

SECTION REPORT FAMILY LAW

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(214) 473-9696

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(817) 573-6433

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NEWSLETTER EDITOR

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

COUNCIL ADMINISTRATIVE ASSISTANT

Christi A. Lankford, christil@idworld.net
Section Wear and Publications

MESSAGE FROM THE CHAIR



The holiday season is here! I love this season of spending time with family and friends, and I am looking forward to a relaxing break to rejuvenate my mind and soul. I am sincerely honored to serve as Chair of the Family Law Council, and I am grateful for our profession and for the friendships that I have developed. As I reflect on this past year, I am reminded of the significant contributions made by so many family law lawyers across the State to further the mission of the Family Law Section in promoting the highest degree of professionalism, education, fellowship, and excellence in the practice of family law.

New Frontiers

Thank you to Joe Indelicato and Natalie Webb for putting together an extraordinary program at the New Frontiers course in Louisville, Kentucky in October. We greatly appreciate the presenters for their hard work and for sharing their expertise with all of us.

Publications

There are wonderful publications produced by the Family Law Section that are available through the Family Law Section website that are great resources for our practices. These publications include Family Law Checklists, the Predicates Manual, the Texas Family Law Practice Manual, the Family Lawyer's Essential Toolkit, Family Law at Your Fingertips, and Section DVD's.

Legislative Work and Texas Family Law Foundation

The Legislature will convene in Austin for the 2017 Legislative Session. Thank you to Diana Friedman, Jack Marr and the Legislative Committee for their continued dedication and willingness to commit their valuable time to this work.

Steve and Amy Bresnan, the lobbyists for the Texas Family Law Foundation, are preparing for the Session and training their lobbying volunteers who will donate their time and pay their own expenses for this important work. The Foundation Bill Review Committee is reviewing the bills filed by other groups to help the 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 www.texasfamilylawfoundation.com.

Pro Bono

The Pro Bono Committee continues to be busy putting on their seminars and webinars across the State. 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.

Website Additions

Remember to view the 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 award ceremony are online. You can click on the name of each award recipient to review his or her portion of the award ceremony.

Continuing Legal Education

Upcoming family law CLE programs include the following:

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, TX
Course Director: Julie Quaid

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

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

New Frontiers
October 19-20, 2017 – Las Vegas, NV
Course Directors: Kathy Kinser and Hon. Emily Miskel

I enjoyed seeing all of you that attended the Technology Course in early December where Heather King did her usual outstanding job. Enjoy the holiday season, and I wish you much peace and happiness in the New Year.

Kathryn Murphy
Chair, Family Law Section

TABLE OF CASES

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**IN THE LAW REVIEWS
AND LEGAL PUBLICATIONS**

NON-TEXAS ARTICLES

- Is Gay the New Asian?: Marriage Equality and the Dawn of a New Model Minority*, Stewart **Chang**, 23 *Asian Am. L.J.* 5 (2016).
- Applying the Principles of Rebellious Lawyering to Envision Family Defense*, Kara R. **Finck**, 23 *Clinical L. Rev.* 83 (Fall 2016).
- Family Structure and Child Well-Being: Dads Make a Difference*, Alma L. **Golden, M.D.**, 31 *Issues L. & Med.* 211 (Fall 2016).
- Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, Deborah L. **Forman**, 19 *U. Pa. J.L. & Soc. Change* 41 (2016).
- The Adoption and Safe Families Act: Proposing a "Best Efforts" Standard to Eliminate the Ultimate Obstacle for Family Reunification*, Brittany **Lercara**, 54 *Fam. Ct. Rev.* 657 (Oct. 2016).
- Court Considerations in the Termination of Parental Rights: A Comprehensive Analysis of Israeli Court Decisions*, Vared **Ben-David**, 54 *Fam. Ct. Rev.* 591 (Oct. 2016).
- Where Did All the Social Workers Go? The Need to Prepare Families for Adoption, Assist Post-Adoptive Families in Crisis, and End Rehoming*, Stacey **Steinberg**, 67 *Fla. L. Rev. F.* 280 (2016).
- Case Comment: Adoptive Couple v. Baby Girl*, 133 *S. Ct.* 2552 (2013), Anietie Maureen-Ann **Akpan**, 6 *Colum. J. Race & L.* 1 (2016).
- Detoxing the Child Welfare System*, Allison E. **Korn**, 23 *Va. J. Soc. Pol'y & L.* 293 (Fall 2016).
- Critical Issues in Relocation Cases*, Phillip M. **Stahl**, 54 *Fam. Ct. Rev.* 632 (Oct. 2016).
- Protecting the Free-Range Kid: Recalibrating Parents' Rights and the Best Interest of the Child*, David **Pimentel**, 38 *Cardozo L. Rev.* 1 (Oct. 2016).
- Note, *High-Conflict Divorce: A Form of Child Neglect*, Alexa N. **Joyce**, 54 *Fam. Ct. Rev.* 642 (Oct. 2016).
- Co-Parenting in a Highly Conflicted Separation/Divorce; Learning About Parents and Their Experiences of Parenting, Coordination, Legal, and Mental Health Interventions*, Kelly **Mandarino**, Marsha Kline **Pruett**, & Linda **Fieldstone**, 54 *Fam. Ct. Rev.* 564 (Oct. 2016).
- Doing What's Best: Determining Best Interests for Children Impacted by Immigration Proceedings*, Becky **Wolozin**, 64 *Drake L. Rev.* 141 (1st Quarter 2016).

IN BRIEF

Family Law From Around the Nation

by
Jimmy L. Verner, Jr.



Agreements: The Idaho Supreme Court reversed a district court's order that an ex-wife convey her interest in certain real estate to her ex-husband to facilitate a loan modification because the parties' property settlement agreement did not require the ex-wife to do so. [Kantor v. Kantor](#), 379 P3. 1080 (Ida. Sept. 13, 2016). In a related case between the same parties, the court held that because the property settlement agreement had not been merged into the divorce decree, the property settlement agreement could not be enforced by contempt. [Kantor v. Kantor](#), 379 P.3d 1073 (Ida. Sept. 13, 2016). In Nebraska, a postnuptial agreement setting forth the parties' property rights upon divorce is void and unenforceable unless it is "attendant upon an immediate separation or divorce." [Devney v. Devney](#), 886 N.W.2d 61 (Nebr. Oct. 21, 2016). The Connecticut Supreme Court affirmed an arbitrator's award that contravened the express terms of a prenuptial agreement upon concluding that the scope of the submission to the arbitrator had not been restricted. [LaFrance v. Lodmell](#), 144 A.3d 373 (Conn. Sept. 6, 2016).

Alimony: The Minnesota Supreme Court confirmed that a trial court may deny an alimony award to a spouse if reallocation of the investment assets awarded to that spouse upon divorce would produce sufficient income to meet the spouse's reasonable monthly expenses, but the trial court erred when it failed to consider the tax consequences of the reallocation. [Curtis v. Curtis](#), ___ N.W.2d ___, 2016 WL 6778551. In [Amero v. Amero](#), ___ A.3d ___, 2016 WL 5940099 (Me. Oct. 13, 2016), the Maine Supreme Judicial Court upheld termination of an alimony award to an ex-wife upon her post-divorce cohabitation, observing that among other things, the ex-wife acknowledged a sexual relationship with her partner, she and her partner "lived across the states" together for a year in a "big rig" truck, and lived together in a condominium for three to four years. The Connecticut Supreme Court rejected an ex-husband's argument that a lump-sum alimony award of \$7.5 million, which was in addition to periodic unallocated alimony and child support of \$40,000 per month, amounted to a property distribution that violated the parties' prenuptial agreement, reasoning that the periodic payments did not cover the ex-wife's monthly expenses of \$65,444 and that the trial court unambiguously characterized the award as alimony. [Hornung v. Hornung](#), 146 A.3d 912 (Conn. Sept. 20, 2016).

Child support: Maine's Supreme Judicial Court and the Colorado Supreme Court concurred that while laches is not a defense to collection of the principal amount of child support arrearages, the doctrine can apply to interest on those arrearages. [Brochu v. McLeod](#), ___ A.3d ___, 2016 WL 5076139 (Me. Sept. 20, 2016); [In re Marriage of Johnson](#), 380 P3d 150 (Colo. Sept. 26, 2016) (en banc). A Montana separation agreement that granted an obligor "the right to modify child support payments every two years" did not relieve the obligor from pleading changed circumstances, such that a Montana trial court acted properly when it denied a motion to modify without a hearing when the motion included only "conclusory statements about the need for a child support modification." [In re Marriage of Brown](#), No. ___ P3d ___, 2016 WL 6882879 (Mont. Nov. 22, 2016). A California court of appeals upheld denial of an obligor's motion to modify as against his argument that the parties' stipulated judgment did not require showing a change of circumstances because it provided for de novo review of the obligor's child support obligation. [In re Marriage of Cohen](#), 3 Cal. App. 5th 1014 (Cal. App. Oct. 3, 2016).

De facto custody: In a pair of cases, the Hawaii Supreme Court held that an unrelated petitioner may seek joint custody of a child if he or she meets the stringent statutory requirements for that status, *Troxel* notwithstanding, because the best interests of the child require that a person who has acted as a de facto parent remain in the child's life. *A.A. v. B.B.*, ___ P.3d ___, 2016 WL 6954096 (Haw. Nov. 3, 2016); *Newcomb v. McPeck*, No. SCAP-15-000022 (Haw. Nov. 1, 2016). The Court of Appeals of New York overturned its prior precedent that a partner without a biological or adoptive relationship with a child has no standing to seek custody or visitation, observing that "in light of more recently delineated legal principles, the definition of 'parent' established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships." *Brooke S.B. v Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. Aug. 30, 2016).

Jurisdiction: The First Circuit reminds us that the "domestic relations exception" deprives federal courts of jurisdiction to address claims arising from a separation agreement filed in a divorce proceeding. *Irish v. Irish*, ___ F.3d ___, 2016 WL 6678347 (1st Cir. Nov. 14, 2016). The Nebraska Supreme Court dismissed an appeal from a post-divorce order of partition requiring property to be sold, holding that "when the dispute in a partition action is over the partition itself rather than ownership or title, there is no final, appealable order until the partition is made." *Schlake v. Schlake*, 885 N.W.2d 15 (Nebr. Sept. 16, 2016). In Wyoming, a court may not appoint a guardian for an unborn child, but such an order amounts to an error in exercising its jurisdiction rather than an order that is void for lack of jurisdiction, especially when the trial court could have ordered a guardianship pre-birth to take effect upon birth. *In re Matter of M.K.H.*, 382 P.3d 1096 (Wyo. Oct. 27, 2016).

Military retirement: Retired military service members who are eligible for disability benefits may obtain them, but to do so they must waive their retired pay. Two California appellate courts considered this rule when two veterans waived their retired pay after divorce judgments granting their spouses interests in that pay. Both courts agreed that the veterans could not deprive their ex-spouses of the property awarded them upon divorce, but they differed on the appropriate remedy. In *In re Marriage of Kay & Chapman*, 3 Cal. App.5th 719 (Cal. App. Sept. 27, 2016), the court reversed the imposition of a constructive trust because there was no evidence of wrongful conduct, remanding for "further equitable relief" if "available and appropriate." In *In re Marriage of Cassinelli*, ___ Cal. Rptr.3d ___, 2016 WL 6472881 (Cal. App. Nov. 2, 2016), the court reversed the trial court's remedy of requiring the veteran to pay spousal support, instead remanding to award the other former spouse damages of \$541 per month, which equaled the former spouse's interest in the veteran's retired pay.

You get your year: Even though Mother had been caught with "mushrooms, meth pipes, marijuana paraphernalia, concentrated cannabis, brass knuckles and butterfly knives"; had "tested positive for methamphetamine, benzodiazepines, and marijuana"; she denied that she had a substance abuse problem "despite her admitted daily marijuana and occasional methamphetamine use"; did not participate in reunification services; was to be incarcerated after a plea agreement; and the trial court concluded there was an "extremely low" likelihood of reunification, the trial court erred when it terminated reunification services after six months because California requires twelve months of services. *M.C. v. Superior Court*, 3 Cal. App.5th 838 (Cal. App. Sept. 29, 2016).

COLUMNS

OBITER DICTA By Charles N. Geilich¹



If there is anything I have learned from the 2016 elections, other than proper locker room banter, is that I should not trust the "elite." Any elite. Neither should you. They aren't looking out for you, and they aren't to be trusted. Everybody (except, presumably, those sneaky elites themselves) says this, so it must be true. (Although, come to think of it, I learned about this from the "media elite." Hm, I'll get back to you on that one.)

Let's unpack this. (By the way, if you hear anyone really say "let's unpack this," you are free to throw something at them. Here, I am only using the phrase as a literary device, so hold your projectiles).

Let's start with the most obnoxious elites: Doctors! Who are they to say they know more about medicine and health care than you and I do? Oh, how they go on and on about "You have this, you have that, don't do this, do more of that." And guess what? We all die anyway! If they're so smart, how come all their patients die? Answer that, Dr. Know It All. Anyone can learn about health from skimming headlines in Prevention magazine while you wait for groceries to be tallied up. You don't even have to buy the thing. And it has coupons. Who needs some career doctor acting all superior?

Political elites? Don't get me started. The only politician who can be trusted is one who has never served in any government organization, ever. But more than that. We need a president, and senators, and whatever those other branches are (the elites would know), who has never accessed a government program or agency for anything, ever. If you have a drivers license, or relied on an air traffic controller, or called the fire department, you are part of the problem!

Let me give you a very specific example. The "elites" are always whining about climate change, and saying that we, you and I, good honest folks, are responsible for it. Really? I have no use for a business that admits right up front that it fails most of the time. That's right, look it up. The so-called "scientific method" is all about making mistake after mistake until, maybe, if they're lucky, they finally get it right.

Important disclaimer: none of this applies to lawyers. We do, in fact, know more than a non-lawyer, and family lawyers know more about family law than any other lawyer. So don't try to handle your own divorce.

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 cngelich@gmail.com. His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

WHEN EXPERTS SEEM TOO CONFIDENT

By John A. Zervopoulos, Ph.D., J.D., ABPP¹



Competent experts are confident. Many poor ones are too. Judges and juries—and all of us—tend to perceive a testifying expert's confident demeanor as reflecting competence. When confident experts testify, they often express their opinions as certainties. If such testimony cuts against your client, you've got a problem.

To address your problem, challenge the confident expert's view of her opinions as certainties. Instead, view opinions as caselaw sees them—as the expert's inferences or judgments based on case facts and reliable data that the expert considered. *Joiner* states: "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Nassim Taleb, in *Fooled by Randomness*, sharply echoes *Joiner*: "Science lies in the rigor of the inference." Now you've got room to work.

Test the rigor of the expert's inferences by asking the expert a key Daubert-related question: Did you consider reasonable alternative explanations of the case facts and data that you collected when forming your opinions? This question will expose the expert's reasoning, reveal biases that may color her opinions, and reflect the competence of her work. Following are lines of questions to flesh out our key question:

- Did you collect sufficient reliable data to consider reasonable alternative explanations of the subject of your testimony? (*Focuses on the sufficiency of reliable data collected by interviews, psychological testing, and review of collateral sources*)
- What reasonable alternative explanations of the case facts and data that you collected did you consider?
- When during the evaluation process did you consider each reasonable alternative explanation of the data? While collecting the data? (*preferable*); After you collected the data? (*vulnerable to confirmatory bias*); As you wrote your report? (*especially vulnerable to confirmatory bias*)
- Why did you discard each reasonable alternative explanation that you did not accept?
- How does your opinion—the strongest reasonable alternative explanation—best fit the case facts and data that you collected better than the explanations that you discarded?

These lines of questions also reflect professional psychology's view of expert opinions and recommendations: Recommendations "are derived from sound psychological data and . . . are based upon articulated assumptions, interpretations, and inferences that are consistent with es-

¹**John A. Zervopoulos, PhD, JD, ABPP** is a forensic psychologist and lawyer who directs **PsychologyLaw Partners**, an expert consulting service that assists lawyers with psychology-related issues, materials, and testimony. His most recent book, *Confronting Mental Health Evidence: A Practical PLAN to Examine Reliability and Experts in Family Law—Second Edition*, was published by the ABA in 2015. *How to Examine Mental Health Experts: A Family Lawyer's Handbook of Issues and Strategies*, also published by the ABA, was released in 2013. He is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.

established professional and scientific standards." Am. Psychological Assn., *Guidelines for Child Custody Evaluations in Family Law Proceedings*. (Guideline 13).

Don't let a confident expert frame her opinions as certainties. Test the rigor of the expert's inferences by questioning whether and how the expert considered reasonable alternative explanations of case facts and data collected. You may be surprised how quickly your deposition or cross examination opens up.

BEATING RETIREMENT ANXIETY

By Christy Adamcik Gammill, CDFA¹



Many baby boomers are experiencing trepidation when it comes to retirement. Will they have enough money? What will they do with their time? Can they find fulfillment in a more relaxed lifestyle?

Maintaining happiness as you exit the work force can create apprehension, but that transition can be navigated more easily by paying special attention to what matters most to you.

Relationships

Humans are resilient creatures, but we need close intimate relationships to thrive. Social support is essential for good mental health. Because some of our most meaningful and lasting relationships come at work, it is easy to see why loneliness can overtake a new retiree when project meetings, water cooler chit-chat and conference calls cease to exist. Consider volunteer opportunities or rating a class in an interesting hobby, it would allow you to meet people who share similar interests.

“What Do You Do?”

For some retirees, this question is bittersweet. If they were lucky enough to feel challenged and fulfilled in their career, those feelings can be replaced by emptiness when the work role is replaced by the role of retiree. You can fill this void by continuing to use the skills and talents you acquired over a lifetime. Figure out what you enjoyed about your job and find new ways to replicate this satisfaction in retirement. If you are retiring as a marketing CEO, for example, become a marketing advisor to a charity or group of entrepreneurs in your area. It's important to find new roles with which to identify yourself. When someone asks, “What do you do?” you not only have an answer but one you are passionate about and proud to discuss.

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 100058 (1/15) Exp 01/17)

ARTICLES

The QDRO Corner Chapter 4 Using a QDRO for liquidity By James M. Crawford, Jr.¹

Introduction

It is no secret that divorce can create extraordinary cash flow requirements beyond the capacity of the parties to meet with current earnings or with savings. Assuming there is not an overstuffed mattress lying around, this situation often means that a choice must be made between selling or refinancing the house as a source of needed funds, or looking to the only other asset of substance: the retirement plan or IRA. Unfortunately, while the pros and cons of the house alternative are familiar to most family law practitioners, not so with respect to the rules that control early access to retirement funds. The fact that these rules are pretty much a mystery to many is not surprising given their awe-inspiring complexity, coupled with the fact that rules are different as between retirement plans and IRAs, and are also different between different types of retirement plans and IRAs. In fact, since plans can adopt different rules from among the permissible alternatives for that plan type (e.g., a 401(k) or a pension plan), the rules can even vary significantly among plans of the same type.

Since this is the QDRO corner, the purpose of this article is to pull back the curtain on these rules as they relate to accessing retirement funds in a qualified plan using a Qualified Domestic Relations Order, recognizing that this is but one small (but important) part of the arcane world of ERISA and the Tax Code.

When and how a QDRO can be used to gain early, and tax efficient access to retirement funds that are not otherwise available for distribution because the participant is still working.

When are benefits available by QDRO?

One advantage of a QDRO is that it can sometimes be used to immediately distribute funds to an “alternate payee” (i.e., a spouse, former spouse, child or other dependent) even if the participant is still working and cannot do so under the terms of the plan.²

There are two rules as to when this can happen. One is statutory, and the other is permitted by regulations and discretionary with the plan. In both cases, it will likely be necessary to consult

¹ Mr. Crawford’s practice is limited to Employee Benefits, ERISA, and Fiduciary Law and is located in The Woodlands, TX. He can be reached at jcrawford@ERISAsite.com.

² This problem is most severe in pension plans (such as “defined benefit” plans or “money purchase” plans), which are not permitted to allow in-service distributions prior to age 62 unless the plan has been terminated. Profit sharing plans (including 401(k) plans) can provide for in-service distribution to be made to a participant, with different rules as to when that is allowed being applicable depending upon the type of account involved (elective deferral, matching, or discretionary employer contributions). For example, a 401(k) plan may provide that a discretionary employer contribution can be available at any time once the participant has been in the plan for at least 5 years, or if the money has been in the plan for at least two years. An elective deferral contribution, however, is not allowed to be distributed in-service earlier than 59 ½, except in cases of hardship. Since plan’s can differ widely in how these rules apply, the plan document should be obtained and carefully reviewed to see if in-service distributions are an option, keeping mind that such distributions may also be subject to the 10% additional tax for early distributions applies under [IRC §72\(t\)](#), unless one of the many exceptions apply.

the formal plan document to see which rule applies and how it applies, although sometimes this information can be found in the Summary Plan Description (SPD).³

The statutorily required alternative is that plans must allow for distribution to be made to an alternate payee once the participant reaches the “earliest retirement age.” If the participant is still in service, this translates to the later of age 50, or the earliest age that the participant could terminate and receive a distribution. Since most plans allow for distribution following termination at any age, the earliest retirement age when money can be distributed by QDRO is when the participant is age 50.

The discretionary rule allows the plan to provide that benefits can be distributed to an alternate at any time that the QDRO requires (or allows). If the plan has this feature, it will be included in the plan document, and possibly in the SPD as well. For plans in this group, the funds needed can be made accessed at any time.

There are three other rules to keep in mind when it comes to whether a QDRO distribution is an available alternative to meet liquidity needs:

1. A QDRO can require payment to a spouse or former spouse, which means that one can be issued during the pendency of a domestic relations proceeding without having to wait for the judgment.
2. There is no requirement to the amount of the participant’s benefit that can be accessed by QDRO, so long as the order does not require the distribution of a benefit that is not yet vested, or that exceeds 100% of the participant’s account or accrued benefit.
3. There is no prohibition against modifying an existing QDRO, or obtaining a second QDRO for the same alternate payee, so long as all the requirements are otherwise satisfied.

Practice Tip: Some defined benefit pension plans (including cash balance plans) will include a provision under which one or more of the various forms of benefit available for payment of the accrued benefit is eligible for an early retirement subsidy. An early retirement subsidy will lessen or eliminate the normal actuarial reduction that will otherwise be applied when a normal retirement benefit is commenced early. The typical amount of this reduction (which adjusts for the fact that the payments are to be made for a longer period) is about 5% per year. For example, if an accrued lifetime age 65 retirement benefit of \$10,000 per month is commenced at 55, the monthly benefit will be reduced to \$5,000, payable for life. Both payment streams have the same actuarial value since the early retirement benefit will be paid about 10 years longer than normal.

However, if this same early retirement benefit is subsidized, then this actuarial adjustment is either reduced or eliminated (and is in effect picked up by the employer). For example, if the early retirement benefit in the above-described plan is fully subsidized, then the monthly payment will be the same \$10,000 whether the benefit is commenced at age 55 or 65. In such plans, the subsidy can easily be worth as much if not more than the benefit itself, and the participant should give serious consideration as to whether it makes sense not to retire early. Not surprisingly, subsidies of this kind are generally provided only by employers who wish to encourage early retirement.

Where the QDRO problem arises is that under the QDRO rules, if benefits are started to the alternate payee while the participant is still working, the subsidy will not apply to the alternate payee’s payments, and the subsidy on that share is permanently forfeited back to the plan (to the benefit of the employer). While the damage can be mitigated by including a provision in the QDRO that if the participant later retires and becomes eligible for the subsidy, the alternate

³ Assuming the plan is covered by ERISA, both of these documents are available upon written request, and must be provided by the plan administrator within 30 days to avoid being subject to a \$110 per day per document penalty for any unreasonable delay past that time. ERISA §502(c).

payee will be entitled to share in that subsidy to the extent of his or her interest that has not yet been paid, each month of that the alternate payee receives an unsubsidized payment, something is left on the table. In our example, if 100% of the benefit were awarded to the alternate payee for liquidity and is paid before the participant retires, each \$5,000 payment would result in the forfeiture of \$5,000 of the subsidy.

The Plan Loan Alternative

All qualified plans may, but are not required to, allow for loans to be made to a participant. While the detailed rules that govern these loans are beyond the scope of this article, as a rule if a plan does allow a participant to borrow on his or her accrued benefit/account, the loan will be limited to the lesser of 50% of the benefit or \$50,000, and (unless secured by a residence, rather than by the benefit in the plan) must be fully amortized and repaid in 5 years. Although for this reason, participant loans alone are rarely sufficient to solve cash flow issues, they can sometimes help because the money received is non-taxable (assuming the loan is kept current).

Further, some plans will allow an alternate payee who is awarded a separate account to have their own loan, which could enable a cooperating couple to borrow up to \$100,000 between them (\$50,000 each) without triggering tax. Whether this is a possibility will be evident from the plan document, or from the plan loan procedures, both of which are available from an ERISA plan on request by a participant or alternate payee. ERISA §104

Practice Tip: If tax is triggered because the loan is not made in compliance with the plan rules; or if it subsequently goes into default, then there will be a taxable deemed distribution of either the full amount (if the loan does not initially qualify) or on the amount in default in all other cases, which will also be subject to the 10% additional tax for early distributions to the same extent it would have been had it been an actual distribution. [Treas. Reg. §1.72\(p\)-1 Q&A 11](#).

