the victim of a sexual assault, a protective may be issued for the duration of the lives of the offender and victim or for any shorter period stated in the order. While the Texas Family Code allows ei-

ther the applicant or the person subject to the order to move the issuing court to reconsider the need for a protective order after one year, the Code of Criminal Procedure only permits the trial court to rescind a protective order issued on the ground of sexual assault on the victim's request. Further, the relevant article of the Code of Criminal Procedure specifically states that to the extent that its provisions conflict with the Family Code, the Code of Criminal Procedure takes precedent. Accordingly, Swearingen lacked standing to move to rescind the order prior to its expiration.

MOTHER WAIVED RIGHT TO TEX. FAM. CODE § 153.258 FINDINGS BECAUSE SHE ONLY REQUESTED FINDINGS PURSUANT TO THE TEX. R. CIV. P.

¶16-4-57. *Filla v. Filla*, No. 03-14-00502-CV, 2016 WL 4177236 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (08-05-16).

Facts: When Mother and Father divorced, Mother was granted the exclusive right to designate their Child's primary residence. A few years later, the parents entered into an MSA that, among other modifications, granted Father the exclusive right to designate the Child's primary residence. After entering the MSA, but before a final order was signed, Mother contacted CPS to report that Father was abusing the Child. Before CPS's investigation was complete, the trial court signed a final order incorporating the MSA. Subsequently, CPS ruled out any abuse by Father but determined that Mother had been emotionally abusive to the Child, coached the Child into making allegations against Father, and put the Child through multiple intrusive medical examinations in relation to those allegations. Based on CPS's findings, Father filed a petition to modify, asking the trial court to order that Mother's access to the Child be supervised. After a bifurcated jury trial and bench trial that included testimony from the Child's therapist and a guardian ad litem, the trial court granted Father's requested relief. Mother appealed. She requested findings of fact and filed a notice of past due findings, but the trial court failed to issue any findings. Among a number of other complaints on appeal, Mother argued that the trial court erred in failing to issue findings that set out its reasons for deviating from the standard possession order.

Holding: Affirmed

Opinion: Mother requested findings pursuant to Tex. R. Civ. P. 296, not Tex. Fam. Code § 153.258. Thus, Mother waived her right to Section 153.258 findings. However, because Mother timely filed a notice of past due Rule 296 findings, the trial court erred in failing to issue any findings. Regardless, because the order and record indicated that the trial court relied on the recommendations of the guardian ad litem, because those recommendations were included in the record, and because Mother fully briefed her appellate issue based on the recommendations, the failure to issue findings did not cause Mother to suffer injury.

WIFE TIMELY FILED MOTION FOR TEMPORARY ORDERS PENDING APPEAL; WIFE PRESENTED NO EVIDENCE TO SUPPORT AWARD OF TEMPORARY SPOUSAL SUPPORT OR TEMPORARY ATTORNEY'S FEES.

¶16-4-58. ***In re Fuentes*****,** ___ S.W.3d ___, No. 01-16-00366-CV, 2016 WL 4203494 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (08-09-16).

Facts: Wife filed for divorce and listed several companies as co-respondents, which she alleged were Husband's alter egos. Additionally, she alleged that Husband had assets under his control with a value in excess of one-billion dollars. Husband did not participate in the trial, and Wife obtained a default judgment that awarded her half the marital estate, $537 million in fraud-on-the-community damages, real and personal property, and shares and interests in the businesses found to be Husband's alter egos. Husband filed a motion for new trial. About the same time, several intervenors from the various businesses filed notices of appeal. More than two months later, the trial court denied Husband's motion for new trial, and Husband timely filed his own notice of appeal. Ten days later, Wife filed in the trial court a motion for temporary orders pending appeal. Husband filed a motion to dismiss Wife's motion, arguing that hers was untimely under the Tex. R. App. P. because it was filed more than 30 days after the intervenors perfected their appeals. The trial court denied Husband's motion and granted Wife's. The court ordered Husband to pay Wife $300,000 per month for spousal support and $50,000 per month for attorney's fees—half of Wife's requested $700,000.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The 30-day deadline to file a motion for temporary orders pending appeal began running with the perfection of Husband's appeal, not with the other parties'. Wife had no reason to seek temporary orders for spousal support until Husband appealed the divorce decree. Thus, her motion for temporary orders pending appeal was timely filed.