QDRO Taxation

While all distributions of pre-tax benefits under a QDRO are taxable as ordinary income (unless rolled to another plan or IRA), they are by statute exempt from the additional 10% early distribution tax that generally applies to any distribution made before the participant is 59½. [IRC §72\(t\)\(2\)\(c\)](#). Thus, not only can a QDRO provide early access to funds not otherwise available because the participant is still working, but they can be paid out at any time without incurring the early distribution penalty tax.⁴

If the QDRO distribution will be spent immediately, there are a few other tax rules to know. First, if the distribution is rollover-eligible (as most are these days), then unless it is transferred directly from the plan to the rollover plan or IRA by the plan trustee, it will be subject to mandatory 20% withholding. This can be avoided only by requesting “direct rollover” of the distribution to an IRA, and then withdrawing that amount from the IRA (in which case mandatory withholding does not apply). However, since the QDRO exception to the 10% early distribution tax also does not apply, this tactic should not be used unless the alternate payee spouse is at least 59½ or can qualify for one of the other exemptions available under [IRC §72\(t\)](#).⁵

When tax is due on a distribution to an alternate payee, it is important to remember who must pay the tax. If the alternate payee is the spouse or former spouse of the participant, the

⁴ It is important to note that the QDRO exception to the early distribution penalty tax is not available for distributions from an IRA. Consequently, when considering whether to divide a plan account by QDRO, or moving to an IRA for tax-free division under [IRC 408\(d\)\(6\)](#), it is important to consider whether the money is likely to be accessed before age 59½ (unless one of the other penalty tax exception allowed under [IRC §72\(t\)](#) is available).

⁵ For example, if the distribution is paid in a series of substantially equal payments (such as a life annuity), the early retirement additional tax is avoided. If the distribution is large enough, this could provide a steady source of income to help defray expenses without paying additional tax.

alternate payee is the one who is liable. But if the alternate payee is a child or other dependent of the participant, the tax is paid by the participant.⁶

Practice Tip: If the plan is invested in employer securities, and if it provides for distributions in kind, and if the securities are highly appreciated, there is a special rule that should be considered before taking early distribution of any securities in participant's account by QDRO. Under this rule, if the distribution qualifies for Net Unrealized Appreciation treatment under [IRC §402\(e\)](#), when the securities are distributed, only their value at the time they were contributed to the plan is taxable as ordinary income. The balance of the distribution (i.e., the net unrealized appreciation) is not taxed until the securities are sold, at which time they will likely qualify for capital gains treatment. The tax savings from NUA treatment can be substantial, and while they are available whether the distribution is to the participant or an alternate payee spouse, they can easily be lost if the distribution is not done in a way and at a time that qualifies for NUA treatment, or if the distribution is rolled to an IRA. Participants who are lucky enough to have this opportunity should consult with a knowledgeable tax advisor before proceeding with any distribution or QDRO.

Practice Tip: If the plan to which the QDRO is directed includes a designated Roth account, there is a whole other set of rules that come into play to the extent that Roth money is included in the award, particularly with regard to the 5-year waiting period for qualified distributions. Because of the potential pitfalls for such an order, it is recommended that a professional advisor knowledgeable in this area be consulted.

Using a Support QDRO to free up current income.

Sometimes the cash flow issue arises because one spouse must pay interim support on top of all the regular expenses of divorce. In this situation, it may be worthwhile to consider using a Support QDRO in place of direct payment of alimony or child support, since the tax effect upon the participant and the recipient is either neutral, or in some cases improved.

To illustrate, consider four scenarios in which it is assumed that the required support payment is \$100 and that both spouses are in the same 30% tax bracket:

Scenario A: H pays the \$100 from his gross income as deductible alimony under [IRC §71](#). Result: H reports \$100 as income, deducts the \$100 payment, and pays no tax. The deduction gives him a tax savings of \$30, for a net support cost of \$70. W pays tax on the \$100 as income, and has after-tax income of \$70.

Scenario B: H obtains a QDRO that pays W \$100 from his profit sharing plan until the plan is notified that benefits to W are to stop. Result: H pays no tax and receives no deduction. Because his plan account is reduced by \$100 of pre-tax money, his tax-effected support cost is still \$70.

Scenario C: H pays \$100 in child support with after-tax money. Result: This payment is not deductible, nor taxable to the child (or to the recipient parent). The cost to H is \$100.

Scenario D: H obtains a child support QDRO that makes the payment directly from his profit sharing plan. The plan distributes \$100 to the child. Result: [H pays \\$30 in tax on that distribution \(unless he is able to avoid that by rolling \\$100 of new money to an IRA, under IRS Notice 89-25, supra\)](#); which makes H cost to use the QDRO to make

⁶ While an alternate payee spouse or former spouse can avoid tax on his or her distribution that is rollover-eligible by either directly rolling it to another qualified plan or IRA, or indirectly rolling it by taking payment (which will be net of 20% mandatory withholding) and rolling that payment (plus the missing 20% with new money if desired) within 60 days. If the alternate payee is a child or dependent, the distribution cannot be rolled by the alternate payee to avoid the tax on the participant, however it may be possible for the participant to come up with new money and execute the rollover to his or her own IRA. See, [IRS Notice 89-25, 1989-1 CB 662](#), Q&A 4.

his payment \$100 (\$70 in after-tax income H will not receive from the plan, plus the \$30 paid in taxes).

That said, is there any advantage to using a QDRO rather than paying spousal or child support directly? In fact, there are at least two. The first relates to employment taxes. If a QDRO is used, the support is paid with money that is not subject to employment tax either when it is contributed to the plan (assuming the contribution was not an elective deferral under a 401(k) plan) or when it is distributed. That can generate a savings of more than 7.5% for H, unless he is also the plan sponsor (for example, as a sole proprietor), in which case the total savings in employment tax is a little over 15% (employer's share and the employee's share together). On a payment of \$3,000 per month, that equates to a monthly savings of about \$450.

The second advantage, is that alimony that is paid by a plan under a QDRO is taxed under [IRC §402](#), not [§71](#), which means that the usual rules that prohibit the front-loading alimony payments do not apply. Thus, for example, if to meet current cash needs the parties agree to a prepayment of 5 years of alimony in a lump sum by QDRO, the tax result will be exactly the same as if the payments had been made ratably over the 5 years: the recipient spouse is treated as the taxpayer, not the participant spouse.

Practice Tip: To achieve the correct tax result in the case of a QDRO for child support, the order must be drafted to make it clear that the "alternate payee" is the child, even though the payment is to be made to a spouse as the child's nominee or agent. This will not only ensure that the distributions will be taxed to the Participant (not the spouse), but it will also avoid having to gross up the payment for mandatory withholding, which does not apply under these circumstances.⁷ Permissible nominees include the custodial parent or guardian--anyone else who is *in loco parentis* status—and any governmental agency that collects child support. See, e.g. the DOL's QDRO handbook entitled "QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations" Q. 1-10, available on the Web at: <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf>. See also, ERISA Opinion Letter No. 2002-03A.

Conclusion

Although the tax and anti-alienation provisions that control the administration of qualified plans are designed to encourage retirement funds to be used for their intended purpose, Congress has taken note of the fact that an exception is appropriate in divorce situations, so that the family court has the freedom to utilize these assets as appropriate within the limitations of the QDRO rules. As a consequence, by following these rules carefully retirement funds can be safely accessed in divorce proceedings as needed. That said, however, it is important to always keep in mind that these funds can only be spent once, and whatever is used up in the divorce proceeding will not be available when it comes time to retire.

⁷ "A distributee other than the employee or the employee's surviving spouse (or a spouse or former spouse who is an alternate payee under a qualified domestic relations order) is not permitted to roll over distributions from a qualified plan. Therefore, those distributions do not constitute eligible rollover distributions under [section 402\(c\)\(4\)](#) and are not subject to the 20-percent income tax withholding under [section 3405\(c\)](#)." [Treas. Reg. § 1.402\(c\)-2](#), Q&A 12(b).

**Flirting with a Representation Requirement:
Premarital Agreements in a Comparative Context
By Ard Ardan¹**

All U.S. states recognize pre-marital or prenuptial agreements in some form. However, their enforceability is a relatively recent phenomenon and can vary from state to state depending on a host of factors. The issue of enforceability of pre-marital agreements, as discussed in the following pages, is determined by the circumstances surrounding their signing rather than content or substantive provisions in the agreement. Many states, including Texas, have adopted the Uniform Premarital Agreements Act (UPAA), which heightens the enforceability of premarital agreements and allows for little recourse for parties seeking refusal of enforcement.² Other states, such as California, have adopted the UPAA along with more stringent requirements for the enforceability of pre-marital agreements: notably the independent counsel requirement when waiving spousal support.³

In an effort to reach a middle ground, the Uniform Law Commission has promulgated a new uniform act, the Uniform Premarital and Marital Agreements Act (UPMAA). The revised act features an access to independent counsel requirement among other proposed changes. This paper contrasts the law on premarital agreements in “pure” UPAA jurisdictions such as Texas with California law and addresses the newly promulgated act and its merits.

While certainly understanding that independent lawyers representing both spouses ideally draft premarital agreements, this paper takes the position that the lack of independent counsel should not ipso facto render an agreement unenforceable. The presence, or absence, of counsel at the signing of a pre-marital agreement, in certain circumstances, is irrelevant as to its validity under general notions of fairness. The fact that independent counsel did not represent the parties is perhaps best introduced as evidence of lack of voluntariness or intent but should never per se invalidate an otherwise perfectly valid pre-marital agreement.

INTRODUCTION: PRE-MARITAL AGREEMENTS, GENERALLY

A recent survey of U.S. divorce attorneys seems to indicate that the number of premarital agreements is on the rise.⁴ Their use has historically been the subject of much controversy and skepticism.⁵ The canon of scholarship and literature around pre-marital agreements would suggest that they are tools used by the rich and powerful to shield their valuable assets from their less fortunate and less legally sophisticated prospective spouses. Billionaire politician Donald Trump famously used pre-nuptial agreements to shield his assets from his last few less well-off prospective wives.⁶ The belief that generally only playboy tycoons enter into premarital agreements with their cocktail waitress fiancées is widespread and misguided.

¹ Mr. Ardan is due to graduate from University of Texas School of Law in May 2017 and may be reached at aardalan90@gmail.com.

² *Tex. Fam. Code* §4.003

³ *West's Ann. Cal. Fam. Code* §1612(c)

⁴ *Increase of Prenuptial Agreements Reflects Improving Economy and Real Estate Market: Survey of Nation's Top Matrimonial Attorneys Also Cites Rise in Women Requesting Prenups*, Press Releases, American Academy of Matrimonial Lawyers, October 16, 2013. <http://www.aaml.org/about-the-academy/press/pressreleases/pre-post-nuptial-agreements/increase-prenuptial-agreements-re>

⁵ Gherini, John G., *The California Supreme Court Swings and Misses in Defining the Scope of Enforceability of Premarital Agreements*, 36 *U.S.F. L. Rev.* 151, 152 (2001) (Discussing the history of premarital agreement enforcement).

⁶ Donald Trump famously enforced premarital agreements against two of his ex-spouses. See Gray, Geoffrey, *With This Ring (and This Contract), I Thee Wed*, *New York Magazine*, March 27, 2006 p. 4

<http://nymag.com/relationships/features/16470/index2.html>; Barron, James, *In Trump v. Trump the Focus Is on Lots of Fine Print*, *The New York Times*, Feb. 15, 1990 <http://www.nytimes.com/1990/02/15/nyregion/in-trump-v-trump-the-focus-is-on-lots-of-fine-print.html>

In fact, pre-marital agreements are entered into by an increasing number of non-affluent couples with relative financial parity.⁷ This may be as a result of the increasingly contractual conception of marriage itself due to the rise in earning power of women.⁸ Parties to a second marriage regularly elect to enter into premarital agreements to fashion the terms of their marriage not just at the time of divorce but during the marriage.⁹ They provide couples contemplating a specific configuration for the distribution of their marital property with a higher degree of certainty and predictability when entering a new union.¹⁰ An older couple, with children from previous marriages, may want to protect assets acquired before the marriage from their new spouse in the event of death or divorce.¹¹

Conceptually, pre-marital agreements owe their existence to the inherently contractual nature of marriage. While marriage is often characterized as an institution sanctioned by the state, with largely uniform parameters and rules from marriage to marriage, pre-marital agreements are usually highly individualized and framed to address each married couple's particular situation.¹²

As a consequence, premarital agreements are creatures of, and generally subject to, principles of contract law.¹³ Their validity is contingent on the ability of the parties to negotiate independently and execute a valid contract voluntarily.¹⁴ Premarital agreements allow the parties to gain a degree of certainty about the outcome of any potential future divorce proceedings by contracting around the default divorce rules imposed by the state under either separate property or community property rules.¹⁵ Pre-marital agreements are perhaps most important in community property states, such as California and Texas, where the common marital property of spouses is divided according to each state's unique community property regime.¹⁶

In many states, a premarital agreement is defined as "an agreement made between prospective spouses in contemplation of marriage and to be made effective upon marriage."¹⁷ However, this definition understates the potential scope of authority of premarital agreements.¹⁸ A premarital agreement, most notably, may shield wealth acquired by one spouse before marriage from the other.¹⁹ An agreement can also serve as a stipulation vis-a-vis division of property acquired during the course of marriage.²⁰ Certain agreements outline responsibilities and obligations to be undertaken by the respective spouses during the course of the marriage.²¹

Simple pre-marital agreements can be broad and limited to mutual total waivers to the right of spousal support in the event of divorce. They can also be complex, detailing the division of marital assets by measuring the number of years spent in the marriage and even prescribing the

⁷ Rieker, Matthias, *A New Way to Use a Pre-Nup*, Wall Street Journal, March 12, 2015 <http://www.wsj.com/articles/a-new-way-to-use-a-prenup-1426176138>

⁸ See Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in *The Fall and Rise of Freedom of Contract* 201 (F.H. Buckley ed., 1999)

⁹ Rieker, WSJ article.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ "[A] premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement." *Unif. Premarital Agreement Act* §2 cmt (1983).

¹⁴ Ryznar, Margaret, *To Have and To Hold For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 *Chap. L. Rev.* 27 (2009) (Describing the nature of premarital agreements)

¹⁵ *Id.* at 31.

¹⁶ *Id.* at 37.

¹⁷ *Id.* at 30-31.

¹⁸ *Id.*

¹⁹ See eg. *Osborne v. Osborne*, 428 N.E.2d 810, 813 (1981); *DeLorean v. DeLorean*, 511 A.2d 1257, 1259 (Ch. Div. 1986)

²⁰ See eg. *Ferry v. Ferry*, 586 S.W.2d 782, 783 (Mo. Ct. App. 1979); *Gant v. Gant*, 329 S.E.2d 106, 109 & n.1 (W. Va. 1985)

²¹ See L. Weitzman, *The Marriage Contract* 225-54 (1981); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *Calif. L. Rev.* 204, 219-23 (1982).

timing and conditions of prospective divorce proceedings.²² For example, in Texas, parties to a premarital agreement can contract with respect to (a) the rights and obligations of either party with respect to any property owned by either party²³; (b) modification or elimination of spousal support²⁴; (c) the making of wills, trusts, life insurance policies used to carry out provisions of the agreement²⁵; (d) the choice of law governing the construction of the agreement and any other matter not “in violation of public policy.”²⁶ Note, however, that the right to child support cannot be adversely affected by a premarital agreement.²⁷

In community property states, couples can stipulate to divide their property under an equitable distribution scheme and vice-versa.²⁸ In this way, pre-marital agreements can be used to circumvent the default rules of division of property with regards to debts owed to third parties.²⁹ In sum, most U.S. states allow parties to premarital agreements wide latitude in the scope of their agreements.

ENFORCEMENT OF PRE-MARITAL AGREEMENTS IN UPA JURISDICTIONS

The enforceability of premarital agreements is a relatively recent development. Indeed, through much of the last century, state courts generally objected to the enforcement of premarital agreements on public policy grounds.³⁰ Contracts intended to facilitate procurement of divorce were deemed illegal as contrary to public policy.³¹ The courts reasoned that marriage is the foundation of social organization in American society and that any incentive given for spouses to terminate their marriage goes against the state’s interest of promoting marriage.³² This reasoning echoes from a time when divorces were fault-based, far less common, and more difficult to obtain.³³

In the 1970s, this longstanding trend was reversed in a series of cases across the country recognizing that premarital agreements are not per se against public policy.³⁴ Additionally, sev-

²² “Hollywood actress Catherine Zeta-Jones reportedly contracted with actor Michael Douglas to receive \$2.8 million per year of marriage upon divorce, and if she proved his infidelity, for an additional \$5 million. Meanwhile, the premarital agreement between actress Nicole Kidman and singer Keith Urban would purportedly pay Urban about \$640,000 for every year that he spent with Kidman, unless he used illegal drugs during the marriage, in which case he would receive nothing. Finally, in light of the public speculation on his marital fidelity, golfer Tiger Woods reportedly amended his premarital agreement, contracting to pay his wife significantly more upon divorce if she refrained from filing for divorce in the immediate future.” From Ryznar, Margaret, *To have and to Hold, For Richer or Richer: Pre-Marital Agreements in the comparative context*.

²³ [Tex. Fam. Code §4.003 \(a\) \(1-3\)](#)

²⁴ [Tex. Fam. Code §4.003 \(a\) \(4\)](#)

²⁵ [Tex. Fam. Code §4.003 \(a\) \(5-6\)](#)

²⁶ [Tex. Fam. Code §4.003 \(a\) \(8\)](#); Note: The analogous [California Family Code §1612](#) treats spousal support in a different manner as discussed later in this paper.

²⁷ [Tex. Fam. Code §4.003 \(b\)](#)

²⁸ Ryznar at 32.

²⁹ *Id.*; see [Sheshunoff v. Sheshunoff](#) 172 S.W.3d 686 (Tex. App- Austin 2005)

³⁰ See Ryznar; Also see [Gallemore v. Gallemore](#) 114 So. 371, 372 (Fl. 1927), [Moss v. Moss](#), 31 Pa. D. & C. 2d 88 (1963).

³¹ See [Gallemore v. Gallemore](#) 114 So. 371, 372 (Fl. 1927)

³² *Id.*

³³ [Posner v. Posner](#) 233 So.2d 381, 383 (Fl. 1970)

³⁴ [Brooks v. Brooks](#), 733 P.2d 1044 (Alaska 1987); [Williams v. Williams](#), 166 Ariz. 260, 801 P.2d 495 (App.1990); [Dingledine v. Dingledine](#), 258 Ark. 204, 523 S.W.2d 189 (1975); [In re Marriage of Dawley](#), 17 Cal.3d 342, 131 Cal.Rptr. 3, 551 P.2d 323 (1976); [Newman v. Newman](#), 653 P.2d 728 (Colo.1982); [Parniawski v. Parniawski](#), 33 Conn.Sup. 44, 359 A.2d 719 (1976); [Posner v. Posner](#), 233 So.2d 381 (Fla.1970); [Scherer v. Scherer](#), 249 Ga. 635, 292 S.E.2d 662 (1982); [Rossiter v. Rossiter](#), 4 Haw.App. 333, 666 P.2d 617 (1983); [Valid v. Valid](#), 6 Ill.App.3d 386, 286 N.E.2d 42 (1972); [Boren v. Boren](#), 475 N.E.2d 690 (Ind.1985); [Matlock v. Matlock](#), 223 Kan. 679, 576 P.2d 629 (1978); [Osborne v. Osborne](#), 384 Mass. 591, 428 N.E.2d 810 (1981); [Frey v. Frey](#), 298 Md. 552, 471 A.2d 705 (1984); [Rinvelt v. Rinvelt](#), 190 Mich.App. 372, 475 N.W.2d 478 (1991); [Hill v. Hill](#), 356 N.W.2d 49 (Minn.App.1984); [Ferry v. Ferry](#), 586 S.W.2d 782 (Mo.App.1979); [MacFarlane v. Rich](#), 132 N.H. 608, 567 A.2d 585 (1989); [Marschall v. Marschall](#), 195 N.J.Super. 16, 477 A.2d 833 (1984); [Fletcher v. Fletcher](#), 68 Ohio St.3d 464, 628 N.E.2d 1343 (1994);

eral states, including Texas, enacted the Uniform Premarital Agreements Act (1983) (“UPAA”), promulgated by the Uniform Law Commission (“ULC”), which favors enforcement.³⁵

The UPAA is essentially tantamount to a statute of frauds for agreements made in contemplation of marriage. The UPAA created a presumption of validity for pre-marital contracts by placing the burden of proving unenforceability on the party against whom enforcement is requested.³⁶ Under the law, there are two ways to prevent the enforcement of a pre-marital agreement; namely by showing lack of voluntary agreement or unconscionability combined with a lack of sufficient disclosure of assets.³⁷ These are the exclusive defenses to enforcement and common law defense generally available with commercial contracts are abrogated.³⁸ The lack of legal representation is not a defense to the enforcement of a pre-marital agreement.³⁹

Texas case law gives strong deference to the presumption of validity of premarital agreements.⁴⁰ Successful challenges to the enforcement of a pre-marital agreement in Texas usually allege lack of voluntary assent. Voluntariness is not defined in the UPAA, however the cases cited in the relevant comment indicate that the ULC commissioners considered that the voluntariness of a premarital agreement turned on whether the agreement was entered into knowingly, in the sense that the parties understood the terms or basic effect of the agreement.⁴¹ Texas case law tells us that a party acts voluntarily if its action is taken intentionally or by the free exercise of its will.⁴² The parameters of what constitutes involuntariness are likewise uncertain and depend upon the circumstances of each case.⁴³

In determining whether any evidence of involuntariness existed, Texas courts have considered (1) whether a party lacked the advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided and (4) whether information has been withheld.⁴⁴ Evidence of fraud or duress may help show involuntariness, however they are not named defenses to the enforcement of a premarital agreement.⁴⁵ Note that Texas and nearly all U.S. jurisdictions do not require consultation with independent counsel for the formation of a valid premarital agreement. Rather, courts consider the lack of independent counsel as a factor when deciding questions of involuntary execution or inadequacy of financial disclosure.⁴⁶

In *Moore v. Moore*, the court found, from the evidence presented at trial that the wife did not sign the premarital agreement voluntarily.⁴⁷ The husband, Gary Moore first attempted to use his

Freeman v. Freeman, 565 P.2d 365 (Okla.1977) (waiver of property rights only but cited by *Taylor v. Taylor*, 832 P.2d 429 (Okla.App.1991) as establishing validity of waivers of permanent alimony); *Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973); *Karkaria v. Karkaria*, 405 Pa.Super. 176, 592 A.2d 64 (1991); *Bassler v. Bassler*, 156 Vt. 353, 593 A.2d 82 (1991); *Gant v. Gant*, 174 W.Va. 740, 329 S.E.2d 106 (1985); *Matson v. Matson*, 107 Wash.2d 479, 730 P.2d 668 (1986); *Hengel v. Hengel*, 122 Wis.2d 737, 365 N.W.2d 16 (Wis.App.1985).

³⁵ Tex. Fam. Code §4

³⁶ Tex. Fam. Code §4.006(a)

³⁷ Tex. Fam. Code §4.006(a) (1-2)

³⁸ Tex. Fam. Code §4.006(c)

³⁹ UPAA Offic. Cmt. §6 “Nothing in Section 6 makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 may have existed (see, e.g., *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962)).”

⁴⁰ *Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App. – Houston [14th Dist.] 1997, no writ)

⁴¹ *In re Marriage of Bonds*, 5 P. 3d 815, 825 (Cal. 2000)

⁴² *Martin v. Martin*, 287 S.W.3d 260, 263 (Tex. App. – Dallas 2009 pet. denied)

⁴³ *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 698 (Tex. App. – Austin 2005, pet. denied)

⁴⁴ *Moore v. Moore*, 383 S.W. 3d 190, 195 (2012); See *Martin*, 287 S.W.3d at 264–66.

⁴⁵ *Sheshunoff*, 172 S.W.3d at 697-698.

⁴⁶ See, e.g., *Randolph v. Randolph*, 937 S.W.2d 815 (Tenn. 1996); *In re Estate of Smid*, 756 N.W.2d 1 (S.D. 2008); *In re Estate of Lutz*, 563 N.W.2d 90 (N.D. 1997); *Fletcher v. Fletcher*, 628 N.E.2d 1343 (Ohio 1994); *Holler v. Holler*, 612 S.E.2d 469 (S.C. Ct. App. 2005); *Edwards v. Edwards*, 744 N.W.2d 243 (Neb. 2008); *In re Estate of Kinney*, 733 N.W.2d 118 (Minn. 2007); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 963 n.9 (Mass. 2010).

⁴⁷ 383 S.W.3d 190 (2012)

own lawyer to draft the agreement as a collaborative effort.⁴⁸ Gary then realized that this would subject the agreement to attack and agreed to pay for a lawyer for his fiancée Caroline.⁴⁹ He then made it effectively impossible for Caroline's lawyer to review the final draft by misrepresenting to her that he did not have the agreement when they went to Martha's Vineyard and then hiding the agreement for several days until just hours before their wedding.⁵⁰ When he did present the draft of the agreement, just hours from their wedding, it did not contain any details as to the value of his estate but did contain a provision waiving any of Caroline's rights to further disclosure.⁵¹ Caroline subsequently panicked and attempted to reach her lawyer to no avail. Gary reassured Caroline that his lawyer had reviewed it and that "it was okay for her to sign."⁵² She subsequently signed it based on these reassurances.⁵³

Perhaps unsurprisingly, the trial court found that the agreement was not entered into voluntarily. While there were no threats or coercion, it sufficed for Caroline to show that by some artifice, Gary created a situation whereby Caroline was pressured into signing an agreement which she did not understand by her own admission and representations.⁵⁴ While the absence of her lawyer by itself did not make the agreement invalid as a matter of law, it was critical in evaluating whether Caroline entered into the agreement voluntarily.⁵⁵

In contrast to the parties in *Moore*, the parties in *Sheshunoff v. Sheshunoff* were both sophisticated and had hired adequate representation in the drafting of their marital agreement.⁵⁶ In that case, the parties signed a premarital agreement shifting most of the couple's debt liabilities unto Mr. Sheshunoff and most of the couple's assets to Ms. Sheshunoff's name for tax purposes.⁵⁷ Each party had hired tax and estate planning attorneys to draft the agreement.⁵⁸ However, Ms. Sheshunoff had secretly hired a divorce attorney and planned on divorcing her husband upon execution of the marital agreement.⁵⁹

The court held that the marital agreement was executed voluntarily and that Mr. Sheshunoff's evidence of involuntary execution was not sufficient to show that he was coerced or defrauded in signing the agreement.⁶⁰ Hence, even if the intent of one of the parties is to ultimately exercise his/her right to divorce at the time of the signing of the premarital agreement, this does not by itself make the signing of the agreement involuntary.

As illustrated in the cases above, the hiring of outside counsel is not, by itself, dispositive on the issue of voluntariness. In *Moore*, though both parties were represented by independent counsel, the circumstances surrounding the execution of the agreement led the court to rule against the enforcement of the premarital agreement. The fact that both parties were represented did not prevent them from signing an agreement, which was ultimately thrown out. In *Sheshunoff*, the parties were both represented by a battery of attorneys that helped draft the myriad documents shifting the couple's liabilities to Mr. Sheshunoff and the maliciously obtained premarital agreement was upheld.

In other words, making attorney representation a requirement for the execution of a valid pre-marital agreement is a poor device to ensure that agreements are entered into voluntarily. The *Sheshunoff* court judged that, by the entirety of the circumstances surrounding the making

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 196.

⁵⁶ 172 S.W.3d 686 (2005)

⁵⁷ *Id.* at 698.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 201

of the agreement, Mr. Sheshunoff had voluntarily entered into a highly unfavorable agreement that effectively acted as a divorce settlement disguised as tax planning. Despite having representation, Mr. Sheshunoff's error of judgment in trusting his now ex-wife is perhaps to be blamed for his unfavorable result.

The couple in *Moore* had representation and their agreement was thrown out for lack of voluntariness. The inquiry of the court was holistic, taking into account the fact that the husband was actively obfuscating the terms of the agreement and hiding the terms of their would-be agreement. The fact that she was represented did not prevent her husband's malicious behavior.

Premarital agreements in UPAA jurisdictions can also be invalidated on a showing of unconscionability and lack of disclosure.⁶¹ The issue of unconscionability must be decided by the trial court as a matter of law before the disclosure questions are addressed.⁶² Neither the Texas Family Code nor Texas case law has provided a definition of unconscionability as it applies in the context of a premarital agreement.⁶³ Texas courts have reviewed this issue on a case-by-case basis using commercial contract law⁶⁴ and looking to the entire atmosphere in which the agreement was made.⁶⁵ In reviewing whether the agreement is unconscionable, courts have considered factors such as the maturity of the parties, their educational levels and business backgrounds, their experiences with prior marriages, their respective ages, and whether there were motivations to protect children.⁶⁶ Most importantly, for our purposes, the lack of independent counsel is not dispositive on the question of unconscionability.⁶⁷

In *Marsh v. Marsh*, the parties signed a one-sided prenuptial agreement at the request of Juanita Marsh.⁶⁸ Juanita had suffered financial losses due to the illness and eventual death of her late husband and she wanted her new husband Bill to guarantee her financial security in consideration of marriage.⁶⁹ An attorney, who drafted the premarital agreement, represented Juanita while Bill elected not to hire counsel for the execution of the agreement.⁷⁰ A release signed by the parties stated that the parties fully understood the terms of the premarital agreement and entered it freely with informed consent and that it was not procured by fraud or duress.⁷¹

⁶¹ [Tex. Fam. Code § 4.006\(a\)](#)

⁶² [Fazakerly v. Fazakerly](#), 996 S.W.2d 260, 265 (Tex. App.- Eastland 1999, pet. denied)

⁶³ [Marsh](#), 949 S.W.2d at 739

⁶⁴ The court in *Marsh* notes: In determining whether a contract is unconscionable or not, the court must look to the entire atmosphere in which the agreement was made, the alternatives, if any, which were available to the parties at the time of the making of the contract; the non-bargaining ability of one party; whether the contract is illegal or against public policy, and, whether the contract is oppressive or unreasonable. At the same time, a party who knowingly enters a lawful but improvident contract is not entitled to protection by the courts. In the absence of any mistake, fraud, or oppression, the courts, as such, are not interested in the wisdom or impolicy of contracts and agreements voluntarily entered into between parties compos mentis and sui juris. Such parties to contracts have the right to insert any stipulations that may be agreed to, provided they are neither unconscionable nor otherwise illegal or contrary to public policy. It has accordingly been said that, almost without limitation, what the parties agree upon is valid, the parties are bound by the agreement they have made, and the fact that a bargain is a hard one does not entitle a party to be relieved therefrom if he assumed it fairly and voluntarily. A contract is not unenforceable on the ground that it yields a return disproportionate to the expenditures in time and money, where there has been no mistake or unfairness and the party against whom it is sought to be enforced has received and enjoyed the benefits. [Wade v. Austin](#), 524 S.W.2d 79, 86 (Tex.Civ.App.—Texarkana 1975, no writ) (citation omitted).

⁶⁵ [Pearce v. Pearce](#), 824 S.W.2d 195, 199 (Tex. App. – El Paso 1991, writ denied)

⁶⁶ See [Marsh](#), 949 S.W.2d at 741.

⁶⁷ *Id.*

⁶⁸ [Marsh](#) at 737.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 738.

Shortly after the signing of the agreement, Bill consulted his longtime attorney who advised him that the premarital agreement had several problems.⁷² Against the advice of his attorney, Bill paid a considerable sum of money into a trust, in partial performance of the terms of the premarital agreement.⁷³

The issues presented on appeal relate to the unconscionability of the agreement. The court found that the one-sided nature of the agreement did not strongly preponderate toward a finding of unconscionability.⁷⁴ The issue of lack of attorney representation was also deemed to not be dispositive. After hearing evidence presented by family law experts from both sides, the court did not find the agreement to be unconscionable.⁷⁵ As a result, the court found that the agreement was valid and enforceable.

In the rather recent case of *Sheriff v. Moosa*, neither party was represented and the court found that the premarital agreement was invalid.⁷⁶ Before entering into an arranged marriage, Mr. Sheriff, pulled a premarital agreement form off the internet and gave Moosa “a few minutes to look over it” before she signed it.⁷⁷ Moosa testified that her marriage to Sheriff was a traditional arranged marriage and that he would not have gotten married to her if she did not sign the prenuptial agreement.⁷⁸ Moosa subsequently testified that she did not think the agreement was fair or that it adequately provided her with information regarding Sheriff’s assets and liabilities.⁷⁹

The court found that the premarital agreement was both unconscionable in that it attempted to change the laws of Texas and also did not provide sufficient disclosure as to the assets of the parties.⁸⁰ The court did not rule on the issue of voluntariness in light of the absence of independent representation.⁸¹

Both cases illustrate the reluctance of Texas courts to weigh the lack of attorney representation as evidence of unconscionability. The fact that a party lacked representation may perhaps be relevant in an inquiry about voluntariness, but it does not seem to be considered in an unconscionability inquiry.

Lack of voluntariness and, in the alternative, a showing of unconscionability paired with lack of disclosure are the exclusive remedies to enforcement of a premarital agreement in Texas and other “pure” UPAA jurisdictions. A showing that one party was not adequately represented is not in itself a defense to the enforcement of a premarital agreement. The UPAA as adopted in Texas abrogates common law defenses to the enforcement of premarital agreements.⁸² While the UPAA approach seems to harshly favor enforcement, it allows courts to strike pre-marital agreements under the circumstances shown in the cases illustrated above. The Texas approach protects prospective spouses while allowing substantial freedom to contract to the parties.

ENFORCEMENT OF PRE-MARITAL AGREEMENTS IN CALIFORNIA

California was the first state to adopt the UPAA in 1985.⁸³ The language relating to waiver of spousal support was stricken from the scope provision of the act at its passage.⁸⁴ For the ensuing years, there was much confusion as to whether independent counsel was required to form a valid pre-marital agreement. In two cases, *In re Marriage of Bonds* and *In re Marriage of Pen-*

⁷² *Id.* at 741.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 742.

⁷⁶ 2015 WL 4736564, 4

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Tex. Fam. Code § 4.006(c)

⁸³ John G. Gehrini, *The California Supreme Court Swings and Misses*, 36 U.S.F. L. Rev. 151, 159

⁸⁴ West’s Anno. Cal. Fam. Code §1615 (Unenforceable Agreements)

delton, the Supreme Court of California ruled that the legislature did not intend to make independent representation a requirement for the waiver of spousal support.⁸⁵ They both held that the absence of representation did not per se render the agreements invalid but that they went to answer the inquiry as to whether the agreement was entered into voluntarily.⁸⁶

Within a few months of these decisions, the California legislature clarified its position by passing Senate Bill 78, which amends §1612 of the Family Code to read:

[a]ny provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.⁸⁷

Commentators have suggested that states adopt California's independent counsel requirement for the creation of enforceable premarital agreements.⁸⁸ It is argued that: (1) premarital agreements are fundamentally different from commercial contracts because the parties do not deal at arm's length with each other, (2) states do not provide sufficient protection for vulnerable parties to premarital agreements and (3) "by adopting an independent counsel requirement like California's, states can ensure informed consent and bargaining equality, while promoting enforceability and predictability."⁸⁹

California and some non-UPAA states require attorney representation for the waiver of spousal support.⁹⁰ This requirement specifically addresses the public policy goal of protecting prospective spouses from entering into agreements, which they could not understand. The framers of this requirement likely identified two issues, namely that: (1) at least some prospective spouses generally cannot understand the consequences of signing waivers of spousal support and (2) as a consequence of advice of counsel, a prospective spouse would refuse to sign a pre-marital agreement that is unfair or adverse to his/her interests. The requirement presumes that individuals are not fully competent to conduct their own affairs and that attorney representation could help temper some bad decision-making.

This paper takes the position that the California Supreme Court's approach was more judicious and should not have been superseded by the state legislature. In the cases of *Bonds* and *Pendelton*, it was shown that the parties to the premarital agreements, while not represented by independent counsel, had voluntarily agreed to be bound by the terms of said agreements.⁹¹

In *Bonds*, famous baseball player Barry Lamar Bonds presented his unrepresented spouse, Susann Margreth Bonds, with a premarital agreement on the eve of their discreet Las Vegas wedding.⁹² Susann presented evidence that she did not enter into the agreement voluntarily because she did not understand the English language sufficiently well and because she was not represented by independent counsel.⁹³ The Supreme Court relied on the UPAA drafter's comments in ascertaining whether independent counsel was required when waiving rights to spousal support.⁹⁴ They concluded that the commissioners at the ULC intended that the party seeking to avoid a premarital agreement prevail by establishing that the agreement was involuntary and

⁸⁵ Gherini at 159.

⁸⁶ *In Re Marriage of Bonds*, 5 P.3d 815 (2000) and *In Re marriage of Pendelton*, 5P.3d 839 (2000)

⁸⁷ *West's Ann. Cal. Fam. Code §1612(c)*; See S. 78, 2001-2002, Reg. Sess., Enrolled Bill Text (Cal. 2001)

⁸⁸ Kennedy, Sandra, *Ignorance is not bliss: why states should adopt California's Independent Counsel Requirement For the Enforceability of PreNuptial Agreements*, 52 Fam. Ct. Rev. 709, 710 (2014)

⁸⁹ *Id.*

⁹⁰ *West's Anno. Cal Fam. Code §1615* (Unenforceable agreements)

⁹¹ *In Re Marriage of Bonds*, 5 P.3d 815 (2000) and *In Re marriage of Pendelton*, 5P.3d 839 (2000)

⁹² *Bonds* at 818.

⁹³ *Id.*

⁹⁴ *Id.* at 827.

that evidence of lack of capacity, duress, fraud, and undue influence as demonstrated by factors uniquely probative of coercion in the premarital context would be relevant in establishing involuntariness.⁹⁵

The court found, based on evidence provided by witnesses to the signing, that despite her lack of representation and weak command of the English language, Susann Bonds understood the concept of a premarital agreement and that she understood that she was waiving her right to spousal support among other things.⁹⁶ The marriage was not a grand affair and could have easily been postponed if either party had requested and so the parties were not under duress as a result of time constraints.⁹⁷ Her understanding of the premarital agreement and subsequent assent to its terms, regardless of the absence of counsel tended to show that she voluntarily signed the agreement.⁹⁸

In California, as in all other states, there are myriad other personal decisions that do not require the help of an attorney. Individuals of varied degrees of wealth and education do not need an attorney to enter into commercial contracts, open a line of credit, get married, draft a valid will, or purchase a home. In fact, in many states, individuals can represent themselves in certain legal matters and are not required to have legal representation even when in jeopardy of a criminal conviction.

The Pennsylvania Supreme Court has adopted an approach strongly favoring freedom of contract principles over paternalistic protections.⁹⁹ They rule that requirements impeding the ability of parties to enter into valid premarital agreements are motivated by obsolete paternalism:

Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the “weaker” party in marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.¹⁰⁰

In light of the foregoing, why do premarital agreements deserve such unique solicitude? If courts and legislatures are keen to eschew the paternalistic protections of the past, why do commentators and California legislators insist on imposing barriers to the enforcement of premarital agreements?

Sandra Kennedy has noted that premarital agreements are unique in their nature and should not be evaluated in the same fashion as commercial contracts.¹⁰¹ It is contended that because premarital contracts are entered into by parties in a confidential relationship, the spouses owe a higher fiduciary duty to each other at the time of the signing.¹⁰² The fact that the negotiation is not done at arm’s length does not affect the solemnity of the contract. Premarital agreements are negotiated, or should be negotiated, in contemplation of the dissolution of this supposed fiduciary duty.

⁹⁵ *Id.* at 826.

⁹⁶ *Id.* at 833-834.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990)

¹⁰⁰ *Id.* at 165.

¹⁰¹ Kennedy at 713.

¹⁰² Kennedy at 713.

It is also suggested that parties to a premarital agreement are subject to heightened optimism bias.¹⁰³ However, optimism bias is inherent in many non-marital agreements that the law does not seek to protect in the same way. The fact that parties are reluctant to take into account the possibility that the contingency they are preparing for may indeed come to bear is their responsibility. Parties who sign away their rights for lack of good judgment, with or without representation, do so at their own peril.

She contends that parties to premarital contracts are deemed too often be in asymmetrical relationships, and that existing remedies are not sufficient to allow recourse.¹⁰⁴ Her note presumes that advice of independent counsel could somehow blunt this perceived asymmetry by providing the parties with information that can help them in their decision-making. As shown in the cases illustrated in this paper, individuals make bad decisions but attributing these decisions to a lack of legal representation is erroneous.

In the cases of *Marsh*, *Moore*, *Sheshunoff*, the presence of legal counsel did not prevent the undesirable outcomes driven by poor decision-making that ultimately bore out. It is doubtful that Sheshunoff and his attorneys had any clue as to the intentions of Mrs. Sheshunoff and no amount of legal advice could have prevented his unenviable result.

Nevertheless, Kennedy concedes in her note that a simple waiver of the right to representation ought to be sufficient to create an enforceable premarital agreement.¹⁰⁵ This begs the question of whether other proponents of the independent counsel requirement believe that spouses have sufficient competence to effectively waive their right to counsel.

It is difficult to imagine what attorney representation of Susann Bonds would have changed under the circumstances outlined above. Where a party is shown to have understood the plain terms of a premarital agreement, namely the idea that they will not receive spousal support as a result of divorce, the requirement for representation seems moot at best. The attorney can perhaps implore the client to not enter into a facially unfavorable agreement. Ultimately however, the parties are the masters of their agreement and no procedural safeguard can prevent someone from inflicting irreparable harm unto themselves.

In sum, it is apparent that California's current approach is misguided and should not be replicated in other UPAA jurisdictions. The California Supreme Court decisions in *Bonds* and *Pendelton* should control and the legislature should repeal the independent representation requirement.

THE UNIFORM PREMARITAL MARRIAGE AGREEMENTS ACT OF 2012

In 2012, the ULC began promulgating a new act, designed to remedy the perceived shortcomings of the UPAA.¹⁰⁶ The Uniform Premarital and Marital Agreements Act (2012) ("UPMAA") greatly expands the grounds upon which a premarital agreement can be challenged in court.¹⁰⁷

In contrast to Texas law and the UPAA, the UPMAA allows common law defenses not enumerated in the act to be used against the enforcement of premarital agreements.¹⁰⁸ This would allow the contract law defenses of legal incompetency, misrepresentation, duress, undue influence, unconscionability, abandonment and waiver as defenses.¹⁰⁹ This would undermine the enforceability of pre-marital agreements. If the primary public policy benefit of pre-marital

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 714.

¹⁰⁵ Kennedy at 713.

¹⁰⁶ Atwood, Barbara; Bix, Brian, *A New Uniform Law for Premarital and Marital Agreements*, 46 *Fam. L. Q.* 313 (2012).

¹⁰⁷ Uniform Law Commission, *The Uniform Premarital and Marital Act of 2012*,

http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf

¹⁰⁸ *Tex. Fam. Code* § 4.006 (c)

¹⁰⁹ UPMAA §5 comment (allowing common law defenses)

agreements is to prevent litigious divorces, allowing challenges beyond voluntariness and unconscionability would be highly counter-productive.

One notable new requirement for formation of a valid premarital agreement is the requirement that both parties have “access to independent legal representation”¹¹⁰ as defined by the act. The ULC stopped short of requiring representation for formation of a valid agreement by requiring “access” to representation.¹¹¹ The drafters of UPMAA conceded that “requirement of legal representation would create an invitation to strategic behavior and unnecessary litigation.”¹¹² The drafters drew a distinction between their approach and the California requirement outlined earlier in this paper.¹¹³

Section 9 (a)(2) requires access to independent legal representation as defined by the statute.¹¹⁴ Subsection (b) requires that the parties have “reasonable time” to (A) “decide whether to retain a lawyer” and (B) “locate a lawyer, obtain advice and consider advice.”¹¹⁵

Under this quasi-requirement, the presumption of validity is challenged in any case where the pre-marital agreement is signed on the eve of the wedding. Hypothetically, two consenting adults could decide to waive each other’s obligations in the event of divorce, without attorneys, on the eve of a wedding and have their agreement ruled unenforceable.

The “access” requirement is well-meaning but seriously threatens the enforceability of otherwise voluntarily executed agreements. It is an obvious compromise between the UPAA stance, which is respected in the vast majority of U.S. jurisdictions, and the California independent representation requirement outlined in this paper.¹¹⁶

The presence or absence of attorneys in the creation of a premarital agreement should arguably only be considered in cases where the parties’ legal sophistication is such that there are terms in the premarital agreement that necessitate the presence of an attorney to properly explain. Barring the presence of terms that cannot be understood by the average lay-person to such an extent that they could not voluntarily agree to them, spouses ought to be able to enter into agreements without being subject to the scrutiny of courts.

The law of premarital agreements, as it is proposed in UPMAA pre-supposes a wide disparity in legal sophistication, age, and income levels. These pre-suppositions are outdated and do not conform to our current understanding of pre-marital agreements.¹¹⁷ In light of the decreasing gap in gender income disparity, the paternalism of the California legislature seems obsolete at best.¹¹⁸

Additionally, there are important public policy considerations that the requirement does not address. It directly increases the cost of executing a valid premarital agreement by requiring that both parties be independently represented. In other words, couples that prefer to delineate the terms under which their property would be distributed upon divorce without resorting to divorce attorneys have to hire divorce attorneys in anticipation of a future divorce proceeding. This is an absurd result. The goal of executing a valid premarital agreement is to avoid litigation and in-

¹¹⁰ UPMAA §9

¹¹¹ UPMAA §9 comment: The requirement of “access to independent counsel” in Subsections (a)(2) and (b) represents the view that representation by independent counsel is crucial for a party waiving important legal rights. The act stops short of requiring representation for an agreement to be enforceable, *cf. California Family Code § 1612(c)* (restrictions on spousal support allowed only if the party waiving rights consulted with independent counsel); *California Probate Code § 143(a)* (waiver of rights at death of other spouse unenforceable unless the party waiving was represented by independent counsel); *Ware v. Ware*, 687 S.E.2d 382, 387-391 (W. Va. 2009) (access to independent counsel required, and *presumption of validity* for premarital agreement available only where party challenging the agreement actually consulted with independent counsel).

¹¹² UPMAA §9 comment p. 15

¹¹³ *Id.*

¹¹⁴ UPMAA comment p. 8

¹¹⁵ *Id.*

¹¹⁶ See *supra*.

¹¹⁷ See Rieker *supra*.

¹¹⁸ See Atwood *supra*

stead both the California approach, and to a lesser extent, the UPMAA approach, require the parties to hire lawyers at the outset of their marriage, anticipating litigation.

It indirectly increases the cost of getting married for couples that would not marry without a premarital agreement.¹¹⁹ The do-it-yourself pre-marital agreement would be cast under a shadow of doubt regarding its enforceability, undermining the very purpose of a premarital agreement.

Most unfortunately, however, the difficulty in enforcing pre-marital agreements ultimately would lead couples to simply forgo signing agreements. Many prospective newlyweds likely would not relish the idea of having to hire counsel on the eve of their wedding and would likely not pursue executing a premarital agreement.

Commentators have asserted that premarital agreements are not like commercial agreements in that the parties are not dealing at arm's length and are subject to optimism bias.¹²⁰ Optimism bias is not entirely unique to premarital agreements. A home buyer purchasing a home would not do so if she was not at least somewhat optimistic about the prospect of owning the home and yet the state does not require her to hire an attorney to execute a valid sale. No such special solicitude should be provided for parties to premarital agreement. Other contracting parties in the commercial context create enforceable contracts notwithstanding the strong possibility that their judgment may be clouded by the circumstances under which their contract is entered into. Barring a showing that the premarital agreement was entered into against one of the parties' will, the optimism, emotional exuberance or excitement of marriage should not be considered an impediment to the formation of a valid premarital agreement.

CONCLUSION

The law of pre-marital agreements as presented in the UPAA judiciously makes these agreements enforceable in most contexts. The contentious nature of divorce and its frequency make the existence of pre-marital agreements increasingly important. Adding formal impediments to their enforceability only creates more causes of action for litigation and does not seriously address the perceived ills of the UPAA. Requiring attorney representation effectively has a chilling effect on the enforceability of agreements and substantially undermines the contracting powers of consenting adults.

Ultimately, requiring the parties to consult with a lawyer to enter into a pre-marital agreement would not achieve the desired outcome of tempering bad decision-making among spouses. Competent adults in the United States are given broad ability to contract on their behalf in a variety of contexts. Requiring either independent representation or access to independent representation is overly paternalistic in a legal regime favoring freedom of contract and the presumptive validity of premarital agreements.



¹¹⁹ It is conceivable to imagine that people with considerable assets would not get married unless they could enforce a valid premarital agreement that protects their assets.

¹²⁰ Kennedy at 713.

**Minor No More? – A Minor Mother’s Right to Legal Counsel
in Voluntary Relinquishment Proceedings
By Kelly Almeter¹**

I. INTRODUCTION

Legal scholar Martha Minow emphasizes, “[w]hatever a chosen theory may point to as the distinguishing characteristics of childhood, the choice to label an individual as a child or as an adult often entails sharp differences in the treatment that individual will receive.”² Both legislation and societal norms make clear that minors are not equal to adults in the eye of the law.³ For example, the establishment of a legal drinking age, the creation of the juvenile court system, and statutory rape laws all emphasize the law’s interest in protecting children.⁴ Legal scholars, jurists, and legislatures have recognized that even though minors mature and develop differently from one another, distinguishing between minority and adulthood is crucial in our society – and for good reason.