Additionally, the order for temporary support was effective immediately and not contingent upon the outcome of the appeal. Thus, Husband lacked an adequate remedy by appeal and was entitled to mandamus relief.

Among other expenses listed in her financial information statement, Wife requested $120,000 a month for security guards but testified that she never felt threatened so as to need security guards; she had no documentation to support her requests for $50,000 for clothing or $200,000 for travel; she requested $30,000 a month for water, lights, telephone, and groceries but admitted she did not personally pay those expenses; she requested $80,000 for medical expenses and loan repayments but had no idea what, if any, debts she owed. Wife admitted she had no personal knowledge of her bills and expenses. Thus, her testimony alone was insufficient to support her claimed monthly expenses. Additionally, there was no evidence that Wife would incur $50,000 a month in attorney's fees or that such an amount was reasonable and necessary.

TRIAL COURT ABUSED DISCRETION BY REFERRING CLARIFICATION PROCEEDING TO SPECIAL JUDGE OVER HUSBAND'S OBJECTION.

¶16-4-59. ***In re Turner*****,** ___ S.W.3d ___, No. 03-16-00367-CV, 2016 WL 4272121 (Tex. App.—Austin 2016, orig. proceeding) (08-09-16).

Facts: Husband and Wife agreed to an order referring their divorce proceeding to a special judge. After a bench trial, the special judge signed a divorce decree that was later approved by

the referring court. A few months later, Wife filed a motion to clarify the property division and requested to have the case referred to the same special judge. Husband objected to the referral. After the trial court referred the case to the same special judge, Husband filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A suit to enforce or clarify a divorce decree is a separate lawsuit from the original divorce proceeding. Thus, the referral to the special judge required a new referring order, which required a second agreement from both parties.

COURT ERRED IN GRANTING HUSBAND'S PLEA TO JURISDICTION BECAUSE HE FAILED TO DISPROVE AS A MATTER OF LAW WIFE'S CLAIM OF COMMON-LAW MARRIAGE.

¶16-4-60. *In re Marriage of Farjardo*, No. 14-15-00653-CV, 2016 WL 4206009 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (mem. op.) (08-09-16).

Facts: Husband and Wife had four children together. Additionally, Husband had seven other children with six other women. Shortly after Wife's fourth child was born, she filed a petition for divorce and a SAPCR. Husband filed a plea to the jurisdiction and motion to dismiss for lack of standing. Wife testified that she believed Husband agreed to marry her, that they had lived together within a year before she filed her petition, and that Husband had introduced her as his wife many times. The couple shared a bank account and had filed tax returns as married. However, the tax returns were only signed by the preparer and not the parties. Husband testified that he never agreed to be married to Wife, never lived with her, and never told people she was his wife. Several witnesses testified, some of whom supported Wife's version of the facts and some of whom supported Husband's version. The trial court determined that Wife failed to rebut the presumption against a common-law marriage that exists if the proceeding is not initiated before the second anniversary of the date on which the parties separated and ceased living together. Wife appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The court questioned whether a plea to the jurisdiction was the proper vehicle to make Husband's argument. Assuming it was, the court noted that if evidence creates a question of fact, a trial court cannot grant a plea to the jurisdiction. Here, there was conflicting evidence regarding whether the parties:

- stopped living together less than two years before Wife filed for divorce;
- agreed to be married; and
- held themselves out to be married.

Thus, the conflicting evidence was sufficient to raise a question of fact.

ATTORNEY'S FEES AWARD COULD NOT BE CHARACTERIZED AS NECESSARIES OR ADDITIONAL CHILD SUPPORT IN NON-ENFORCEMENT MODIFICATION SUIT.