“Children have the drive and motor skills to act long before they acquire the capacity to understand the risks and consequences of their actions.”⁵ As a result, children’s rights have been described as inherent in human nature.⁶ This “societal norm” is premised on the idea that “children’s natural dependency and capacity for growth established[s] their right to be nurtured on the path to adulthood.”⁷ Nevertheless, the point at which a minor reaches capacity is very individualized and it is nearly impossible to pinpoint one particular age as an adulthood benchmark.⁸ This is especially true because “[a]dulthood, if defined as the taking on of adult roles and responsibilities, can come very early in some societies and for some children, and very late for others in different settings.”⁹ Generally, in the United States the age at which one reaches majority is eighteen, despite the fact that no one supposes a child is automatically transformed into an adult on their eighteenth birthday.¹⁰

Childhood is often divided into various phases.¹¹ One renowned psychologist, Jean Piaget, defines childhood using four different developmental stages.¹² During the first stage children

¹ Kelly Almeter is due to graduate from SMU Dedman School of Law in May 2017. She can be reached at kalmeter@mail.smu.edu.

² Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L.J. 1, 2 (1986).

³ See Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights,”* 1976 BYU L. REV. 605, 613 (1976).

⁴ BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 42-43 (Princeton University Press, 2008); Minow, *supra* note 1, at 8.

⁵ WOODHOUSE, *supra* note 3, at 42.

⁶ *Id.*

⁷ *Id.*

⁸ See *id.* at 26 (highlighting that “[r]esearch has shown that ‘capacity’ does not appear suddenly when one turns eighteen, but evolves through stages of development”); see also Hafen, *supra* note 2, at 647-48.

⁹ *Id.* (explaining that the “timing of transition from childhood to adulthood is strongly influenced by issues of class and culture as well as by issues of race and gender”).

¹⁰ *Id.* at 45; Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 787 (2000) (explaining “[a]lthough the line the law draws at eighteen (or, for some purposes, sixteen or seventeen) is inevitably somewhat arbitrary, it is designed to capture, in some rough form, the age at which individuals’ cognitive, emotional, social and moral development becomes relatively stable and when an individual’s understanding, behavior and relationships can be expected to conform to adult standards”).

¹¹ WOODHOUSE, *supra* note 3, at 18.

¹² *Id.* at 19; Sarah J. Baldwin, *Choosing a Home: When Should Children Make Autonomous Choices About Their Home Life?*, 46 SUFFOLK L. REV. 503, 506 (2013) (describing Piaget’s four stages of development and also

begin to appreciate their immediate surroundings and hone skills like grasping and sucking.¹³ In the second stage children recognize figures and symbols, but this cognition is less organized than an adult's.¹⁴ During third stage children develop the ability to systematically process, but only if they have particular examples as comparisons.¹⁵ And lastly, during the fourth stage children are able to systematically process more abstract ideas.¹⁶

Capacity is defined as "the ability to think rationally, form plans, and make choices," and traditionally, society has deemed children as incapable of making rational decisions.¹⁷ As a result, the "current law[s] restricting a child's right to make a decision assume children are not competent to make those decisions."¹⁸ Society requires that a minimum capacity be established in order for one to exercise their choice rights.¹⁹ Legal scholar, Bruce Hafen, defines "choice rights" as rights that apply to "minors' decisions having serious long term consequences that have traditionally required either legal or parental approval (or both) in order to be enforceable."²⁰ There are inherent risks associated with not striking the proper balance between minor protection and minor independence.²¹ Specifically, too much independence has the potential to interrupt a minor's personal growth and will hinder one's ability to make responsible choices.²² Additionally, "the lifelong effects of binding, childish choices can create permanent deprivations far more detrimental than the temporary limitations upon freedom inherent in the discipline of educational processes."²³ As a result, minors must often be protected from their own immaturity,²⁴ and the crucial analysis in determining whether a person be deemed a minor or an adult should recognize that while minors may "outgrow their restricted state . . . the more important question is whether they will outgrow it with maximized capacities."²⁵

"The United States of America has the highest adolescent pregnancy and birth rates of any other industrialized nation."²⁶ In total, about 3,985,924 children were born in the United States in 2014.²⁷ According to the Centers for Disease Control and Prevention, in 2014 "249,078 babies were born to woman aged 15-19 years, for a birth rate of 24.2 per 1,000 women in this age group."²⁸ "In 2008, 141,428 girls under the age of eighteen gave birth," and roughly "4% of these mothers were under the age of fifteen, 12% were age fifteen, [and] 29% were age sixteen."²⁹ Additionally, a recent study has estimated that roughly 5% of teen birth mothers voluntarily re-

recognizing that other scholars "reject Piaget's stage theory and believe adolescents individually develop skills at varying times").

¹³ WOODHOUSE, *supra* note 3, at 19.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Baldwin, *supra* note 11, at 504-05.

¹⁸ *Id.* at 505.

¹⁹ Hafen, *supra* note 2, at 647.

²⁰ *Id.* at 650.

²¹ *See id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Hafen, *supra* note 2, at 650.

²⁶ Barbara Glesner Fines, *Challenges of Representing Adolescent Parents in Child Welfare Proceedings*, 36 U. DAYTON L. REV. 307, 308 (2011).

²⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Births: Preliminary Data for 2014*, NATIONAL VITAL STATISTICS REPORTS, Vol. 64, No. 6 (June 17, 2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_06.pdf.

²⁸ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Births: Final Data for 2014*, NATIONAL VITAL STATISTICS REPORTS, Vol. 64, No. 12 (Dec. 31, 2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf.

²⁹ Fines, *supra* note 25, at 308.

linquish their parental rights,³⁰ while the vast majority of minor mothers keep their babies.³¹ Some states' legislation and case law suggests that a minor mother's relinquishment may not be completely voluntary,³² even though "[t]ermination of parental rights has been characterized as the death penalty of family law."³³ Despite these findings, the majority of states do not require that a minor parent be provided legal counsel, or even a guardian ad litem, in voluntary relinquishment proceedings.³⁴

Although it may seem trivial to urge for the legal representation of all minor mothers in voluntary relinquishment proceedings based on the relevant statistics, for the five percent of teenage mothers consenting to the termination of their parental rights, this decision is undoubtedly life changing and deserves greater protection. Indeed, the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) held that the "proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."³⁵ Because of the serious implications behind a minor mother's decision to voluntarily relinquish her parental rights, this article will argue that *all* states should require a minor mother to be represented by legal counsel in voluntary relinquishment proceedings.

The first section of this article will provide a historical overview of the development of children's rights. In doing so, this section will examine past legislation and judicial decisions that emphasize the state's protective function in regards to minors. The second section will highlight the current state of the law and will discuss the statutes adopted by various states. The current statutes either require the appointment of legal counsel, the appointment of a guardian ad litem, parental consent, or some combination of the three. The third section of this article will proffer possible explanations for why a state may not want to provide a minor parent with legal representation. This section will explore various rationales such as the assumption that minors are unfit to raise children, the financial burden on the state, the assumption that society wants newborns adopted quickly in order to protect the traditional family dynamic, and lastly, that having a baby automatically triggers adulthood, and thus the minor is no longer in need of the law's protection.

Finally, the fourth section of this article will argue for legal reform, specifically that all states should require a minor mother to have legal representation when voluntarily relinquishing her parental rights. The first portion of this section will discuss minors' vulnerability and will highlight the risks associated with their lack of capacity, such as their susceptibility to undue influence and misleading statements. The second portion will compare the lack of protection for minors in this situation compared to the more highly publicized and regulated rights provided to minors in the medical decision-making context. Lastly, the third portion will highlight the importance of strict interpretation for these statutes.

II. HISTORICAL BACKGROUND – CHILDREN IN THE LAW

There are great inconsistencies in the law regarding when minors are treated as children and when they are considered adults.³⁶ Legislating for children is often difficult because at all times there are two competing interests – protecting children while they are incompetent, yet providing and encouraging autonomy when they reach majority.³⁷ These two interests are em-

³⁰ *Id.* at 313.

³¹ Buss, *supra* note 9, at 787-88 (noting that this assertion applies to minor mothers who ultimately give birth).

³² Fines, *supra* note 25, at 313.

³³ *Id.* at 317.

³⁴ See Baldwin, *supra* note 11, at 511.

³⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992).

³⁶ Minow, *supra* note 1, at 2.

³⁷ *Id.* at 4.

phasized in the idea that children do not have the requisite capacity to make important decisions for themselves, but society does not want children to be categorized as merely the property of others.³⁸ As a result, “at any given time in a child’s development, he or she may be competent for some purposes and incompetent for others.”³⁹

The rationales behind legislation affecting children include movements that limited the rights of minors, those that extended the rights of minors, and also legislation that was purported to benefit children, but ultimately furthered different policy goals. Martha Minow suggests, “children simply are not the real focus of the varied laws that affect them.”⁴⁰ Instead, traffic laws, violent crime legislation, and abortion laws are political reforms in which children only have small or incidental roles.⁴¹ For example, even in the development of child labor laws children were not the real “goal” in legislation.

[L]aws against child labor . . . did not pass legislatures until organized labor joined in their support—and realized that child labor laws could improve the ability of adult workers to command higher salaries by constricting the available labor pool. Children were only one of many social concerns, and perhaps not even a central one.⁴²

Minow further emphasizes that because these reforms are not primarily concerned with protecting children, “it should not be surprising that laws treat them inconsistently.”⁴³ Another scholar, Martin Guggenheim, critiques the claim that children’s rights are examined with a “child-centeredness” perspective.⁴⁴ Guggenheim argues that “[c]hildren’s rights has become a mantra invoked by adults to help them in their own fights with other adults in all sorts of contexts.”⁴⁵ He recognizes that if children truly were the center of the analysis for legislation, our laws would drastically differ.⁴⁶ For example, the U.S. would ban cigarettes, alcohol, pollutants, and war.⁴⁷ There is often give-and-take in the legislative process, and Guggenheim asserts, “there are other perspectives apart from a child’s that we rightly take into account even when we talk about children’s rights and needs.”⁴⁸ The question posed by this article is why society and the law fails to protect minor mothers in the voluntary relinquishment context, yet clearly protects minors, regardless of whether there is truly a child-centered rational or a different societal motive, in similar circumstances.

There are two distinct legal eras that helped develop children’s rights. The first, the Progressive Era, required schooling for children, regulated minors’ rights to abortion, created the juvenile court system, set minimum drinking ages, and established drivers’ license limitations.⁴⁹ In this era, the central policy theme was that children and adults do not necessarily have the same rights, and that children’s rights must be limited in order to protect them.⁵⁰ The idea that children need support and education during their early years led to the removal of many children from impoverished families and a nation-wide requirement that children must attend school.⁵¹ One legal scholar, Katherine Hunt Federle, asserts that minors’ “incompetencies suggest that

³⁸ Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 259 (1979).

³⁹ Minow, *supra* note 1, at 4.

⁴⁰ *Id.* at 5-6.

⁴¹ *Id.* at 6.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS?* xi (Harvard University Press 2005).

⁴⁵ *Id.* at xiii.

⁴⁶ *Id.* at xi.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Minow, *supra* note 1, at 8-9.

⁵⁰ *Id.* at 10.

⁵¹ WOODHOUSE, *supra* note 3, at 31.

the rights children do have are somehow different, less fundamental, and more easily overridden by paternalistic concerns for their safety and well-being.”⁵² For example, in 1967 President Lyndon Johnson was the first president to devote an entire congressional message to children when he urged for Congress to adopt various medical and social service programs as well as compensatory education programs for children.⁵³ Additionally, just years later President Nixon advocated for a nationwide reform tailored to provide children under the age of five healthy and stimulating development opportunities.⁵⁴ Ultimately, these reformers created adolescence, a developmental stage in between infancy and adulthood, which extended minority.⁵⁵

The second legal era of children’s rights, the Independence Movement, extended the rights of minors.⁵⁶ This movement urged for providing children greater rights, and advocated for less focus on the protective function.⁵⁷ This era criticized the Protectionist Movement and advocated to no longer subject children to the infringing rules imposed by schools and adults.⁵⁸ In fact, “[s]ocial critics starting in the mid-1950’s attacked the creation of adolescence in particular for stigmatizing and excluding young people from adult worlds and responsibilities.”⁵⁹ Case law such as *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in which the United States Supreme Court recognized that minors had free-speech rights while in public schools, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), where the Court held that a state’s statute requiring a minor to receive parental consent prior to obtaining an abortion was unconstitutional, illustrate the ideals behind this movement.⁶⁰ Lastly, the tension between the Progressive Era and the Independence Movement is highlighted in the United States Supreme Court case *In Re Gault*, 387 U.S. 1 (1967), in which the Court held that “the juvenile court must assure a right to counsel, a right against self-incrimination, a right to notice of charges, and a right to confront and cross-examine accusers.”⁶¹ Whereas traditionally, “[b]y removing young people from adult courts and bringing them to a special institution connected with social and psychological experts, the juvenile courts rejected the use of procedural safeguards in favor of a model of therapeutic paternalism.”⁶²

Lastly, a remaining interest argues for the protection of familial relationships, and advocates for the government to allow parents to determine the scope of their children’s rights. This rationale recognizes that “[c]onceptually and practically, children in our society are not autonomous persons but instead dependents who are linked legally and daily to adults entrusted with their care.”⁶³ Additionally, “[c]hildren’s dependencies specifically situate them within the sphere of the private family, where parents stand between children and the state.”⁶⁴ This ideology highlights a sharp difference between the public and private sphere for children.⁶⁵ While this interest emphasizes that right to family privacy, underlying protection principals are still at play.⁶⁶ Specifically, despite the law’s traditional recognition of the parents’ authority to determine the scope of

⁵² Katherine Hunt Federle, *Children, Curfews and the Constitution*, 73 WASH. U. L.Q. 1315, 1367 (1995).

⁵³ Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 273 (1995).

⁵⁴ *Id.*

⁵⁵ Minow, *supra* note 1, at 9.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.*

⁵⁸ WOODHOUSE, *supra* note 3, at 31.

⁵⁹ Minow, *supra* note 1, at 10.

⁶⁰ *Id.* at 11.

⁶¹ Minow, *supra* note 52, at 275.

⁶² *Id.* at 279.

⁶³ Minow, *supra* note 1, at 18.

⁶⁴ *Id.*

⁶⁵ *Id.* at 7.

⁶⁶ WOODHOUSE, *supra* note 3, at 42.

their child's decisions and rights, if the minor was parentless or the parents were deemed unfit, "the state took the parents' place under the *parens patriae* doctrine, which empowered the government to protect those who could not protect themselves."⁶⁷ Eugene Volokh asserts that unless the parental unfitness exception applies, parents are better suited to make decisions for their children than the state.⁶⁸

Human experience (and possibly biology) suggests that parents are usually almost certain to be much more benevolent despots to their own children than even the most devoted bureaucrats would be. And human experience, coupled with most parents' far greater emotional stake in the children's well-being than even the best and brightest government officials will possess, suggests that parents will also usually (though not always) serve their children's best interests better than government agents will.⁶⁹

The idea that a minor's parents are in the best position to make decisions on their behalf is rooted in the notion that parental authority is necessary to maintain a stable family environment, which, in turn, is crucial for a functioning society.⁷⁰ As a result, in both arguments for extending children's rights and arguments urging for greater protection of minors, legislatures had to grapple with invading what is traditionally thought of as the "parents' domain."⁷¹

III. THE CURRENT STATE OF THE LAW

"All the justifications for children's different treatment under the law are grounded in assumptions about developmental differences between children and adults."⁷² Traditionally, society has labeled children as lacking the necessary capacity to make rational decisions.⁷³ Some of the rationales for limiting minors' abilities to make decisions include: "promoting socialization and education; guaranteeing sufficient care; pursuing family interests; implementing normative models of proper behavior; and supporting and protecting minors."⁷⁴ Nevertheless, these rationales do not always explain the inconsistencies in the laws that allow minors to make decisions in certain circumstances, yet limit minors' rights in others.⁷⁵ The most common argument in support of denying minors' rights is that children need protection, and that the "state has a *parens patriae* interest in protecting minors' health and welfare from decisions grounded in immaturity."⁷⁶ Nevertheless, if society believes that children need protection because they lack the capacity to make rational and informed choices – why do the majority of states allow a minor mother to relinquish her parental rights without the advice of an attorney or guardian ad litem?

Only five states require a minor to be represented by legal counsel in a voluntary relinquishment proceeding.⁷⁷ For example, the applicable Vermont statute holds that a minor parent has the requisite capacity to voluntarily relinquish her parental rights *if* an attorney who does not also represent the adopting parent or child-placing agency represents the minor.⁷⁸ Also, the at-

⁶⁷ *Id.* (explaining that in the late twentieth century's child welfare system, there is ongoing debate as to whether the government's focus should be on "protecting children by assisting their families to care for them, or whether the focus should be on removing children who were abused or neglected from their homes to places of refuge").

⁶⁸ Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 NYU L. Rev. 631, 676 (2006).

⁶⁹ *Id.*

⁷⁰ Wald, *supra* note 37, at 259.

⁷¹ Minow, *supra* note 52, at 283.

⁷² Buss, *supra* note 9, at 787.

⁷³ Baldwin, *supra* note 11, at 506.

⁷⁴ *Id.* at 504.

⁷⁵ *Id.*

⁷⁶ *Id.* at 506.

⁷⁷ See VT. STAT. ANN. Tit. 15A § 2-405 (West 2016); MONT. CODE ANN. § 42-4-405 (West 2015); KAN. STAT. ANN. § 59-2115 (West 2015); MD. CODE ANN., FAM. LAW § 5-339 (West 2013); ME. REV. STAT. ANN. Tit. 18-a, § 9-106 (2016).

Vermont, Montana, Kansas, Maryland, and Maine require a minor to be represented by legal counsel in voluntary relinquishment proceedings.

⁷⁸ VT. STAT. ANN. Tit. 15A § 2-405(c) (West 2016).

torney must certify in writing that the attorney explained the terms and consequences of the relinquishment, that the minor understood the terms and consequences, and that the minor mother agreed to terminate her parental rights voluntarily.⁷⁹ Lastly, the attorney must inform the minor that counseling is available by a court-appointed adoption counselor or a counselor of the minor mother's choice.⁸⁰ Similarly, the relevant Montana statute requires a minor to be represented by an independent attorney in a direct placement adoption, but also emphasizes that a minor's voluntary relinquishment is not voidable simply because of the relinquishing parent's minority.⁸¹ Lastly, the relevant Maine statute mandates independent legal counsel throughout the entire relinquishment process for *indigent* minor parents, unless the adopting parent is related to the minor, the minor parent refuses counsel, or the court determines that legal counsel is not necessary.⁸²

Additionally, only eight states either mandate or provide the court discretion to appoint a guardian ad litem to a minor mother when voluntarily relinquishing her parental rights.⁸³ The role of the guardian ad litem is to determine what is in the *best interest of the child* and to report to the court that the minor's relinquishment was voluntary and made with a full understanding of its terms and consequences.⁸⁴ For example, Alabama law requires that before a minor can voluntarily relinquish her parental rights, the minor must be appointed a guardian ad litem.⁸⁵ Similar to other states' statutes, voluntary relinquishment is not voidable because of the parent's minority alone.⁸⁶ Finally, the official comment to this statute highlights the underlying principles of contract law when explaining, "[i]t is imperative (1) to allow a minor to consent, and (2) at the same time negate the normal contractual disability of a minor."⁸⁷ Additionally, the Wisconsin statute holds that the guardian ad litem must "interview the minor parent, investigate the reason for the termination of parental rights, assess the voluntariness of the consent and inform the minor parent of his or her rights and of the alternatives to, and the effect of, termination of parental rights."⁸⁸ Lastly, the West Virginia statute provides the court with the discretion to appoint a guardian ad litem to represent minor parent, but "[t]he failure of the court to appoint a guardian ad litem is not grounds for setting aside a decree of adoption."⁸⁹

Five states require that the minor mother's parent consents to the minor's relinquishment of parental rights, unless the minor meets the mandated judicial bypass criteria.⁹⁰ For example, Louisiana requires that for private adoptions, the minor's parents must consent to the adoption unless the minor is emancipated either judicially or by marriage.⁹¹ The statute also provides that if the "minor's parents or tutor refuse to join in the act or cannot be located, the court may au-

⁷⁹ VT. STAT. ANN. Tit. 15A § 2-405(d)(1)-(2) (West 2016).

⁸⁰ VT. STAT. ANN. Tit. 15A § 2-405(d)(4) (West 2016).

⁸¹ MONT. CODE ANN. § 42-4-405(1)-(2) (West 2015).

⁸² ME. REV. STAT. ANN. Tit. 18-a, § 9-106(b) (2016).

⁸³ See ALA. CODE §26-10A-8 (2016); ARK. CODE ANN. § 9-9-220 (West 2015); CONN. GEN. STAT. ANN. § 45a-708 (West 2016); KY. REV. STAT. ANN. § 199.500 (West 2016); WASH. REV. CODE ANN. § 26.33.070 (West 2016); WIS. STAT. ANN. § 48.235 (West 2016); W. VA. CODE ANN. § 48-22-304 (West 2016); TENN. CODE ANN. § 36-1-110 (West 2016). The states whose statutes discuss appointing a guardian ad litem include Alabama, Arkansas, Connecticut, Kentucky, Washington, Wisconsin, West Virginia, and Tennessee.

⁸⁴ WASH. REV. CODE ANN. § 26.33.070(1) (West 2016).

⁸⁵ ALA. CODE §26-10A-8(a) (2016).

⁸⁶ ALA. CODE §26-10A-8(b) (2016).

⁸⁷ ALA. CODE §26-10A-8(cmt.) (2016).

⁸⁸ WIS. STAT. ANN. § 48.235(5)(b) (West 2016).

⁸⁹ W. VA. CODE ANN. § 48-22-304 (West 2016).

⁹⁰ See LA. CHILD. CODE ANN. Art. 1113 (2000); N.H. REV. STAT. ANN. § 170-B:5 (2016); MINN. STAT. ANN. §259.24 (West 2015); MICH. COMP. LAWS ANN. § 710.43 (West 2011); R.I. GEN. LAWS ANN. § 15-7-10 (West 2016). The states that require parental consent are Louisiana, New Hampshire, Minnesota, Michigan, and Rhode Island.

⁹¹ LA. CHILD. CODE ANN. Art. 1113(A) (2000).

thorize the minor to surrender without the required consent if it finds that the minor is sufficiently mature and well-informed to surrender [the] child for adoption or that the surrender is otherwise in the child's best interest."⁹² But, the consent of the minor's parent is not required if it is an agency adoption.⁹³ Unlike many other state statutes, Louisiana also requires the relinquishing parent to participate in at least two counseling sessions regarding the parental termination with either a social worker, psychologist, psychiatrist, or counselor *before* executing the relinquishment of parental rights.⁹⁴ Additionally, Louisiana law mandates that the evaluating counselor submit an affidavit stating that the relinquishing parent attended at least two sessions and disclosing whether or not the surrendering parent understood the finality and consequences of the termination of parental rights.⁹⁵ Lastly, the statute holds that if the counselor has reason to question the surrendering parent's mental capacity to relinquish their parental rights, the affidavit must explain how the counselor reached that conclusion.⁹⁶ If the affidavit contains a caveat regarding the parent's capacity, the counselor must provide a recommendation for further evaluation.⁹⁷

Unlike other state's statutes, New Hampshire gives the court the discretion to determine whether or not consent of the minor's parent is required.⁹⁸ Michigan law differs from the others in that a minor parent can either have their own parent consent to the voluntary relinquishment, or the consent requirement can be fulfilled by a guardian ad litem.⁹⁹ Like the Michigan statute, Rhode Island requires that for a minor parent to voluntarily relinquish their parental rights, the minor parent must obtain consent from either one of the minor's parents, guardian, or guardian ad litem.¹⁰⁰ Lastly, the statute requires that the court determine that the voluntary termination of parental rights be in the best interest of the child *before* granting the petition.¹⁰¹

All states should mandate that a minor mother be provided an *attorney* throughout the entirety of the relinquishment proceedings. First, it is crucial to highlight the differences between an attorney representing a minor and a guardian ad litem. Attorneys' roles are detailed in the ABA Model Rules of Professional Conduct, which "provides that the *client* is to direct the objectives of the representation."¹⁰² This client-directed representation requires an attorney to provide advice and ensure that the client understands the consequences of their decisions.¹⁰³ The role of a guardian ad litem (GAL) is more convoluted.¹⁰⁴ A GAL is required to advocate for the best interest of the child, which may differ from the minor mother's decisions. Additionally, a GAL serves as "the eyes and ears of the court," and thus encompasses a quasi-judicial function.¹⁰⁵ Also, in the context of a minor mother relinquishing her parental rights, it can be very difficult for a GAL to focus on the minor mother instead of the adoptee.¹⁰⁶

Since most GALs are primarily child advocates, it is difficult for some to keep their focus on representing the parent rather than concerning themselves with what would be

⁹² LA. CHILD. CODE ANN. Art. 1113(C) (2000).

⁹³ LA. CHILD. CODE ANN. Art. 1113(E) (2000).

⁹⁴ LA. CHILD. CODE ANN. Art. 1120(A) (2003).

⁹⁵ LA. CHILD. CODE ANN. Art. 1120(B) (2003).

⁹⁶ LA. CHILD. CODE ANN. Art. 1120(C) (2003).

⁹⁷ *Id.*

⁹⁸ N.H. REV. STAT. ANN. § 170-B:5(I)(a) (2016).

⁹⁹ MICH. COMP. LAWS ANN. § 710.43(4) (West 2011).

¹⁰⁰ R.I. GEN. LAWS ANN. § 15-7-10(b) (West 2016).

¹⁰¹ *Id.*

¹⁰² Fines, *supra* note 25, at 322 (citing Model Rules of Prof'l Conduct R. 1.2 (2010)).

¹⁰³ *Id.* at 328 (citing Model Rules of Prof'l Conduct R. 1.4, 2.1 (2010)).

¹⁰⁴ *Id.* at 322.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 323.

good for the teen's infant . . . Now that she has a child, the same system that cast the ward as a helpless victim is quick to cast her as the enemy.¹⁰⁷

Lastly, requiring the minor mother's parent's consent is insufficient because a "parent's preferences may not adequately take into consideration the context of the child's social situation," and there is a strong likelihood that parents may force their moral viewpoints on the minor.¹⁰⁸

IV. RATIONALE FOR STATES WITH NO REQUIREMENTS OR LIMITED REQUIREMENTS

One scholar argues that society and the law ignore children's rights because minors lack the capacity to make important decisions, a child's parents are in the best position to make choices for them, and preservation of the family dynamic is best for society as a whole.¹⁰⁹ Another scholar furthers, "the debate over where to draw the line between childhood and adulthood represents a debate over the kind of relationship any given individual should have with the larger community."¹¹⁰ Possible rationales for states that have no- or limited legal protection for minor mothers terminating their parental rights include (1) the assumption that minors are unfit to raise children; (2) the financial burden on the state; (3) the assumption that society wants newborns adopted quickly in order to protect the traditional family dynamic; and (4) that having a baby automatically triggers adulthood, and thus the minor is no longer in need of the law's protection.

A. Notion That Minors are Unfit to Raise Children

The first rationale for not providing a minor mother legal counsel in a voluntary relinquishment proceeding is that minors are unfit to raise children. Studies indicate that children born to minors have a greater risk of developing medical, educational, or developmental problems.¹¹¹ Additionally, there is a greater risk of poverty, abuse, and neglect for children raised by minor mothers.¹¹² One scholar emphasizes that it is very common for minor mothers to be impoverished, and that "[t]he poorer the young woman, the more likely she will become a mother."¹¹³ Additionally, as can be expected, having a child only increases the financial burdens on a minor mother, and thus minor mothers have a greater likelihood of receiving welfare.¹¹⁴ Similarly, low education levels can be both a cause and consequence of teen pregnancy.¹¹⁵ In fact, minor mothers "are substantially less likely than woman who delay childbearing to complete high school or obtain a GED by the age of twenty-two (66% vs. 94%)."¹¹⁶

While these concerns, although controversial, are substantiated by research, this article is not asserting that minor mothers should be prohibited from relinquishing their parental rights. Instead, the argument rests solely on the idea that minor mothers are still *minors* and thus need protection in order to understand the finality and severity of their decisions. Indeed, "research also indicates that, when *guided* by caring and competent adults, adolescents can make critical decisions for themselves and their children."¹¹⁷

¹⁰⁷ *Id.* at 323 (quoting Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y 1, 23 (2006)).

¹⁰⁸ See Lois A. Weithorn, *Involving Children in Decisions Affecting Their Own Welfare*, in CHILDREN'S COMPETENCE TO CONSENT 235, 240 (Gary B. Melton et al. eds., 1983).

¹⁰⁹ Baldwin, *supra* note 11, at 520.

¹¹⁰ Minow, *supra* note 1, at 2.

¹¹¹ Buss, *supra* note 9, at 811.

¹¹² *Id.*; but see Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 102 (2013) (highlighting that "it is less certain today that these problems are related to teenage childbearing rather than the underlying poverty that is a risk factor for teenage pregnancy").

¹¹³ Fines, *supra* note 25, at 309.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; see Seymore, *supra* note 111, at 108. (explaining that "minor mothers complete, on average, fewer years of school, are less likely to graduate high school, and are less likely to go on to college").

¹¹⁶ Fines, *supra* note 25, at 309.

¹¹⁷ Fines, *supra* note 25, at 328 (emphasis added).

B. Incentive to have Newborns Adopted Quickly

The second, and related justification for not providing a minor mother legal counsel when voluntarily relinquishing her parental rights, is the incentive to have newborns adopted quickly. This is not an assertion that all child-placing agencies or adopting parents have unethical motives, but instead is a reflection on society's desire to promote and maintain "traditional" families.

The lack of regard for the parental rights of unmarried and teen mothers arises from skepticism about the parenting abilities of young mothers and the disregard of the mother-child dyad, absent a marriage, as a family. Negative attitudes about teen pregnancy, unwed pregnancy, and teen and single parenting invest the decision to terminate parental rights and consent to adoption by a minor mother with seeming rationality.¹¹⁸

Requiring a minor mother to have legal counsel throughout the entire relinquishment process has the potential to delay, or even stop, the pending adoption if the minor mother is made aware of a caveat in the adoption agreement that she would not have understood without her attorney's advice. As a result, society's perceptions about minor mothering combined with the high demand for newborns by adopting parents encourages expediency in relinquishment proceedings.

C. Financial Burdens on the State

The third justification for not requiring a minor mother to have legal counsel is the increased financial burden on the state. States have apportioned the financial expense of appointing legal counsel or guardian ad litem differently. For example, Kansas requires the child-placing agency or petitioner to pay for the minor parent's independent legal counsel, unless an attorney already represents the minor parent.¹¹⁹ In Wisconsin, the court must order the adoption agency or the adoptive parents to pay for the minor parent's guardian ad litem.¹²⁰ Similarly, Connecticut law provides the court with the discretion to require the petitioner to pay for the minor's guardian ad litem.¹²¹ Alternatively, the relevant Minnesota statute states that the county in which the relinquishment is filed will pay for the cost of the minor's consultation with an attorney, clergy member, or physician if the minor is unable to afford the costs.¹²² Lastly, the Washington statute provides the court with the discretion to determine which party will pay the attorney or guardian ad litem fees and will approve the costs.¹²³

The most cost efficient standard is to require the child-placing agency or the adopting parents to cover the minor mother's legal fees. Unlike other statutes, this option would not rely on taxpayer dollars. Nevertheless, because of the intermingled financial relationship between the parties, the contract will need to clearly state that the attorney serves as a representative of the minor mother, *not* the agency or adopting parent(s). Indeed, the ABA Model Rules of Professional Conduct permit a third party to pay an attorney's fee if the *client* consents, the third party does not oversee the representation, and the lawyer maintains confidentiality with the client and does not reveal these confidences to the third party.¹²⁴ Lastly, by mandating that a minor mother have legal counsel throughout the relinquishment process, the state is ensuring that these relinquishments are conducted properly and that all parties understand the terms of the agreement. As a result, the state is likely to avoid costly and lengthy adoption contestations.

¹¹⁸ Seymore, *supra* note 111, at 157.

¹¹⁹ KAN. STAT. ANN. § 59-2115 (West 2015).

¹²⁰ WIS. STAT. ANN. § 48.235(8)(c)(1)-(2) (West 2016).

¹²¹ CONN. GEN. STAT. ANN. § 45a-708(b) (West 2016).

¹²² MINN. STAT. ANN. §259.24(2) (West 2015).

¹²³ WASH. REV. CODE ANN. § 26.33.070(2) (West 2016).

¹²⁴ LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 589 (Wolters Kluwer, 3d ed. 2012) (citing MODEL RULES OF PROF'L CONDUCT R. 1.8 (2015)).

D. Having a Baby Triggers Adulthood – The Law No Longer Sees Minors as Incompetent

The last justification for not providing a minor mother legal counsel in voluntary relinquishment proceedings is the notion that having a baby triggers adulthood, and thus the law no longer sees the minor mother as lacking competency. This assumption is highlighted in the fact that in a majority of states a pregnant minor cannot have an abortion without either receiving parental consent or judicial bypass.¹²⁵ Nevertheless, if that same minor chose to give birth to the child and later relinquish her parental rights, in most states the minor mother would be considered an adult and would not need parental consent or legal counsel throughout the proceedings.¹²⁶

The assumption seems to be that, once a decision to forgo abortion is made, the decision to place a child for adoption rather than raising the child as a single teen parent is the only rational choice under the circumstances, so no protections are needed to protect that minor mother's interest.¹²⁷

The idea that a minor in the early stages of her pregnancy can be referred to as in her "tender years" and "under emotional stress" is incompatible with the majority of states' presumption that immediately after childbirth that mother has reached capacity and no longer needs legal protection.¹²⁸ Indeed, the fact that a minor has a child of her own does not emancipate that minor mother, "and even if it did, emancipation relinquishes an adult parent's duties to her child, but does not afford a minor the full rights of majority."¹²⁹ This "double standard" further highlights the flawed reasoning and lack of protection for minor mothers throughout relinquishment proceedings.¹³⁰

V. REFORMING THE LAW – ALL STATES SHOULD REQUIRE A MINOR PARENT TO HAVE LEGAL REPRESENTATION WHEN VOLUNTARY RELINQUISHING RIGHTS

Voluntarily terminating one's parental rights is a serious decision with grave legal and psychological consequences.¹³¹ Relinquishment prohibits a parent from claiming custody of the child or visitation rights, terminates a parent's ability to make educational decisions for the child, and lastly, the parent no longer has an inheritance right to the child.¹³² It is crucial that minor mothers have an attorney throughout relinquishment proceedings because "[a] minor birth parent may not know or understand what rights parents have and thus, does not fully understand the rights she is relinquishing."¹³³

A universal mandate is necessary to protect minor mothers for two reasons. The first justification is based on minors' vulnerability and the inherent risks associated with their lack of capacity, such as their susceptibility to undue influence and misleading statements. Secondly, legislatures and courts have drastically limited minors' medical decision-making rights in order to protect them from their own incompetency. Nevertheless, the majority of states provide no legal protection to minor mothers when they choose to terminate their parental rights. This arbitrary distinction leads to adequate protection of minors in the medical sphere, but a complete disregard for a minor mother's wellbeing after relinquishing her parental rights. Lastly, once a nation-

¹²⁵ Baldwin, *supra* note 11, at 513; Seymore, *supra* note 111, at 102.

¹²⁶ *Id.*

¹²⁷ Seymore, *supra* note 111, at 101.

¹²⁸ See *Bellotti v. Baird*, 443 U.S. 622, 641 (1979); see also Baldwin, *supra* note 11, at 516 (explaining that "[i]f a young woman chooses to become a young mother, she immediately obtains adult-like rights, but if the same young, pregnant teenager decides to abort, her choice is subject to adult involvement").

¹²⁹ Tara Grigg Garlinghouse, *Fostering Motherhood: Remediating Violations of Minor Parents' Right to Family Integrity*, 15 U. PA. J. CONST. L. 1221, 1227 (2013).

¹³⁰ *Id.*

¹³¹ Seymore, *supra* note 111, at 148-49.

¹³² *Id.*

¹³³ *Id.*

wide mandate is implemented, all courts must strictly interpret the statute to ensure sufficient protection for the minor.

A. The Inherent Vulnerability of Minors Demands Legal Representation

A minor's vulnerability and susceptibility to undue influence and misleading statements requires all states to mandate that a minor mother have an attorney throughout the entirety of the voluntary relinquishment proceedings. Minors' vulnerability can be divided into two categories.¹³⁴ The first is a physical vulnerability based on minors' smaller size and strength and also accounts for the physical development of their bodies.¹³⁵ The second category is psychological, and highlights minors' "greater openness to influence."¹³⁶ Both the physical and psychological vulnerabilities of minors have been used to justify limiting their rights.¹³⁷ Additionally, because of the limited rights that are provided to minors, "our current legal and ethical standards also require that we 'protect more vulnerable and less capable individuals from their own deficits and assure that their best interests are considered."¹³⁸

The United States Supreme Court case of *Bellotti v. Baird*, 443 U.S. 622 (1979) involved a close examination of a Massachusetts' statute that required that a minor, unmarried female who wished to have an abortion obtain the consent of both of the minor's parents, and if one or both of the minor's parents refused to consent, the minor could obtain consent through a judicial bypass procedure.¹³⁹ In its analysis, the Court first highlights that children and adults are not equal under the law,

There are three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the guiding role of parents in the upbringing of their children.¹⁴⁰

The Court further opines that minority alone does not remove a child from the protection of the Constitution,¹⁴¹ but also recognizes that the "unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural, requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children."¹⁴²

Additionally the Court emphasizes the inherent vulnerability of minors when explaining, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."¹⁴³ Also, the court recognizes that a minor considering an abortion is making a very difficult decision – even by adult standards. The court further determined, having an abortion "is a grave decision, and a girl of tender years, under emotional stress, may be ill equipped to make it without mature advice and emotional support."¹⁴⁴

Ultimately the *Bellotti* Court held that it would be unduly burdensome on a minor to initially require a consultation with the minor's parents *before* the minor was permitted to seek relief through the judicial bypass procedure.¹⁴⁵ Instead, the court, acting under the doctrine of *parens*

¹³⁴ Buss, *supra* note 9, at 797.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 798.

¹³⁸ Weithorn, *supra* note 107, at 238.

¹³⁹ *Bellotti v. Baird*, 443 U.S. 622, 627 (1979).

¹⁴⁰ *Id.* at 625.

¹⁴¹ *Id.* at 633.

¹⁴² *Id.* at 634 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion)).

¹⁴³ *Id.* at 635.

¹⁴⁴ *Id.* at 641.

¹⁴⁵ *Id.* at 647.

patrie,¹⁴⁶ recognized that “there are parents who would obstruct, and perhaps altogether prevent, the minor’s right to go to court.”¹⁴⁷ The *Bellotti* Court struck a balance between the interests of minor protection and independence by recognizing that minors lack the capacity to make this decision alone and without the input of an adult, but also acknowledging that some minors may choose to not share this decision with their parents.

Throughout its analysis, the *Bellotti* court recognized the vulnerability of minors and their lack of capacity to make such a serious decision without the consent or input of an adult. The justifications for the *Bellotti* opinion also apply to a minor mother terminating her parental rights. For example, terminating one’s parental rights is a “grave decision” and the minor mother is undoubtedly “under emotional stress.”¹⁴⁸ Indeed, research indicates that terminating one’s parental rights is a “profound loss experience,” that has the potential to cause long-term and damaging consequences.¹⁴⁹ Nevertheless, “these negative effects can be mitigated with sufficient resources and support to make an informed and deliberate choice.”¹⁵⁰ Similar to a minor contemplating an abortion, a minor terminating her parental rights is asked to make a grave decision even though she may not fully understand the potential consequences.¹⁵¹ Just as the Court required either parental consent or judicial approval in order for a minor to have an abortion, all states should require that a minor mother have an attorney throughout relinquishment to ensure that she is not harmed by her own vulnerabilities and incapacity.

1. Minors’ Susceptibility to Misleading Statements

Additionally, all states should mandate that a minor mother have an attorney throughout voluntary relinquishment proceedings in order to protect minors from falling victim to misleading statements. For example, in *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App.—Austin 2000) a nineteen-year-old mother sought counsel from a child-placing agency, Marywood, and agreed to use this agency to coordinate the adoption placement of her child.¹⁵² The agency did not review the relinquishment affidavit with the young mother, and did not discuss the term “irrevocable” with her.¹⁵³ Additionally, the young mother agreed to the adoption based on her understanding that it was an “open adoption,” in which the mother believed she would be able to maintain contact and visit her birth child after the adoption.¹⁵⁴ In reality, while the adoptive parents are informed of the “open adoption” criteria, the birth mother is not a signatory to the contract, and thus has no legal recourse if the adoptive parents fail to abide by its terms.¹⁵⁵ Additionally, at one of the meetings with the child-placement agency the young mother was instructed to sign the relinquishment affidavit, even though she was not previously informed that the affidavit would be executed that day.¹⁵⁶ According to the mother, the agency’s assurances that the adoptive couple would follow the open-adoption contract and that the young mother “would be able to see her son grow up,” “were the only reason she signed.”¹⁵⁷ The appellate court held that the mother’s relinquishment affidavit was executed based on the agency’s misrepresentation, fraud,

¹⁴⁶ See Baldwin, *supra* note 11, at 506 (explaining that “[t]he state has a *parens patrie* interest in protecting minors’ health and welfare from decisions grounded in immaturity”).

¹⁴⁷ *Bellotti*, 443 U.S. 622, 647 (1979).

¹⁴⁸ See *id.*

¹⁴⁹ See Fines, *supra* note 25, at 317-18.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Vela v. Marywood*, 17 S.W.3d 750, 753 (Tex.App.—Austin 2000).

¹⁵³ *Id.* at 754.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 755.

¹⁵⁷ *Id.*

or overreaching, and thus the mother did not voluntarily terminate her parental rights.¹⁵⁸ As a result, the mother's relinquishment was void.

Even though the birth mother was nineteen and no longer a minor, the court repeatedly described her as a young woman.¹⁵⁹ The court highlighted that she faced a life-changing situation, and that the mother "found comfort and placed reliance on [the agency's] counseling."¹⁶⁰ Marywood's false promise and misleading statements highlight the vulnerability of young mothers who are considering terminating their parental rights. The fact that the mother in *Vela* was nineteen and had reached majority only advances the argument that *minor* mothers must be provided legal counsel in termination of parental rights proceedings. If the appointment of legal counsel is required before a minor mother executes a relinquishment affidavit, minor mother's facing false promises similar to those in *Vela* will be informed of the lack of enforceability of an open adoption, and thus can make an informed decision.

2. Minors' Susceptibility to Undue Influence

Additionally, minor mothers terminating their parental rights need an attorney in order to protect them from undue influence. For example, in *In re Adoption of D.N.T.*, 843 So.2d 690 (Miss. 2003) a minor mother voluntarily relinquished her parental rights to a married couple in Mississippi.¹⁶¹ Prior to the relinquishment, the minor mother lived with the couple for only a few months, relied on the couple for financial support, and the couple cared for the infant while the minor mother was away at night.¹⁶² Significantly, fifteen days after terminating her parental rights the minor mother asked the court to set aside the adoption, and only when the proceedings became classified as a contested adoption did the court appoint a guardian ad litem to the minor mother.¹⁶³ The majority of the court held that the minor mother and maternal grandmother failed to prove that the minor mother's consent was the product of fraud or undue influence.¹⁶⁴ Additionally, the court emphasizes the minor mother's immaturity by stating,

The record is replete with bad decisions Camille has made her entire life. She has proven herself *immature beyond understanding*, as evidenced adequately by her own testimony of leaving Diane with almost strangers (Rick and Carol) while she spent the nights at her new boyfriend's house having sex and smoking marijuana with him.¹⁶⁵

Even though the majority recognizes the minor mother's immaturity and inability to fully understand the long term consequences of her choices, the majority nevertheless attempts to justify its holding by explaining, "there is a clear distinction in the law between the way a minor child contemplating abortion is treated and the way that a minor child contemplating an adoption is considered and it's the fact of the child's parenthood that makes that decision different."¹⁶⁶

The concurring opinion argues that the court "moved too far away from protecting vulnerable minor parents in the adoption process," and highlights that the Court has a "constitutional duty to protect children—be they 15 months old or 17 years old—insofar as that is consistent with the law."¹⁶⁷ The concurring opinion rightfully criticizes the majority for concluding that by giving birth, the minor parent automatically reached adulthood and has the capacity to consent to something so serious.¹⁶⁸ Lastly, the concurring opinion urges the court to adopt the statutory

¹⁵⁸ *Vela v. Marywood*, 17 S.W.3d 750, 764 (Tex.App.—Austin 2000).

¹⁵⁹ See *id.*

¹⁶⁰ *Id.*

¹⁶¹ *In re Adoption of D.N.T.*, 843 So.2d 690, 695 (Miss. 2003).

¹⁶² *Id.*

¹⁶³ *Id.* at 698.

¹⁶⁴ *Id.* at 709.

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ *In re Adoption of D.N.T.*, 843 So.2d 690, 712 (Miss. 2003) (emphasis added).

¹⁶⁸ *Id.*; see Seymore, *supra* note 111, at 101.

safeguards implemented in other states, and assures that requiring a minor to have legal counsel or a guardian ad litem would only make the adoption process more efficient and less vulnerable to challenges.¹⁶⁹

[I]n all equity, providing a guardian ad litem to a minor parent presents no impediment to legitimate adoptions (and even should make them all the more secure from challenge), whereas it offers literally the only chance under our rigorous statutory and case law to protect a minor parent from unjust and unfair pressures and misrepresentations.¹⁷⁰

Additionally, the dissent held that the minor mother did not have the legal capacity to terminate her parental rights and that the relinquishment was involuntary because the adoptive parents exerted undue influence over the minor mother.¹⁷¹ First, the dissent argues that because minors have limited contractual rights, the minor mother in this case was not able to contract to relinquish her parental rights.¹⁷² Second, the dissent argues that the minor mother was the victim of undue influence because when preparing to execute the relinquishment affidavit “she was told she could not leave the lawyer’s office with the articles to look them over and the attorney who prepared the papers was not available for questions regarding their content.”¹⁷³

In support of this assertion the dissent highlights that immediately after meeting the minor mother the adoptive parents invited her and the baby to move in with them, encouraged the minor mother to go out at night, financially supported the minor and her baby, and the adoptive mother frequently cried and complained to the minor mother of her inability to conceive or adopt a child.¹⁷⁴ The dissent concludes that the “adoptive parents preyed on an innocent and uneducated teenager.”¹⁷⁵ The minor mother was undoubtedly a victim of undue influence because after knowing the minor mother for only three months they persuaded her to terminate the maternal grandmother’s guardianship of the infant, and convinced the minor to relinquish her parental rights by assuring her that she had six months to revoke her consent and that she would be able to have a relationship with the infant after the adoption.¹⁷⁶ Again, if all states ensured that minor mothers had an attorney throughout the entirety of the relinquishment process, safeguards would be provided to mothers to ensure that they understand the finality of their decisions and are educated about when the relinquishment will take effect.

B. Legal Parallels to Minors’ Involvement in Medical Decision-Making

Traditionally, state law requires informed consent of a competent patient before providing medical treatment.¹⁷⁷ Nevertheless, the law typically labels minors as unable to give informed consent.¹⁷⁸ As a result, there is a long-standing presumption that minors are incapable of consenting to medical treatment.¹⁷⁹ This presumption of incapacity was established in the Protectionist Era, which argued for the protection of minors’ health.¹⁸⁰ Indeed, minors’ limited medical decision-making rights are often codified either through statutes that establish minimum age re-

¹⁶⁹ *In re Adoption of D.N.T.*, 843 So.2d 690, 715 (Miss. 2003).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 716.

¹⁷² *Id.* at 717.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 718.

¹⁷⁵ *In re Adoption of D.N.T.*, 843 So.2d 690, 718 (Miss. 2003).

¹⁷⁶ *Id.*

¹⁷⁷ B. Jessie Hill, *Medical Decision Making By and On Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL’Y 37, 39-40 (2012); Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 409 (2002).

¹⁷⁸ Hill, *supra* note 176, at 40; Hartman, *supra* note 176, at 409.

¹⁷⁹ Hill, *supra* note 176, at 40.

¹⁸⁰ Hartman, *supra* note 176, at 409.

quirements for medical consent, or those that allocate the right of consent for a minor's medical treatment specifically to the minor's parent.¹⁸¹ These statutes highlight a critical issue in minors' rights in the medical-decision-making context – authority.¹⁸² The U.S. Supreme Court justified minors' lack of authority when rationalizing, “*inexperience* limits minors' legal autonomy for making life's difficult decisions.”¹⁸³

Over the past few decades, there has been an increase in state involvement in minors' medical decision-making.¹⁸⁴ Initially, states limited minors' rights by requiring or encouraging parental involvement in minors' abortion decisions, as well as adopting statutes that permit the involuntary commitment of minors to mental-health facilities based on the parent's and doctor's recommendations.¹⁸⁵ Today, courts utilize a balancing test to determine whether to intervene in a family's medical decision-making.¹⁸⁶ Under this approach, courts are likely to intervene in family decision-making if the medical treatment posed little to no risk for the minor, and the parents lack of consent for the treatment results in a certainty of either death or serious bodily injury.¹⁸⁷ On the other hand, courts are less likely to intervene if the medical treatment is risky, and without the treatment the minor has little to no risk of death or serious injury.¹⁸⁸ Lastly, states are beginning to create exceptions to the general presumption prohibiting minors from consenting to medical treatment, and are thus extending some decision-making rights to minors.¹⁸⁹

Despite the presumption that minors are incompetent, there are some well-established exceptions to the general rule limiting a minor's ability to consent to medical treatment.¹⁹⁰ For example, minors are authorized to consent to medical treatment in emergency situations.¹⁹¹ Additionally, all states permit minors *alone* to consent to testing and treatment for sexually transmitted diseases.¹⁹² The rationale behind this exception is the state's interest in deterring the spread of disease while recognizing that many minors may forgo treatment if required to inform their parents of the cause.¹⁹³ Lastly, many states permit minors to consent for the treatment of substance abuse, sexual assault, outpatient mental-health care, contraception, and prenatal care.¹⁹⁴

Additionally, some state have adopted the “mature minor” doctrine in determining whether an *older* minor has the requisite capacity to consent to medical treatment, regardless of whether the minor's parents consent.¹⁹⁵ This doctrine essentially holds that a minor's consent “may still be effective if [she] is capable of appreciating the nature, extent, and probable consequences of the conduct consented to.”¹⁹⁶ In [Commonwealth v. Nixon, 761 A.2d 1151 \(Pa. 2000\)](#) a sixteen year old died from diabetes acidosis, a chronic condition that was nevertheless treatable. The

¹⁸¹ Hill, *supra* note 176, at 41.