¶16-4-61. *Kerlick v. Kerlick*, No. 03-14-00620-CV, 2016 WL 4506162 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (08-24-16).

Facts: Mother was forced to resign her job as a middle-school teacher when she failed to show up to work twice. Subsequently, she was arrested at a gas station after arousing police suspicion. A search of her purse revealed methamphetamine, empty baggies, and a digital scale. A search of her home revealed more drugs and baggies. After TDFPS got involved, Mother and Father signed a safety plan, providing that Mother would be allowed no contact with the Child. Later, she was permitted to write letters to the Child that would be intercepted and reviewed by the Child's therapist for determination of whether the letters should be given to the Child. Around the same time that the safety plan was signed, Father initiated a modification suit, seeking sole managing conservatorship. After a bench trial, a final order maintained the contact-by-letters-only restriction but left open the possibility of expanded access at a later time. On appeal, Mother raised a number of complaints, including that the trial court abused its discretion when it awarded Father attorney's fees as "necessaries" or additional child support.

Holding: Affirmed as Modified

Opinion: Because this was a non-enforcement modification suit, the trial court lacked discretion to award attorney's fees as necessaries or additional child support. Thus, the appellate court modified the order to delete the language characterizing the award as such.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT REQUIRED BY TEXAS RULE OF CIVIL PROCEDURE 296 AND COULD NOT PROPERLY BE CONSIDERD BY THE APPELLATE COURT SO DEADLINE FOR FILING NOTICE OF APPEAL NOT EXTENDED.

¶16-4-62. *Shanklin v. Shanklin,* No. 13-15-00392-CV, 2016 WL 3962707 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (07-21-16).

Facts: After Wife filed for divorce, her and Husband entered into a Rule 11 agreement regarding the division of their marital and separate property. Less than sixty days after Wife filed her petition for divorce, the trial court signed a divorce decree in accordance with Wife and Husband's Rule 11 agreement.

Thereafter, Husband retained counsel and sought permission from the trial court to withdraw his consent to the divorce under the Rule 11 agreement. At the hearing on Husband's request, Husband presented no evidence. Instead, Husband sought permission to withdraw his consent on the basis that the May 1, 2015 divorce decree did not comply with section 6.702(a) of the Texas Family Code because it was entered within sixty days of the date on which Wife filed her petition for divorce. The trial court denied Husband's request to withdraw his consent and signed a Final Decree of Divorce on June 18, 2015.

The next day, Husband requested findings of fact and conclusions of law from the trial court on what described as disputed issues. In response to Husband's request, the trial court submitted findings and conclusions. On August 25, 2015, Husband filed a notice of appeal of the trial court's June 18, 2015 Final Divorce Decree. Wife's motion to dismiss followed.

Holding: Appeal Dismissed.

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Opinion: To invoke appellate court jurisdiction, an appellant must file a timely notice of appeal. A timely notice of appeal must be filed within thirty days after the judgment is signed by the trial court unless an exception applies to extend the thirty-day deadline, in which case the deadline extends from thirty days to ninety days. One exception that triggers this ninety-day extension applies when the appellant requests findings of fact and conclusions of law from the trial court in a case where such findings "either are required by [Texas Rule of Procedure 296] or, if not required, could properly be considered by the appellate court."

Here, Husband requested findings from the trial court based on what he described in his motion as "disputed" evidence regarding the characterization and value of the marital estate. However, there was nothing in the record that indicated that the trial court based its judgment in any part on an evidentiary hearing or trial—much less one in which disputed evidence was presented regarding the characterization and value of the marital estate. Instead, the trial court's judgment incorporated the Rule 11 agreement and was based on a legal determination that such agreement was valid and enforceable under the circumstances. No trial or evidentiary hearing was held at which Husband disputed any factual matters that formed the basis of the trial court's judgment. Furthermore, Husband did not explain how the trial court's findings regarding the enforceability of the Rule 11 agreement were useful in reviewing his appellate issues.

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