¹⁸² SAMUEL M. DAVIS, CHILDREN'S RIGHTS UNDER THE LAW 74-75 (Oxford Univ. Press 2011).

¹⁸³ Hartman, *supra* note 176, at 410 (quoting [Parham v. J.R., 442 U.S. 584, 602 \(1979\)](#)) (emphasis added).

¹⁸⁴ Davis, *supra* note 181, at 90.

¹⁸⁵ Hartman, *supra* note 176, at 409.

¹⁸⁶ Davis, *supra* note 181, at 90.

¹⁸⁷ *Id.* at 76.

¹⁸⁸ *Id.* at 90.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Hill, *supra* note 176, at 43 (explaining that this exception was codified in *all* states and the District of Columbia).

¹⁹² *Id.*; see also Davis, *supra* note 181, at 90.

¹⁹³ Hartman, *supra* note 176, at 416; Hill, *supra* note 176, at 43 (recognizing that “it is better to encourage the treatment than to serve the parents' interest in being involved in their children's care”).

¹⁹⁴ Hill, *supra* note 176, at 42-43 (explaining that these exceptions derive from the state's policy objective of not deterring minors to seek medical care).

¹⁹⁵ Walter J. Wadlington, *Consent to Medical Care for Minors*, in CHILDREN'S COMPETENCE TO CONSENT 57, 60 (Gary B. Melton et al. eds., 1983).

¹⁹⁶ Weithorn, *supra* note 107, at 244 (quoting Restatement (Second) of Torts, Ch. 45, Section 892(A) (1979)).

minor's parents were convicted of involuntary manslaughter and endangering the welfare of a child because despite the daughter's severe symptoms, the parents only prayed for her and had her anointed.¹⁹⁷ On appeal, the parents argued that "their daughter was mature enough to make her own decisions regarding health care and religion," and urged the appellate court to accept the mature minor doctrine as an affirmative defense.¹⁹⁸ The court disagreed with the parents' argument, and held that despite the state's statutory exceptions allowing a minor to consent to treatment for substance abuse and venereal disease, "these statutes do not . . . show a legislative intent that any minor, upon the slightest showing, has capacity either to consent to or to refuse medical treatment in a life and death situation."¹⁹⁹

Although the mature minor doctrine and statutory exceptions may lead one to "assume that these laws were based on the concept of assuring greater personal autonomy for minors, they were in fact largely rooted in expediency."²⁰⁰ Again, often-times minors are not the real "goal" of the legislation that affects them, "[i]nstead, other powerful social goals are the focus of these laws."²⁰¹ Another medical-decision concerning minors is their right to seek an abortion. In *Bellotti*, the U.S. Supreme Court struck a balance between the competing state protective interests and minors' independence interests by holding that "a state could prevent a minor from having an abortion absent parental consent, so long as the state provided a judicial bypass exception."²⁰² Nevertheless, Minow asserts that the rights of minors were not the central focus for state legislatures or courts in adopting these abortion statutes.

In the 1980s and 1990s, legislative and judicial battles over abortion rights spilled into the children's rights terrain as pro-choice advocates sought rights for minors and pro-life advocates lobbied for parental consent or notification procedures. This may be one of many instances in which the topic of children's rights constitutes only a superficial frame for what more fairly is a larger national controversy with little opportunity to put children's interests into the picture.²⁰³

But for a small number of statutory exceptions and the mature minor doctrine, minors have very limited rights in the medical-decision making context.²⁰⁴ Additionally, courts and legislatures alike justify these limitations because minors do not have the requisite capacity or experience "for making life's difficult decisions."²⁰⁵ Nevertheless, in most states minors who voluntarily relinquishing their parental rights are provided no legal protection.²⁰⁶ By allowing a minor to consent to terminating her parental rights, the law has already created an exception against the traditional presumption that minors lack the capacity to consent.²⁰⁷ In order to protect minors and make their consent *informed*, all states must require that an attorney represent a minor mother who is voluntarily relinquishing her parental rights.

C. Strict Interpretation of Relevant Statutes

Lastly, once a nation-wide mandate requiring an attorney to represent a relinquishing minor mother is implemented, all courts must strictly interpret the statute to ensure sufficient protection

¹⁹⁷ LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 237 (Aspen Publishers, 2d ed. 2006) (citing *Commonwealth v. Nixon*, 761 A.2d 1151 (Pa. 2000)).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 240.

²⁰⁰ *Id.* at 237.

²⁰¹ Minow, *supra* note 1, at 5-6.

²⁰² Seymore, *supra* note 111, at 127.

²⁰³ Minow, *supra* note 52, at 289-90.

²⁰⁴ See Davis, *supra* note 181, at 90; see also Weithorn, *supra* note 107, at 244.

²⁰⁵ See Hartman, *supra* note 176, at 410.

²⁰⁶ See Seymore, *supra* note 111, at 99.

²⁰⁷ See Hill, *supra* note 176, at 40-41 (explaining that minors are not able to enter into binding contracts).

for the minor. For example, in *In Re Adoption of A.L.O.*, 132 P.3d 543 (Mont. 2006), three weeks after the sixteen-year-old mother gave birth, both the minor mother and father decided to give the baby up for adoption.²⁰⁸ Throughout the termination of parental rights proceeding the minor mother asserted that she was over the age of eighteen, even though she was actually seventeen.²⁰⁹ Over thirty days after the mother voluntarily relinquished her parental rights she filed a motion to set aside the adoption and “asserted that since she was under eighteen years of age and not represented by legal counsel at the time she signed the relinquishment paperwork, the court’s order of termination was void.”²¹⁰ Additionally, the applicable Montana statute requires a minor voluntarily relinquishing her parental rights in a direct parental placement adoption to have independent legal counsel.²¹¹

The Supreme Court of Montana correctly applied a strict interpretation of the relevant statute. Indeed, the court recognized that the legislative intent behind the statute was “to protect minor parents from making legally binding direct parental placement adoptions without counsel’s advice and representation.”²¹² Additionally, the fact that the minor mother intentionally lied about her age throughout the adoption proceedings emphasizes why statutes requiring legal counsel for minor mothers exist—to protect minors from making immature, uneducated, and grave decisions without fully understanding the severity and consequences of their actions.

Additionally, in *In re Adoption of R.C.B.*, 336 P.3d 922 (Kan. Ct. App. 2014), *review denied* (Jan. 15, 2015), a minor gave birth to a child and soon after voluntarily relinquished her parental rights so that the minor mother’s guardian could adopt the newborn.²¹³ Before the adoption was approved, the court required that the adopting guardian arrange for the minor mother to meet with independent legal counsel in compliance with the applicable Kansas statute.²¹⁴ The guardian secured legal counsel, but “attended the meeting with [the minor’s] attorney, did almost all of the talking, and didn’t allow [the minor] to speak with the attorney alone.”²¹⁵ At that meeting, the minor mother consented to relinquishing her parental rights.²¹⁶ Later, the minor mother contested the adopted on the grounds that it was not voluntary and that she was not provided *independent* legal counsel.²¹⁷

The appellate court correctly recognized the relinquishing mother’s minority at the time of signing the termination of parental rights paperwork, and that in order for the minor mother’s consent to be upheld, all of the statutory requirements must be met.²¹⁸ The relevant Kansas statute requires that a minor mother be provided independent legal counsel before executing a relinquishment in order to “protect minors from consenting to an adoption without knowledge of the consequences and independent legal advice.”²¹⁹ The court recognized that the minor was not provided *independent* legal counsel because the adopting party’s presence during the meeting “rendered counsel’s advice useless because it prevented [the minor] from expressing her own opinion or asking questions about the adoption for fear of repercussions from [the adopting parent.]”²²⁰

²⁰⁸ *In Re Adoption of A.L.O.*, 132 P.3d 543, 544 (Mont. 2006).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 545.

²¹¹ *Id.*

²¹² *Id.* at 546.

²¹³ *In re Adoption of R.C.B.*, 336 P.3d 922, *1-2 (Kan. Ct. App. 2014), *review denied* (Jan. 15, 2015).

²¹⁴ *Id.*

²¹⁵ *Id.* at *2.

²¹⁶ *Id.*

²¹⁷ *Id.* at *3.

²¹⁸ *Id.* at *8.

²¹⁹ *In re Adoption of R.C.B.*, 336 P.3d 922, *9 (Kan. Ct. App. 2014), *review denied* (Jan. 15, 2015).

²²⁰ *Id.*

The court correctly applied a strict interpretation of the statute because the guardian's presence and active participation in the minor mother's meeting with the attorney essentially allowed the adverse party to dictate and control the meeting.²²¹ Additionally, the guardian's presence at the meeting ultimately resulted in a waiver of the attorney-client privilege, highlighting that the minor mother "lacked truly independent advice."²²² A universal mandate requiring attorney representation for each minor mother relinquishing her parental rights is ineffective if not strictly interpreted. After all, the intent of the statute is to provide a minor mother with input "free from the influence, guidance, or control of another," in order to ensure that she is making an informed decision and understanding of the severity of its consequences.²²³

V. CONCLUSION

Voluntarily relinquishing one's parental rights prohibits a parent from claiming custody of the child or asserting visitation rights, terminates a parent's ability to make educational decisions for the child, and lastly, the parent no longer has an inheritance right to the child.²²⁴ In addition to the legal ramifications of relinquishment, terminating one's parental rights can have grave psychological effects on the relinquishing parent. Indeed, this drastic severance of familial ties has accurately been analogized as the death penalty of family law.²²⁵ One scholar asserts that relinquishment can be even more difficult for a minor mother to manage, explaining:

For teen parents, the loss and grief of relinquishing or losing a child is aggravated by the circumstances of fewer resources to make these decisions and less emotional maturity to cope with the emotional fallout.²²⁶

Despite the severity and the finality of a decision to terminate one's parental rights and the traditional consensus that minors have limited decision-making rights, the majority of states have not adopted statutes that require a minor mother to have an attorney throughout the entirety of the relinquishment process.

Because of the serious implications behind a minor mother's decision to voluntarily relinquish her parental rights, *all* states must require a minor mother to be represented by an attorney throughout these proceedings. In the legal context, minor mothers are very vulnerable and may fall victim to misleading statements and undue influence. Cases such as *In re Adoption of D.N.T.*, 843 So.2d 690 (Miss. 2003), *Bellotti v. Baird*, 443 U.S. 622 (1979), and *Vela v. Marywood*, 17 S.W.3d 750, 764 (Tex.App.—Austin 2000) emphasize the need for attorney representation in minor relinquishments. Indeed, if the mothers in *In re Adoption of D.N.T.* and *Vela* had legal counsel, their adoption decree contestations could have been entirely avoided. Both cases demonstrate that minor mothers are still *minors*, and thus need legal protection.

Additionally, comparing the rights of minor mothers in the voluntary relinquishment context to the medical decision-making rights of minors illustrates a clear injustice in the law. Despite the development of emergency medical treatment exceptions and the creation of the mature minor doctrine, legislation and courts continue to emphasize that minors have very limited rights to consent or decline medical treatment. Despite the serious regulation of minors' medical decision-making rights, only a minority of states have recognized that relinquishing minor mothers still need legal protection. Lastly, once a nationwide mandate that requires an attorney for all minor mothers relinquishing their parental rights is established, courts must strictly interpret these statutes in order to ensure continued protection for minors.

²²¹ *Id.* at *10.

²²² *Id.*

²²³ *Id.* at *10.

²²⁴ *Id.*

²²⁵ Fines, *supra* note 25, at 317.

²²⁶ *Id.* at 318.

Guest Editors this month includes Jimmy Verner (*J.V.*), Michelle May O’Neil (*M.M.O.*), Rebecca Tillery Rowan (*R.T.T.*), and Jessica H. Janicek (*J.H.J.*)

DIVORCE ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT ABUSED DISCRETION BY ENTERING DECREE PARTIALLY ENFORCING MSA THAT BY ITS OWN TERMS WAS OF “NO FURTHER FORCE AND EFFECT.”

¶16-5-01. *Vazquez v. Vazquez*, No. 13-15-00306-CV, 2016 WL 6804462 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (11-10-16).

Facts: During the parties’ divorce proceeding, they entered into an MSA that awarded Husband certain real property contingent upon his payment of \$250,000.00 cash to Wife. Additionally, the MSA was made contingent on Husband’s ability to secure a loan for the \$250,000.00: “in the event [Husband] is not able to secure such a loan, this [MSA] shall be of no further force and effect.”

Subsequently, Wife filed a motion seeking to enforce the MSA. She argued that Husband failed to comply with the MSA by failing to secure the loan. Husband filed a motion to set aside the MSA, arguing that because he was unable to secure the loan, the MSA was no longer enforceable. After a hearing, the trial court granted Wife’s motion and entered a decree of divorce ordering the sale of the property “as is” and the payment of \$250,000.00 to Wife, with any remaining net proceeds being awarded to Husband. The decree disposed of all other assets pursuant to the MSA. Husband appealed, arguing that the trial court erred in modifying the MSA. Wife argued that the trial court was authorized to divide community property no longer covered by the MSA due to Husband’s breach.

Holding: Reversed and Remanded

Opinion: Because the MSA was compliant with [Tex. Fam. Code § 6.602](#), the trial court lacked authority to enter a decree that varied from the terms of the MSA. The MSA unambiguously provided that if Husband could not secure the loan, the MSA would be of no further force and effect. Husband was unable to secure the loan. Thus, the trial court was without authority to enter a final divorce decree enforcing certain terms of the MSA while modifying others.

Editor’s Comment: *Use precise language when making your MSA contingent or conditional so that you are not stuck with it if the condition fails! The court of appeals got this one right. R.T.R.*

Editor’s Comment: *Divorce decrees often include provisions that a residence will be re-financed, provisions that are not always feasible or entered into in good faith. This case illustrates one court’s approach to a party’s claim that he tried, but failed, to obtain financing. Before proceeding, the trial court, apparently on its own initiative, ordered production of Husband’s loan applications. J.V.*

Editor’s Comment: *While utilizing contingency provisions in an MSA can be helpful, and can protect your client if certain conditions are not met, it is also necessary to ensure that the contingency is actually beneficial to your client. For instance, in this case, because the contingency essentially voided the MSA, the Husband essentially had the power to decide whether or not he*

wanted to comply with the MSA. If this MSA had given Wife the option of enforcement or voiding the MSA, the contingency provision may have provided a little more leverage for Wife. J.H.J.

**SAPCR
PROCEDURE AND JURISDICTION**

THIRD-PARTY COULD NOT ESTABLISH STANDING TO INTERVENE IN SAPCR BASED SOLELY ON EVENTS THAT OCCURRED AFTER SUIT WAS FILED.

¶16-5-02. *In re J.A.T.*, ___ S.W.3d ___, No. 14-15-00515-CV, 2016 WL 4923450 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (09-15-16).

Facts: Third-Party filed an original SAPCR, asking the court to name her and Father joint managing conservators of the Child. The associate judge entered temporary orders naming Third-Party sole managing conservator. Father filed a counter-petition and requested a de novo hearing, after which the trial court dismissed Third-Party's original petition for lack of standing. Third-Party then filed a motion to intervene in Father's remaining counter-suit. Father responded by non-suiting his counter-petition and filing a motion to deny Third-Party leave to intervene. After the trial court denied Third-Party's motion to intervene, Third-Party appealed, contending that she had standing because—pursuant to the temporary order that appointed her sole managing conservator—she had actual care, control, and possession of the Child for the requisite time, giving her standing to file an original SAPCR.

Holding: Affirmed

Opinion: [Tex. Fam. Code § 102.003](#) provides that in determining the Child's principal residence, the court must consider the relevant time *preceding the date of commencement of suit*. Here, in her attempt to establish standing, Third-Party relied solely on events that occurred after suit was filed. Because she lacked standing to file an original suit at the time she filed her original petition, she could not acquire standing to intervene while the case was pending.

Editor's Comment: *Third Party attempted to rely upon TFC 102.003(a)(9), which requires "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." J.V.*

GRANDPARENTS NOT REQUIRED TO FILE [TEX. FAM. CODE § 153.432](#) AFFIDAVIT BECAUSE THEY HAD STANDING UNDER [§ 102.003\(a\)\(9\)](#).

¶16-5-03. *In re C.D.M.*, No. 11-15-00319-CV, 2016 WL 5853261 (Tex. App.—Eastland 2016, no pet. h.) (mem. op.) (10-06-16).

Facts: The Child lived with Grandparents from birth until the age of three. Grandparents filed an original petition to be appointed the Child's joint managing conservator, alleging standing based on [Tex. Fam. Code § 102.003\(a\)\(9\)](#). Subsequently, Grandparents filed an amended petition that alleged standing under both [§ 102.003\(a\)\(9\)](#) and [§ 153.432](#). They attached an affidavit alleging that denial of their possession or access to the Child would significantly impair the Child's physical health or emotional well-being. Father filed a motion to dismiss Grandparents' claims be-

cause their affidavit did not contain supporting facts sufficient to satisfy § 153.432. The trial court granted Father’s motion and entered an order appointing Mother sole managing conservator. Grandparents appealed, arguing that the trial court erred in dismissing their suit because they had standing under § 102.003(a)(9).

Holding: Reversed and Remanded

Opinion: Grandparents sought standing based on [Tex. Fam. Code § 102.003\(a\)\(9\)](#)—the time during which they had actual care, control, and possession of the Child—not based on their biological relationship to the Child. Thus, the affidavit requirement of [Tex. Fam. Code § 153.432\(c\)](#) (the grandparent access statute) did not apply.

Editor’s Comment: This case is a good example of why, if your client may have standing under multiple provisions of the Texas Family Code, it is a good idea to assert multiple standing bases on an alternative basis. Thus, if standing is not found under one provision or if the requirements of the statute are not properly followed under one standing provision (as the trial court found here), a party may still have standing under an entirely different provision of the Code. J.H.J.

FATHER’S ORIGINAL COUNTER-PETITION FILED TWELVE DAYS BEFORE TRIAL NOT SURPRISE TO MOTHER BECAUSE ADDED CLAIMS HAD COMMON ELEMENTS WITH MOTHER’S AND REQUIRED SAME EVIDENTIARY PROOF.

¶16-5-04. [In re Rodriguez, No. 13-16-00411-CV, 2016 WL 5846544](#) (Tex. App.—Corpus Christi 2016, orig. pro) (mem. op.) (10-04-16).

Facts: In an agreed divorce decree based on an MSA, the parents were appointed joint managing conservators, and neither was ordered to pay child support. Mother had the exclusive right to designate the Children’s primary residence within a single county. Subsequently, Mother filed a motion to modify, asserting that Father had not been involved in the Children’s lives or contributed to them financially. Mother argued that the agreement to no child support was based on a presumption that both parents would be equally involved with the Children and would be able to maintain their relatively equal incomes. Father initially filed a general denial. The trial court entered a docket control order setting the case for trial and stating that the case would be tried by a jury if there are any issues to which a party had the right to a determination by jury.

Three weeks before trial, Mother filed her second amended petition. Ten days later, Father filed a supplemental answer and counter-petition seeking the exclusive right to designate the Children’s primary residence and to prevent the Children from contact with Mother’s boyfriend. Mother filed a motion to strike Father’s counter-petition, asserting he requested his relief “for the first time” “on the eve of trial.” The trial court struck Father’s pleading on the basis that it served as a surprise. Father filed a petition for writ of mandamus to challenge the striking of his pleading and the trial court’s refusal to allow the issue of attorney’s fees to be tried to a jury.

Holding: Writ of Mandamus Conditionally Granted; Appeal Dismissed as Moot

Opinion: A trial court has no discretion to refuse an amended pleading unless (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment.

Here, the trial court’s docket control order contained no restriction regarding amended pleadings, and Father filed his amended pleading more than seven days before trial. No leave

of court was necessary under the Texas Rules of Civil Procedure. Further, because Father's counterpetition addressed the same central issue as Mother's petition, she could not claim surprise.

Because a jury determination on attorney's fees is merely advisory, the trial court did not err in refusing Father's request to submit those issues to a jury.

***Editor's Comment:** A case that reminds us to always work with opposing counsel to get a pre-trial scheduling order in place (and one that ideally expands the normal 7-day deadline for amended pleadings). R.T.R.*

MOTHER LACKED STANDING TO INITIATE ORIGINAL SAPCR YEARS AFTER HER PARENTAL RIGHTS HAD BEEN TERMINATED.

¶16-5-05. *In re R.B.*, No. 02-16-00387-CV, 2016 WL 6803200 (Tex. App.—Fort Worth 2016, orig. proceeding) (mem. op.) (11-17-16).

Facts: Mother signed an affidavit voluntarily terminating her parental rights, and the maternal Grandparents adopted the Child. Despite the termination and adoption, Grandparents allowed the Child to live with Mother in California for two school years. Grandparents executed powers of attorney to give Mother temporary custody of the Child and to enroll the Child in school. When the Child returned to Grandparents for the summer, they decided that the Child would stay and attend school in Texas. Mother filed a SAPCR seeking to be named joint managing conservator with Grandparents and to have the exclusive right to designate the Child's primary residence. Grandparents filed a plea to the jurisdiction, arguing Mother lacked standing under [Tex. Fam. Code § 102.006](#). The trial court held that [§ 102.006](#) did not apply because Grandparents had "voluntarily relinquished" the Child and had conferred standing under [§ 102.003\(a\)\(9\)](#). The trial court issued temporary orders giving Mother limited access to the Child. Grandparents filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: [Tex. Fam. Code § 102.006](#), entitled "Limitations on Standing," provides in pertinent part:

- (a) ...if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:
 - (1) a former parent whose parent-child relationship with the child has been terminated by court order;
 - * * *
 - (b) The limitations on filing suit imposed by this section do not apply to a person who:
 - (1) has...possession [pursuant to] an existing court order; or
 - (2) has the consent of the child's managing conservator, guardian, or legal custodian to bring suit.
 - (c) The limitations on filing suit imposed by this section do not apply [to certain specified biological relatives, if the suit is filed] not later than the 90th day after the date the parent-child relationship between the child and the parent is terminated...

The language of the statute clearly and unambiguously prohibited Mother from seeking conservatorship, and none of the exceptions applied. Because the statute's language is unambiguous, looking into legislative materials would be wholly inappropriate.

Citing *In re Lee*, 411 S.W.3d 445, the appellate court noted that the best interest inquiry of Tex. Fam. Code § 153.002 may be entirely inapplicable when a different, more specific family code statute applies.

Further, the statute's language indicates that the Legislature considered and balanced the need for finality and permanency for child with the rights of other family members to seek conservatorship of the child by providing a limited window of time during which certain biological relatives can file an original suit.

Finally, the powers of attorney signed by Grandparents granted Mother only the rights to enroll the Child in school and to consent to medical care. The powers of attorney could not be construed as giving Mother consent to file suit.

Editor's Comment: I have to say, I completely disagree with the result in this case. Essentially, you have a case where a mother's parental rights were terminated, but the child subsequently lived with the mother for two years in an entirely different state. While I agree that a terminated parent shouldn't be able to obtain standing as a "parent" (because they are no longer considered a parent), I completely disagree that a terminated parent cannot obtain standing under another provision of the Code, as was the case here. Basically, under this ruling, even if the child lived with mother her entire life, after mother was terminated, mother could never, ever obtain custody of this child, even as a third party, because she was originally terminated. How in the world is that in the best interest of the child? I can't believe that was the intent of the statute and that provision, and hopefully this case will make its way to the Texas Supreme Court. J.H.J.

SAPCR PATERNITY

FATHER NOT A "DONOR" BECAUSE SPERM NOT PROVIDED TO A LICENSED PHYSICIAN FOR ASSISTED REPRODUCTION, SO ENTITLED TO BE APPOINTED A JMC OF THE CHILD.

¶16-5-06. *In re P.S.*, ___ S.W.3d ___, No. 02-16-00008-CV, 2016 WL 6277374 (Tex. App.—Fort Worth 2016, no pet. h.) (10-27-16).

Facts: Mother (a gay woman) and Father were friends. Mother wanted to have a child and asked Father if he would provide sperm. Father agreed and provided sperm in a sterile cup directly to Mother. Mother artificially inseminated herself and successfully conceived a child. Father attended doctor's appointments during the pregnancy and was present for the birth. He signed an acknowledgment of paternity and the Child's birth certificate. He was involved in the Child's life for a few months. Father lost contact with Mother when she lost her phone. Mother got married and moved to a new home.

Mother rescinded the acknowledgement of paternity and mailed Father a form requesting that he voluntarily relinquish his parental rights. Father sought assistance from the OAG to adjudicate his paternity. At trial, Father testified that Mother knew he wanted children but did not anticipate that he would ever marry. Father asserted that he and Mother agreed that he would be a father to the Child. Mother testified that Father agreed to be a sperm donor. Mother's new wife asked the trial court to find that Father was a "donor," so she could adopt the Child. The trial court appointed Mother and Father joint managing conservators, ordered Father to pay child support, and entered a possession order. Mother appealed, arguing that a "donor" is not a "parent."

Holding: Affirmed

Opinion: The Texas Family Code defines a “donor” as one who provides sperm to a licensed physician to be used for assisted reproduction. Here, the sperm was provided directly to Mother and not to a licensed physician, so Father did not meet the definition of a donor and was not prohibited from being named the Child’s parent.

TDFPS NOT CONSIDERED AN “INDIVIDUAL,” SO NOT AUTHORIZED TO INITIATE A PROCEEDING TO ADJUDICATE PARENTAGE WHEN THERE WAS AN ACKNOWLEDGED FATHER.

¶16-5-07. *In re J.F.S.*, No. 12-16-00255-CV, 2016 WL 6996642 (Tex. App.—Tyler 2016, orig. proceeding) (mem. op.) (11-30-16).

Facts: Father signed an adjudication of paternity of the Child. TDFPS sought to terminate Father’s parental rights, and his parents wanted the Child placed with them.

Mother had met Father 7 months before the Child was born of “good size.” Mother admitted to having a sexual relationship with another man 10 months before the Child was born. Nevertheless, Mother and Father both asserted that they fully believed Father was the Child’s father. Father’s parents stated that they did not believe that Father was the biological father, but they did not care because they loved the Child. TDFPS felt that the issue of paternity needed to be resolved before placement and sought an order for genetic testing. The trial court granted TDFPS’s request, and Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A valid acknowledgment of paternity filed with the vital statistics unit is the equivalent of an adjudication of paternity. A trial court abuses its discretion when a child’s paternity has been legally established and it orders genetic testing before such a parentage determination has been set aside. *Tex. Fam. Code* § 160.609 provides that when a child has an acknowledged father, an “individual” may commence a proceeding to adjudicate parentage. TDFPS is a governmental agency, not an individual. Thus, TDFPS is not statutorily authorized to commence a proceeding to adjudicate parentage when there is an acknowledged father. Accordingly, because the acknowledgement of paternity had not been set aside, the trial court abused its discretion by ordering genetic testing.

**SAPCR
ALTERNATIVE DISPUTE RESOLUTION**

MSA ENFORCEABLE BECAUSE WIFE DID NOT ESTABLISH SHE WAS COERCED INTO SIGNING MSA.

¶16-5-08. *Araujo v. Araujo*, No. 13-15-00345-CV, 2016 WL 4578401 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (09-01-16).

Facts: During the divorce proceedings, Husband and Wife signed an MSA that divided the couple’s real property and required Wife to make a cash payment to Husband. After Wife’s attorney

withdrew, she hired a new attorney who filed a motion to revoke the MSA as unenforceable. Wife testified that she attended school through sixth grade in Mexico, did not speak English, and that no one translated the MSA for her. Wife stated that she only signed the MSA because her first attorney “forced” her to sign by telling her the judge would make her sign. The trial court denied Wife’s motion to revoke and signed a final decree incorporating the MSA. Wife appealed, arguing the MSA was invalid because she was coerced to sign it.

Holding: Affirmed

Opinion: Wife did not identify anything in her testimony that constituted a threat or rose to a level that would render her incapable of exercising her free agency or unable to withhold her consent. Further, although uncontroverted, Wife’s testimony was also uncorroborated. The trial court did not have to accept Wife’s testimony that she signed because she felt “pressured and coerced.”

Editor’s Comment: The trial court also rejected Wife’s argument that the court could not divorce the parties because the MSA required the parties to remain married until Wife paid \$27,000 to Husband, finding that although Wife had not made the payment, she had the ability to make it. J.V.

Editor’s Comment: This case gives a good reminder that even if evidence is totally and unequivocally uncontroverted, that it is up to the trial court to determine the weight of the evidence. Here, despite the uncontroverted testimony, without supporting proof, the trial court found that the evidence didn’t rise to the necessary level to find duress and coercion. J.H.J.

**SAPCR
FAMILY VIOLENCE**

ACQUITTAL OF FATHER’S FAMILY VIOLENCE CHARGE DID NOT REQUIRE TRIAL COURT TO LIFT PROVISION FOR NONDISCLOSURE OF MOTHER’S CONTACT INFORMATION.

¶16-5-09. *In re D.D.J.*, No. 13-14-00401-CV, 2016 WL 6962007 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (11-22-16).

Facts: When Mother and Father divorced, the trial court made a finding of family violence. A couple years later, while family violence charges were pending against Father in criminal court, the family court ordered that Mother’s contact information not be disclosed to Father. Subsequently, a jury acquitted Father of the family violence charges.

A few years after that, Father filed a motion to enforce his visitation rights and a motion to modify the prior SAPCR orders. Mother filed a motion to enforce child support and a motion to modify the prior SAPCR orders. The trial court heard all four motions in a single consolidated proceeding, after which, it modified the SAPCR orders, retained the nondisclosure provision, ordered Father to pay the Children’s outstanding medical bills, and ordered Father to pay Mother’s attorney’s fees. Father appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Because an acquittal is not equivalent to or a determination of actual innocence, the trial court could have reasonably determined that the nondisclosure provision was still in the best interest of the Children. Father did not deny that he referred to Mother in a derogatory manner in front of the Children, and a nondisclosure provision can be used to prevent such harassment.

Although Mother was entitled to an attorney's fee award for her enforcement action, Father was not required to pay attorney's fees in a modification suit. Because the trial court globally awarded attorney's fees incurred as a result of legal representation in "this case," the appellate court reversed for further proceedings on the issue of attorney's fees.

Editor's Comment: *If proceeding on a hearing or trial that is taking up both an enforcement and a modification, do not forget to segregate your attorney's fees and testify as to them separately! If possible, make it easy on yourself, and bill your time to two separate matters (the modification and the enforcement) from the beginning. R.T.R.*

Editor's Comment: *The court relies on Tucker v. Thomas, 419 S.W.3d 292 (Tex. 2013), for the proposition that the TFC "does not authorize recovery of attorney's fees for legal services unrelated to [Mother's] enforcement action." That's not correct. Tucker recognizes that TFC 106.002 allows recovery of attorney's fees in modification suits. Tucker held only that attorney's fees in modification suits cannot be ordered as necessities or as additional child support, i.e., that they are not enforceable by contempt. J.V.*

SAPCR CONSERVATORSHIP

CHILD'S BEST INTEREST, NOT PARENTAL PRESUMPTION, DETERMINES WHETHER PETITIONER SHOULD BE APPOINTED A POSSESSORY CONSERVATOR.

¶16-5-10. *In re Ryan*, No. 12-16-00284-CV, 2016 WL 6996639 (Tex. App.—Tyler 2016, orig. proceeding) (mem. op.) (11-30-16).

Facts: Mary and Lorna married in Connecticut in 2009. They wanted to adopt, but because same-sex marriage was not legal in Texas at the time, Lorna initiated the formal adoption proceedings and became the Child's legal parent. Subsequently, Mary filed a petition for divorce and asked the court to appoint Mary and Lorna joint managing conservators. The trial court appointed Lorna the Child's sole managing conservator and did not appoint Mary a possessory conservator because she failed to overcome the parental presumption. Mary filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: While there is a parental presumption when appointing a managing conservator, whether to appoint a possessory conservator should be determined by what is in the Child's best interest. The trial court did not determine whether appointing Mary as a possessory conservator would be in the Child's best interest and, thus, applied the incorrect legal standard.

**SAPCR
POSSESSION**

FATHER’S HISTORY OF VIOLENCE SUPPORTED RESTRICTED POSSESSION ORDER.

¶16-5-11. *In re N.P.M.*, ___ S.W.3d ___, No. 08-15-00172-CV, 2016 WL 5812640 (Tex. App.—El Paso 2016, no pet. h.) (10-05-16).

Facts: Mother and Father had one Child together. Father had five other children. During a SAPCR proceeding regarding the Child, the trial court heard testimony regarding Father’s history of aggression with his other children, which resulted in Father’s arrest for assault. Father had also been physically, mentally, and sexually abusive towards Mother in the presence of the children. Father’s oldest daughter had a habit of running away, and Father showed a lack of interest in her whereabouts. Additionally, the Child was regularly returned to Mother looking dirty and neglected. The trial court appointed the parents as joint managing conservators and gave Father a restricted possession schedule. Father appealed arguing that there was no evidence to support deviating from the standard possession order.

Holding: Affirm

Opinion: The evidence supported restricting Father’s visitation because of his history or pattern of family violence and a history or pattern of past or present child neglect, emotion, and physical abuse directed toward his children and specifically the Child.

**SAPCR
CHILD SUPPORT**

NO ABOVE-GUIDELINE SUPPORT BECAUSE MOTHER FAILED TO ESTABLISH PRIVATE SCHOOL WAS A PROVEN NEED OF THE CHILD.

¶16-5-12. *Trojani v. Trojani*, No. 13-14-00630-CV, 2016 WL 4702685 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.) (09-11-16).

Facts: When Mother and Father divorced, Father was ordered to pay the maximum guideline child support for the parties’ two Children. Subsequently, Mother filed a petition to increase Father’s child support obligation to include private school expenses for one Child. Father testified that he had been paying for the private school, although he was not required by court order to do so. After finding that Father’s income exceeded the amount for maximum guideline support, the court signed an order increasing Father’s child support obligation. He appealed.

Holding: Reversed and Rendered in Part; Affirmed in Part

Opinion: To impose child support beyond the statutory guidelines, the record must contain evidence of the ‘proven needs’ of the Child. Here, the record was devoid of any evidence showing

something special that made the Child need or especially benefit from some aspect of non-public schooling.

Editor's Comment: If you want to try to get the court to order someone to pay for private school expenses, you have to put on evidence of how the private school is a 'proven need.' Here, mom put on zero evidence. But generally, the evidence needs to show 'something special' that makes that particular child need or 'especially benefit' from some aspect of the private school. To me, unless you have learning disabilities, that seems like a high burden of proof. R.T.R.

Editor's Comment: As an example of a proven need, and citing caselaw, the court mentioned that private school might be required because of a child's severe learning disabilities. J.V.

Editor's Comment: As a reminder, generally all that is required on appeal is for the record to point to some (not even a lot!) of evidence to support the Judge's ruling. Before you put on a case with regards to above-guideline support, make sure to research all of the elements, both statutory and case law, and hit each element when presenting your case. If the record has some support for the judge's ruling, it's far less likely to be overturned on appeal. J.H.J.

SAPCR MODIFICATION

REGARDLESS OF FATHER'S VIOLATION OF THE GEOGRAPHIC RESTRICTION ON THE CHILD'S RESIDENCE, EVIDENCE SUPPORTED MODIFICATION TO GRANT MOTHER THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S PRIMARY RESIDENCE.

¶16-5-13. *In re R.H.C.*, No. 09-15-00429-CV, 2016 WL 6128055 (Tex. App.—Beaumont 2016, no pet. h.) (mem. op.) (10-20-16).

Facts: Mother and Father had been appointed joint managing conservators, and Father had the exclusive right to designate the Child's primary residence within a specific county and counties contiguous to that county. Mother was granted a possession order that was modified to accommodate her 24-hour shifts as a paramedic.

About two years later, Father filed a petition to modify and attached an affidavit stating that he and the Child had already moved outside the geographic restricted area due to his employment. Mother filed a counter-petition.

Father testified that after moving, the Child had access to a better education, a stable home, and a regular routine. The Child was able to spend more time with him and extended family. The Child was not exposed to Mother's ex-boyfriend's coming and going from the home, and Mother had access to the Child and was able to visit the Child at school. Father admitted that Mother and the Child had a close relationship and that the Child wanted Mother to attend school functions and other events. However, Father did not believe that moving 250 miles away from Mother posed any problems.

Mother testified that her new work schedule allowed her to care for the Child full time. She expressed concerns about the Child's hygiene, diet, and her physical and emotional health while with Father. Mother stated that the Child's demeanor had changed since the move and described the Child as clingy, sad, and withdrawn. Mother wanted to enroll the Child in counseling, but Father refused. Mother further testified that the move had sometimes prevented her from exercising her possession of the Child.

The trial court expressed concerns for the Child's emotional well-being before granting Mother the exclusive right to designate the Child's primary residence under the existing geographic restriction. Father appealed, asserting the evidence did not support a finding that the modification was in the Child's best interest.

Holding: Affirmed

Opinion: Applying the *Holley* and *Lenz* factors, the trial court made a reasonable decision considering the evidence presented. Contrary to Father's contention, no evidence suggested that the trial court's order was based solely on Father's violation of the prior order.

Editor's Comment: Asking for forgiveness rather than permission didn't work. J.V.



TRIAL COURT LACKED JURISDICTION TO COMPEL OAG TO DISBURSE CHILD SUPPORT FUNDS FOR PAYMENT OF AMICUS ATTORNEY'S FEES; TRIAL COURT NOT REQUIRED TO ENTER ARREARAGE JUDGMENT BECAUSE OAG'S GENERAL REQUEST FOR RELIEF IN ANSWER DID NOT CONSTITUTE MOTION FOR ENFORCEMENT.

¶16-5-14. *In re H.G.-J.*, ___ S.W.3d ___, No. 14-15-00551-CV, 2016 WL 6561468 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (11-03-16).

Facts: A prior order in a suit initiated by the OAG required Father to pay monthly child support. Subsequently, Father filed a motion to modify conservatorship and be appointed the conservator with the right to receive child support. The OAG filed a general denial, in which it “urge[d] that the Court confirm any outstanding arrears, render a judgment and appropriate payout.”

After a hearing, the trial court ordered Mother to pay child support, awarded the amicus attorney fees to be paid by each parent, and directed the OAG to disburse funds collected from Father for child support to the amicus attorney to satisfy his portion of the judgment for the amicus attorney's fees. Additionally, the trial court declined to enter a judgment confirming Father's arrearage. The OAG appealed, arguing that the trial court lacked jurisdiction to require the OAG to disburse the funds and that the trial court erred in failing to enter judgment on Father's arrears.

Holding: Affirmed as Modified

Opinion: Tex. Gov't Code § 22.022(c) provides that “[o]nly the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that by state law, the officer or officers are authorized to perform.” An injunction may be either prohibitive, forbidding particular conduct, or mandatory, requiring particular conduct. The trial court's order required mandatory conduct—that the OAG to disburse funds to the amicus attorney—and constituted an injunction. Accordingly, pursuant to Tex. Gov't Code § 22.022(c) the trial court lacked authority to issue its injunctive order against the OAG, and that portion of the order was void.

Additionally, the trial court was not required to reduce Father's alleged arrearage to a money judgment because the OAG's answer generally denying Father's claims did not comply with [Tex. Fam. Code § 157.002](#)'s requirements of a motion for enforcement (i.e., the answer did not identify provisions of the order violated, state the manner of Father's noncompliance, etc.).

SAPCR
TERMINATION OF PARENTAL RIGHTS

UNCHALLENGED GROUND FOR TERMINATION SUPPORTED TERMINATION ORDER.

¶16-5-15. *In re S.P.*, ___ S.W.3d ___, No. 08-15-00360-CV, 2016 WL 4801597 (Tex. App.—El Paso 2016, no pet. h.) (09-14-16).

Facts: The 18-month-old Child was found dirty and alone behind a restaurant. The parents, who both had problems with alcohol, presented conflicting accounts of how the Child ended up there. Initially, neither seemed very concerned about the Child's disappearance. During the proceedings initiated by TDFPS, the parents failed to comply with their service plans. After a final trial both parents' parental rights were terminated. Mother appealed the best interest finding and the two endangerment grounds on which her termination was based, but did not appeal the finding that she failed to comply with a court order.

Holding: Affirmed

Opinion: Mother only appealed two of the three statutory grounds on which the termination of her parental rights was based. Thus, the unchallenged ground was sufficient to support the judgment. Additionally, the evidence supported a finding that termination was in the Child's best interest.

EVIDENCE SUPPORTED TERMINATION OF FATHER'S PARENTAL RIGHTS.

¶16-5-16. *In re G.N.*, ___ S.W.3d ___, No. 08-16-00077-CV, 2016 WL 5121991 (Tex. App.—El Paso 2016, no pet. h.) (09-21-16).

Facts: Mother and Father had six children together. Father's parental rights to the oldest four had previously been terminated in two separate suits. Their youngest child died. This suit concerned the remaining Child.

Father had a history of substance abuse, including use of cocaine, marijuana, and opiates. He had a substantial criminal history that included assault, domestic violence, theft, drugs, and resisting arrest. Additionally, Father was diagnosed with bipolar disorder and anxiety and became aggressive and angry when he did not take his prescribed medications. During the proceedings, Father failed to comply with his court-ordered service plan. The trial court terminated Father's parental rights on endangerment grounds. In one issue, Father challenged the finding that termination was in the best interest of the Child.

Holding: Affirmed

Opinion: Applying the *Holley* factors, the evidence supported a finding that termination of Father's parental rights was in the Child's best interest.

MOTION TO WITHDRAW NOT REQUIRED TO COMPLY WITH *ANDERS* IN APPEAL OF TERMINATIONS OF PARENTAL RIGHTS.

¶16-5-17. *In re G.P.*, ___ S.W.3d ___, No. 10-16-00068-CV, 2016 WL 5417458 (Tex. App.—Waco 2016, no pet. h.) (09-28-16).

Facts: The trial court terminated Mother's and Father's parental rights to the Child. Father's appointed appellate counsel filed an *Anders* brief, asserting that his review of the record found no arguable issues to raise on appeal. Father's attorney did not file a motion to withdraw as has historically been required in order to comply with the procedures set forth in *Anders*.

Holding: Affirmed

Opinion: Recent decisions by the Texas Supreme Court indicate that an *Anders* brief alone may not be considered "good cause" for the purpose of granting an attorney's motion to withdraw. Under the Texas Family Code, an attorney appointed to represent a parent in the appeal of a termination proceeding continues in that capacity until the case has been dismissed, all appeals relating to a final termination order have been exhausted or waived, or counsel has been relieved or replaced after a finding of good cause by the court on the record. Appellate counsel must still comply with the other requirements of *Anders*, including the filing of a brief that demonstrates a thorough review of the record and discussion of any potential issues and the required notices to the client.

Editor's Comment: *Ordinarily, an Anders brief is accompanied by a motion to withdraw, but because an appointed attorney's duty to represent the client in a termination case continues until the case has been dismissed and appeals have been exhausted or waived, it would "be a waste of resources, both of appellate counsel and the judiciary, to require the filing of a motion that will be denied automatically upon an appellate court's finding of the existence of no arguable issues, and we will not require counsel to pursue a useless act." J.V.*

EXISTENCE OF UNREVOKED AFFIDAVIT OF RELINQUISHMENT NOT *IPSO FACTO* EVIDENCE THAT TERMINATION IS IN THE CHILD'S BEST INTEREST.

¶16-5-18. *In re E.J.R.*, ___ S.W.3d ___, No. 13-16-00302-CV, 2016 WL 6591805 (Tex. App.—Corpus Christi 2016, no pet. h.) (09-29-16).

Facts: The Child was born while Mother and Father were each married to other people. The trial court adjudicated Father as the father and appointed Mother sole managing conservator and Father possessory conservator. A few months later, Father executed an affidavit of voluntary relinquishment of his parental rights. Mother then filed a petition seeking the termination of Father's parental rights. Father appeared at the hearing pro se. He did not challenge the validity of the affidavit; however, Father stated that he no longer believed that it would be in the Child's best interest to be adopted by Mother's husband. Rather, Father stated that he loved the Child and wanted to continue to be the Child's father. The trial court denied Mother's petition for termination, and she appealed.

Holding: Affirmed

Opinion: When challenging an order granting termination based on an unrevoked affidavit of relinquishment, an appealing party is limited to showing fraud, duress, or coercion in the execution of the affidavit. However, contrary to Mother’s assertion, this rule does not apply to the review of an order *denying* termination. Additionally, while an affidavit of relinquishment may be a sufficient basis to find termination is in a child’s best interest, the affidavit alone does not require a trial court to order an involuntary termination. An affidavit sufficient to support a ground for termination under [Tex. Fam. Code § 161.001\(1\)](#) does not relieve the petitioner from showing that termination is in the best interest of the child.

Here, Mother offered little evidence that termination would be in the Child’s best interest, while Father testified that he loved the Child and wished to remain in the Child’s life. Father showed evidence of time he had spent with the Child, as well as evidence of his attempts to spend more time with the Child. Additionally, Father was current in his child support payments.

Despite Mother’s contention, there was no evidence the trial court “set aside” the affidavit before reaching its determination. Rather, there was sufficient evidence to support a finding that termination was not in the best interest of the Child.

Editor’s Comment: Apparently Mother’s only viable argument became that signing the affidavit of relinquishment required termination when Dad testified that he loved the child, wanted to remain in her life, was current on his child support, had brought his three other children and mother to meet the child, had spent “ample time” with the child “and relished it,” and introduced several photos of himself with the child. J.V.

MISCELLANEOUS

☆☆☆ TEXAS SUPREME COURT ☆☆☆

DISSENT: ACCESS TO SPOUSAL EMPLOYMENT BENEFITS IS NOT A FUNDAMENTAL RIGHT, AND TEXAS HAS A RATIONAL BASIS FOR LIMITING EMPLOYMENT BENEFITS TO ONLY OPPOSITE-SEX MARRIAGES.

¶16-5-19. [Pidgeon v. Turner](#), ___ S.W.3d ___, No. 15-0688, 2016 WL 4938006 (Tex. 2016) (09-02-16).

Facts: Prior to *Obergefell*, Houston began offering benefits such as health insurance to same-sex partners of city employees if they had been legally married in a state allowing same-sex marriage. Two Houston taxpayers sued, seeking a permanent injunction to prevent the city from providing the benefits. The trial court granted a temporary injunction, and the city filed an interlocutory appeal. While the appeal was pending, *Obergefell* was decided. The appellate court reversed and remanded the suit, in light of *Obergefell*, announcing that there was “no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the grounds of its same-sex character.” The taxpayers petitioned the Texas Supreme Court for review.

Holding: Petition for Review Denied

Dissenting Opinion: (J. Devine) *Obergefell* concerned access to marriage and was not an equal protection challenge to the allocation of employment benefits. Marriage—not access to spousal employment benefits—is a fundamental right, and laws limiting access to a fundamental right are entitled to stricter scrutiny. A restriction to spousal employment benefits should only be reviewed for a rational basis. The *Obergefell* majority’s general assumption that states would extend all opposite-sex benefits to same-sex couples did not constitute a legal holding. Texas’s concerns about procreation are sufficient to meet the rational-basis standard. To allow the courts—as opposed to democracy—to make this decision undermines precedent and the limited role of courts in our nation.

Editor’s Comment: *This dissenting opinion—what? To me, this case makes zero sense. So essentially, by this opinion, Texas can create an entirely new class of married people—those that get “married” benefits, and those that cannot? SCOTUS found there is a right to marriage, period, end of story, and I find it would be a grave constitutional violation to divide people into those that are entitled to one kind of marriage (with benefits) and those that are entitled to another. J.H.J.*

HUSBAND’S APPEAL DISMISSED FOR FAILURE TO COMPLY WITH TRIAL COURT’S TEMPORARY ORDERS PENDING APPEAL.

¶16-5-20. [Rodriguez v. Borrego](#), ___ S.W.3d ___, No. 08-15-00340-CV, 2016 WL 5335424 (Tex. App.—El Paso 2016, no pet. h.) (09-23-16).

Facts: After a final divorce decree was signed, Husband requested findings of fact and conclusions of law. Wife then filed a motion requesting temporary orders in the event Husband perfected an appeal. After Husband perfected his appeal, the trial court granted Wife’s motion and ordered Husband to pay temporary spousal support and Wife’s attorney’s fees. More than six months later, Wife filed a motion to dismiss Husband’s appeal because he had not paid her any spousal support or attorney’s fees pursuant to the temporary orders. The appellate court granted Husband’s request to abate the appeal to give him time to comply with the temporary orders. Subsequently, Husband stated that he needed additional time to obtain funds from a Thrift Savings Plan. After the appellate court had granted three extensions, Husband filed a motion asking the appellate court to reconsider its order that his appeal would be dismissed if he failed to comply with the temporary orders.

Holding: Dismissed

Opinion: The appellate court was patient with Husband and gave him multiple opportunities to comply with the temporary orders, but he failed to do so. Contrary to Husband’s contention, he was not required by the temporary orders to use the Thrift Savings Plan to make the required payments. Husband had other assets that he could have used to make the payments. However, he made no payments for ten months, and he made no attempt to negotiate with the plan administrator until more than six months after the first payment was due—until after Wife filed her motion to dismiss. Husband was not permitted to ignore a temporary order simply because he disagreed with it and intended to appeal it.

Editor’s Comment: *If appellee obtains a temporary order for support or attorney’s fees under TFC 6.709, appellant should be sure to obey the order in light of this ruling. J.V.*

Editor's Comment: This case is a reminder that if you appeal, you may be subjected to certain requirements by the trial court in a temporary orders pending appeal, and if you don't comply (even if you appeal the temporary orders pending appeal), your client's entire appeal may be dismissed. I think this is a very useful tool on appeal, and it is a reminder again as to why filing a temporary orders pending appeal may be very useful in an appellate situation. J.H.J.

**RESTRICTED APPEAL REQUIRES ERROR ON THE FACE OF THE RECORD THAT IS AP-
PARENT, NOT ERROR THAT MAY BE INFERRED.**

¶16-5-21. *In re R.S.T.*, ___ S.W.3d ___, No. 14-15-00925-CV, 2016 WL 5573733 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (09-29-16).

Facts: In 2001, a Louisiana state district court issued a judgment adjudicating Patrick as R.S.T.'s biological father and ordering him to pay \$152.00 in child support each month. The record indicates that a notice of registration of this Louisiana order was filed in the Texas trial court in 2011. The notice stated that Patrick had accrued \$18,394.84 in child-support arrearages under the Louisiana order. OAG filed a motion to confirm the support arrearages. The trial court granted OAG's motion and issued its order confirming support arrearages.

Patrick filed a motion for new trial, requesting that the trial court set aside the arrearages judgment against him. In his motion, he stated that he had asked for DNA testing in the matter because he did not believe that he was R.S.T.'s father. The trial court granted Patrick's motion for new trial. OAG subsequently filed a notice of nonsuit concerning its previous motion to confirm support arrearages.

Over 2 years later, Patrick filed a motion to modify child support deductions alleging the following:

1. Material/substantial change, so payments for child support from his paycheck should be stopped.
2. the Motion to Confirm Arrearages was non-suited in 2012, after Patrick found **not** to be the biological father of the child.
3. Despite the non-suit of the case and Patrick being not adjudicated as father, OAG continued to deduct child support payments from Patrick's paychecks.

After a hearing in which OAG did not participate, the trial court granted Patrick's requested modification because Patrick was never properly served with citation in regards to the claim for child support registration in Texas of the Louisiana child support order and ordered that all withholding for child support arrearages from his paychecks be stopped. Eleven weeks after the court issued its order, OAG filed a notice of restricted appeal.

Holding: Affirmed.

Opinion: In order to succeed on a restricted appeal, an appellant must establish that: (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any post judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent from the face of the record.

OAG's primary argument is that the trial court did not have jurisdiction to issue an order modifying a registered foreign support order from Louisiana. However, it is not apparent from the record before us that the trial court's order was intended to modify that particular order. Because the motion to modify and the court's order granting the motion differ, it is not clear which support order the trial court asserted its jurisdiction over, much less whether that jurisdiction was erroneously asserted. OAG asks this court to infer from the conflicting motion and order not only

that the trial court modified the Louisiana support order, but also that it erred in doing so. However, “a restricted appeal requires error that is *apparent*, not error that may be *inferred*.”

Concurring Opinion. OAG also asserted that Patrick failed to use the remedies available under [Family Code section 158.506](#) to contest an administrative writ of withholding. This Court must give effect to the substance rather than the form or title of Patrick’s “Motion to Modify” and the trial court’s order granting it. The record reflects that the substance of the trial court’s order was an order that all income withholding regarding Patrick’s child-support arrearages stop rather than a modification of the Child Support Order. Because the trial court did not modify the Child Support Order, it is not apparent from the face of the record that the trial court erroneously modified this order. Under [Family Code §158.506](#), “[e]xcept as provided by Section 158.502(c), an obligor receiving the notice under Section 158.505 may request a review by the Title IV-D agency to resolve any issue in dispute regarding the identity of the obligor or the existence or amount of arrearages.” The record reflects that the trial court issued a judicial order for income withholding in its December 2011 order confirming a child-support arrearage. The record does not reflect that Patrick received notice under [Texas Family Code section 158.505](#) of an administrative writ of withholding. Error is not apparent from the face of the record based on Patrick’s failure to use the remedies available under Family Code section 158.506.7

HUSBAND’S MOTION FOR CONTINUANCE DID NOT CONTAIN THE SIGNATURE OF A NOTARY OR MEET THE REQUIREMENTS OF TCPRC § 132.001 FOR AN UNSWORN DECLARATION.

¶16-5-22. [Hardwick v. Hardwick, 2016 WL 5442772 \(Tex. App.—Fort Worth 2016, no pet. h.\) \(09-29-16\)](#).

Facts: Wife filed for divorce in May 2014, and Husband filed a counterpetition. Both were initially represented by counsel, but both Wife’s counsel withdrew in January 2015, and Husband’s counsel withdrew in March 2015, after which both parties continued pro se for a while. On June 24, 2015, Wife’s former attorney served Husband with a notice of appearance. On June 29, 2015, it was filed with the court. On July 1, 2015, Wife appeared at trial with her attorney, and Husband appeared pro se. That morning at 8:12 a.m. Husband filed an unverified motion for continuance asking for time to retain an attorney, which the trial court denied. Following a bench trial, the trial court entered a final decree of divorce.

Holding: Affirmed.

Opinion: A motion for continuance must be in writing, state the specific facts supporting the motion, and be verified or supported by an affidavit. If a motion for continuance is not verified or supported by affidavit, it is presumed the trial court did not abuse its discretion in denying the motion.

Here, Husband’s motion for continuance contained a “Verification” page that included the following statement: “I, the undersigned, swear under oath that the above Motion for Continuance is true and correct.” Husband’s signature immediately followed that statement. While the “Verification” page contained a place for a notary’s signature and seal, the space for the notary was left blank. Thus, Husband’s motion for continuance was not verified or supported by affidavit.

Although the parties did not address the issue, the court of appeals also considered whether Husband’s statement on the “Verification” page qualifies as an unsworn declaration Under [Texas Civil Practice and Remedies Code § 132.001](#), which provides, with the exception of cer-

tain situations that do not apply here, “an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law.” An unsworn declaration, however, must be “in writing” and “subscribed by the person making the declaration as true under penalty of perjury.” Here, Husband's signed statement on the “Verification” page was not made under penalty of perjury, and as such, it does not cure the fact that his motion for continuance was not verified or supported by affidavit.

Editor’s Comment: *CPRC 132.001 can be convenient, but one must comply exactly with its requirements. J.V.*

MOTHER NOT ENTITLED TO RESTRICTED APPEAL—ABSENCE OF NOTICE FROM CLERK’S RECORD OF TRIAL SETTING NOT PROOF OF LACK OF NOTICE.

¶16-5-23. *Richardson v. Sims*, No. 01-15-01115-CV, 2016 WL 5787291 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (mem. op.) (10-04-16).

Facts: Father initiated an original SAPCR. Mother and Father both appeared at a temporary orders hearing, after which, the trial court granted Mother the exclusive right to designate the Child’s primary residence and ordered Father to pay child support. Subsequently, Mother violated the temporary orders and failed to appear at a hearing regarding the violations. The trial court modified the temporary orders to give Father the exclusive right to designate the Child’s primary residence and suspended Father’s child support obligation. A few months later, the case was called to trial. Mother failed to appear, and Father was granted a default judgment, which stated that Mother had made a general appearance, was notified of trial, and failed to appear. Mother filed a notice of restricted appeal.

Holding: Affirmed

Opinion: To be entitled to a restricted appeal, error must be apparent on the face of the record. The law presumes that a trial court hears a case only after proper notice to the parties. If the record is silent as to whether notice of a trial setting was given, no error appears on the face of the record. Further, here, the judgement included a recitation that due notice was given.

Editor’s Comment: *Citing caselaw, the court also observed, “The clerk's record does not typically contain a copy of a notice of a trial setting, and therefore, its absence from the clerk's record is not proof that proper notice was not provided.” J.V.*

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.

¶16-4-24. *In re Fuentes*, ___ S.W.3d ___, No. 01-16-00366-CV, 2016 WL 5851890 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (10-06-16) (reh’g den.).

(Note: The appellate court conditionally granted Husband’s petition and subsequently denied Wife’s motion for rehearing and, in doing so, withdrew and replaced its prior opinion. The only revision made was to vacate the trial court’s temporary order—rather than

remand—and to order the trial court to enter a new order consistent with the appellate court’s opinion.)

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.

Editor’s Comment: *The court states that mandamus is appropriate when a trial court awards attorney’s fees not conditioned upon the conclusion of an unsuccessful appeal. Otherwise, review by appeal is the appropriate remedy. The court applies that reasoning to temporary support which by its nature requires present rather than prospective payment. Thus, all orders for temporary support during appeal must be reviewable by writ of mandamus. That’s important to know given Rodriguez v. Borrego, supra, where the El Paso Court of Appeals dismissed an appeal for failure to comply with temporary orders during appeal. J.V.*



TEXAS COURTS LACK AUTHORITY TO GRANT GENDER CHANGE ORDERS.

¶16-5-25. *In re McReynolds*, ___ S.W.3d ___, No. 05-15-01254-CV, 2016 WL 5920779 (Tex. App.—Dallas 2016, no pet. h.) (10-11-16).

Facts: Appellant filed an original petition seeking to change his gender designation from female to male. Appellant asserted that [Tex. Fam. Code § 2.005\(b\)\(8\)](#) authorized the court authority to grant his requested relief. The trial court held that it lacked authority to change gender identity markers. Appellant appealed.

Holding: Affirmed

Opinion: [Tex. Fam. Code § 2.005\(b\)\(8\)](#) provides that an order granting a sex change can be used as proof of identity to acquire a marriage license. That section does not indicate that an order granting a sex change could or would be issued from a Texas court. In the Texas Family Code, while there is a chapter providing procedures for a change of name, there is no similar chapter for a change of gender.

Editor's Comment: One wonders why appellant wanted a gender change when after Obergefell v. Hodges, same-sex couples can marry. But in this case, appellant admitted he was not seeking a marriage license but "would use a sex change order to support an application to amend his birth certificate." J.V.

ATTORNEY'S FEES ADEQUATELY SEGREGATED BY USING COLORED HIGHLIGHTERS TO IDENTIFY ON WHICH CASE FEES WERE INCURRED.

¶16-5-26. *In re Marriage of Mobley*, ___ S.W.3d ___, No. 06-15-00057-CV, 2016 WL 6247009 (Tex. App.—Texarkana 2016, no pet. h.) (10-26-16).

Facts: Two years after their divorce based on an MSA, Wife filed a lawsuit against Husband and his divorce attorneys alleging they breached their fiduciary duty by obtaining information from the IRS without her consent. During discovery for the breach of fiduciary duty case, Wife allegedly uncovered evidence that Husband fraudulently concealed information relevant to the property division. Wife argued that Husband failed to disclose the details of a sale of certain companies during the divorce proceeding. Wife filed a bill of review seeking to set aside the divorce decree. In response to the bill of review, Husband filed a motion to dismiss and a request for attorney's fees. Husband asserted that the companies sold were his separate property and that Wife had no interest in the sale. The trial court granted Husband's motion to dismiss and awarded attorney's fees. Wife appealed.

Holding: Affirmed

Opinion: Wife acknowledged in the MSA that the companies were Husband's separate property, and thus, she had no interest in the transaction. Moreover, Wife received a memo regarding the sale before it was completed and chose not to conduct additional investigation through discovery during the divorce proceeding. Thus, there was no evidence of extrinsic fraud, and Wife was not entitled to a bill of review.

A party who successfully defends a bill of review is entitled to recover attorney's fees in the bill of review proceeding if attorney fees are authorized in the prosecution of the underlying case. Additionally, contrary to Wife's assertion, Husband adequately segregated the fees in-

curred in the bill of review from those incurred in the breach of fiduciary duty case. In the invoices for fees, work performed in the breach of fiduciary duty case was highlighted in blue, work in the bill of review was highlighted in green, work in both cases was highlighted in pink and then halved, and costs were highlighted in yellow.

***Editor's Comment:** I find this case interesting, because it stands for the proposition that you don't need to have fancy separate exhibits or notebooks or anything of the sort to segregate and separate attorney's fees. Instead, as long as the fees were highlighted and easy to distinguish, the Court could easily identify which fees belonged to which action. J.H.J.*

WIFE'S APPEAL MOOT BECAUSE SHE VOLUNTARILY NONSUITED CLAIMS AFTER PARTIAL SUMMARY JUDGMENT GRANTED TO HUSBAND.

¶16-5-27. *Mobley v. Mobley*, ___ S.W.3d ___, No. 06-15-00058-CV, 2016 WL 6247010 (Tex. App.—Texarkana 2016, no pet. h.) (10-26-16).

Facts: Two years after their divorce based on an MSA, Wife filed a lawsuit against Husband and his divorce attorneys alleging they breached their fiduciary duty by obtaining information from the IRS without her consent. Husband filed a motion for partial summary judgment, which was granted along with an award for his attorney's fees. Subsequently, Wife voluntarily filed a nonsuit, stating "Plaintiff no longer desires to prosecute her claims asserted in this lawsuit" yet also appealed the partial summary judgement and award of attorney's fees.

Holding: Reversed in Part; Affirmed in Part

Opinion: Because a nonsuit effectively moots the merits of the underlying case, nothing remained to be resolved on appeal, and because the nonsuit occurred after the partial summary judgment was entered, the dismissal foreclosed any right Wife may have had to refile those claims later. Thus, while her nonsuit did not dispose of Husband's counterclaims for fees, costs, and sanctions, Wife had nothing left to appeal regarding the partial summary judgment.

The trial court's order awarding sanctions failed to include the basis for attorney's fees as sanctions. Moreover, there was no evidence presented that Wife's claims were brought for an improper purpose, that there were no grounds for the legal arguments advanced, or that the factual allegations lacked evidentiary support. The court noted, "That is not to say that such evidence did not exist—but it was not presented to the trial court."

***Editor's Comment:** The court does a nice job of highlighting the differences between sanctions under TRCP 13 and under CPRC Ch. 10, then explains that there must be evidence of all elements of a sanctions claim to support an award of sanctions. J.V.*

FATHER ENTITLED TO DE NOVO HEARING BECAUSE TIMELY REQUESTED AND NO WAIVER MADE BEFORE ASSOCIATE JUDGE HEARING.

¶16-5-28. *In re J.A.P.*, ___ S.W.3d ___, No. 04-16-00271-CV, 2016 WL 6407324 (Tex. App.—San Antonio 2016, no pet. h.) (10-31-16).

Facts: TDFPS sought to terminate Father's parental rights to one child and to discharge him as managing conservator of another child. An associate judge heard the matter and rendered an order granting TDFPS's requested relief. Father timely filed a request for a de novo hearing. At

a hearing on Father's request, TDFPS argued that Father had waived his right to a de novo hearing because his attorney signed the associate judge's order, which provided in pertinent part:

The Court finds that all parties have waived any objections to the hearing by an Associate Judge, and do hereby waive their right to de novo review pursuant to [Section 201.015 of the Texas Family Code](#).

TDFPS explained that the language was included in all termination orders. The trial court denied Father's request for a de novo hearing, and he appealed.

Holding: Reversed and Remanded

Opinion: A waiver of a de novo hearing must be made before the start of a hearing by an associate judge. Nothing in the record indicated that a waiver was discussed before or during the hearing. Additionally, Father's waiver of any objections to an associate judge hearing the case on the merits did not constitute of a waiver of a de novo hearing. Finally, even if the right to object to a de novo hearing could be waived after a hearing, Father's attorney only signed the order as "approved as to form," which was insufficient to establish a consent decree.

Editor's Comment: But, as the opinion notes, "Approved as to Form and Substance" or "Approved as to Content" can operate as a consent to the substance of an order. J.V.

LITIGATION EXCEPTION TO PHYSICIAN-PATIENT PRIVILEGE NOT APPLICABLE BECAUSE MOTHER'S MEDICAL CONDITION NOT ULTIMATE ISSUE FOR EITHER PARTY'S CLAIMS OR DEFENSES.

¶16-5-29. *In re Morgan*, ___ S.W.3d ___, No. 01-16-00530-CV, 2016 WL 6462200 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (11-01-16).

Facts: Father filed for divorce and initially asked that the parents be appointed joint managing conservators of their Children and that he be designated the primary conservator. Subsequently, each party filed amended petitions seeking sole managing conservatorship. Father served discovery on Mother, in which he sought production of Mother's medical records. Mother objected, claiming the records were protected by the physician-patient privilege. Father filed a motion to compel and for sanctions, arguing that he was entitled to the records under the litigation exception to the physician-patient privilege. After reviewing the records *in camera*, the trial court ordered Mother to produce the records. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The "litigation exception" applies when any party relies on the patient's physical, mental, or emotional condition as part of the party's claim or defense and the communication or record is relevant to that condition. The test is not simply whether the condition is relevant because any litigant *could plead* some claim or defense to which a patient's condition could arguably be relevant. Additionally, if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an 'ultimate' issue for a claim or defense, it is an abuse of discretion to order production of medical records protected by the physician-patient privilege.

Here, Father's pleadings contained no allegation that a medical condition affected Mother's suitability as a conservator, and Mother's pleadings also raised no issue concerning her medical condition.

***Editor's Comment:** This case is interesting. It essentially holds that a party does not have to hand over their medical records (something that is routinely done by agreement in most cases involving children) if their medical condition is merely an evidentiary or intermediate fact issue as opposed to an "ultimate" issue. The court also noted that the father's pleadings did not allege that mother's medical condition affected her suitability as a conservator. But how do we balance that notion with the idea that family law pleadings are supposed to be fairly devoid of inflammatory "facts" and allegations? Do I now have to explain in detail why I think mother is crazy in my petition for divorce in order to get her medical records? This case seems to indicate I do. But shouldn't I be able to review the medical records BEFORE I call her crazy in a public pleading? R.T.R.*

NO ABUSE OF DISCRETION IN DENYING NAME CHANGE WHEN PETITION FAILED TO DISCLOSE CRIMINAL HISTORY.

¶16-5-30. *In re Jones*, ___ S.W.3d ___, No. 01-15-00590-CV, 2016 WL 6462223 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (11-01-16).

Facts: Patrick filed a petition seeking to change his name from Patrick Kent Lindsey Jones to Patrick Joseph LeBaron, allegedly to avoid identity theft and harassment from his father. In his petition, he represented that he had never been charged with an offense above a Class C misdemeanor. Subsequently, Patrick filed an unverified proposed order granting his name change, in which he changed his name to Patrick Charles Duval—which was not the name originally requested—and disclosed a charge for reckless driving, a Class B misdemeanor. The trial court denied the petition. In a motion for new trial, Patrick asserted that he did not know that reckless driving was a Class B misdemeanor. The trial court denied the motion for new trial, and Patrick appealed.

Holding: Affirmed

Opinion: The Texas Family Code requires that a petition for a name change include the disclosure of any offense above the grade of Class C misdemeanor or an explanation for the nondisclosure. Here, Patrick failed to include his reckless driving charge in his petition and only mentioned it in his unverified proposed order. Additionally, the name requested in his petition did not match the name in his proposed order.

ASSOCIATE JUDGE'S JUDGMENT BECAME FINAL BECAUSE FATHER'S REQUEST FOR DE NOVO HEARING INSUFFICIENT—TRIAL COURT LOST PLENARY POWER 30 DAYS LATER.

¶16-5-31. *In re H.F.*, No. 02-16-00347-CV, 2016 WL 6706324 (Tex. App.—Fort Worth 2016, orig. proceeding) (mem. op.) (11-14-16).

Facts: The OAG initiated a suit to establish orders for conservatorship and child support. The district judge referred the suit to a Title IV-D associate judge, who held a hearing and signed an agreed order disposing of all issues. Three days later, Father filed a notice of appeal in the referring court, stating general that he "gives notice that he appeals the order of the [associate judge] and requests a truce [sic] de novo in the [district court]." That same day Grandmother filed a petition in intervention pursuant to [Tex. Fam. Code § 102.004](#). More than 30 days later,

Mother filed a motion to strike Grandmother's intervention and to dismiss Father's appeal. A few weeks later, the district court held a hearing, denied Mother's motion to strike and granted Grandmother leave to intervene. Mother filed a petition for writ of mandamus, arguing that the trial court erred in denying her motion to strike because there was no SAPCR in which Grandmother could intervene.

Holding: Writ of Mandamus Conditionally Granted

Opinion: If a party fails to timely request a de novo hearing, or if it waives its right to request a de novo hearing, a Title IV-D associate judge's proposed order or judgment because final without ratification by the referring court. If a party's request for a de novo hearing is timely filed but fails to specify the issues that will be presented to the referring court, then the request is insufficient. Here, Father's request for a de novo hearing, though timely filed, did not specify any issues he would be presenting to the referring court. Thus, the associate judge's order became final 3 days after the order was signed. Moreover, the trial court's plenary power to grant a new trial or to vacate, modify, correct or reform the judgement expired 30 days after it became final (33 days after it was signed). Accordingly, the trial court's order signed after its plenary power expired was void.

Additionally, although Grandmother filed her original petition on the same day the order became final, she did not become a party to the SAPCR merely by filing that petition. A trial court must grant a grandparent leave to intervene before a grandparent may do so. The trial court did not grant leave before the order became final and did not enter any further orders before its plenary power expired. Thus, the trial court had no power to grant Grandmother leave to intervene.

Editor's Comment: One common misperception is that if a hearing is heard in a IVD or associate court, that a party can still file a de novo appeal to the district court. That may be true if the request is timely filed AND the request specifically states what issues are on appeal. It is good practice to specify exactly which issues will be the subject of the de novo appeal in your de novo request, rather than a form de novo request. J.H.J.

TRIAL COURT ERRED IN FINDING FATHER ABLE TO PAY COURT COSTS.

¶16-5-32. *In re A.M.*, ___ S.W.3d ___, No. 08-16-00277-CV, 2016 WL 6835727 (Tex. App.—El Paso 2016, no pet. h.) (11-21-16).

Facts: Appellees filed a motion to terminate Father's parental rights and to adopt the Child. Father, who was represented by legal aid, filed a statement of inability pay costs. Appellees filed a motion challenging Father's statement. After a hearing on Appellees' motion, the trial court found that because Father's income was \$1,437 per month, he had the ability to pay costs. Father filed a motion in the appellate court challenging the trial court's order.

Holding: Reversed and Rendered

Opinion: [Tex. R. Civ. P. 145](#) provides that a party who files a statement of inability to pay costs cannot be required to pay costs except by order of the court as provided by [Rule 145](#). Appellees' motion challenging the statement contained no sworn evidence as required by [Rule 145](#) and merely stated that their allegations were based on a "good faith belief." Accordingly, Appellees motion was insufficient to warrant a hearing.

Additionally, although [Rule 145](#) allows the trial court, on its own motion, to require the declarant to prove his inability to pay costs, the trial court's inquiry into Father's resources failed to

take into consideration Father's monthly expenses or his outstanding debts. Father established that his monthly expenses exceeded his monthly income. By focusing exclusively on income, the trial court did not properly consider whether Father *could afford to pay costs*—the critical inquiry of [Rule 145](#).

MEMORANDUM RULING AFTER FINAL TRIAL DID NOT CONSTITUTE A FINAL ORDER AND DID NOT AFFECT APPELLATE TIMETABLE.

¶16-5-33. *In re B.W.S.*, No. 05-15-01207-CV, 2016 WL _____ (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (11-28-16).

Facts: The parties' final decree of divorce granted Mother possession of the Child for several Jewish holidays. Subsequently, both parties sought a modification of conservatorship. After a final bench trial, the court eliminated Mother's religious holiday possession. Mother appealed arguing that the modification was arbitrary and unreasonable. Father challenged the timeliness of Mother's appeal, arguing that the appeal was filed late because, despite being filed within 30 days of the "Final Order," it was filed more than 3 months after the court's Memorandum Ruling, which was sent just after the final bench trial.

Holding: Affirmed as Modified

Opinion: Trial courts often send "letter rulings" to parties expressing the court's rulings and instructing the prevailing party to prepare a final order. Generally, courts have not accorded final-judgment status to letter rulings. Here, the Memorandum instructed the parties to prepare a Final Order. The trial court signed a final order three months after the Memorandum was sent. Mother filed no post-judgment motions after the Memorandum but did so after the Final Order. Father did not argue below that the Memorandum was a final judgment, and he filed a motion after the Memorandum was issued asking the court to sign a final order. Thus, although the memorandum ruling was not in the physical format of a letter, it was not intended to be a final judgment.